No. 05-51433

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JIMMY AGUILAR,

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 defendant's request for oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Jimmy Aguilar, on October 3, 2005. (4 R. 862; R.E. 2).[1] Aguilar's notice of appeal was timely. This Court's jurisdiction arises under 28 U.S.C. 1291.

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[1] The number before the "R" is the volume number of the Record on Appeal. Numbers after the "R" are pages in that volume. "T.R." refers to the trial transcript. The number before it refers to the volume number and the number after it refers to the relevant page number. "Br. __" indicates the page number of the defendant's opening brief. "GX" and "DX" refer to the government's and defendant's trial exhibits, respectively. "R.E. __" indicates the tab number of the defendant's record excerpts. "G.R.E. __" indicates the tab number of the government's record excerpts.

STATEMENT OF THE ISSUES

1. Whether the district court's instruction that the jury was to judge Aguilar's use of force in light of "all the surrounding circumstances" was proper.

2. Whether the district court's instruction to the jury to judge Aguilar's use of force in light of the Fourth Amendment's objective reasonableness standard was proper.

3. Whether the district court's instructions on the intent element of Count 1 were proper.

4. Whether the district court erred when it employed Aguilar's proposed jury instructions regarding "corruptly" and "improper purpose."

5. Whether the district court abused its discretion when it limited cross-examination of the victim's prior arrests for assaulting police officers.

6. Whether the district court's exclusion of a photograph of a person the victim fought prior to his arrest, and testimony concerning a possible firearm in the car at the scene of the arrest, was proper.

7. Whether the district court abused its discretion in replacing an original juror with an alternate.

STATEMENT OF THE CASE

On August 4, 2004 a four-count superceding indictment was filed against defendant Jimmy Aguilar, alleging various civil rights and obstruction of justice

violations. At the time of the offense, Aguilar was a police officer with the Crystal City, Texas, Police Department.

Count I charged that on or about August 7, 2001, Aguilar violated 18 U.S.C. 242 by knowingly and willfully acting under color of law when assaulting Victor Jimenez while he was restrained in handcuffs, and by jamming the barrel of a firearm into his mouth, violating Jimenez's Fourth Amendment rights resulting in bodily injury. (2 R. 416; R.E. 5). Count 2 charged Aguilar with violating 18 U.S.C. 924(c)(1)(A)(ii) by using a firearm in relation to a crime of violence. (2 R. 417; R.E. 5). Count 3 charged Aguilar with violating 18 U.S.C. 1512(b)(1) on or about October 13, 2003, by knowingly and corruptly persuading, and attempting to corruptly persuade, Sheriff's Deputy Ricardo Rios to withhold truthful testimony from a federal grand jury investigating the August 7, 2001, beating, with the intent to influence and prevent the testimony of Rios in an official proceeding. (2 R. 417; R.E. 5). Count 4 charged Aguilar with violating 18 U.S.C. 1001(a)(2) by knowingly and willfully making a false, fraudulent, and fictitious material statement and representation when stating that he did not handcuff Jimenez until after Jimenez had threatened and head-butted Aguilar. (2 R. 418; R.E. 5).

On September 7, 2004, the jury returned a guilty verdict on Counts 1, 3, and 4, and acquitted Aguilar on Count 2. (3 R. 690-691; R.E. 4) The district court sentenced Aguilar to a term of 60 months on each count to be served concurrently,

with credit for time served, three years of supervised release, and a fine. (4 R. 863; R.E. 2).

STATEMENT OF FACTS[2]

A. Facts Related To Count 1 – 18 U.S.C. 242

On August 6, 2001, defendant Jimmy Aguilar was a police officer with the Crystal City, Texas, Police Department. (1 T.R. 206). The Zavala County Sheriff's Department routinely provides back up for Crystal City's officers. (1 T.R. 204, 248.) At about 11:30 p.m. on August 6, 2001, Crystal City Police Officers Aguilar and Adrian Diaz, assisted by Zavala County Sheriff's deputies Jesse Lopez and Ricardo Rios, responded to a call of a fight in progress at Paisano's Bar in Crystal City. (2 T.R. 109-110). The officers arrived to find that Gilbert Garcia, 4 T.R. 23, had been beaten, and was bleeding severely from his mouth and head. (2 T.R. 110-111). The two suspects in the altercation, who had left the bar, were Victor Jimenez and Frank Herrera. (2 T.R. 111).

Shortly thereafter, at about 1:30 a.m. on August 7, 2007, all four officers responded to a report of loud music at a residence. (1 T.R. 206, 208; 2 T.R. 249; G.X. 221). The officers found the people at the house intoxicated, and one was

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[2] There is some conflict between the government's recitation of the facts and Aguilar's. The government recites the facts as viewed in the light most favorable to its case and drawing all inferences in favor of upholding the jury's verdict. See, e.g., *United States* v. *Soape*, 169 F.3d 257, 264 (5th Cir. 1999) (articulating sufficiency of the evidence standard).

passed out on the trunk of a car. (1 T.R. 206; 2 T.R. 66). The loud music was coming from a gray Le Baron parked in the driveway. (1 T.R. 209). The residents of the house turned down the music at the request of Office Aguilar. (1 T.R. 209). The officers also told the residents not to leave the house (2 T.R. 66-67).

Deputies Lopez and Rios, in two parked cars about two blocks from the house, waited to see if "somebody came out." (1 T.R. 212). About 10-20 minutes later, a blue Cadillac, with one headlight burned out, left the house and the two deputies followed (1 T.R. 212; 1 T.R. 221; 2 T.R. 68; 2 T.R. 116; G.X. 221), stopping the car. (1 T.R. 213; 2 T.R. 68). Deputy Rios arrested the driver Jesse Lopez (different from Deputy Lopez), and Deputy Lopez went to the passenger side of the car where Jimenez was sitting (1 T.R. 213; see also 2 T.R. 72). Deputy Lopez opened the passenger side door, Jimenez exited and, according to Deputy Lopez, "turned around and put his hands behind his back." (1 T.R. 213). Lopez immediately handcuffed him. (1 T.R. 213). Deputy Lopez noticed a little blood on Jimenez's shirt, but did not see any injuries to Jimenez's person or face. (1 T.R. 213-214). After handcuffing Jimenez, Deputy Lopez escorted Jimenez back to Lopez's patrol car, (1 T.R. 214), and put Jimenez in the rear passenger-side seat. (1 T.R. 217-218). Jimenez was intoxicated. (2 T.R. 56). Deputy Rios placed the driver of the car in the back seat on the driver's side of the same patrol car. (1 T.R. 218).

At this point, Officer Diaz, followed by Officer Aguilar, arrived. (1 T.R. 218, 219). Officer Aguilar asked whom they had arrested, and Deputy Lopez informed him that they had arrested Jesse Lopez and Victor Jimenez. (1 T.R. 220) Deputy Lopez asked Aguilar "if he wanted to talk to Jimenez." (1 T.R. 220). Deputy Lopez proceeded to the Cadillac to search it. (1 T.R. 221).

Aguilar retrieved Jimenez from the police cruiser to photograph his shirt. (3 T.R. 43; 4 T.R. 34). Aguilar grabbed Jimenez, who was still handcuffed, tightly by the biceps while Officer Diaz tried to take a picture of Jimenez. (1 T.R. 221-222). Jimenez was, according to Lopez, "trying to kick the camera," (1 T.R. 222), and told Aguilar and Diaz that they would not take his picture. (2 T.R. 157). Jimenez also was threatening to kill Aguilar. (2 T.R. 209). Jimenez stated at trial that he (Jimenez) was "being a jerk." (3 T.R. 43).

Aguilar released his hold on Jimenez's handcuffs, Jimenez turned around, and he and Aguilar began to argue. (1 T.R. 223). After Aguilar let go of him, Jimenez "head butted" Aguilar in the face. (1 T.R. 223; 2 T.R. 158; 3 T.R. 240). In response, according to Lopez, Aguilar "took [Jimenez] down and they * * * hit [Lopez's] patrol car, and then they fell down to the ground." (1 T.R. 224; 2 T.R. 158).[3]

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[3] After that shift, Lopez discovered a dent in his patrol car that had not previously been there. (1 T.R. 224).

Aguilar then stood up over Jimenez, who was lying on his back on the ground, still handcuffed. (1 T.R. 225; 2 T.R. 77). Aguilar, who according to Rios appeared to have his balance (2 T.R. 76), then proceeded, in the words of Lopez, to "land[] a knee on Victor Jimenez'[s] face." (1 T.R. 225; 2 T.R. 75). Deputy Lopez testified that Aguilar intentionally dropped knee-first onto Jimenez's face, (1 T.R. 226), and both he and Deputy Rios stated that Aguilar landed his full weight on Jimenez's face. (1 T.R. 226; 2 T.R. 78). Aguilar weighed somewhere between 200-230 pounds. (1 T.R. 226; 1 T.R. 233; 2 T.R. 77).

According to Deputy Lopez, Aguilar then "grabbed [Jimenez] by the neck and started choking him." (1 T.R. 226-227; 2 T.R. 78). While Officer Aguilar choked Jimenez, Lopez noted that Jimenez was "gasping for air" and his face showed "deep pain." (2 T.R. 79; 1 T.R. 232; 2 T.R. 160-161). Deputy Lopez and Officer Adrian Diaz attempted to take Aguilar off Jimenez. (1 T.R. 232; 2 T.R. 78-79; 2 T.R. 164-165). While they initially had difficulty pulling Aguilar off Jimenez (1 T.R. 232), they eventually "managed" to do so. (1 T.R. 232; 2 T.R. 81).

Aguilar told Lopez that he would put Jimenez in Lopez's car for transport to the police department. (1 T.R. 241). Aguilar picked Jimenez up by the arms, walked him towards the car and threw Jimenez hard against the rear passenger side of Lopez's patrol car. (1 T.R. 243; 2 T.R. 85; 2 T.R. 172). The side of Jimenez's

face hit the side of the car. (2 T.R. 237). According to Lopez, Aguilar threw Jimenez hard enough against the car to hurt him. (1 T.R. 244). Aguilar then opened the door and quickly threw Jimenez head first into the patrol car. (1 T.R. 245; 2 T.R. 86). Aguilar testified that he was aware that Jimenez had been arrested for assault on a police officer, and claimed that this arrest factored into his decision of what sort of danger Jimenez might pose. (4 T.R. 80; 3 T.R. 60; GX 370).

Deputy Lopez brought Jimenez to the Crystal City police department. (2 T.R. 87). Jimenez stayed the rest of the morning in a cell. (2 T.R. 283). Jimenez testified that after being placed in his cell, he experienced extreme pain from the injuries caused by Aguilar's assault. (3 T.R. 53). Officer Erasmo Ramon, on duty at the police station, discovered Jimenez's injuries later that day and called EMS. (2 T.R. 283). Aguilar told Officer Ramon that he had been head-butted that morning, but he did not tell Ramon that he had choked or beaten anyone. (2 T.R. 277-278).

After Jimenez's injuries were discovered, EMS took him to a nearby hospital. (2 T.R. 283; 3 T.R. 59). He then was airlifted to a hospital in San Antonio. (3 T.R. 316). Jimenez suffered extensive injuries, including fractures to various bones in his face and his hyoid bone (located in the front of the neck). (2 T.R. 310-312; 3 T.R. 102, 106, 115, 154; 4 T.R. 238-239). In San Antonio, Dr.

Roberto Perez-Nieves operated on Jimenez's face and jaw, inserting plates and screws to secure the fractures and repair his jaw. (3 T.R. 150-157). The plates and screws still remain in Jimenez's face. (3 T.R. 159). Jimenez was in the hospital in San Antonio for 14 days and incurred bills in excess of $70,000 (3 T.R. 60).

Prior to the incident at issue, Aguilar had attended a course on the "use of force" at Middle Rio Grande Law Enforcement Academy (4 T.R. 198). The Rio Grande Academy does not teach its students how to employ knee drops or choke holds. (5 T.R. 137, 139). It does not train in knee drops because they are "too difficult to control" and they are "too dangerous if * * * not controlled." (5 T.R. 137). Choke holds are not taught because they are "too dangerous" and may result in "[d]eath, serious injury, crushing of a larynx, [or] breaking the hyoid bone." (5 T.R. 139).

Aguilar testified that he remembered learning about the use of force, the law about the use of force, concepts regarding the use of force, force options and alternatives, factors basic to unreasonable force, and when excessive force is being used. (4 T.R. 199). He also agreed that he had been taught that a "[r]easonable or necessary force is the minimum amount of lawful aggression sufficient to achieve a legitimate law enforcement objective." (4 T.R. 199). The Crystal City Police Department had established a use of force policy that limited "threatened,"

"actual," or "deadly force" to those times when an officer had determined that its use was "necessary to accomplish goals of the Department" and those circumstances where such use was "justified" under the Texas Penal Code. (5 T.R. 17).

At trial, Deputies Rios and Lopez testified that they believed Aguilar used excessive and unjustified force in dropping onto Jimenez with his knee and choking him. (2 T.R. 80-81; 1 T.R. 231). Officer Diaz testified that he had been taught not to "hit the head" because striking the head is "considered deadly force in most options," (2 T.R. 161) and can have "dire consequences." (2 T.R. 162). Luis Contreras, the Chief of Police for Crystal City, also testified that he did not think it would be appropriate to choke a handcuffed subject. (5 T.R. 19). Deputy Lopez testified that Aguilar used more force than necessary to throw Jimenez into the car, (1 T.R. 245), and that it looked like throwing Jimenez into the car would have hurt Jimenez. (2 T.R. 87). Officer Diaz stated that he did not think Aguilar's technique of putting Jimenez against the car was appropriate because Jimenez "didn't have much fight in him anymore and he wasn't struggling or anything anymore." (2 T.R. 173).

B. Obstructive Conduct

After the assault, Officer Diaz said that Aguilar told him "something to the effect that 'I fucked up.'" (2 T.R. 176). At the end of the shift, Deputies Lopez

and Rios and Officer Diaz saw Aguilar in front of the police department. (1 T.R. 245; 2 T.R. 89; G.R.E. 6, 7). Rios testified that Aguilar asked the officers to "help him out and not put in the report that Mr. Jimenez was handcuffed." (2 T.R. 90; 1 T.R. 245; G.R.E. 6, 7). Aguilar wanted Lopez to write that Lopez had never handcuffed Jimenez and had handed Jimenez to Aguilar uncuffed. (1 T.R. 246; G.R.E. 6). Aguilar also told Lopez that he (Aguilar) would take the blame for the beating if anything went wrong with their false reports. (1 T.R. 246; 2 T.R. 47; G.R.E. 6, 7). Deputy Lopez wrote a false report the day after the incident. (1 T.R. 246; G.R.E. 6).

On the evening of August 7, Lopez, Diaz, Rios, and Aguilar met at Diaz's house. (2 T.R. 90; G.R.E. 7). Lopez testified that Aguilar told them that Jimenez was "seriously injured." (1 T.R. 249; G.R.E. 6). Aguilar appeared concerned, (2 T.R. 91), and told the other officers that they "might expect some trouble" because Jimenez had been airlifted to San Antonio. (2 T.R. 184; 1 T.R. 249; 2 T.R. 90-91; G.R.E. 6, 7). Diaz testified that Aguilar said that they needed to "get [their] story straight" and he asked them to "substantiate his story," by saying that Jimenez was not handcuffed. (2 T.R. 184; G.R.E. 7). Aguilar again asked Lopez to lie on his report. (1 T.R. 249; G.R.E. 6). Aguilar assured the others that if "anything went wrong" that he "would take the blame for it." (2 T.R. 91; G.R.E. 7).

Rios told Aguilar that if Jimenez had injuries "it might have been because of the knee that [Aguilar] put in Jimenez' face." (2 T.R. 92; G.R.E. 7). Aguilar told Rios not to put that in the report, but to find a way to justify Jimenez's injuries without implicating Aguilar in an assault. (2 T.R. 92; G.R.E. 7). Aguilar then told Rios that he would find a way to justify the injuries. (2 T.R. 92; G.R.E. 7). Additionally, Aguilar told Diaz to say falsely that Diaz "showed up at the very end of everything." (2 T.R. 184; G.R.E. 7).

Another meeting was scheduled at Mi Casa Steak House in Carrizo Springs. (1 T.R. 250; G.R.E. 6). Lopez did not attend. (1 T.R. 250; G.R.E. 6). Aguilar told Diaz and Rios that their story would be that Diaz showed up after the incident occurred. (2 T.R. 93; G.R.E. 7). Aguilar told Rios to say that Jimenez was not handcuffed, that Rios had assisted Aguilar in handcuffing Jimenez, and not to mention the knee drop or any of the other things that Rios had seen Aguilar do to Jimenez. (2 T.R. 93; G.R.E. 7). According to Rios, Aguilar told them that he would explain Jimenez's injuries by saying that when "he dropped Jimenez to the ground * * * his elbow had landed on Jimenez' facial area." (2 T.R. 94; G.R.E. 7). Both Rios and Diaz filed false reports. (2 T.R. 94-95; 2 T.R. 184-185; GX 134; G.R.E. 7).

The FBI received a complaint from Jimenez. (3 T.R. 179). FBI Special Agent Thomas Joy testified that because the Sheriff's Department and the police

department reports about the incident were "grossly inconsistent with the injuries that had been sustained by Mr. Jimenez," the FBI initiated a full investigation. (3 T.R. 181). Because the offense report Aguilar produced on August 7, 2001, listed Rios and Lopez as witnesses to the incident, the FBI obtained investigative reports from Rios and Lopez. (3 T.R. 182-183; GX 134). Agent Joy stated that in reading the reports in light of the medical records, the FBI could discern no "explanation for the extent of Mr. Jimenez' injuries." (3 T.R. 183).

The FBI interviewed Lopez, Diaz and Rios. (1 T.R. 250; 2 T.R. 95; 2 T.R. 186-187). All three stood by their previously agreed-to false stories. (1 T.R. 251; 2 T.R. 96; 2 T.R. 186-187). Afterwards, Aguilar spoke to all three officers, (1 T.R. 251; 2 T.R. 97; 2 T.R. 187), thanked Rios for "helping him out" (2 T.R. 97, and told Diaz that if they all just stuck to the false story, everyone would be okay. (2 T.R. 187).

In 2003, Jimenez filed a civil suit against the officers. (1 T.R. 252). Aguilar spoke to Lopez about the civil suit, telling him that he (Aguilar) "had already talked to his lawyer and that everything was all right, just to stick to our stories." (1 T.R. 253). He also reassured Rios. (2 T.R. 97).

After the civil suit was filed, the FBI contacted Diaz in October 2003. (2 T.R. 189, 191). Diaz then told Aguilar that the problem had not gone away. (2

T.R. 189). Aguilar again told Diaz, "'Just stick to your story and we'll be all right.'" (2 T.R. 189-190). Diaz again lied to the FBI. (2 T.R. 190).

Deputy Lopez was subpoenaed to appear before the federal grand jury on October 15, 2003. (1 T.R. 253). Aguilar called Lopez on the phone before that testimony and asked him "what was going on." (1 T.R. 253). Lopez told Aguilar that he could not say anything. (1 T.R. 253). Lopez testified truthfully to the Grand Jury. (1 T.R. 254).

Rios was also subpoenaed and contacted Aguilar. (2 T.R. 98-99). Aguilar told Rios to just "stick with the story, that everything would be all right, because he [Aguilar] had already talked to his attorney." (2 T.R. 99). On October 13 or 14, 2003, after Rios had spoken to the Assistant United States Attorney but before his Grand Jury testimony, Aguilar called Rios and asked if they could talk. (2 T.R. 99). When they met, Aguilar asked Rios what was going on, and Rios told him that the officers could not "go and lie to the grand jury." (2 T.R. 101). Aguilar responded that they should just stick to the false story and that "his attorney had told him that everything was okay." (2 T.R. 101). Rios testified truthfully to the grand jury. (2 T.R. 101). Diaz voluntarily and truthfully testified to the Grand Jury. (2 T.R. 197-198).

In the course of its investigation, the FBI interviewed Aguilar, who told them unequivocally that Jimenez was not handcuffed at the time of the assault. (3

T.R. 190). The rest of his story also differed in significant respects from the one told by Officer Diaz and Deputies Rios and Lopez at trial. For instance, Aguilar told the FBI that he was the officer who escorted Jimenez away from the Cadillac. (3 T.R. 192). Aguilar stated that while walking Jimenez back to the car, Jimenez head-butted Aguilar in the face, catching him off guard and causing him to fall backwards, and that as Aguilar fell backwards, he grabbed Jimenez and they both fell. (3 T.R. 192-193). Aguilar also told the FBI that he wrestled Jimenez to the ground, had Jimenez on his back and sat on Jimenez's chest to restrain him, and that he used his forearm to apply force to Jimenez's head to subdue him. (3 T.R. 195). Aguilar told the FBI that this was the only time that he struck Jimenez. (3 T.R. 195). Aguilar also told the FBI that Diaz arrived on the scene as Aguilar was handcuffing Jimenez. (3 T.R. 197).

FBI Agent Thomas Preston Joy testified that Aguilar's statement that Jimenez had been handcuffed was material to the FBI investigation because "in determining whether or not * * * Mr. Aguilar had violated the civil rights of Mr. Jimenez, it was important to note whether or not Mr. Jimenez was, in fact, swinging and hitting and punching or if he was handcuffed." (3 T.R. 206-207).

Aguilar testified at trial that he had lied to the FBI about how and when Jimenez was handcuffed. (4 T.R. 11). Aguilar also admitted that he had lied to the FBI about Diaz not being at the scene of the crime. (4 T.R. 81-82). Aguilar

also admitted to putting nothing in his report about throwing Jimenez into the side of the car, and lying to the FBI about handcuffing Jimenez. (4 T.R. 159). Aguilar's supplemental incident report also falsely reported what occurred the morning of August 7, 2001. (2 T.R. 193; GX 136).

SUMMARY OF ARGUMENT

This Court should affirm Aguilar's conviction. Each of Aguilar's arguments fails. None of the jury instructions contained error. The district court's limitation on cross-examination and exclusion of certain evidence was not an abuse of discretion. Finally, the replacement of the juror was not an abuse of discretion.

1. The jury instructions on how to judge the reasonableness of Aguilar's use of force were clearly correct. They conformed to *Graham* v. *Connor*, 490 U.S. 386 (1989), and properly informed the jury that it needed to analyze any use of force in light of "all the circumstances" and Jimenez's conduct. This instruction is indistinguishable from language upheld by this and other circuits.

2. The district court did not constructively amend the indictment of the 18 U.S.C. 242 count. Aguilar was indicted for violating Jimenez's Fourth Amendment rights. The jury charge clearly informed the jury that it was to judge the Fourth Amendment's use of force on an objective reasonableness standard,

rather than the subjective malicious and sadistic standard employed in the Eighth and Fourteenth Amendment contexts in this Circuit.

3. The jury instruction on the intent required to convict on 18 U.S.C. 242 was correct. The instruction properly informed the jury that specific intent was required to convict. The language Aguilar challenges as "general intent" language is nothing of the sort, but rather language used in both general and specific intent crimes to explain that circumstantial evidence can be used to find intent.

4. The district court did not err when it gave the 18 U.S.C. 1512(b)(1) instruction. First, Aguilar himself invited this alleged error. The portion of the instruction to which Aguilar now objects is language Aguilar himself proposed to the district court. Furthermore, this case differs significantly from *Arthur Andersen* v. *United States*, 544 U.S. 696 (2005). Unlike *Arthur Andersen*, where the Supreme Court's concern was driven by the defendant's argument that the company had "impeded" benignly, this case involves no such argument. Aguilar's defense was not that he had attempted to impede the Grand Jury in an innocent manner, but rather that he never told Rios to lie to the Grand Jury. Finally, the instruction as a whole properly informed the jury of the appropriate legal standard. Accordingly, there was no error in this instruction.

5. The district court neither violated Aguilar's Sixth Amendment right to confront Jimenez nor abused its discretion by prohibiting cross-examination of

Jimenez on his prior arrests for assaulting police officers. The jury had a sufficient basis from which to judge Jimenez's attitude toward the police.

6. The district court did not abuse its discretion by excluding either the photograph of Gilbert Garcia, the man Jimenez beat earlier that evening, or testimony concerning the possibility of a gun being present in the Cadillac. The photograph's cumulative and prejudicial nature substantially outweighed its slight probative value, and any testimony concerning a gun was irrelevant given the circumstances of the assault.

7. The district court did not abuse its ample discretion when it dismissed a juror who had disregarded the court's rule against notetaking, and as a matter of law there was no prejudice to Aguilar, because he selected the alternate juror who replaced the dismissed juror.

ARGUMENT

I

THE DISTRICT COURT'S 242 INSTRUCTION PROPERLY FOLLOWED *GRAHAM* V. *CONNOR*

Aguilar argues that the district court abused its discretion by declining to use his proposed language in its jury charge on the 18 U.S.C. 242 count and giving an instruction that did not conform to the requirements the Supreme Court established in *Graham* v. *Connor*, 490 U.S. 386 (1989). Br. 28-37. He argues that

the jury was not instructed to evaluate Aguilar's conduct in relation to Jimenez's conduct. Br. 35. This argument is without merit.

A. Standard of Review

This Court reviews a preserved challenge to a jury instruction or a refusal to give a requested charge for abuse of discretion. *United States* v. *Fuchs*, 467 F.3d 889, 900 (5th Cir. 2006); *United States* v. *Cain*, 440 F.3d 672, 674 (5th Cir. 2006). In reviewing a jury instruction for error, this Court "determines whether the charge as a whole is a correct statement of the law and whether it clearly instructs the jury on the law applicable to the facts." *United States* v. *Ibarra-Zelaya*, 465 F.3d 596, 607 (5th Cir. 2006). In addition, any "error in a jury instruction is subject to harmless error review." *Ibid.*

B. The District Court Correctly Instructed The Jury To Consider The Totality Of The Circumstances, Including Jimenez's Conduct

Graham v. *Connor*, which involved a civil action under 42 U.S.C. 1983 arising from a beating by a police officer, requires that the "'reasonableness' of a particular use of force * * * be judged from the perspective of a reasonable officer on the scene" and that this inquiry be an objective one. 490 U.S. at 396-397. *Graham* cautions that "[t]he test of reasonableness is not capable of precise definition or mechanical application," but that "its proper application requires careful attention to the facts and circumstances of each particular case." *Id.* at 396. These facts and circumstances include "whether the suspect poses an

immediate threat to the safety of the officers or others" and whether the suspect "is actively resisting arrest or attempting to evade arrest by flight." *Ibid*.

A reading of the instructions the district court gave on the 242 count as a whole demonstrates that the jury was properly directed to consider the totality of the circumstances with regard to Aguilar's use of force. While the court did not invoke the formulaic language Aguilar requested, it was not required to do so.[4] Rather, the instructions needed to inform the jury "as to the principles of law applicable to the factual issues confronting" it. *Fuchs*, 467 F.3d at 901.

The instruction given here clearly did that. First, the court stated:

> Whether or not the force * * * was unreasonable is an issue to be determined by you ***in the light of all the surrounding circumstances***, on the basis of that degree of force a reasonable and prudent officer would have applied ***under the circumstances in this case***.

(3 R. 670; 6 T.R. 101; R.E. 8) (emphasis added). Later in the charge, the district court informed the jury:

> [In] determin[ing] whether the force [Aguilar] used was reasonable or unreasonable * * * you must determine whether defendant used an amount of force ***reasonably necessary to hold Victor Hugo Jimenez in custody, prevent escape or defend himself or another against bodily harm***, * * * * * you should ***consider all the circumstances*** of the case from the point of view of an

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[4] In fact, in a case cited by Aguilar, the court instructed that the "exact wording" of *Graham* is not to be given "talismanic weight" and a district court need not "echo the opinion paragraph by paragraph to convey adequately its import to the jury." *United States* v. *Schatzle*, 901 F.2d 252, 255 (2d Cir. 1990).

> ordinary and reasonable officer on the scene. If, after ***considering all the circumstances***, you find that defendant used unreasonable force * * *.

(3 R. 671 (emphasis added); 6 T.R. 102; R.E. 8).

Each of these quoted portions informed the jury that it was to take into account all the circumstances of *this* case in determining whether Aguilar used excessive force. The second quoted portion required the jury to determine whether Aguilar's use of force could be justified by Jimenez's actions, the dangers they posed, and his recalcitrance, if any. This portion of the charge is substantively similar to *Graham*'s language concerning "whether the suspect poses an immediate threat to the safety of the officers or others" and whether the suspect "is actively resisting arrest or attempting to evade arrest by flight," *Graham*, 490 U.S. at 396. This easily belies Aguilar's contention that the district court's instruction failed to set forth the *Graham* factors. Br. 36. It is simply not true, as Aguilar claims, Br. 36, that "neither specifically, nor in the abstract, did the court make clear to the jury that the reasonableness of Mr. Aguilar's use of force was to be evaluated in relation to the conduct of Jimenez."

This Court has recognized similar language as an adequate 242 instruction. In *United States* v. *Sipe*, the district court had "instructed the jury that conviction could rest only a finding beyond reasonable doubt that Sipe used force that was 'greater than the force which would have been reasonably necessary ***under the***

circumstances to an ordinary and reasonable officer ***in the same circumstances***.'" 388 F.3d 471, 480 (5th Cir. 2004) (emphasis added). This Court stated that "[t]his instruction demonstrates the essentially objective nature of the test for ascertaining whether unreasonable force was used – objective in the sense that it is informed by *all the facts and circumstances*." *Ibid.* The Court also said that "[t]his instruction comports with clearly established law in this circuit regarding the use of excessive force under § 242." *Id.* at 480 n.22. The language the district court employed in *Sipe* is substantively indistinguishable from that the district court employed in this case. See also *United States* v. *Brown*, 250 F.3d 580, 586 (7th Cir. 2001) (holding that an instruction similar to that at issue here "correctly and adequately summarizes the 'objective reasonableness' standard" established in *Graham*"). Additionally, the language Aguilar contends is legally faulty is nearly identical to the language in a widely used standard instruction on Section 242 Fourth Amendment violation. See 1 L. Sand, *et al.*, *Modern Federal Jury Instructions*, Instr. 17-6 (2003).[5]

Nor was Aguilar's defense hampered by the district court's refusal to employ his requested language. Aguilar was still able to argue that the force he

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[5] In *United States* v. *Brugman*, 364 F.3d 613, 616 (5th Cir. 2004), cited by Aguilar, while this Court recited *Graham's* general standard for finding reasonableness, it did not say that a jury instruction need include all of *Graham*'s specifics. More importantly, in that case, this Court was not even addressing the adequacy of a jury instruction, a point which Aguilar himself admits. Br. 35.

employed was justified by Jimenez's actions. In fact, in his closing argument, counsel for Aguilar argued that Aguilar "would have been well within his rights" to use deadly force "given what [Jimenez] had done to Officer Aguilar." (6 T.R. 70; 6 T.R. 84) (arguing that Aguilar "didn't violate anybody's rights" but that he "spared Mr. Jimenez' life"). In light of this closing and the clearly proper jury instruction, there can be no doubt that the jury understood that it was to consider Aguilar's actions in relation to Jimenez's conduct. There was no error in the jury instructions, and accordingly, the district court did not abuse its discretion in instructing the jury on Section 242.

II

THE DISTRICT COURT DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT

Aguilar argues that the district court's instruction on Count 1 constructively amended the indictment on the 242 charge and made Aguilar criminally liable for violating Jimenez's Eighth and Fourteenth Amendment rights, rather than his Fourth Amendment right. Br. 37-38. Aguilar's argument is unavailing.

A. Standard of Review

"The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment." *United States* v. *Threadgill*, 172 F.3d 357, 370 (5th Cir. 1999). Accordingly, an indictment "cannot be broadened or altered except by the grand jury." *Ibid.* A "constructive amendment

occurs when the government changes its theory during trial so as to urge the jury to convict on a basis broader than that charged in the indictment, or when the government is allowed to prove an essential element of the crime on an alternative basis permitted by the statute but not charged in the indictment." *United States* v. *Robles-Vertiz*, 155 F.3d 725, 728 (5th Cir. 1998). This Court looks to the "charge as a whole" to determine whether an instruction constructively amends an indictment. *United States* v. *Leahy*, 82 F.3d 624, 631 (5th Cir. 1996). A "constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged." *United States* v. *Nunez*, 180 F.3d 227, 230-231 (5th Cir. 1999).

B. The District Court Properly Employed A Fourth Amendment Standard In Its Instruction

As is well-established, different constitutional standards apply to the use of force during arrests, pretrial detention, and post-conviction incarceration. See *Graham* v. *Connor*, 490 U.S. 386, 398 (1989); *Whitely* v. *Albers*, 475 U.S. 312, 318 (1986); *Bell* v. *Wolfish*, 441 U.S. 520, 535-536 (1979). There is no dispute that the Eighth Amendment requires an inquiry into a "defendant's subjective intent," while the Fourth Amendment inquiry does not include subjective concepts such as "malice and sadism," Br. 39, but requires a focus on the objective reasonableness of the use of force.

Where Aguilar's argument fails, however, is that the district court clearly and properly charged the jury with a *Fourth Amendment objective* standard on the Section 242 count. A reading of the jury instruction on the 242 count *in its entirety* shows that despite describing Aguilar as having been "arrested," the district court instructed the jury to apply the Fourth Amendment objective reasonableness standard. It put the jury on notice that it was to judge Aguilar's actions based upon the amount of force "a reasonable and prudent officer would have applied under the circumstances in this case." (3 R. 670; see also 3 R. 671; 6 T.R. 101; 6 T.R. 102; R.E. 8).

Contrary to Aguilar's contentions, nothing in the charge required the jury to analyze Aguilar's actions in light of the Eighth Amendment or Fourteenth Amendment standards applicable to prisoners or pretrial detainees. If, as Aguilar asserts, the district court's instruction somehow shifted this into the Eighth Amendment context, one would expect the court to have articulated the Eighth Amendment standard this Court applies to prisoners and pretrial detainees established in *Hudson* v. *McMillian*, 503 U.S. 1, 6-7 (1992). See *United States* v. *Daniels*, 281 F.3d 168, 179 (5th Cir. 2002). But, the district court *did not* instruct the jury that it was to evaluate whether Aguilar applied force to Jimenez "in a good faith effort to maintain or restore discipline, or *maliciously and sadistically for the very purpose of causing harm*." *Valencia* v. *Wiggins*, 981 F.2d 1440, 1446

(5th Cir. 1993) (emphasis added). Rather, the court articulated the proper Fourth Amendment objective reasonableness standard.

While the district court did speak of actions done to keep someone "who has been arrested" in custody, see 3 R. 670-671, 6 T.R. 101, R.E. 8, this language did not magically convert this case from a Fourth Amendment case to an Eighth Amendment case nor, more importantly, did it confuse the jury as to the standard to convict. It is a standard legal principle that a district court may tailor jury instructions to the specific facts of each particular case. See O'Malley, *Federal Jury Practice And Instructions*, Instr. 7-2 (6th ed.) ("Each case has its own peculiar facts, and formalized instructions must be tailored to the requirements of the facts of the given case."). Here the most sensible reading of the district court's use of "arrested" is that it referred to the process of handcuffing and securing of Jimenez, rather than a change of *legal* status from someone being taken into custody to pretrial detainee.

Even assuming that the district court's references to "a person who has been arrested" were somehow more appropriate in a pretrial detainee context, Aguilar's argument fails because it "disregards the balance of the instructions." *United States* v. *Leahy*, 82 F.3d 624, 631 (5th Cir. 1996). These are the only possible references to the pretrial detainee context; all of the other language in the instruction referred to the Fourth Amendment standard. Therefore, the district

court did not constructively amend Aguilar's indictment, and the charge neither misinstructed nor confused the jury.

Finally, this Court has stated that there is "no constructive amendment" where a jury is "instructed * * * to consider only the crime * * * charged in the indictment," where that "indictment was read to the jury at the beginning of trial, and the jury was given a copy of the indictment for use during the deliberations." *United States* v. *Holley*, 23 F.3d 902, 912 (5th Cir. 1994); see also *Leahy*, 82 F.3d at 631. Just as in *Holley*, here the indictment, which clearly states that the right at issue was the Fourth Amendment right, (2 R. 416; R.E. 5), was read to the jury at the beginning of *voir dire*, (1 T.R. 96), read again when the judge instructed the jury on all the counts, (6 T.R. 98), and, most importantly, was within the written instructions provided to the jury for its deliberations. (3 R. 667; 6 T.R. 90; R.E. 8). The district court also specifically instructed the jury that Aguilar was "not on trial for any acts, conduct, or offenses *not alleged in the indictment*." (3 R. 667; 6 T.R. 97; R.E. 8) (emphasis added). Accordingly, the jury charge did not constructively amend Aguilar's indictment.

III

THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY WITH REGARD TO THE SPECIFIC INTENT REQUIRED BY COUNT 1

Aguilar argues that the district court's insertion of certain language instructing the jury how it might infer intent was erroneous. Br. 40-47. Aguilar argues that this language articulated the standard for finding general intent and, in the context of a Section 242 charge, allowed "the jury to find Mr. Aguilar guilty of a § 242 violation on a diluted burden of proof." Br. 45-46. Aguilar's argument is meritless. The language used is appropriate for either general or specific intent crimes, and has been employed in Section 242 cases.

A. Standard of Review

This Court reviews a "properly objected-to instruction * * * for abuse of discretion." *United States* v. *Guidry*, 406 F.3d 314, 321 (5th Cir. 2005). It reviews *de novo* "whether an instruction misstated an element of a statutory crime." *Ibid.*; see also *United States* v. *Patterson*, 431 F.3d 832, 837 (5th Cir. 2005). See also *supra* at p. 19.

B. The Language The District Court Employed Is Not General Intent Language

While Aguilar is correct that Section 242 requires a demonstration of specific intent, his challenge to the instruction fails in several significant respects.[6]

At the outset, the instruction that a jury *may* infer that a person ordinarily intends the natural and probable consequences of an act knowingly done was not error at all. That charge, or a variant of it, is standard language employed in criminal cases, whether involving general or specific intent. See, *e.g.*, O'Malley, *Federal Jury Practice And Instructions*, Instr. 17.07 (5th ed.) (employing this language for proof of intent under "General Instructions for Federal Criminal Cases"); Goodman, Levinthal, *Charges to the Jury and Requests to Charge in a Criminal Case*, Vol. 1, §4: 54 at 202-203 (under "General Instructions" for all types of cases). It explains to juries that circumstantial evidence can be used to infer intent. See, *e.g.*, *United States* v. *Yi*, 460 F.3d 623, 629 (5th Cir. 2006); *United States* v. *Nelson*, 277 F.3d 164, 196 (2d Cir. 2002) (quoting and approving instruction stating that jury "may rely on circumstantial evidence in determining" intent and that "[i]n this regard, * * * [the jury could] infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done").

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[6] The cases Aguilar cites, Br. 42-45, stand for a number of unobjectionable propositions including that Section 242 requires a showing of specific intent and that there is a difference between general and specific intent.

This Court has stated clearly that specific intent can be proven by circumstantial evidence – the very evidence from which this instruction stated that the jury here could infer intent. *United States* v. *Ismoila*, 100 F.3d 380, 387 (5th Cir. 1996); *United States* v. *Finney*, 714 F.2d 420, 422 (5th Cir. 1983). Furthermore, this Court has consistently upheld this language or its equivalent in jury instructions for specific intent crimes. See *Dupuy* v. *Cain*, 201 F.3d 582, 587 (5th Cir. 2000) (describing instruction that included equivalent language as a "specific intent jury instruction"); *United States* v. *Moye*, 951 F.2d 59, 62 (5th Cir. 1992); *United States* v. *Austin*, 774 F.2d 99, 103 & n.2 (5th Cir. 1985) (upholding specific intent instruction that included equivalent language). Indeed other circuits have held that the specific intent for a Section 242 violation can be inferred from circumstantial evidence, *United States* v. *Bradley*, 196 F.3d 762, 769 (7th Cir. 1999); *United States* v. *Johnstone*, 107 F.3d 200, 208-209 (3d Cir. 1997), and this very language has been upheld by other courts when employed in a Section 242 instruction. See, *e.g.*, *United States* v. *Myers*, 972 F.2d 1566 (11th Cir. 1992). In fact, in *United States* v. *Koon*, 34 F.3d 1416 (9th Cir. 1994), a 242 case that Aguilar cites in support of his position, Br. 43, the district court employed substantively similar language in instructing the jury on the 242 count. See *Allen* v. *City of Los Angeles*, 92 F.3d 842, 849 n.10 (9th Cir. 1996).[7]

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[7] *Allen* is the civil trial involving *Koon* defendants. In the course of *Allen*, the (continued...)

This Court has held, in the context of a violation of 31 U.S.C. 5316 (failure to report a monetary instrument in excess of $10,000), that specific intent "may, and generally must, be proven circumstantially," and that the "the *natural probable consequences* of an act may satisfactorily evidence the state of mind accompanying the act, *even when a particular mental attitude* is a *crucial element* of the offense." *United States* v. *O'Banion*, 943 F.2d 1422, 1429 (5th Cir. 1991) (quoting *United States* v. *Maggitt*, 784 F.2d 590, 593 (5th Cir.1986)) (emphasis added).

United States v. *Screws*, 325 U.S 91 (1945), the seminal case on the issue of specific intent in a 242 violation, itself allows for the sort of inference at issue in the objected-to language. *Screws* states that the "reckless disregard of constitutional prohibitions or guarantees * * * need not be expressed" but rather "may at times be reasonably inferred from all the circumstances attendant on the act." 325 U.S. at 106. In analyzing whether specific intent – the "requisite bad purpose" – "was present" a jury is "entitled to consider *all the attendant circumstances*." *Id.* at 107. In other words, a jury can make inferences about a defendant's specific intent based on the circumstances of the case – including the

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[7](...continued)
Ninth Circuit quotes from the district court's instructions in the criminal trial. It includes this language which is omitted in *Koon's* recitation of the instruction. See *Koon*, 34 F.3d at 1449 (omitting quoted language).

nature of that defendant's actions. There was no error in including this instruction and, therefore, the district court did not abuse its discretion.

C. Any Error Was Remedied By The Instructions As A Whole

Even assuming that this language is "general intent" language, Aguilar's argument fails because the jury instruction "as a whole" was "a correct statement of the law." *United States* v. *Greer*, 939 F.2d 1076, 1089 (5th Cir. 1991). Where, as here, the jury charge in its entirety correctly stated the law, "the incorrectness of one paragraph or one phrase alone is generally not considered to be reversible error." *Ibid.* "Indeed, a misstatement of the law by a trial judge that 'dilutes the *specific intent* requirement' is not reversible error if the instruction as a whole suggests the appropriate standard to be applied." *Ibid.* (emphasis added).

The jury instruction as a whole put the proper standard in front of jury, as is evident from reading the rest of the charge on intent. Immediately before the language to which Aguilar objects, the district court stated:

> The word "willfully," as that term has been used from time to time in these instructions, meaning that the act was done voluntarily and intentionally, and with the *specific intent to do something the law forbids*; that is, with the bad purpose either to disobey or disregard the law. The required *specific intent* required by Count One is the *intent to use unreasonable force* against Victor Hugo Jimenez.

(3 R. 676; 6 T.R. 108; R.E. 8) (emphasis added). Immediately after the objected-to language, the district court further explained:

> It is not necessary for you to find that the defendant was thinking in constitutional terms at the time of the incident. You may find that the defendant acted with the required *specific intent* even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved, *provided that you find the defendant intended to accomplish that which the constitution forbids*. Nor does it matter that the defendant also may have been motivated by hatred, anger, revenge or some other emotion, provided that the *intent which I have described to you is present*."

(3 R. 677; 6 T.R. 109; R.E. 8) (emphasis added). Earlier in the instruction the district court stated the elements of a 242 violation including that "the defendant acted willfully, that is, that the defendant committed such act or acts with a bad purpose or evil motive, intending to deprive the victim of that right," (3 R. 669-670; 6 T.R. 100; R.E. 8) and repeated this element later in the instruction. (3 R. 672; 6 T.R. 104; R.E. 8).

This language correctly sets out the requisite specific intent to convict a defendant on 18 U.S.C. 242. Indeed, this language is substantively similar to language proposed by Aguilar, see 3 R. 655-656, and comports with this Circuit's pattern jury instructions for 18 U.S.C. 242 counts, Fifth Circuit Pattern Jury Instructions 2.18, and language this Court approved for Section 242 instructions in a number of cases, see *United States* v. *Garza*, 754 F.2d 1202, 1210 (5th Cir. 1985), *United States* v. *Sipe*, 388 F.3d 471, 479 (5th Cir. 2004). Similar language also is employed in widely used standard jury instructions describing 242's

willfulness element. 1 L. Sand, *et al.*, *Modern Federal Jury Instructions*, Instr. 17-13 (2003); O'Malley, *Federal Jury Practice And Instructions*, Instr. 29.05 (5th ed.). Therefore, the inclusion of the objected-to language, even if problematic, was remedied by the instruction as a whole.

IV

THE DISTRICT COURT DID NOT COMMIT ERROR WHEN IT GAVE THE JURY THE DEFINITION OF "CORRUPTLY" IN 1512(b)(1) THAT AGUILAR REQUESTED

Aguilar argues that the district court erred in giving a jury charge that included language that the Supreme Court later found flawed in *Andersen* v. *United States*, 544 U.S. 696 (2005). Br. 49. He contends that because the "charge given by the trial court * * * was taken directly from the [*Andersen*] charge" the district court necessarily erred. Br. 49-50. Aguilar's arguments fail.

A. Standard of Review

Where a defendant has "invited or induced" an alleged error, this Court will reverse only for "manifest injustice." *United States* v. *Green*, 272 F.3d 748, 754 (5th Cir. 2001). Where a defendant simply fails to object to a jury instruction, "the appropriate standard of review is plain error." *United States* v. *Daniels*, 281 F.3d 168, 183 (5th Cir. 2002). Error is plain only "when it is clear or obvious and it affects the defendant's substantial rights." *United States* v. *Hickman*, 331 F.3d 439, 443 (5th Cir. 2003) (quoting *United States* v. *Cotton*, 535 U.S. 625, 631

(2002)). "A defendant's substantial rights are only affected if the error 'affected the outcome of the district court proceedings.'" *Ibid.* (quoting *United States* v. *Olano*, 507 U.S. 725, 734 (1993)). Even if those conditions are present, this Court still will only "reverse the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.*

If the Court finds that Aguilar properly preserved his objection, the standard of review is the same as *supra* at p. 28.

B. Aguilar Invited The Alleged Error And Failed To Object To The Language Arthur Andersen *Found Erroneous*

To "properly object to the district court's jury instruction," a defendant must "inform[] the court of the specific objection and the grounds for the objection." *United States* v. *Redd*, 355 F.3d 866, 874 (5th Cir. 2003) (quoting Fed. R. Crim. P. 30(d)). Where a defendant raises an objection on appeal he did not raise below, the issue is not preserved and plain error review is appropriate. *United States* v. *Heath*, 970 F.2d 1397, 1407 (5th Cir. 1992). Where, however, a defendant "invited or induced" an alleged error, he cannot later complain about this "invited error" on appeal. *United States* v. *Green*, 272 F.3d 748, 754 (5th Cir. 2001). Here, Aguilar objected to the instruction at trial but did so on a ground different from that he now asserts. In fact, he proposed the very language at issue in *Arthur Andersen*. Because Aguilar's argument is so general, Br. 49, a brief examination

of the issues in *Arthur Andersen* is necessary to understand the objection Aguilar now raises.

In *Arthur Andersen*, the Supreme Court found error in the way the jury instructions for 1512(b)(2)(A) and (B) violations defined the term "corruptly." 544 U.S. at 707. Those instructions defined "corruptly" as "having an improper purpose," and further defined "improper purpose" as "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." *United States* v. *Arthur Andersen*, 374 F.3d 281, 293 (5th Cir. 2004). The Supreme Court's concern focused on the use of the word "impede," which it believed could criminalize *innocent* conduct that nonetheless impeded or got "in the way of the progress of the Government." *Arthur Andersen*, 544 U.S. at 707.

As Aguilar notes, Br. 48-49, this language was employed in this case. (3 R. 674). Aguilar, however, *proposed* it. (3 R. 652; 6 T.R. 22; G.R.E. 10, 11).[8] While Aguilar objected to portions of the 1512(b)(1) charge, (6 T.R. 22-24; G.R.E. 10), his objection related to the way the elements of the count were explained, not to

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[8] The language Aguilar proposed read:

> To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or *impede* the fact-finding ability of an official proceeding, such as a federal grand jury.

(3 R. 652; G.R.E. 11) (emphasis added).

the way "corruptly" was defined. Thus, Aguilar not only failed to object but affirmatively invited the alleged error in this case. Aguilar "cannot complain on appeal of alleged errors which he invited or induced." *Green*, 272 F.3d at 754; *United States* v. *Baytank, Inc.*, 934 F.2d 599, 606-607 (5th Cir. 1991) (applying invited error doctrine to jury instructions). Therefore, this Court need not reach Aguilar's argument.[9] Even if the plain error standard applies, language Aguilar proposed cannot constitute plain error. See, *e.g.*, *United States* v. *Pitrone*, 115 F.3d 1, 5 (1st Cir. 1997) ("Where, as here, a defendant criticizes a jury instruction on a ground not raised below, and does so on the basis of an alleged error induced at least in part by his implied concessions before the district court, it will be infrequent that he can satisfy the fourth furcula of the plain error test.").

C. Arthur Andersen *Is Distinguishable*

Aguilar summarizes the *Arthur Andersen* decision and concludes that because the same instruction was given in this case, there was error, Br. 49,

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[9] At the close of the case, Aguilar moved pursuant to Rule 29 for a judgment of acquittal on all counts, and with reference to the 1512(b)(1) count cited *United States* v. *Farrell*, in which the Third Circuit applied a more stringent definition of "corruptly," 126 F.3d 484, 489 (3d Cir. 1997), than this Court did in *Arthur Andersen*. 5 T.R.153-156. A Rule 29 motion is, of course, an argument that there is insufficient evidence to convict, rather than a challenge to a jury instruction. Even if one assumes that this argument was akin to the *legal* challenge at issue in *Arthur Andersen*, he did not renew it when jury instructions were discussed, and he effectively waived it when he proposed the very instructions he now challenges.

suggesting that such an instruction is *per se* error. But Aguilar's syllogism is flawed, and his argument disregards the context of *Arthur Andersen*.

The Supreme Court in *Arthur Andersen* was concerned with the jury instruction because "persuad[ing] a person with intent to cause that person to withhold testimony or documents from a Government proceeding or * * * official is not *inherently* malign." *Arthur Andersen*, 544 U.S. at 703-704 (emphasis added). The Court held that the jury instructions "failed to convey the requisite consciousness of wrongdoing." *Id.* at 706. The Court stated that the district court told the jury that "even if [petitioner] *honestly* and *sincerely* believed that its conduct was lawful, you may find [petitioner] guilty." *Ibid.* By defining improper purpose as an intent to "subvert, undermine, or impede," the district court in *Arthur Andersen* allowed innocent conduct to be criminalized. *Id.* at 706-707. "No longer was any type of 'dishonest[y]' necessary to a finding of guilt, and it was enough for petitioner to have simply 'impede[d] the Government's factfinding ability." *Id.* at 707. The disconnect between dishonesty and the subverting, undermining, or impeding was exacerbated further by the instructions allowing the jury to find guilt without "*any* nexus between the 'persua[sion]' to destroy documents and any particular proceeding." *Ibid.*

These infirmities were fatal in *Arthur Andersen* because of the *specific* defense Arthur Andersen raised. While the Supreme Court's decision does not go

into great detail about Arthur Andersen's defense, it is clear from this Court's decision at the appellate level and the company's brief to the Supreme Court that Arthur Andersen was arguing that its employees destroyed documents benignly or innocently, pursuant to its standard document retention policy. *Arthur Andersen*, 374 F.3d at 287 (Andersen's explanation was that its employees "were attempting to clean up their files in anticipation of their examination" by supervisory personnel); Supreme Court Brief of Arthur Andersen, 2005 WL 429977 at *1 (2005). In other words, Arthur Andersen did not deny that it had destroyed documents; it argued that its employees did so without the requisite bad intent and without a specific proceeding in mind. The jury instructions effectively precluded such a defense.

In clear contrast to *Arthur Andersen*, in this case Aguilar did not attempt to explain in any innocent manner his asking Rios (or his other colleagues) to make false statements. Instead, Aguilar simply denied ever trying to persuade Rios to lie. (4 T.R. 84; G.R.E. 8). The government's theory of the case with respect to Count 3 was that Aguilar had attempted to get Rios to lie to the grand jury, telling Rios to "stick to the story," (2 T.R. 101), – that is, to stick to the *false* reports and *false* assertion that Jimenez was not handcuffed. There also was considerable evidence about Aguilar's lead role in concocting the false story in the first place. See, *supra* pp. 10-14. There was absolutely no evidence – and Aguilar did not

argue – that any of Aguilar's attempts to persuade his colleagues to lie to the police, the FBI, and the Grand Jury had any benign purpose. Here there was no possible concern, as there was in *Arthur Andersen*, that the jury could improperly convict Aguilar for innocent conduct. Additionally, unlike in *Arthur Andersen* where the conduct was not tied to any specific proceeding, here the evidence showed Aguilar knew of the pending Grand Jury investigation when he asked Rios to lie for him. Thus, the use of the word "impede," problematic in *Arthur Andersen*, was of no concern in this case. The district court committed no legal error – indeed, acted quite properly – by tailoring its instruction to the facts of this case.

In *United States* v. *LeMoure*, 474 F.3d 37, 42 (1st Cir. 2007), one of the defendants argued that the district court's instructions did not "sufficiently explain that * * * corrupt persuasion must be done 'knowingly'" with "consciousness of wrongdoing." The Court stated that "the situation in *Arthur Andersen* was dramatically different" from that at issue in *LeMoure*. *Ibid.* At issue in *Arthur Andersen* "was the arguable misuse of an otherwise legitimate document destruction policy," whereas *LeMoure's* defendants could not "conceivably have thought that urging witness to lie in official proceedings was lawful," *ibid.,* and the jury instructions "had no ill effects," *id.* at 43. The same is true here.

D. The Charge As A Whole Properly Instructed The Jury

Even assuming that the district court's use of *Arthur Andersen's* definition of "corruptly" and "improper purpose" was problematic (and it was not), the jury instruction as a whole well informed the jury that it could convict Aguilar on the 1512(b)(1) charge only for "malign" or bad intent. The district court properly instructed the jury that it needed to find that Aguilar "acted knowingly and with intent to influence or prevent" Rios' testimony "with respect to withholding *truthful* testimony." (3 R. 674; 6 T.R. 106; R.E. 8) (emphasis added). The district court also defined "act with intent to influence the testimony of a witness" as acting for the "purpose of getting the witness to change, color, or shade his or her testimony in some way." (3 R. 674-675; 6 T.R. 106; R.E. 8). The indictment read to the jury and included in the instructions also used the term "withhold *truthful* testimony." (3 R. 668; 6 T.R. 98; R.E. 8) (emphasis added). This language made clear to the jury that it could convict Aguilar only if it believed Aguilar acted to influence Rios to lie, or to prevent Rios' testimony, in order to withhold the truth from the Grand Jury.[10] In other words, the charge *as a whole* required the jury to find bad or malicious intent on the part of Aguilar in order to convict on the

[10] As noted, nothing in the record suggested that Aguilar attempted to convince Rios to refrain from testifying nor did Aguilar make such an argument. This means that the relevant portion of the instruction is the language dealing with intent to "influence" Rios' testimony.

1512(b)(1) count. Because the jury instruction as a whole required the jury to find such wrongdoing to convict, there was no error in the 1512(b)(1) instruction.[11]

V

THE DISTRICT COURT DID NOT VIOLATE AGUILAR'S SIXTH AMENDMENT RIGHTS OR ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF JIMENEZ'S ARREST RECORD

Aguilar argues that his Sixth Amendment Right to Confrontation was violated. Br. 50-57. He argues that evidence of Jimenez's past arrests should have been allowed so as to probe Jimenez's possible bias and prejudice toward police, and that precluding this evidence violated his Sixth Amendment right because it was evidence suggesting Aguilar's state of mind. Br. 55. This argument fails.

A. Standard of Review

The "Confrontation Clause" of the Sixth Amendment "guarantees a criminal defendant the right to cross-examine the witnesses against him." *United States* v. *Jimenez*, 464 F.3d 555, 559 (5th Cir. 2006). This Court applies a *de novo* review to "[a]lleged violations of the Confrontation Clause," but any such violations "are subject to harmless error analysis." *Id.* at 558 (5th Cir. 2006). Where "sufficient cross examination has been granted to satisfy the Sixth Amendment," *United*

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[11] This instruction, furthermore, did not include language at issue in *Arthur Andersen* which allowed the jury to find the defendant guilty even if it "honestly and sincerely believed that its conduct was lawful." 544 U.S. at 705.

States v. *Landerman*, 109 F.3d 1053 (5th Cir. 1997), this Court reviews "limitations on the scope of cross-examination for clear abuse of discretion." *United States* v. *Campbell*, 49 F.3d 1079, 1085 (5th Cir. 1995). The inquiry is "whether the jury had sufficient information to appraise the bias and motives of the witness." *Ibid.* (quoting *United States* v. *Tansley*, 986 F.2d 880, 886 (5th Cir. 1993)).

B. There Was No "Confrontation Clause" Violation

The limitation on cross-examination the district court imposed in this case did not violate Aguilar's Sixth Amendment Right to Confrontation. Jimenez was not a central or critical witness for the government, and the jury had sufficient information from which to judge any potential bias on the part of Jimenez toward the police in general, or Aguilar in particular.

This Court has stated that the "importance of and need to safeguard this right is enhanced when * * * the witness is crucial to the prosecution." *United States* v. *Cooks*, 52 F.3d 101, 104 (5th Cir. 1995). Here, Jimenez was simply not *the* or *a key* government witness. This is seen by looking at a number of aspects of his testimony. The government did not call Jimenez as a witness until after all three of the other police officers involved in this incident – the key eye-witnesses to Aguilar's unwarranted attack on Jimenez – had given their extensive testimony that Aguilar's actions were excessive. Jimenez's testimony was at times

inconsistent with that of the police officers in this case, see, *e.g.*, 3 T.R. 46-47, 78, and importantly, on Count 2, the one count (involving the assault with a gun barrel) for which Jimenez's testimony could even conceivably be considered central, the jury chose *not* to believe Jimenez (and Deputy Lopez for that matter), and instead credited Aguilar's testimony and that of his expert witness. Jimenez clearly was not the key witness on the 242 count.

The jury clearly had sufficient information to render judgment on Jimenez's possible potential bias toward police and Aguilar. Aguilar was permitted to question Jimenez on his biases and motivations. The district court informed Aguilar's counsel that it would allow her to question Jimenez about his conviction for assault on a public servant, (3 T.R. 13; GX 370), and counsel examined Jimenez about this arrest, (3 T.R. 90). Notably, she did not ask Jimenez any questions about the possible bias this past incident might have created in him toward police officers. The district court also permitted Aguilar's counsel to question Jimenez concerning the lawsuit he filed against Aguilar and his fellow officers. See 3 T.R. 83, 88. The testimony, cross-examination, and evidence that the district court allowed in at trial was thorough and permitted the jury ample room to draw its own informed inferences about Jimenez's bias and motive in

relation to police officers in general, and Aguilar in particular. Aguilar's Sixth Amendment rights clearly were not violated.[12]

Assuming, *arguendo,* that Aguilar's Sixth Amendment Right was violated, this Court must then determine whether that error was harmless. In doing so, the Court examines a number of factors, including looking again at "the importance of the witness' testimony in the prosecution's case," "the extent of cross-examination otherwise permitted," "whether the testimony" of the witness "was cumulative," and "of course, the overall strength of the prosecution's case." *United States* v. *Yi*, 460 F.3d 623, 634 (5th Cir. 2006). Each of these points demonstrates that if there was any error here, it clearly was harmless. As explained above, Jimenez was far from crucial or central in the government's case; the district court allowed cross-examination concerning his felony conviction for assault of a public official; Jimenez's testimony (to the extent it was consistent with the police officers) was

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[12] Aguilar's argument that the limitation on cross-examination and exclusion of Jimenez's arrest record violated his Sixth Amendment right because it was relevant to Aguilar's state of mind, Br. 55, has nothing to do with the Sixth Amendment analysis. The Sixth Amendment question revolves around whether the jury had enough information from which it could make inferences or judgments of Jimenez's possible biases or motives. Any objection or argument concerning the exclusion of Jimenez's arrest record for the purpose of showing Aguilar's state of mind would be styled as a straight-forward claim of abuse of discretion. *United States* v. *Virgen-Moreno*, 265 F.3d 276, 295 (5th Cir. 2001) ("The decision whether to admit testimony or other evidence is committed to the sound discretion of the trial judge."). In his brief Aguilar fails to challenge the district court's exclusion of this evidence for purposes of showing Aguilar's state of mind for abuse of discretion, and, therefore, has waived any argument regarding it.

cumulative; and the government's overall case was extremely strong. Any violation of Aguilar's Sixth Amendment right was harmless beyond any reasonable doubt.

The cases Aguilar cites in support of his argument are distinguishable. *United States* v. *Garza,*754 F.2d 1202, 1206 (5th Cir. 1985), which Aguilar relies upon extensively, involved the government blocking proof of the arrest records of *six* of its witnesses where "[s]everal of the witnesses had been arrested, sometimes by the [defendant's] deputies." *Ibid.* The Court stated: "Evidence of past arrests, and past involvement with police in general and defendants *in particular*, would be pertinent in the jury's essential determination of credibility." *Ibid.* (emphasis added). There is no indication that *Garza* is to be read as standing for the rule that arrest records must always be admitted wherever there is a police officer defendant. Unlike *Garza*, the jury here had information from which it could have inferred that Jimenez was biased against police officers and Aguilar in particular. Additionally, as in *Garza*, any error here was harmless. *Id.* at 1208.

In *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974), the defendant was precluded from cross-examining the *key* government witness about his juvenile record. The same type of issue was present in other cases Aguilar cites. *United States* v. *Landerman*, 109 F.3d 1053, 1063 (5th Cir. 1997); *Greene* v. *Wainwright*, 634 F.2d

272, 275 (5th Cir. 1981); *United States* v. *Croucher*, 532 F.2d 1042, 1044-1045 (5th Cir. 1976). As discussed *supra* Jimenez was not a key government witness.

C. The District Court Did Not Abuse Its Discretion In Excluding Evidence Of Jimenez's Past Arrests

The district court did not abuse its discretion in limiting questioning about Jimenez's arrest history. In order to show an abuse of discretion in this context, Aguilar is required to "show that the court's limitation on cross-examination was clearly prejudicial." *United States* v. *Davis*, 393 F.3d 540, 548 (5th Cir. 2004). Aguilar "must show that a reasonable jury might have had a significantly different impression of the witness's credibility if defense counsel had been allowed to pursue the questioning." *Ibid.* Aguilar has not made this showing.

By precluding Aguilar's counsel from cross-examining Jimenez on his numerous arrests because their "prejudicial value outweigh[ed] any probative value," 3 T.R. 17, the district court exercised proper discretion. The jury would not have had a different impression of Jimenez's credibility if it had learned that he had a number of arrests for assaulting police officers, in addition to the one conviction for assaulting an officer about which it knew. The jury had ample evidence in front of it that Jimenez was a scofflaw. The district court did not abuse its discretion in excluding questioning of Jimenez on his arrest record.

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED A PHOTOGRAPH OF GILBERT GARCIA AND TESTIMONY CONCERNING THE POSSIBILITY OF A FIREARM IN THE CADILLAC

Aguilar next argues that the district court abused its discretion and caused him harm when it excluded a photograph of Gilbert Garcia, the person with whom Jimenez was in a bar fight earlier that night, Br. 57, and when it excluded evidence that Deputies Lopez and Rios were searching Jesse Lopez's Cadillac for a gun at the time of the incident, Br. 58-59.[13] Aguilar's arguments fail.

A. Standard of Review

This Court reviews "a trial judge's determination as to the admissibility of evidence" for abuse of discretion. *United States* v. *Pace*, 10 F.3d 1106, 1115 (5th Cir. 1993). Any abuse of discretion is reviewed for harmless error. *United States* v. *Harms*, 442 F.3d 367, 377 (5th Cir. 2006).

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[13] As an initial matter, Aguilar has waived any argument with respect to evidence concerning Jimenez hitting Garcia with a chair, as he mentions it only in passing and does not make arguments concerning its exclusion in the argument portion under "Issue VI" of his brief. See Br. 60, 61 (discussing in argument sections photograph and possibility of firearm but not hitting with chair); *Laborers' Int'l Union* v. *Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue . . . will not suffice to bring that issue before this court.").

B. The District Court Did Not Abuse Its Discretion

A district court may "exclude evidence 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.'" *United States* v. *Saldana*, 427 F.3d 298, 307 (5th Cir. 2005) (quoting Fed. R. Evid. 403).

i. The Photograph Of Gilbert Garcia

The district court did not abuse its discretion when it excluded the photograph of Gilbert Garcia. The photograph had great potential for prejudice and was cumulative of other evidence.[14] The district court stated that it would allow questions about the nature of the fight and what Gilbert Garcia looked like. (2 T.R. 13). Aguilar's counsel asked Deputy Lopez about Garcia's appearance, and Lopez testified to the amount of blood he saw on Garcia. (2 T.R. 24). Deputy Rios also testified concerning Garcia's bloody appearance, 2 T.R. 110-111, as did Aguilar. (4 T.R. 23). The photo was merely cumulative of this testimony. In

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[14] Contrary to Aguilar's claim, Br. 55 (citing *Government of Virgin Islands* v. *Carino*, 631 F.2d 226 (3d Cir. 1980), the question of prejudice under Rule 403 is not limited to prejudice *to* the defendant. See, *e.g.*, *United States* v. *Thevis*, 665 F.2d 616, 648 (5th Cir. 1982) (upholding an exclusion of defense evidence because "the danger of prejudice and confusion of the jury was relatively high"); *United States* v. *George*, 266 F.3d 52, 63 (2d Cir. 2001) (finding that district court did not abuse discretion in excluding defense video that "could easily [have] generate[d] the kind of sympathy [for the defendant] that the district court noted would be more prejudicial than probative") vacated in part on different grounds, *United States* v. *George*, 255 F.3d 52 (2d Cir. 2001).

addition, it easily could have been prejudicial, as it might tend to "suggest decision on an improper basis," *United States* v. *Jackson*, 339 F.3d 349, 356 (5th Cir. 2003) (quoting Advisory Committee's Notes on Fed. R. Evid. 403), by giving the jury emotional reasons to believe Jimenez deserved the beating he received from Aguilar based on what he had done to Garcia.

It also could easily have confused the issues in front of the jury. The jury was not called to make judgments on the bar fight, but rather the incident that occurred hours later (and in the case of the 18 U.S.C. 1001 and 18 U.S.C. 1512 charges months and years later, respectively). These concerns substantially outweighed what little probative value the photo had.[15]

ii. Evidence Of Firearm

The district court did not abuse its discretion when it excluded evidence of the possibility of a firearm in the Cadillac. First, it is unclear how this information is relevant given the facts of this case, a point the district court noted in excluding this evidence. (1 T.R. 54). It is undisputed that Aguilar retrieved a handcuffed Jimenez who was secured in the back of the police cruiser, not the Cadillac. Jimenez was nowhere near the Cadillac at that point. Aguilar was evidently

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[15] If the Court finds that Aguilar has not waived argument concerning the exclusion of Jimenez hitting Garcia with a chair, the Court should find that its exclusion was not abuse of discretion. How Jimenez and Garcia fought had little or no relevance to the questions in front of the jury and tended to confuse the issues before jury. Thus, the district court could in its discretion preclude testimony concerning it.

unconcerned about Jimenez having access to a potential gun, as he removed Jimenez from the security of the police cruiser, (4 T.R. 34), stated that he was not afraid of the handcuffed Jimenez, (4 T.R. 107), and made no effort to search Jimenez. Additionally, there was no testimony that Aguilar believed Jimenez was reaching for a gun or weapon. Given that this evidence had no, or little relevance, its tendency to confuse the issues in front of the jury and its prejudicial value substantially outweighed its probative value. It would have unnecessarily added an emotional element to the jury's analysis of the arrest scene based on the specter of a gun. It would have also tended to obscure the issues in front of the jury – Jimenez was not being arrested for using a gun. Given all this, the district court did not abuse its discretion in precluding this evidence.

VII

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT REPLACED A JUROR, WHO DISOBEYED ITS INSTRUCTIONS, WITH AN ALTERNATE JUROR

Aguilar argues that the district court abused its discretion by dismissing a juror for taking notes in contravention of the district judge's trial rules and appointing one of the alternate jurors in the original juror's place. Br. 61. Aguilar's argument clearly fails.

A. Standard of Review

It is within the "trial judge's sound discretion to remove a juror *whenever* the judge becomes convinced that the juror's abilities to perform his duties become impaired." *United States* v. *Huntress*, 956 F.2d 1309, 1312 (5th Cir. 1992) (quoting *United States* v. *Dominguez*, 615 F.2d 1093, 1095 (5th Cir. 1980) (emphasis added)). District courts "have discretion to dismiss jurors for just cause." *United States* v. *Edwards*, 303 F.3d 606, 631 (5th Cir. 2002). An abuse of discretion "only" occurs "'when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Ibid.* (quoting *Whitehead* v. *Food Max of Miss., Inc.*, 277 F.3d 791, 792 (5th Cir. 2002)). Prejudice is only present "if the juror was discharged without factual support or for a legally irrelevant reason." *United States* v. *Virgen-Moreno*, 265 F.3d 276, 288 (5th Cir. 2001). This Court examines the underlying factual finding of the district court for clear error and will only reverse if its "review of the relevant evidence leaves [it] with the definite and firm conviction that mistake has been committed." *Edwards*, 303 F.3d at 631 (internal quotation marks omitted).

B. Background

A reading of the transcript pages Aguilar cites, Br. 61-62, indicates only that the judge dismissed two alternates, Hal Buesing and Cathy Wacaser. (6 T.R. 113; G.R.E. 10). An examination of the juror roster and the jury seating chart clears up

any confusion. Buesing was originally a member of the twelve-person jury. See 3 R. 589; 3 R. 597; G.R.E. 11 (listing Hal Buesing as "Juror #11"). Kelly Garrett and Wacaser were designated alternates #1 and #2, respectively. (3 R. 597; 3 R. 591; G.R.E. 11). Instead of dismissing one alternate and one member of the twelve-person pool explicitly, the district court simply dismissed Buesing by redesignating him an alternate before the jury began deliberations.

C. The District Court Did Not Abuse Its Discretion

The district court's actions here were for just cause, and factually supported. Buesing was told that note-taking was prohibited. (5 T.R. 161-162; G.R.E. 9). Instead of acceding to the instruction of the court, he continued his note-taking. (5 T.R. 158, 161; G.R.E. 9). Although the judge seized the notes, she did not know whether other notes might still exist. (5 T.R. 160; G.R.E. 9). Thus, the judge had reason to be concerned, and also was justified in being concerned about the effect or taint on the jury individually questioning the juror might have. (5 T.R. 160; G.R.E. 9). The district court's dismissal of the juror and replacement with one of the alternates, who Aguilar selected, was not an abuse of discretion.

Contrary to Aguilar's contentions, Br. 64, the district court was not required to question the juror individually or hold a separate hearing to determine whether dismissal was appropriate. This Court has explicitly held that no such "evidentiary hearing is necessary" and "the scope of the investigation is committed

to the district court's sound discretion." *United States* v. *Coleman*, 997 F.2d 1101, 1106 (5th Cir. 1993); *United States* v. *Fryar*, 867 F.2d 850, 854 (5th Cir. 1989); *United States* v. *Ramos*, 71 F.3d 1150, 1153 (5th Cir. 1995); *United States* v. *Sotelo*, 97 F.3d 782, 794 (5th Cir. 1996).

Even assuming, *arguendo*, that the standard applied by the Eleventh Circuit in *Green* v. *Zant*, is applicable, i.e. that "[w]here the disability of the juror is less certain or obvious * * * some hearing or inquiry into the situation is appropriate," 715 F.2d 551, 556 (11th Cir. 1983), this case presents a situation in which the juror's disability *was* obvious and clear from the circumstances. The juror disregarded a clear order of the court, imparted through the court security officer, and continued to take notes – after initially taking notes without the court's prior permission. The trial judge was justified in assuming that the juror's actions clearly signaled a lack of regard for the court and its instructions.

This Court has found no abuse of discretion in circumstances much less obvious than those here. In *United States* v. *Krout*, 56 F.3d 643, 647 (5th Cir. 1995), this Court found no abuse of discretion when the district court denied a mistrial where a magistrate judge had dismissed a juror without even notifying the parties, because the appellant failed to show any prejudice. The district court denied the motion for a mistrial because the parties had selected three alternates. *Id.* at 646. This Court found that reasoning sufficient, and Krout failed to

demonstrate prejudice as he had "the opportunity to challenge the qualifications of alternate jurors when they were selected" and did not show how the "resulting jury was deficient." *Id.* at 647; see also *United States* v. *Rodriguez*, 573 F.2d 330, 332 (5th Cir. 1978) (holding no abuse of discretion where juror dismissed after juror called court to say he was going to work instead of the trial and the court did not try to contact the juror). Aguilar also suffered no prejudice where prior to deliberation, a disobedient juror was dismissed and replaced with an alternate he selected. Aguilar's argument fails.

CONCLUSION

The Court should affirm defendants' convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, along with a computer disk containing an electronic version of the brief, were served by First Class Mail on the following:

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I further certify that, on the same date, copies of the United States' brief were sent by First Class Mail to the Clerk of the United States Court of Appeals for the Fifth Circuit.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief exceeds the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 13,571 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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