Nos. 08-755 and 08-756

In the Supreme Court of the United States

IGNACIO RAMOS, PETITIONER

v.

UNITED STATES OF AMERICA

JOSE ALONSO COMPEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners had fair notice that law-enforcement officers who unlawfully shoot a fleeing suspect are subject to prosecution under 18 U.S.C. 924(c), which prohibits the use (including discharge) of a firearm during and in relation to a crime of violence.

2. Whether the Fourth Amendment's reasonableness test for the use of force by law-enforcement officers should be modified to permit officers to shoot a fleeing suspect when the shooting takes place near an international border.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-60) is reported at 537 F.3d 439.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2008. A petition for rehearing was denied on

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 08-755.

September 10, 2008 (Pet. App. 61-62). The petitions for a writ of certiorari were filed on December 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner Ramos was convicted on one count of assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3); one count of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6); one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); two counts of tampering with an official proceeding, in violation of 18 U.S.C. 1512(c); and one count of deprivation of rights under color of law, in violation of 18 U.S.C. 242. Petitioner Compean was convicted of the same offenses, and he was also convicted on two additional counts of tampering with an official proceeding. Ramos was sentenced to 132 months and one day of imprisonment, to be followed by three years of supervised release. Compean was sentenced to 144 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated the convictions for tampering with an official proceeding, affirmed the remaining convictions, and remanded for resentencing. Pet. App. 1-60; C.A. R.E. tabs 7, 8. The President later commuted petitioners' prison sentences. See p. 6, *infra*.

1. Petitioners were Border Patrol agents in Texas. Pet. App. 1. On February 17, 2005, they chased an alien drug smuggler who was driving a van toward the Mexican border. *Id.* at 1, 5. The smuggler, Oswaldo Aldrete-Davila, had crossed into the United States to re-

trieve a van that was carrying a large load of marijuana. *Id.* at 7. Aldrete-Davila reached the van, and when he was spotted, he decided to try to drive back to Mexico. *Ibid.* When the van became stuck at the edge of an irrigation ditch near the Rio Grande River, Aldrete-Davila abandoned it and ran toward the border while petitioners gave chase. *Id.* at 2, 7. Petitioners shot at Aldrete-Davila several times, hitting him once before he escaped into Mexico. *Id.* at 2.

After the shooting, petitioners and another Border Patrol agent gathered the ejected shell casings and threw them into an irrigation ditch. Pet. App. 10. In violation of Border Patrol policy, petitioners did not tell their supervisors that they had discharged their weapons. *Ibid.*

Several days later, another Border Patrol agent learned that Aldrete-Davila had been shot while attempting to flee from Border Patrol agents. Pet. App. 4-5. In exchange for immunity, Aldrete-Davila agreed to cooperate with the investigation of the shooting, and he returned to the United States so that the bullet could be removed from his body. *Id.* at 6. Tests of the bullet and of the firearms of all Border Patrol agents on duty in the area on February 17 revealed that the bullet came from Ramos's gun. *Ibid.* With that information, investigators were able to identify petitioners as the agents who had fired upon Aldrete-Davila. *Id.* at 6-7.

2. A federal grand jury in the Western District of Texas returned an indictment charging both petitioners with assault with intent to commit murder, in violation of 18 U.S.C. 113(a)(1); assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3); assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6); discharging a firearm during and in relation to a crime

of violence, in violation of 18 U.S.C. 924(c)(1)(A); and deprivation of rights under color of law, in violation of 18 U.S.C. 242. Pet. App. 11 n.1. In addition, Ramos was charged with two counts of tampering with an official proceeding, in violation of 18 U.S.C. 1512, and Compean was charged with four counts of that offense. Pet. App. 11 n.1. Petitioners were tried by a jury.

Compean testified that Aldrete-Davila threw dirt as he fled, causing Compean to fall to the ground. Pet. App. 9. Compean said that he began firing when he saw Aldrete-Davila "turn with something in his hand, putting Compean in fear for his life." *Ibid.* Similarly, Ramos testified that he saw Compean "on the ground" and "saw Aldrete-Davila with something in his hand." *Ibid.* Ramos then fired a single shot. *Ibid.*

Aldrete-Davila offered a different version of events. He "denied turning around and denied having any object in his hand." Pet. App. 9. Instead, Aldrete-Davila "insisted that he simply ran towards the border, saw dirt being kicked up around him by bullets, and then fell, feeling a burning sensation in his left buttock." *Ibid.*

The jury found petitioners not guilty of assault with intent to commit murder but guilty of all other charges. Pet. App. 12. Because of their convictions for discharging a weapon during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A), petitioners were subject to a statutory minimum of ten years of imprisonment. The district court sentenced Ramos to 132 months and one day of imprisonment, to be followed by three years of supervised release. Pet. App. 12; C.A. R.E. tab 7. The court sentenced Compean to 144 months of imprisonment, to be followed by three years of supervised release. Pet. App. 12; C.A. R.E. tab 8.

3. The court of appeals affirmed in part, reversed and vacated in part, and remanded for resentencing. Pet. App. 1-60.

Petitioners argued that they "had no warning—either from the statutory language or from its previous application—that [18 U.S.C. 924(c)] could apply to law enforcement officers when carrying out their duties." Pet. App. 36. The court of appeals rejected that claim. *Id.* at 36-42. The court began its analysis by emphasizing that whether Section 924(c) "may be applied to officers otherwise acting lawfully in carrying out their duties" was not the question before it. *Id.* at 36. In light of the jury's verdict, the court could not assume that petitioners "acted in self-defense or for the safety of others." *Ibid.* To the contrary, the verdict compelled the court to assume that petitioners "shot at, and wounded, Aldrete-Davila without lawful justification," because the jury "rejected [petitioners'] versions of the facts." *Id.* at 36-37.

The court of appeals held that petitioners "cannot advance a persuasive textual argument supporting their fair warning claim," because Section 924(c)(1)(A) "is applicable to 'any person' and contains no language that law enforcement officers are excepted from its application." Pet. App. 39. The court noted that its precedents "permitted application of § 924(c)(1)(A) to police officers." *Id.* at 40 (citing cases). In addition, the court reasoned that "there is no question but that a police officer's unjustifiable shooting of a victim qualifies as a crime of violence" and "that a police officer's shooting a victim who poses no physical threat to the safety of the officer or the public is unjustifiable." *Id.* at 39.

In response to petitioners' argument that Aldrete-Davila "posed a specific threat" to petitioners' safety,

the court of appeals again observed that "this view of the facts was rejected by the jury." Pet. App. 40. Citing *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the court explained that the conduct for which petitioners were convicted "violates the Fourth Amendment rights of the fleeing felon if he poses no physical threat to the officers or danger to others." Pet. App. 42. Thus, the court concluded that petitioners "were denied no right of due process for lack of notice that § 924(c) could be applied to police officers while performing law enforcement duties." *Id.* at 59.

The court of appeals determined that the Border Patrol's investigation of the shooting was not an "official proceeding" within the meaning of 18 U.S.C. 1512(c), and it therefore vacated petitioners' convictions for tampering with an official proceeding. Pet. App. 46-55. The court rejected a number of other claims not reasserted here and remanded for resentencing. *Id.* at 60.

4. On January 19, 2009, President Bush commuted petitioners' sentences. Under the commutations, each petitioner's prison sentence will expire on March 20, 2009.[2]

ARGUMENT

Petitioners contend (Pet. 12-37; 08-756 Pet. 5-14) that they lacked warning that 18 U.S.C. 924(c) could be applied to law-enforcement officers performing their duties and that the Court should modify the Fourth Amendment's reasonableness test governing the use of force by the police in the context of law enforcement at the border. The court of appeals correctly rejected

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[2] U.S. Dep't of Justice, *President George W. Bush Grants Commutations* (Jan. 19, 2009) <http://www.usdoj.gov/opa/pr/2009/January/09-opa-053.html>.

those claims, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners renew their claim (Pet. 12-26; 08-756 Pet. 5-13) that Section 924(c) does not provide fair warning that the statute applies to "on duty law enforcement officers attempting to apprehend fleeing felons who actively resist arrest." Pet. 12. That argument lacks merit. Section 924(c) applies to "*any* person" who uses or carries a firearm "during and in relation to *any* crime of violence."[3] 18 U.S.C. 924(c)(1)(A) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary of the English Language* 97 (1976)). As the court of appeals explained, the statutory language and controlling case law leave no doubt that Section 924(c) can apply, and has previously been applied, to law-enforcement officers. Pet. App. 36-42. Petitioners rely (Pet. 22) on the legislative history, but they concede that it "clearly supports a conclusion that anyone licensed to carry a gun, including a police officer, could be subject to prosecution" under Section 924(c).

Petitioners acknowledge (Pet. 14) that "a number of cases from various Courts of Appeals have upheld the application of [Section] 924(c) to on duty police officers," and they cite no court of appeals case taking a contrary position. Instead, they assert (Pet. 15) that their case is factually distinguishable from those that have applied Section 924(c) to law-enforcement officers, because it

[3] In this case, the indictment charged that petitioners discharged a firearm, which is a form of "use." Pet. App. 43-44; *Bailey* v. *United States*, 516 U.S. 137, 148 (1995).

involved on-duty agents who were "attempting to apprehend a fleeing felon who had actively resisted arrest and led the agents on a high speed chase." Pet. 15. But the Due Process Clause does not limit the application of criminal statutes only to factual scenarios identical to those that courts have already addressed. The test is one of "reasonable warning," *United States* v. *Lanier*, 520 U.S. 259, 269 (1997), which can come from the statute "standing alone," *id.* at 267. And in any event, the court of appeals concluded that prior cases applying Section 924(c) to law-enforcement officers "appear to encompass the circumstances of this case." Pet. App. 41. Petitioners' factbound challenge to that determination does not warrant this Court's review.

2. Petitioners further contend (Pet. 26-37; 08-756 Pet. 13-14) that the "reasonableness" test for evaluating claims that officers used excessive force in violation of the Fourth Amendment should be "modified" to excuse their conduct in the factual scenario of law enforcement at the border. No such modification is necessary: the applicable test already takes the totality of the circumstances into account. This Court held in *Graham* v. *Connor*, 490 U.S. 386 (1989), that "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, without regard to their underlying intent or motivation." *Id.* at 397. And in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the Court held that it is not reasonable under the Fourth Amendment for an officer to shoot a fleeing felon who poses no threat to the officers or danger to others. There is no basis for departing from those standards in this case.

Petitioners emphasize (Pet. 30) that their victim was an illegal alien near a border, and they cite *United States* v. *Flores-Montano*, 541 U.S. 149 (2004), in support of their argument that "the powers of law enforcement officers in connection with international border detentions and searches are broader than otherwise." But although *Flores-Montano* recognized that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *id.* at 152, the holding of that case does not assist petitioners. The Court in *Flores-Montano* concluded "that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank." *Id*. at 155. Nothing in *Flores-Montano* suggests that an officer may shoot an unarmed suspect who poses no threat to his safety or that of the public simply because the shooting takes place near a border.

Petitioners also cite *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), but their reliance on that case (08-756 Pet. 14) is similarly misplaced. In *Verdugo-Urquidez*, this Court held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. Petitioners' conduct, however, occurred within the United States. And while it is true that aliens "receive constitutional protections when they have come within the territory of the United States and developed *substantial* connections with this country," *id.* at 271 (emphasis added), this Court has never suggested that ordinary reasonableness standards are inapplicable to the use of force against illegal aliens briefly present in the United States.

Moreover, short of a rule under which officers may always shoot suspected felons at the border, it is doubtful whether any modification of the reasonableness standard would excuse petitioners' conduct in this case. As the court of appeals emphasized, petitioners "presented a much different version of the facts from that presented by the government," but "[t]he jury did not believe the Border Patrol agents." Pet. App. 2-3. By finding petitioners guilty, the jury implicitly rejected their claim (Pet. i) that Aldrete-Davila was "actively resisting arrest." Instead, it found that he "posed no physical threat to either officer." Pet. App. 2. Indeed, petitioners acknowledge (Pet. 35) that their claim is essentially one of "insufficient evidence," a claim that the court of appeals correctly rejected and that does not warrant this Court's review in any event.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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