



NATIONAL BORDER PATROL COUNCIL

of the

American Federation of Government Employees

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NATIONAL BORDER PATROL COUNCIL REBUTTAL TO THE MISREPRESENTATIONS OF THE U.S. ATTORNEY'S OFFICE OF THE WESTERN DISTRICT OF TEXAS CONCERNING THE PROSECUTION OF BORDER PATROL AGENTS JOSÉ ALONSO COMPEAN AND IGNACIO RAMOS

Every story has at least two sides, and the incident giving rise to the wrongful prosecution of Border Patrol Agents José Alonso Compean and Ignacio Ramos is certainly no exception. The U.S. Attorney for the Western District of Texas, Johnny Sutton, has made extraordinary efforts to publicize his side of the story, issuing no fewer than seven press releases concerning this matter. Recently, he issued a press release entitled “Myth vs. Reality--the Facts of Why the Government Prosecuted Agents Compean and Ramos.” This document presents a one-sided view of the incident that relies almost exclusively on the statements and testimony of Osvaldo Aldrete-Davila, the drug smuggler encountered by Agents Compean and Ramos on February 17, 2005.

It is important to understand that only three individuals were eyewitnesses to the crucial events of that day: the two accused Border Patrol agents and the drug smuggler. The other Border Patrol agents who responded to the scene remained on the north side of a steep and wide drainage canal, and their view of the levee channel south of them was completely obscured by the levee access road, which is about 12 feet higher than the road on which they stood, and about 8 feet higher than the spot on the other side of levee where Agents Compean and Ramos knelt and stood, respectively, when they fired their pistols in self-defense as the drug smuggler pointed a gun at them.

This rebuttal document is divided into sixteen sections, each containing three subsections. The first two subsections in each section, entitled “Myth” and “Reality,” are taken verbatim from the U.S. Attorney’s Office’s January 17, 2007 press release, and the “Fact” subsection presents the Agents’ side of the story, allowing readers to draw their own conclusions.¹

I. “Myth”: The agents were just doing their jobs

“Reality”: Securing our nation’s borders can be a tough and dangerous job. Often, Border Patrol agents find themselves in difficult and dangerous situations. We give them guns and allow them to defend themselves. Border Patrol training allows for the use of deadly force when an agent reasonably fears imminent bodily injury or death. An agent is not permitted to shoot an unarmed suspect who is running away.

¹ In an attempt to avoid needless confusion, the “Fact” section is *italicized*.

There was no credible evidence that the agents were in a life-threatening situation or that Aldrete, the Mexican alien, had a weapon that would justify the use of deadly force. In fact, Border Patrol Agent Juarez, who was at the scene, testified at trial that he did not draw his pistol because he did not believe there was a threat. He also testified that Aldrete did not have a weapon and was almost to Mexico when Agent Compean began firing at him.

In America, law enforcement officers do not get to shoot unarmed suspects who are running away, lie about it to their supervisors and file official reports that are false. That is a crime and prosecutors cannot look the other way.

Fact: Both Agent Compean and Ramos testified that the drug smuggler turned and pointed a weapon at them while he was running away. The wound channel created by the bullet that struck the drug smuggler corroborates their version of the events. According to the affidavit of the Office of Inspector General investigator who accompanied the drug smuggler to William Beaumont Army Medical Center for treatment, the Army doctor who removed the bullet fragment from the drug smuggler “advised that the bullet entered the lower left buttocks of the victim and passed through his pelvic triangle and lodged in his right thigh.” At the trial, the Army doctor testified that the drug smuggler’s body was “bladed” away from the bullet that struck him, consistent with the motion of a left-handed person running away while pointing backward, causing the body to twist. There is only one logical object that he would have been pointing at them under these circumstances – a firearm.

As noted previously, none of the agents on the north side of the irrigation canal could have possibly seen what transpired on the other side of the levee access road, even if they climbed on top of one of the vehicles. It is also worth noting that Agent Juarez, along with two other Border Patrol agents, was granted immunity by the Department of Justice in exchange for his testimony. Since he was not involved in the incident, one has to wonder why he would need immunity, and what effect that had on the truthfulness of his testimony.

II. “Myth”: **The government let a drug smuggler go free**

“Reality”: My office would have much preferred to see Aldrete convicted and sent to prison for his crimes. We are in the business of putting guys like Aldrete behind bars. In fact, this office leads the nation in the number of drug smuggling cases we prosecute. Because the agents could not identify him, found no fingerprints, could not tie him to the van and did not apprehend him after shooting him, the case against Aldrete could not be proven.

Fact: The U.S. Attorney’s Office and Office of Inspector General had no trouble identifying Osvaldo Aldrete-Davila as the driver of the van loaded with 743 pounds of marijuana and tracking him down in Mexico. Since the drug smuggler obviously made frequent trips to the United States, it would have been a simple matter to issue a warrant for his arrest, and wait for law enforcement authorities to take him into custody.

III. “Myth:” **These Border Patrol agents should not have been prosecuted**

“Reality:” The crimes committed by these agents rise to the level of felonies and are not mere administrative oversights. This was not a simple case of discharge of a firearm that was not reported. The truth of this case is that Agents Compean and Ramos shot 15 times at an unarmed man who was running away from them and who posed no threat.

This office cannot ignore these agents’ crimes just because the person they shot turned out to be a drug smuggler. Our system of justice requires that a person be tried in a court of law before he is punished. We do not permit police officers to summarily punish those whom the officers think have committed crimes. A police officer cannot shoot at an unarmed suspect who does not pose an immediate serious threat to the life of the officer or a bystander.

In order to maintain the rule of law, federal prosecutors cannot look the other way when law enforcement officers shoot unarmed suspects who are running away, then lie about it to their supervisors and file official reports that are false.

Fact: The U.S. Attorney’s version of what happened at the border on February 17, 2005 relies almost exclusively on the testimony of an admitted drug smuggler, hardly a trustworthy source. Moreover, as previously noted, it is directly contradicted by compelling physical evidence – the angle of the bullet that struck the drug smuggler. It is clear that the drug smuggler was pointing something at the agents as he ran away, and it was reasonable under the totality of the circumstances for them to assume that the object was a firearm. Since the drug smuggler absconded into Mexico, there was no way that the agents could have recovered his weapon – he took it with him.

IV. “Myth:” **Aldrete has been arrested for smuggling more drugs into the United States**

“Reality:” Aldrete has not been subsequently arrested for drug smuggling. Our office is in the business of prosecuting drug traffickers and alien smugglers. We are on the front lines of this battle and we aggressively prosecute these criminals every day in court. In fact, the Western District of Texas leads the nation in the number of individuals we prosecute for illegally smuggling drugs into this country. If we had a provable case against Aldrete, we would prosecute him.

Fact: In October of 2005, Aldrete-Davila was indicted for smuggling about 1,000 pounds of marijuana. The sealed indictment was subsequently expunged. One of the other individuals who was indicted in that drug seizure was called as a witness for the defense, but was not allowed to testify due to the sealed indictment. Likewise, the DEA agents involved in the seizure were not allowed to testify because it was an ongoing investigation that could have been compromised.

While an indictment is not technically an “arrest,” it is more than a little distressing that the U.S. Attorney would engage in a play on words in an attempt deceive the public about the true nature of Osvaldo Aldrete-Davila. There is no doubt that he is a member of one of the drug cartels.

V. **“Myth:” The government gave Aldrete blanket immunity for his crimes**

“Reality:” Agent Compean failed to arrest Aldrete when he attempted to surrender; instead, Compean tried to hit Aldrete with the butt of his shotgun, at which time Aldrete began to run towards the border. The agents shot at him 15 times, hitting him once, knocking Aldrete to the ground. Compean and Ramos chose not to walk over to the wounded Aldrete and arrest him; rather, they re-holstered their guns, turned around and left the scene. When Aldrete then got back to Mexico without having been apprehended and identified, there was no longer any way to tie him to the load of marijuana, except through his own admissions.

Prosecutors promised Aldrete they would not use his truthful statements and testimony to prosecute him for the events that occurred on Feb. 17, 2005. Prosecutors around the country routinely make similar representations to obtain crucial testimony. This type of “use immunity” does not give blanket immunity for any crimes he may have committed or may commit in the future. If there were other admissible evidence besides his own statements sufficient to convict him, he could be prosecuted for the offense he describes.

As a practical matter, the promise to Aldrete gave up very little since the case against him was not prosecutable. There was no way to prosecute Aldrete while he was in Mexico. We could not have forced him to come back to the United States to be prosecuted, and there was no evidence against him until he agreed to cooperate.

Fact: The drug smuggler never attempted to surrender; he had his hands raised in an attempt to assault Agent Compean and/or grab him or the shotgun that he was carrying. Moreover, the drug smuggler did not fall to the ground after the shots were fired, but rather disappeared down the riverbank, only to reappear shortly thereafter, climb into a van and be driven away.

The fact that the U.S. Attorney’s Office and Office of Inspector General were able to track down the drug smuggler in Mexico proves that the government had sufficient evidence to tie him to the drug load, but nonetheless chose not to prosecute him.

VI. **“Myth:” Aldrete had a gun and the agents only fired in self defense**

“Reality:” Trial testimony from other Border Patrol agents who were at the scene and who arrived shortly after the shooting shows that this is not true. Testimony further revealed that Agents Compean and Ramos never took cover nor did they ever warn the other agents to take cover. This action demonstrates that they did not perceive a threat. In his statement to investigators, Compean admitted that Aldrete had attempted to surrender with both hands open and in the air.

Had Agents Compean and Ramos truly believed Aldrete was a threat, they would not have abandoned him after the shooting and they would have warned their fellow agents who arrived at the scene to stay out of the open while an armed suspect was on the loose. If the agents had believed that the shooting was justified then they would have left the crime scene undisturbed and let the

investigation absolve them. The agents knew that Aldrete did not have a weapon and they knew he posed no threat to them as he fled. Agent Juarez also testified that Aldrete was surrendering to Compean with his hands open and empty palms turned to Compean.

Fact: Agent Compean never admitted nor testified that the drug smuggler attempted to surrender. He stated that the drug smuggler was refusing his commands to surrender and approached him with outstretched arms as if attempting to grab or assault him. Both of the agents testified that the drug smuggler did not point a weapon at them until he was in the channel between the levee road and the Rio Grande river. There was no place to take cover in that wide-open area, nor was there any time to do so. Furthermore, the agents did not “abandon” the drug smuggler after they fired their weapons; he absconded into Mexico.

VII. “Myth:” The agents were not sure of what they saw because it was in the middle of the night

“Reality:” The events of Feb. 17, 2005, occurred at approximately 1:00 P.M MT.

Fact: Neither of the Border Patrol agents has ever alleged nor intimated that they were unsure of what they saw because of the time of the incident.

VIII. “Myth:” Johnny Sutton is an overzealous prosecutor who is on the wrong side of the law

“Reality:” These agents were found guilty by a unanimous jury in a United States District Court after a trial that lasted more than two and a half weeks.

The two agents were represented by experienced and aggressive trial attorneys, both of whom vigorously challenged the Government’s evidence through cross examination.

Both agents told their stories from the witness stand and had full opportunities to explain their version of events and to offer their own evidence. The jury heard everything including the defendants’ claims of self defense. The problem for Agents Compean and Ramos is that the jury did not believe their stories because they were not true.

Fact: Had the U.S. Attorney’s Office bothered to conduct a thorough investigation instead of relying upon the assertions of a known drug smuggler, it never would have arrested Agents Compean and Ramos and prosecuted them. Moreover, its withholding and suppression of exculpatory evidence denied the defendants a fair trial.

It is also significant that three of the twelve jurors later submitted sworn affidavits alleging that they had been misled into believing that there could be no dissent in the decision of the jury, and that the minority would have to accede to the will of the majority. Despite this cloud over the propriety of the process, the judge refused to overturn the verdict.

IX. “Myth:” These agents are facing too much time in Federal prison

“Reality:” Congress determined the penalties imposed on Compean and Ramos by setting the punishment for discharging a firearm during a crime of violence at a mandatory minimum of ten years (on top of any other sentence imposed). Congress did not make an exception for law enforcement officers.

Fact: The U.S. Attorney’s Office was not required to charge Agents Compean and Ramos with using or carrying a firearm during the commission of a crime of violence. In fact, it is quite doubtful that Congress ever intended that this provision be used against law enforcement officers who carry firearms in the performance of their normal duties. More importantly, these two agents never should have been prosecuted or convicted in the first place. Innocent people should not spend any time in prison.

X. “Myth:” The drug smuggler was awarded a green card

“Reality:” Aldrete was not given a green card which would enable him to have permanent legal resident status in this country. A military physician in the United States removed the bullet from Aldrete because it was an important piece of evidence and because the law requires the government to render such assistance. In order to have the bullet removed, meet with federal investigators and to testify in court in El Paso, he was entitled to come into the United States on a limited basis within a limited geographical area and only for those purposes. The last time he was legally allowed to enter the United States was in February 2006.

Fact: The drug smuggler was promised legal permanent resident status in exchange for his testimony against the two Border Patrol agents, but that offer was withdrawn after he was indicted for smuggling an additional 1,000 pounds of marijuana in October of 2005. Contrary to the assertion of the U.S. Attorney, there is no law that requires the government to render medical assistance to injured illegal aliens. The drug smuggler was scheduled to attend the sentencing of the two agents in October of 2006, but mysteriously failed to appear.

XI. “Myth:” Aldrete never had his hands up and was not attempting to surrender

“Reality:” In their sworn testimony, Agent Compean and Agent Juarez both testified that Aldrete did have his hands in the air in an effort to surrender.

Fact: Agents Compean and Ramos testified that the drug smuggler did not attempt to surrender, but rather initially had his hands in the air in order to keep his balance as he climbed the steep bank of the irrigation canal, and then lunged at Agent Compean with outstretched arms as if attempting to grab or assault him. As noted previously, Agent Juarez claimed that he witnessed the shooting incident from his position north of the levee – a physical impossibility. His testimony regarding this matter is equally suspect.

XII. “Myth:” Compean was bloodied from a struggle with Aldrete

“Reality:” Trial testimony showed that the only blood on Agent Compean was between his thumb and forefinger and was a result of him improperly holding his weapon. When asked if he was injured, he said “no” and when further asked if he wanted to file a report for his injury, he again said “no.”

Fact: During the struggle with Osvaldo Aldrete-Davila, Agent Compean sustained lacerations to his forehead and hand. One of the supervisors at the scene dissuaded him from filing an assault report by stating that it was already near the end of their assigned shift and they would have to wait a long time for the FBI to arrive in order to file the report.

XIII. “Myth:” These agents did not report the shooting to supervisors because the supervisors were on the scene of the shooting

“Reality:” The trial testimony of the defendants, fellow Border Patrol agents who were on the scene and who arrived shortly thereafter, as well as taped radio communications showed that there were no supervisors at the scene at the time of the shooting. The agents knew they must report any discharge of a firearm and had just received training to this effect the day before this shooting. Further, Agent Ramos was a Border Patrol firearms instructor and a member of the evidence recovery team. He was well aware of this requirement as he had taught this to other agents. They did not report the discharge because they knew the shooting was not justified. Furthermore, based on their training and experience, they were aware of what law enforcement resources would be dispatched to the crime scene to investigate a shooting, including sector evidence team, the Federal Bureau of Investigation, and state and local law enforcement.

Fact: Two Border Patrol supervisors arrived at the scene of the incident within minutes after the shooting, and Agents Ramos and Compean overheard some of the agents talking about the shooting in the presence of the supervisors. It would have been logical for them to assume that the supervisors were aware of the shooting. In accordance with the agency’s firearms policy, employees who participate in or observe a reportable shooting incident are required to “orally report the incident to a supervisor . . . within one hour of the time the incident occurs or within one hour of the time the employee becomes aware of the incident.” The maximum penalty for the first instance of failing to do so is a five-day suspension without pay. Several agents did notify the supervisors that Agent Compean had been assaulted, but the supervisor refused to file a report because it would have taken too much time and required notification to the FBI.

In other statements, the U.S. Attorney’s Office has also claimed that Agent Compean attempted to “cover-up” the incident by picking up the expended cartridges from the scene of the incident and disposing of them. It has also claimed that both agents filed false reports concerning the incident because they failed to mention the fact that shots were fired. If Agent Compean were truly intent on destroying the evidence of the shooting, it is highly doubtful that he would have tossed the expended cartridges a few yards away in the irrigation canal in plain sight of all of the other agents at the

scene. It is much more likely that his actions were those of an individual suffering from Post-Traumatic Stress Disorder, and in his state of confusion he reverted to his training at the firearms range, where agents are taught to pick up their expended cartridges and toss them into containers. Also, employees are not only not required to file written reports concerning shooting incidents, but the policy discourages them from doing so.

XIV. “Myth:” Illegal aliens do not have any constitutional rights

“Reality:” The courts have held that the 4th Amendment to the Constitution protects all persons in the United States whether they are here legally or illegally. It is a violation of the 4th Amendment to shoot an unarmed person who poses no threat to the shooter. This law applies regardless of immigration status.

Fact: The 4th Amendment’s prohibition against arbitrary arrests does not protect individuals who are reasonably believed to have committed a crime. In this case, Osvaldo Aldrete-Davila was observed driving a vehicle away from the border, fled from Border Patrol agents who attempted to stop his vehicle, assaulted a Federal agent, and turned and pointed a weapon at the agents as he was fleeing. In these circumstances, the immigration status of the offender is irrelevant. The agents were clearly justified in attempting to effectuate an arrest and defend themselves.

XV. “Myth:” Agent Ramos claims that the bullet extracted from Aldrete might not have come from his service revolver

“Reality:” Agent Ramos stipulated and agreed before trial that the bullet extracted from Aldrete came from his service weapon. Independent forensic analysis also showed that the bullet extracted from Aldrete matched Agent Ramos’ weapon.

Fact: An Army surgeon at William Beaumont Army Medical Center removed a bullet fragment from the drug smuggler’s right thigh on March 16, 2005. At 7:45 p.m. that evening, Christopher Sanchez, an investigator with the Department of Homeland Security’s Office of Inspector General, took Aldrete-Davila and the bullet fragment to his personal residence for the night. This negligent action broke the chain of custody for this vital piece of evidence. The following day, Christopher Sanchez submitted a bullet fragment to the Texas Department of Public Safety for testing. The report concluded that “[t]he copper-jacketed bullet was fired from a barrel having six lands and grooves inclined to the right. The manufacturer of the firearm that fired the copper-jacketed bullet is unknown, but could include commonly encountered models of 40 S&W caliber FN/Browning, Beretta, Heckler & Koch, and Ruger pistols.” During the testing of the bullet fragment, the lab technicians destroyed all traces of DNA on it, eliminating the possibility of proving that it came from the drug smuggler’s body. These careless actions needlessly cast suspicion on this aspect of the prosecution’s case.

XVI. “Myth:” Agent Ramos was Border Patrol Agent of the year

“Reality:” Agent Ramos has never received any formal recognition or award for being the Border Patrol Agent of the year. In fact, he has been arrested on at least two occasions for domestic abuse and was formally disciplined for conduct unbecoming a federal officer.

Fact: Agent Ramos’ nomination for Border Patrol Agent of the Year was withdrawn after he was arrested for defending himself against an armed drug smuggler. He did receive a number of awards and commendations during an otherwise unblemished ten-year career. As U.S. Attorney Johnny Sutton well knows, the evidence concerning the unrelated prior arrests and proposed disciplinary action was inadmissible in Agent Ramos’ trial and is completely irrelevant. To set the record straight, however, all of the charges in the two domestic violence arrest cases were dropped, and the formal disciplinary action stemmed from the same incidents. That disciplinary proposal was challenged and scheduled for an arbitration hearing, but that proceeding was postponed indefinitely because of Agent Ramos’ arrest.