No. 03-50294

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GARY M. BRUGMAN

Defendant - Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose the defendant's request for oral argument.

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JURISDICTIONAL STATEMENT

A federal grand jury charged the defendant in a one-count indictment with violating 18 U.S.C. 242. The district court had jurisdiction pursuant to 18 U.S.C. 3231. Final judgment was entered on March 10, 2003, and, pursuant to Federal Rule of Appellate Procedure 4(b), the defendant filed a timely notice of appeal that same day. This Court has jurisdiction to review the district court's judgment pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support the defendant's conviction under 18 U.S.C. 242.

2. Whether the district court abused its discretion in admitting evidence of another act committed by the defendant.

3. Whether the district court erred in calculating the defendant's sentence.

STATEMENT OF THE CASE

The indictment alleged that, on or about January 14, 2001, the defendant, Gary M. Brugman, "while acting under color of law, did kick and strike Miguel Angel Jimenez-Saldana, resulting in bodily injury," and thereby "did willfully deprive Miguel Angel Jimenez-Saldana of his rights secured and protected by the Constitution and laws of the United States to be free from the use of unreasonable force by one acting under color of law," in violation of 18 U.S.C. 242 (1 R. 4, 33, 41). The defendant pled not guilty and was tried before a jury in the Western District of Texas from October 28-31, 2002.

Prior to trial, the government gave notice pursuant to Federal Rule of Evidence 404(b), that it intended to introduce evidence of a subsequent similar act committed by the defendant (1 R. 36-39). The defendant moved to exclude the evidence (1 R. 53-55), and a hearing was held outside the presence of the jury (6

R. 27-39). The court heard the proffered testimony, followed by arguments from both sides, and concluded that the evidence was admissible on the ground that its "relevancy * * * outweighs its prejudicial value" (6 R. 39).

At the close of the government's case, the defendant moved to dismiss the indictment and/or for judgment of acquittal, but the court denied his motion (6 R. 73-74). The defendant renewed his motion at the close of all the evidence, but the court again denied it (9 R. 107). The jury returned a verdict of guilty (1 R. 121).

The defendant filed a post-trial motion for judgment of acquittal on the ground that the evidence was insufficient to support a conviction under 18 U.S.C. 242, or, in the alternative, for a new trial on the ground that the district court abused its discretion in admitting evidence of other bad crimes, wrongs, or acts committed by the defendant (1 R. 132-144). The court denied the defendant's motion (1 R. 156-166).

A sentencing hearing was held before the district court on March 10, 2003, at which the defendant raised a number of objections (10 R. 1-23). The court overruled the defendant's objections and sentenced him to 27 months' imprisonment followed by two years of supervised release (10 R. 21). Final judgment was pronounced that same day (1 R. 181) and the defendant immediately

filed a notice of appeal (1 R. 169). The defendant is not currently incarcerated (10 R. 22).

STATEMENT OF FACTS

The defendant, Gary M. Brugman, is a United States Border Patrol agent stationed at Eagle Pass, Texas (8 R. 43-44). In the late afternoon or early evening of January 14, 2001, the defendant, while on duty, responded to a sensor alert in the Roseta Farms Pecan Orchard area near the border (7 R. 7-9; 8 R. 50-51). The defendant and his partner drove in the direction of the sensor and spotted a group of approximately ten individuals attempting to enter the United States illegally. The defendant exited his vehicle and chased the group on foot while yelling in Spanish for them to stop (3 R. 6-8; 8 R. 55-56). Meanwhile, two other agents, Marcelino Alegria and Remberto Perez, heard radio traffic that the defendant was responding to a sensor alert, so they proceeded in their vehicle in the direction of the sensor to assist him (4 R. 14-15; 7 R. 7-9). The pair eventually spotted the group of illegal aliens and began to follow, however, when they encountered an irrigation ditch and could no longer proceed in their vehicle, Perez instructed Alegria to exit the car and chase after the Mexicans on foot (4 R. 16-19; 7 R. 9-10). Alegria quickly caught up with the group. He apprehended the Mexicans and

instructed them all to sit down on the ground on their buttocks. Everyone complied (3 R. 8-9; 4 R. 20-26).

A few seconds later, the defendant, who was still chasing the group, arrived on the scene. The defendant approached and asked the illegal aliens in Spanish in an angry or agitated voice, "Why did you run?" or "Do you want to run?" The defendant then directed his questions specifically to one man, Miguel Jimenez-Saldana, asking him, "Do you like to run? You like to run, huh?" Jimenez-Saldana, who was seated on the ground as ordered, did not move or respond (3 R. 9-10; 4 R. 30-33). The defendant struck Jimenez-Saldana with his foot, pushing him to the ground. Although he did not fight back, resist, or move, the defendant then struck Jimenez-Saldana again with his hands (3 R. 10-12; 4 R. 33-34; 7 R. 13-15). The defendant repeated these actions with the man seated next to Jimenez-Saldana, asking him also whether he liked to run and then pushing him to the ground with his foot and striking him with his hands. The second man also did not fight back, resist, or move (3 R. 12-13; 4 R. 34-36).

After the defendant assaulted Jimenez-Saldana and the other alien, the defendant, Alegria, and Perez (who by now had also arrived on the scene), arrested all of the Mexicans and led them to a transport vehicle so that they could be processed (4 R. 36-37; 7 R. 15-16; 8 R. 72-74). When they arrived at the station,

Jimenez-Saldana saw a sign encouraging individuals to report abuse by Border Patrol agents. During his interview, therefore, he mentioned that he had been beaten. A formal complaint was then filed (3 R. 16-17; 6 R. 6-9). Jimenez-Saldana experienced residual pain for three days following the assault (3 R. 18).

SUMMARY OF ARGUMENT

1. The evidence was sufficient to support the defendant's conviction under 18 U.S.C. 242. The government introduced credible testimony of three eyewitnesses, including that of the victim, that the defendant committed the act alleged in the indictment, that is, that the defendant "did kick and strike" Jimenez-Saldana in violation of his constitutional right to be free from the use of unreasonable force. To the extent that these witnesses testified inconsistently, such inconsistencies were minor and did not lend support to a theory of innocence. Moreover, it is within the province of the jury to weigh conflicting evidence and evaluate the credibility of witnesses.

The evidence also established that the defendant's use of force was unreasonable. The eyewitnesses testified that Jimenez-Saldana fully complied with Alegria's order to sit down, and that he did not actively resist arrest. There was no evidence that Jimenez-Saldana posed an immediate threat to the safety of the agents or that he attempted to flee. Thus, the defendant's testimony that he

thought it was necessary to use "100 percent" of his force to kick Jimenez-Saldana to the ground does not, based on the evidence, satisfy the Fourth Amendment's "objective reasonableness" test. Viewed in the light most favorable to the government, the evidence was sufficient to support the jury's finding that the defendant acted with the specific intent to deprive Jimenez-Saldana of his right to be free from the use of unreasonable force.

The evidence was also sufficient to show that the defendant's conduct resulted in bodily injury to the victim. Jimenez-Saldana testified that he felt physical pain when the defendant kicked and struck him. He also testified that he experienced residual pain for about three days following the assault. Because the pain was caused by an unconstitutional use of force, this evidence was sufficient to support the jury's finding of bodily injury.

2. The district court did not abuse its discretion in admitting evidence of another act committed by the defendant. Federal Rule of Evidence 404(b) authorizes the use of "other act" evidence for certain limited purposes, including to establish the element of intent. Pursuant to this rule, the government introduced evidence of a subsequent similar act committed by the defendant in order to establish the element of "wilfulness." The evidence was properly admitted because it clearly satisfied the two-prong test this Court articulated in *United*

States v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). First, the evidence was relevant to the defendant's intent because the assault of Rodriguez-Silva involved the same state of mind as the charged offense. Second, because the defendant denied at trial that he possessed the requisite specific intent, the probative value of the extrinsic evidence was high and not substantially outweighed by its undue prejudice. Moreover, the incidents were strikingly similar and close in time.

3. The district court did not err in calculating the defendant's sentence. The defendant's base offense level was properly derived from the applicable sentencing guidelines for civil rights crimes, and the court's finding in support of the "vulnerable victim" adjustment was not clearly erroneous.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION UNDER 18 U.S.C. 242

The district court instructed the jury in this case that in order to find the defendant guilty of violating 18 U.S.C. 242, it must find that the government proved beyond a reasonable doubt: (1) "[t]hat the defendant deprived the victim of a right secured by the Constitution or laws of the United States by committing one or more acts charged in the indictment;" (2) "[t]hat the defendant acted willfully,

that is, that the defendant committed such act or acts with a bad purpose or evil motive, intending to deprive the person of that right * * *;" (3) "[t]hat the defendant acted under color of law;" and (4) "[t]hat the defendant's conduct resulted in bodily injury to the [victim]" (1 R. 110-111). The defendant does not challenge these jury instructions, but rather, argues that the evidence was insufficient to support the jury's finding that the defendant acted with the specific intent to deprive the victim of his constitutional right to be free from the use of unreasonable force (Def. Br. 7-20), and also that his conduct resulted in bodily injury to Jimenez-Saldana (Def. Br. 20-23). As explained below, these arguments are without merit.

A. *Standard Of Review*

This Court "review[s] the jury's finding of guilt under a standard that is highly deferential to the verdict." *United States* v. *Harris*, 293 F.3d 863, 869 (5th Cir.), cert. denied, 537 U.S. 950 (2002). As this Court has previously stated:

> The standard of review for determining whether there was sufficient evidence to convict a defendant is whether the evidence, when reviewed in the light most favorable to the government with all reasonable inferences and credibility choices made in support of a conviction, allows a rational fact finder to find every element of the offense beyond a reasonable doubt. The evidence is viewed in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict.

United States v. *Asibor*, 109 F.3d 1023, 1030 (5th Cir.), cert. denied, 522 U.S. 902 (1997) (citation omitted).

B. *The Evidence Was Sufficient To Prove That The Defendant Acted With The Specific Intent To Deprive Jimenez-Saldana Of His Constitutional Right To Be Free From The Use Of Unreasonable Force By One Acting Under Color Of Law*

The defendant argues that the government failed to prove that he acted with the specific intent to deprive Jimenez-Saldana of his right to be free from the use of unreasonable force because: (1) the testimony of government witnesses who observed the defendant kick and strike Jimenez-Saldana was, at times, so conflicting or inconsistent that it gave more than equal support to a theory of innocence as well as a theory of guilt (Def. Br. 9-15); and (2) the defendant's use of force was reasonable because he believed that Jimenez-Saldana "was going to flee or attack Alegria" (Def. Br. 15-20). Both of these arguments must fail.

In order to find that the evidence in this case supported a finding of "wilfulness" within the meaning of 18 U.S.C. 242, the jury had to find that the defendant "act[ed] in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *Screws* v. *United States*, 325 U.S. 91, 105 (1945); accord *United States* v. *Hayes*, 589 F.2d 811, 820 (5th Cir.), cert. denied, 444 U.S. 847 (1979). It is well-settled that the Fourth

Amendment's protection against unreasonable searches and seizures requires that officers refrain from using excessive force, that is, more force than is reasonably necessary, when effectuating an arrest. *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989); accord *Ikerd* v. *Blair*, 101 F.3d 430, 433 (5th Cir. 1996). "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them," *Graham*, 490 U.S. at 397, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight," *id.* at 396.

1. The eyewitnesses' testimony in this case clearly establishes that the defendant used excessive force against Jimenez-Saldana. Agent Alegria, the eyewitness who most closely observed the encounter, testified that all of the Mexicans, including Jimenez-Saldana, obeyed his command to stop running, and further, that they all complied with his order to sit on the ground on their buttocks (4 R. 23-26). When questioned in detail about his apprehension of Jimenez-Saldana and the others, Alegria's testimony was unequivocal:

Q. When you said, "Get down on your butts," did you use the Spanish language to instruct them to get down on their butts?
A. Yes, sir.
Q. Did the entire group obey that command or was there some difficulty in understanding?
A. No, sir, they all did what I asked them to.
Q. Was there any hesitation?
A. No, sir.
Q. Were you concerned in any way that perhaps they weren't getting it?
A. No, they did what they were supposed to.
Q. When they then went down on their butts, were they down like this? Were they like this, or do you recall (indicating)?
A. *I know they were on their butts, that's for sure, where I felt, you know, secure and safe from them* (4 R. 26 (emphasis added)).

Alegria further testified that although the aliens were seated in a "secure and safe" position on their buttocks, the defendant asked Jimenez-Saldana, "Do you like to run? You like to run, huh?," and then used his foot to push him:

> [A]nd that's where the guy fell down on the ground. He was – I mean, he was sitting, but he, I guess fell on his left side and he went down to – he went down on his knees and punched him a couple of times on his rib side, on his right side (4 R. 33-34).

Alegria described the force of the blows as follows: "I could hear like the pounds on the – like on the guy's ribs. And like a grunting noise, pretty much. * * * They were pretty good punches" (4 R. 35-36). Finally, Alegria testified that the defendant also kicked and struck a second man in the same manner: "After he gave [Jimenez-Saldana] a couple of punches, he got up and got another guy and

asked him also the same question, 'You also like to run, huh?' and pushed him down, also. And he went down on his knees again. And I don't remember the punch or anything like that, but like one or two punches on the second guy, also" (4 R. 34-35).

Alegria's testimony that the aliens were securely seated on their buttocks is consistent with that of the victim. Jimenez-Saldana testified:

> Q. And when you sat down on the ground, did you sit down on the ground on your knees or did you sit down on the ground on your butt?
> A. On the butt.
> * * *
> Q. And when you sat down, did you ever attempt to stand up at any point?
> A. No.
> Q. Did any member of your group ever attempt to get up?
> A. No (3 R. 9).

Jimenez-Saldana's testimony similarly corroborates Alegria's testimony that the defendant, without reason or provocation, struck him and another man with his foot and then again with his fists:

> Q. What did [the defendant] do when he reached the group that was seated on the ground?
> A. He came running. He was angry, saying, "Do you want to run?"
> Q. How do you know he was angry?
> A. The way he screamed at us.
> * * *
> Q. And what did he do when he reached the group?
> A. He came and kicked me.

* * *

Q. After the angry agent kicked you, what did you do?
A. He grabbed from the back of the head and pushed my head into the ground.
Q. Why did he do that?
A. I don't know.
Q. Had you done anything – after he kicked you, did you try to stand up then?
A. No.
Q. Had you attempted to run in any way?
A. No.
Q. After he kicked you and he put your head in the ground, what else did he do?
A. He put his knee on me.

* * *

Q. What did he do then?
A. Then he pulled – the guys that was next to me, he pulled him onto me and started to hit him.
Q. Hit him with what?
A. With his fist (3 R. 10-12).

Agent Perez, who by then had abandoned his vehicle and caught up with the group on foot, observed the incident from about 80 to 100 yards away (7 R. 14). His testimony supports the testimony of Alegria and the victim regarding the defendant's use of excessive force:

Q. When you saw the aliens, were they moving or were they stationary?
A. They appeared to be stationary.
Q. Were they standing or sitting?
A. A couple of them looked like they were kneeling. One of them – some of them looked like they were sitting down.

* * *

Q. And what, if anything, did you see [the defendant] doing?

A. I saw Gary kick one of the aliens.
Q. Can you tell us how he kicked him?
A. I really don't remember if it was like a kick, like a swing kick or like a pushing kick. I don't know, sir.
Q. *Did you hear any impact from the kick?*
A. *I heard a thud.* Sound carries a lot in an orchard.
* * *
Q. When you observed the kick and heard the thud, did you observe any aliens resisting or struggling from your vantage point?
A. I couldn't tell from my vantage point, sir. It didn't appear so, but I really couldn't tell, sir (7 R. 13-14 (emphasis added)).

The defendant argues that this Court must reverse his conviction because "[t]he inconsistent testimonial evidence from the [g]overnment's three witnesses gives more than equal circumstantial support to a theory of innocence as well as a theory of guilt" (Def. Br. 15). In support of this argument, the defendant contends that Alegria's testimony that the defendant "pushed" Jimenez-Saldana with his foot and then "punched" him with his hands is inconsistent with Jimenez-Saldana's own testimony that the defendant "kicked" him and then "pushed" his head to the ground (Def. Br. 8-12). By focusing on semantics rather than substance, however, the defendant fails to recognize that the testimony of these witnesses is more consistent than it is inconsistent. Indeed, the indictment alleged that the defendant "did kick and strike" Jimenez-Saldana (1 R. 4), and both Alegria and Jimenez-Saldana testified that the defendant, after asking Jimenez-Saldana whether he liked to run, struck him with his foot and caused him to fall to

the ground. They both further testified that, once on the ground, the defendant got down on his knees and proceeded to use his hands to strike Jimenez-Saldana again, either by "punch[ing]," as Alegria stated (4 R. 33-34), or by "grab[bing]" and then "push[ing]," as Jimenez-Saldana explained (3 R. 10-11). Although the two witnesses used different words, they generally described the same sweeping movements of the defendant.[1]

The defendant further points out that Agent Perez testified that he only saw the defendant kick, but not strike, Jimenez-Saldana (Def. Br. 13-14). But the probative value of Perez's testimony was self-limiting, as even he admitted that there were many things from his vantage point that he could not see. He could, however, hear (7 R. 14). The true probative value of his testimony, therefore, goes to the level of force used by the defendant. Indeed, Perez testified that, from 80 to 100 yards away, he heard a loud thud immediately after he observed the defendant kick Jimenez-Saldana (7 R. 13-14). This testimony is consistent with that of Alegria and Jimenez-Saldana. However, his testimony that a couple of the Mexicans "looked like" they were kneeling rather than sitting down (7 R. 13) was of less value given his vantage point, and it certainly did not negate the highly probative testimony of Agent Alegria, who was standing in closest proximity to

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[1] Jimenez-Saldana testified in Spanish through a court interpreter.

the Mexicans, that they all complied without hesitation with his order to sit down on their buttocks (4 R. 26).

In short, the government's eyewitness testimony does not contradict the jury's finding that the defendant committed the act alleged in the indictment; and it certainly does not lend any support to a theory of innocence. Indeed, no witness, not even the defendant, testified that the defendant *did not* kick or strike Jimenez-Saldana. To the contrary, the defendant himself testified that he struck Jimenez-Saldana with his foot and, in so doing, used more than a *de minimis* amount of force. As he stated: "[W]hen I ran up and pushed him with my foot, *I pushed him with 100 percent of my force*, and I did sit him down quite rough, yes" (8 R. 124 (emphasis added)). The defendant further testified that "100 percent" of his "force" included 195 pounds of body weight plus an additional 25 pounds of gear (8 R. 127).

Even if there were some evidence supporting a theory of innocence in this case, reversal based on insufficiency of the evidence would be unjustified. "The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." *United States* v. *Lankford*, 196 F.3d 563, 575 (5th Cir. 1999), cert. denied, 529 U.S. 1119 (2000).

Moreover, "authority hardly need be cited for the rule that '[i]t is the sole province of the jury, and not within the power of this Court, to weigh conflicting evidence and evaluate the credibility of witnesses.'" *United States* v. *Green*, 180 F.3d 216, 220 (5th Cir.) (quoting *United States* v. *Millsaps*, 157 F.3d 989, 994 (5th Cir. 1998)), cert. denied, 528 U.S. 1054 (1999); see also *United States* v. *Bermea*, 30 F.3d 1539, 1552 (5th Cir. 1994) ("Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature."), cert. denied, 513 U.S. 1156 (1995).

2. Further, based on the evidence, there is no question that defendant's use of force was unreasonable. As already discussed, the primary eyewitnesses testified that Jimenez-Saldana, once apprehended, sat down on the ground as ordered and made no effort whatsoever to resist arrest. Despite the defendant's contention that Jimenez-Saldana was "squat[ting]" rather than "sit[ting]" (8 R. 66-67), or his claim on cross-examination that it was necessary to use "100 percent" of his force to kick Jimenez-Saldana "[b]ecause it looked like he was getting ready to either assault Agent Alegria or run again" (8 R. 127, 132), there was no evidence that Jimenez-Saldana actually "pose[d] an immediate threat to the safety of the officers," or that he "actively resist[ed] arrest or attempt[ed] to evade arrest

by flight," that might justify the level of force used. *Graham*, 490 U.S. at 396; see also *Ikerd*, 101 F.3d at 434 (observing that, in some circumstances, "the use of nearly any amount of force may result in a constitutional violation when a suspect 'poses no threat to [the officers'] safety or that of others, and [the suspect] does not otherwise initiate action which would indicate to a reasonably prudent police officer that the use of force is justified'").

Indeed, the Fourth Amendment's "reasonableness" test is an objective one, *Ikerd*, 101 F.3d at 433 (citing *Graham*, 490 U.S. at 397), and the defendant's actions in light of the facts and circumstances must be judged against an objective standard. *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968); see also *Graham*, 490 U.S. at 397 (explaining, "nor will an officer's good intentions make an objectively unreasonable use of force constitutional").

The defendant testified that, as a federal law enforcement officer, he was trained under the "Use of Force" Model (8 R. 128). The Model is explicitly based upon the Supreme Court's articulation of the Fourth Amendment's "objective reasonableness" test and instructs officers how to select the appropriate level of force when responding to a subject's actions (Gov't Exh. 19 at 1).[2] For example,

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[2] For the Court's convenience, the "Use of Force" Model (Gov't Exh. 19) is included as an addendum to this brief.

the Model describes the lowest level of subject action, "[c]ompliant ([c]ooperative)," as one where "[t]he likelihood of a physical response by the subject is minimal" (Gov't Exh. 19 at 2; see also 8 R. 128). The Model instructs that the officer should use "cooperative controls" for these subjects, such as officer presence and communication skills (Gov't Exh. 19 at 5; see also 8 R. 128). The Model describes the next level of subject action as "[r]esistant ([p]assive)," that is, where "[t]he subject exhibits the preliminary level of noncompliance which requires some degree of physical contact by the officer in order to elicit compliance. For example, a subject verbally refuses to go with the officers following a lawful arrest. The subject offers no physical or mechanical enhancement toward the resistance effort other than to stand motionless or remain seated" (Gov't Exh. 19 at 2; see also 8 R. 129). The Model instructs that an officer should use "[c]ontact [c]ontrols" for these subjects, such as a "soft empty hand control. The officer may also await backup officers and show strength in numbers" (Gov't Exh. 19 at 5; see also 8 R. 129). The defendant conceded that a "soft empty hand control" entails no more than placing a hand on the subject and using verbal commands to direct him (8 R. 130).

Viewed in the light most favorable to the government, the evidence in this case establishes that Jimenez-Saldana and the other subjects were "compliant

(cooperative)." Alegria and Jimenez-Saldana testified that all the aliens fully complied with Alegria's orders to stop and sit down on their buttocks (3 R. 9; 4 R. 26). Alegria unequivocally stated, "I know they were on their butts, that's for sure, where I felt, you know, secure and safe from them" (4 R. 26). Kicking and striking Jimenez-Saldana, a compliant subject, was thus an unreasonable use of force. See *Ikerd*, 101 F.3d at 434. Even assuming Jimenez-Saldana demonstrated signs of "resistant (passive)" by, for example, "squatting" rather than "sitting," the level of force applied by the defendant nevertheless would have been excessive. According to defense witness Tony Pitts, a Border Patrol agent who trains other agents on the use of non-deadly force, "reasonable" force is "the minimum amount of force necessary to accomplish the agent's or officer's goal" (8 R. 181-182). Forcibly kicking and striking Jimenez-Saldana clearly exceeded the minimum amount of force necessary to get him to sit down.

The jury weighed all the evidence and concluded that, in light of the facts and circumstances, the defendant intentionally used unreasonable force against Jimenez-Saldana. The eyewitness testimony regarding the defendant's words and actions against not only Jimenez-Saldana, but also the man seated next to him, was, viewed in the light most favorable to the verdict, more than sufficient to prove that the defendant acted wilfully. To be sure, the government corroborated

this testimony with evidence involving another alien and a similar use of unreasonable force by the defendant just five weeks after the charged offense. As explained below, this extrinsic evidence was properly admitted and considered by the jury. See Part II, *infra*. Accordingly, the evidence was sufficient to prove the requisite specific intent, and this Court should affirm the jury's finding.

C. *The Evidence Was Sufficient To Prove That The Defendant's Conduct Resulted In Bodily Injury To Jimenez-Saldana*

The defendant argues that the evidence was insufficient to prove that his conduct resulted in bodily injury to Jimenez-Saldana because "unsubstantiated allegations of physical pain which are *de minimis*, do not result in a constitutional violation" (Def. Br. 22). This argument is flawed.

It is well-settled in this circuit that in order to find that the defendant used excessive force in violation of Jimenez-Saldana's Fourth Amendment rights, it was not necessary for the jury to find that Jimenez-Saldana suffered "significant injury." *United States* v. *Harris*, 293 F.3d 863, 870 (5th Cir.), cert. denied, 537 U.S. 950 (2002). Nonetheless, this Court does require that the victim have "suffered at least some form of injury." *Williams* v. *Bramer*, 180 F.3d 699, 703 (5th Cir. 1999). "In determining whether an injury caused by excessive force is more than *de minimis*, we look to the context in which that force was deployed.

'[T]he amount of injury necessary to satisfy our requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances.'" *Id.* at 703-704 (quoting *Ikerd*, 101 F.3d at 434)). In other words, evidence of "some injury" is sufficient to establish the "bodily injury" element of 18 U.S.C. 242, so long as the injury was caused by an officer's use of excessive force in violation of the Fourth Amendment. The issues, therefore, are collapsed into "only one inquiry." *Ikerd*, 101 F.3d at 434 n.9.

Here, as already discussed, the evidence was sufficient to show that the defendant kicked and struck Jimenez-Saldana with the specific intent to deprive him of his Fourth Amendment right to be free from the use of unreasonable force. See Part I.B., *supra*. In addition, Jimenez-Saldana testified that when the defendant kicked him, "I felt pain and I lost my breath" (3 R. 13). This testimony was consistent with Agent Alegria's testimony that he heard Jimenez-Saldana making a "grunting noise" while the defendant kicked and struck him (4 R. 35). Jimenez-Saldana further testified that following the encounter with the defendant, he experienced residual pain "[f]or around three days" (3 R. 18). Since the pain was caused by the defendant's unreasonable use of force, this testimony was sufficient to support the jury's finding that the defendant's actions caused bodily

injury. See, *e.g.*, *Harris*, 293 F.3d at 870 n.6 (assuming without deciding that "bodily injury" under 18 U.S.C. 242, "means any injury to the body, no matter how temporary" and "also includes physical pain" (quoting *United States* v. *Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993)).

Accordingly, this case is clearly distinguishable from *Siglar* v. *Hightower*, 112 F.3d 191 (5th Cir. 1997), and the two district court cases upon which the defendant mistakenly relies. In *Siglar*, this Court concluded that allegations of physical pain did not amount to "physical injury" for the purpose of stating an Eighth Amendment claim. This Court explained: "The absence of serious injury while relevant to the inquiry, does not preclude relief. * * * However, the Eighth Amendment's prohibition of cruel and unusual punishment excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" *Id.* at 193 (quoting *Hudson* v. *McMillian*, 503 U.S. 1, 7, 10 (1992)). Because the plaintiff in that case failed to allege a claim of excessive force based on the Eighth Amendment standard, this Court held that his allegation of physical pain was not cognizable. *Id.* at 193-194. Here, however, the standard is the Fourth Amendment's "reasonableness" test and, as already explained, the defendant's use of force was unreasonable. Accordingly, Jimenez-Saldana's testimony of physical

pain was sufficient to establish "bodily injury." *Cf. Nowell* v. *Acadian Ambulance Serv.*, 147 F. Supp.2d 495, 509-510 (W.D. La. 2001) (concluding that injuries which resulted from an officer's objectively *reasonable* use of force were not of constitutional significance); *Crow* v. *Comal County*, 2001 WL 1910555, at *5 (W.D. Tex. June 13, 2001) (same).

In sum, viewed in the light most favorable to the government, the evidence was sufficient to support the jury's finding that the defendant's conduct resulted in "bodily injury" to Jimenez-Saldana in violation of 18 U.S.C. 242.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF ANOTHER ACT COMMITTED BY THE DEFENDANT

Rodriguez-Silva testified that on February 22, 2001, he attempted to enter the United States illegally with a group of friends while carrying 100 kilograms of marijuana. Rodriguez-Silva testified that shortly after crossing the border, they were detected and chased by the defendant. Rodriguez-Silva also testified that, as the defendant chased him, the defendant screamed, "Stop, you f**king son of a bitch" (6 R. 44-45). He further testified that, while being chased, he twisted his ankle and fell to the ground. Consequently, Rodriguez-Silva was easily apprehended by the defendant. Although he offered no resistance, Rodriguez-Silva testified that the defendant climbed on top of him and that the defendant put

his elbow and knees into Rodriguez-Silva's neck and stomach. Rodriguez-Silva testified that the defendant then put on a pair of gloves and punched him three times in the nose. He also testified that the defendant "seemed a little angry" (6 R. 46). Finally, Rodriguez-Silva testified that he felt pain as a result of being beaten (6 R. 40-49). His injuries, for which he received medical treatment, were depicted in a photograph taken immediately after his arrest (6 R. 46-48; Gov't Exh. 16).

A. *Standard Of Review*

This Court reviews the district court's decision to admit evidence of another act committed by the defendant for abuse of discretion. *United States* v. *LeBaron*, 156 F.3d 621, 624 (5th Cir. 1998), cert. denied, 525 U.S. 1162 (1999).

B. *The District Court Did Not Abuse Its Discretion In Allowing The Rodriguez-Silva Evidence*

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" In *United States* v. *Beechum*, this Court interpreted Rule 404(b), as requiring a two-step test: "First, it must be determined that the extrinsic evidence is relevant to an issue other than the defendant's character. Second, the

evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [R]ule 403." 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). Rule 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The defendant argues that the district court abused its discretion in admitting evidence of the Rodriguez-Silva incident because it did not satisfy either prong of the *Beechum* test. This argument is without merit.

Under the first step of the *Beechum* test, extrinsic evidence is relevant to the issue of intent where the defendant "indulg[ed] himself in the same state of mind in the perpetration of both the extrinsic and charged offenses." *Beechum*, 582 F.2d at 911. The defendant contends, however, that the Rodriguez-Silva evidence is irrelevant because the government failed to prove by "plain, clear, and convincing" evidence that he possessed specific intent to use excessive force against Rodriguez-Silva (Def. Br. 27-29). The defendant, however, misstates the standard of proof required to show relevancy under Rule 404(b). In considering the admissibility of "other act" evidence, the Supreme Court has explicitly rejected

the "clear and convincing" standard in favor of the much lower "sufficiency of the evidence" standard. See *Huddleston* v. *United States*, 485 U.S. 681, 685-691 (1988). In so doing, the Supreme Court endorsed this Court's approach in *Beechum*. See *id.* at 689-690. As this Court stated:

> [T]he task for the trial judge is to determine whether there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense. The judge need not be convinced beyond a reasonable doubt * * *, *nor need he require the Government to come forward with clear and convincing proof.* The standard for the admissibility of extrinsic evidence is that of [R]ule 104(b): "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist."

Beechum, 82 F.2d at 913 (emphasis added) (citations and footnote omitted); see also *Huddleston*, 485 U.S. at 690 ("In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact * * *. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence."). Here, the direct testimony of Rodriguez-Silva that he did not resist arrest once he was apprehended and that the defendant forcibly pinned him to the ground and punched him in the nose three times, corroborated by the photograph of his injuries, was more than sufficient for the

court to find that the jury could reasonably conclude by a preponderance of the evidence that the defendant intended to use excessive force against him.

Relevant extrinsic evidence satisfies the second prong of the *Beechum* test if its probative value substantially outweighs its prejudicial effect. 582 F.2d at 911. In *Beechum*, this Court identified three factors that a trial court judge should consider when making this determination: (1) "the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference;" (2) "the overall similarity of the extrinsic and charged offenses;" and (3) "how much time separates the extrinsic and charged offenses." *Id.* at 914-915. Application of each of these factors to the instant case makes clear that the district court did not abuse its discretion in refusing to exclude the Rodriguez-Silva evidence under Rule 403.

Indeed, the first factor alone requires affirmance of the district court's decision since, "[w]here it is evident that intent will be an issue at trial, [this Court has] held the admission of the extrinsic offense as part of the Government's case in chief not to be grounds for reversal." *Id.* at 915. The defendant, however, argues that the extrinsic evidence was unnecessary to prove his intent because the government offered the testimony of three eyewitnesses to the charged offense.[3]

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[3] At the same time, the defendant argues that such testimony was insufficient to prove the requisite specific intent. See Part I.B, *supra*.

He submits, therefore, that the Rodriguez-Silva evidence was cumulative and served no other purpose than to inflame and confuse the jury (Def. Br. 26-27, 29). But from the beginning of trial to this appeal, the defendant maintained that he lacked the requisite specific intent to deprive Jimenez-Saldana of his Fourth Amendment right to be free from the use of unreasonable force (5 R. 21; Def. Br. 8-20). The issue of intent, therefore, was not only a material issue at trial, but it was a *contested* material issue. Accordingly, the Rodriguez-Silva evidence had high probative value. See, *e.g.*, *United States* v. *Emery*, 682 F.2d 493, 499-501 (5th Cir.) (discussing the government's need for extrinsic evidence where state of mind is a contested issue), cert. denied, 459 U.S. 1044 (1982).

This case is very similar to a recent Fourth Circuit case, *United States* v. *Mohr*, 318 F.3d 613 (4th Cir. 2003), which also involved the use of "other act" evidence in the prosecution of a law enforcement officer under 18 U.S.C. 242. In *Mohr*, the officer was accused of releasing her dog on a compliant subject, thereby acting under color of law to wilfully deprive the subject of his Fourth Amendment right to be free from the use of unreasonable force. *Id.* at 616-617. At trial, the defendant testified that the victim was not compliant and, as a result, her release of the dog did not constitute an unreasonable use of force. As proof of the defendant's intent to use unreasonable force, the government introduced evidence

of two subsequent acts of her intentional misuse of a police dog. *Id.* at 617. The defendant denied that she acted wilfully to deprive either victim of his Fourth Amendment right and challenged the relevancy of the evidence. *Id.* at 618-620. She argued that the evidence was unnecessary given that "the government had 'a mass of [other] evidence' of intent." *Id.* at 619. The court of appeals rejected her argument:

> The problem with this argument is that Mohr specifically disputed her intent at trial. She herself testified that she released the dog on Mendez based on her training and her view that it was reasonable and justified given her perception that Mendez was attempting to flee. In light of the government's heavy burden of proving, beyond a reasonable doubt, that Mohr released her dog on Mendez with the 'particular purpose' of violation or in 'reckless[] disregard' of Mendez's right to be free from unreasonable force, the district court clearly did not abuse its discretion in finding the [other act] evidence necessary.

Ibid. The defendant's position in this case is identical to that of the defendant in *Mohr*. Given the government's "heavy burden" of proving that he acted wilfully, the Rodriguez-Silva evidence was also highly probative and not needlessly cumulative.

Consideration of the similarities between the charged and extrinsic offenses also increases the probative value of the Rodriguez-Silva evidence. See *Beechum*, 582 F.2d at 915 ("Of course, equivalence of the elements of the charged and

extrinsic offenses is not required. But the probative value of the extrinsic offense correlates positively with its likeness to the offense charged."). Both the Jimenez-Saldana and Rodriguez-Silva incidents followed a chase of the victim by the defendant. In each case, the defendant exhibited angry behavior, referred to the fact that the victim had run from him, and struck the victim seemingly as punishment for fleeing. Because the defendant's conduct was strikingly similar in both encounters, the Rodriguez-Silva evidence was highly probative of his intent to commit the charged offense against Jimenez-Saldana. See, *e.g.*, *United States* v. *Albert*, 595 F.2d 283, 288 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Moye*, 951 F.2d 59, 62 (5th Cir. 1992).

Finally, consideration of the closeness in time of the Rodriguez-Silva incident to the charged offense also weighs heavily in favor of the evidence's probative value. See *Beechum*, 582 F.2d at 915 ("[T]emporal remoteness depreciates the probity of the extrinsic evidence."). Here, the extrinsic act took place only five weeks after the Jimenez-Saldana incident. This Court has upheld the admission of "other act" evidence for acts that occurred more than a year before or after the charged conduct. See, *e.g.*, *Moye*, 951 F.2d at 60, 62 (Where crime was committed in 1990, "the earlier offense committed in January 1988 was not so remote in time to the charged offense to depreciate its probity"); *Albert*, 595

F.2d at 288-289 ("Finally, the two events were not too temporally remote, one in 1969 or 1970, and the other in 1972"). Indeed, in *Mohr*, the subsequent acts occurred two and three years after the charged conduct. 318 F.3d at 616, 618, 620.

In sum, the probative value of the Rodriguez-Silva evidence was not outweighed by its prejudicial effect. While it may be true that this evidence was damaging to the defendant's case, it did not unfairly prejudice him within the meaning of Rule 403. As the *Mohr* court observed:

> Rather, Rule 403 only requires suppression of evidence that results in unfair prejudice–prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion, and only when that unfair prejudice *substantially* outweigh[s] the probative value of the evidence.

Id. at 619-620 (emphasis in original) (internal quotation marks omitted).

In any event, even if there was some prejudice to the defendant that resulted from admission of the Rodriguez-Silva evidence, it was mitigated by the district court's limiting instruction:

> 25. You have heard evidence that the defendant committed an act which may be similar to the one charged in the indictment, but which was committed on another occasion. You must not consider that evidence in deciding whether the defendant committed the act charged in the indictment. However, you may consider this evidence for other, very limited purposes.
>
> 26. If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the act charged in the indictment,

> then you may consider evidence of the similar act allegedly committed on another occasion to determine:
>
> > Whether the defendant had the state of mind or intent necessary * * * [, or] * * * the motive or the opportunity to commit the act charged in the indictment; or * * * acted according to a plan or in preparation for the commission of a crime; or * * * committed the act for which he is on trial by accident or mistake.
>
> 27. These are the limited purposes for which any evidence of a similar act may be considered (1 R. 111-112).

These limiting instructions are consistent with Rule 404(b), and have been upheld repeatedly by this Court as sufficient to overcome prejudice resulting from the admission of extrinsic evidence. See, *e.g.*, *Beechum*, 582 F.2d at 917; *LeBaron*, 156 F.3d at 626; *Moye*, 951 F.2d at 62; *United States* v. *West*, 22 F.3d 586, 595 (5th Cir.), cert. denied, 513 U.S. 1020 (1994); *United States* v. *Peterson*, 244 F.3d 385, 393 (5th Cir.), cert. denied, 534 U.S. 857 (2001); see also *Mohr*, 318 F.3d at 620. Accordingly, this Court should affirm the district court's decision to admit evidence of the defendant's strikingly similar use of unreasonable force against Rodriguez-Silva five weeks after the Jimenez-Saldana incident.

III. THE DISTRICT COURT CORRECTLY CALCULATED THE DEFENDANT'S SENTENCE

A. *Standards Of Review*

This Court "review[s] the district court's interpretation of the guidelines *de novo*" and its "finding of unusual vulnerability for clear error and to determine whether the district court's conclusion was plausible in light of the record as a whole." *United States* v. *Lambright*, 320 F.3d 517, 518 (5th Cir. 2003).

"This [C]ourt reviews a district court's refusal to reduce a defendant's offense level for acceptance of responsibility under U.S.S.G. 3E1.1 with a standard even more deferential than a purely clearly erroneous standard. The ruling should not be disturbed unless it is without foundation." *United States* v. *Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (internal quotation marks and citation omitted).

This Court "[has] jurisdiction to review the district court's decision not to depart downward from the guideline range only if the court based its decision upon an erroneous belief that it lacked the authority to depart. There must be something in the record to indicate that the district court held such a belief." *Lambright*, 320 F.3d at 519.

B. *The District Court Did Not Err In Calculating The Defendant's Sentence*

The district court correctly sentenced the defendant to 27 months' imprisonment (10 R. 21). The defendant was found guilty of violating 18 U.S.C. 242, which authorizes a maximum sentence of ten years imprisonment if the act results in bodily injury. Pursuant to the Federal Sentencing Guidelines, the base offense level for a conviction under this statute is ten if the offense involved "the use or threat of force against a person." U.S.S.G. 2H1.1(a)(3)(A). This level is increased by six if "the defendant was a public official at the time of the offense" or "the offense was committed under color of law." U.S.S.G. 2H1.1(b)(1). Finally, an upward adjustment of two levels is warranted "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. 3A1.1(b)(1). Applying these Guidelines to the case at bar, the court correctly calculated the defendant's offense level to be 18 (10 + 6 + 2 = 18) (10 R. 17). Where, as here, the defendant has no criminal history, the sentence range for offense level 18 is 27 to 33 months, which falls in Zone D of the Sentencing Table. U.S.S.G. Ch. 5, Pt. A. The minimum term for a Zone D sentence must be satisfied by a sentence of imprisonment only (*i.e.*, not by probation). U.S.S.G. 5C1.1(f).

In challenging the propriety of this sentence, the defendant first contends (Def. Br. 32) that the court erred in increasing his offense level by two under U.S.S.G. 3A1.1(b)(1), which authorizes such an adjustment if the offense involved a "vulnerable victim." The defendant, however, offers no support for this contention. Indeed, in applying the adjustment, the district court properly relied on this Court's recent decision in *United States* v. *Lambright* interpreting the "vulnerable victim" guideline (10 R. 3-4). In *Lambright*, this Court recognized that a victim may be vulnerable when he is in custody and cannot defend himself or flee. The evidence in this case comports with this Court's analysis *Lambright.* The victim here was immobile, sitting on the ground, under the supervision of another Border Patrol agent. He had effectively surrendered to the authority of the arresting officer. The defendant took advantage of that susceptibility and assaulted him while he was sitting on the ground. See 320 F.3d at 518. Accordingly, the district court's finding of vulnerability based upon the record as a whole was not clearly erroneous.

The defendant next contends (Def. Br. 32) that the district court erred in refusing to decrease his offense level by two pursuant to U.S.S.G. 3E1.1, for "demonstrat[ing] acceptance of responsibility for his offense." However, "[t]his adjustment is not intended to apply to a defendant who puts the government to its

burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. 3E1.1, cmt. n.2. The defendant pled not guilty and proceeded to trial. At trial, he contested all factual elements of the offense except one.[4] Indeed, the defendant on appeal continues to deny responsibility, arguing that the government failed to meet its burden of proving beyond a reasonable doubt that he intended to deprive Jimenez-Saldana of his Fourth Amendment right by using unreasonable force against him, or that his conduct resulted in bodily injury to Jimenez-Saldana (Def. Br. 7-23).

This Court's decision in *United States* v. *Washington*, 340 F.3d 222 (5th Cir. 2003), does not support the defendant's position (Def. Br. 32). In *Washington*, the defendant admitted the facts underlying the crime charged, that is, he admitted to being a felon in possession of a firearm, but pled not guilty because he wanted to pursue a motion to suppress in order to challenge the legality of the search and seizure which resulted in his arrest. This Court held that the defendant was eligible for a sentence reduction under U.S.S.G. 3E1.1 because such circumstances fall within the Guidelines' exception for defendants who proceed to

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[4] The only element of 18 U.S.C. 242 which the defendant did not contest was "under color of law."

trial on issues unrelated to factual guilt, such as a constitutional challenge to the statute used for prosecution. *Washington*, 340 F.3d at 229 (citing U.S.S.G. 3E1.1, cmt. n.2). This Court explained:

> Here Washington stipulated to all the facts necessary for his conviction. He admitted to the factual guilt of his offense. Washington's decision to pursue the suppression of the evidence should not preclude him from receiving credit for accepting responsibility. To affirm the district court in this case would chill the filing of suppression motions by defendants who admit their factual guilt.

Id. at 230. Unlike the defendant in *Washington*, the defendant here has contested the facts regarding his intent and use of unreasonable force by attacking the credibility of government witnesses. He also denied that his conduct resulted in bodily injury by attacking the credibility of Jimenez-Saldana with regard to his allegations of physical pain. Accordingly, the defendant was not eligible for the reduction based on acceptance of responsibility, and this Court should not disturb the district court's decision as one "without foundation." *Id.* at 227.

Finally, the defendant contends that the district court erred in calculating his base offense level because U.S.S.G. 2A2.3 provides that the base offense level for "minor assault" is six (Def. Br. 32-33). However, the Guidelines for convictions under 18 U.S.C. 242 are clear and unambiguous. They provide:

(a) Base Offense Level (*Apply the Greatest*):

> (1) the offense level from the offense guideline applicable to any underlying offense;
>
> (2) 12, if the offense involved two or more participants;
>
> (3) 10, if the offense involved (A) the use or threat of force against a person * * *.

U.S.S.G. 2H1.1 (emphasis added). The defendant's conviction under 18 U.S.C. 242 for the intentional use of unreasonable force by definition involved "the use or threat of force against a person." U.S.S.G. 2H1.1(3)(A). Accordingly, a base offense level of ten, which is greater than the base offense level for minor assault, was properly applied. The district court did not have authority to depart downwardly; this Court should uphold the defendant's sentence. See *Lambright*, 320 F.3d at 519.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief for the United States as Appellee, and a diskette containing the brief, were served by Federal Express, overnight mail, on November 13, 2003, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached Brief for the United States as Appellee is proportionally spaced, has a typeface of 14 points, and contains 9,133 words.

_____

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