APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[filed July 13, 2021]

No. 19-50997

United States of America,

Plaintiff—Appellee,

versus

Esteban Gaspar-Felipe,

Defendant—Appellant.

Appeal from the United States District Court for the Western District of Texas
USDC No. 4:18-CR-682-4

Before Jones, Costa, and Duncan, *Circuit Judges*.
Stuart Kyle Duncan, *Circuit Judge*:

Esteban Gaspar-Felipe appeals his convictions and sentence for his role in an alien smuggling operation during which an alien died. We affirm.

I. Background

A. Facts

In August 2018, a group of thirteen people, led by a guide nicknamed "Chivo," illegally entered the United States by crossing the Rio Grande. The group—which was reduced to eleven by the end of the trip—walked through the desert for nine nights until they reached a Texas highway. Chivo made a call on his cell phone and, several hours later, two cars arrived to pick them up. A juvenile named David Morales was driving a Chrysler 300 sedan with Orlando

Gomez (Orlando) in the front passenger seat. Alexandra Wharff was driving a Chevy pickup with her boyfriend, Carlos Gomez (Carlos), in the front passenger seat. Four of the aliens went into the Chrysler, and the other seven—including Chivo—went into the Chevy.

Shortly after that, early in the morning of September 7, 2018, Border Patrol agents observed these two vehicles traveling in tandem on the highway from Marathon, Texas. The agents initiated a traffic stop on the Chrysler, which pulled to the side of the road but then drove off quickly as the agents approached. The agents were unable to catch the fleeing vehicles, which were traveling at about 100 miles per hour even though it was still dark and intermittently raining, so they alerted other officials ahead. An officer deployed spike strips, which disabled the pickup, but the Chrysler evaded them. Carlos and the aliens exited the disabled truck and escaped into the brush, but Wharff remained in the truck and was arrested immediately.

Continuing its high-speed flight, the Chrysler traveled through school zone traffic, passed school buses, and avoided a second set of spike strips. During the pursuit, which reached a top speed of 115 miles per hour, police radio traffic included reports that an object was thrown from the Chrysler's window that might have been a firearm. A third spike-strip deployment was partly successful, but the Chrysler continued to drive on the rim of the flattened tire. Officers positioned their vehicles to try and force the Chrysler to detour away from an upcoming area of school traffic and morning congestion, but the Chrysler thwarted that attempt by driving against oncoming traffic. Officers then fired their rifles at the Chrysler, trying to disable the tires. After the Chrysler stopped, officers

found that one of the aliens, Tomas Juan-Tomas, had been shot to death. The other occupants were captured and detained.

Meanwhile, after escaping the disabled pickup, Carlos took the aliens into hiding so he could complete delivery and receive his payment for transporting them. But Wharff provided information that led to Carlos's arrest, and Carlos then provided information that led to the arrest of appellant Esteban Gaspar-Felipe, the last of the aliens still in hiding. Cecilio Jimenez-Jimenez and Juan Juan-Sebastian, two of the aliens in the Chrysler, identified Gaspar-Felipe as Chivo, who guided their group from Mexico.

B. Procedural History

A grand jury charged Wharff, Orlando, Carlos, and Gaspar-Felipe with two counts of transporting an illegal alien for the purpose of commercial advantage and private financial gain (Counts One and Two), and one count of transporting an illegal alien for the purpose of commercial advantage and private financial gain resulting in death (Count Three). Gaspar-Felipe was also charged with illegal reentry (Count Four). Although Gaspar-Felipe was willing to plead to Counts One, Two, and Four, he would not plead guilty to Count Three. Because the government would not offer a plea deal that excluded his guilty plea to Count Three, Gaspar-Felipe proceeded to trial.

The district court granted the government's motion to declare Jimenez-Jimenez and Juan-Sebastian unavailable material witnesses because they were removed to Guatemala after they provided videotaped depositions, and the government was unable to contact them to arrange for their returning to testify at Gaspar-Felipe's trial.

The jury found Gaspar-Felipe guilty as charged in Counts One, Two, and Four. For Count Three, the jury found Gaspar-Felipe guilty of transporting an illegal alien for commercial advantage and private financial gain, but it found—by answering a special interrogatory—that his offense did not result in Juan-Tomas's death.

A presentence report (PSR) determined Gaspar-Felipe's total offense level was 28, including a ten-level adjustment under United States Sentencing Guidelines § 2L1.1(b)(7)(D) because a person died during the smuggling venture. The PSR did not apply an adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 because Gaspar-Felipe put the government to its burden of proof at trial. Based on a criminal history category of I, the resulting advisory range was 78 to 97 months in prison.

Gaspar-Felipe objected to the PSR on various grounds, including the lack of an adjustment for acceptance of responsibility and the reliance on acquitted conduct, namely the death of Juan-Tomas. Alternatively, Gaspar-Felipe requested a downward variance because he was acquitted of Juan-Tomas's death, he had been willing to plead guilty to most of the counts on which he was convicted, and a variance was warranted by the relevant sentencing factors. The court overruled all of Gaspar-Felipe's objections. After hearing arguments, the court denied Gaspar-Felipe's motion for a downward variance and determined the advisory range was appropriate. Accordingly, the court imposed a total within-Guidelines term of 78 months in prison and three years of supervised release.

Gaspar-Felipe timely appealed.

II. Discussion

Gaspar-Felipe's arguments fall into two groups: challenges to his convictions and challenges to his sentence. We address each group in turn.

A. Challenges to Gaspar-Felipe's Convictions

i. Confrontation Clause

Gaspar-Felipe argues he was convicted in violation of the Confrontation Clause, a claim we review *de novo*. *United States v. Buluc*, 930 F.3d 383, 387 (5th Cir. 2019).

The issue concerns two witnesses—Juan Juan-Sebastian and Cecilio Jimenez-Jimenez—who were among the aliens Gaspar-Felipe smuggled. Captured after the September 2018 car chase, both men were deposed and then returned to Guatemala. But the government failed to secure either man's presence at Gaspar-Felipe's June 2019 trial, and so it moved to have them declared unavailable. Gaspar-Felipe timely objected, claiming their absence would violate his Sixth Amendment right to confront the witnesses against him. The district court granted the government's motion and both men's videotaped depositions were played for the jury.[1]

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall

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[1] Generally, the men testified that they or their family members had made up-front payments to members of the smuggling ring to facilitate their entry into the United States. They also described the journey across the border and identified Gaspar-Felipe as the man who guided the group of aliens across the desert.

enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI. This clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541

U.S. 36, 53–54 (2004). It is undisputed that "the playing of [a] videotaped deposition [at trial] constitute[s] the admission of [a] testimonial statement[]," *United States v. Tirado-Tirado*, 563 F.3d 117, 122–23 (5th Cir. 2009), and that Gaspar-Felipe was able to cross-examine both Juan-Sebastian and Jimenez-Jimenez during their depositions.[2] Thus, Gaspar-Felipe's Confrontation Clause claim turns on whether the men were "unavailable."

"A witness is 'unavailable' for Confrontation Clause purposes if the 'prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.'" *Tirado-Tirado*, 563 F.3d at 123 (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *overruled on other grounds by Crawford*, 541 U.S. 36).[3] "The lengths to which the government must go to produce a witness to establish the witness's unavailability is a question of reasonableness and the government need not make efforts that would be futile." *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002). To be sure, a "merely perfunctory effort" is not enough. *United States v. Allie*, 978 F.2d 1401, 1408 (5th Cir. 1992); *see also Aguilar-Tamayo*, 300 F.3d at 566 (government

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[2] His defense counsel cross-examined both witnesses at their depositions.

[3] "[P]re-*Crawford* cases on [unavailability] remain good law." *Tirado-Tirado*, 563 F.3d at 123 n.3.

did not use "reasonable means" where it "stipulated that it took no steps to secure the presence of . . . witnesses"). But when the government takes "numerous steps to insure that deported witnesses w[ill] return for trial," it has likely made a good faith effort. *Aguilar-Tamayo*, 300 F.3d at 566 (discussing *Allie*, 978 F.2d 1401). Furthermore, "[t]he ultimate success or failure of [the government's] efforts is not dispositive," provided it "has employed reasonable measures to secure the witness' presence at trial." *Allie*, 978 F.2d at 1407 (quoting *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 418 (5th Cir. 1992); *see also Mechler v. Procunier*, 754 F.2d 1294, 1297 (5th Cir. 1985) (witness unavailable where "state demonstrated adequate, though unsuccessful, attempts to secure her presence"). "The prosecution bears the burden of establishing that a witness is unavailable." *Tirado-Tirado*, 563 F.3d at 123.

In this case, the government's efforts to secure Juan-Sebastian's and Jimenez-Jimenez's presence at trial began during their depositions. The government informed both men they might have to testify at a future trial, received their verbal assurances under oath that they would return to testify if summoned, and issued them formal trial subpoenas. They each were given a letter in Spanish (their native language) telling them where and how to present themselves at the border in the event their testimony was required. The witnesses were informed—during the deposition and in the letter—that any travel, lodging, or other expenses would be paid by the government.[4] Finally, the

[4] For example, the letters stated that, should the men have to testify, "the necessary arrangements will be made for your transportation . . . by means of a prepaid ticket." They further explained that "the United States Attorney's Office will pay for your hotel and meals" and that "[w]hen the

government obtained Juan-Sebastian's and Jimenez-Jimenez's contact information, including addresses and phone numbers in Guatemala.

Starting in December 2018, about a month after the men were returned to Guatemala, one of the officers working the case, Special Agent Joel Avalos, began trying to reestablish contact. Avalos tried to reach them by phone no fewer than nine times each over the six-month period from December 2018 to May 2019. Jimenez-Jimenez never answered Avalos's calls. Juan-Sebastian never personally answered, though individuals purporting to be his relatives did. One relative, who identified himself as Juan-Sebastian's father, provided an alternate number for him, which Avalos also called during subsequent unsuccessful attempts to reach Juan-Sebastian.

Gaspar-Felipe argues these efforts were insufficient. For instance, he notes the government did not offer Juan-Sebastian or Jimenez-Jimenez work permits that would have let them to remain in the United States until trial. He also claims he successfully contacted Jimenez-Jimenez via Jimenez-Jimenez's court-appointed attorney. As to the government's efforts themselves, Gaspar-Felipe emphasizes the government's purported failure to verify the witnesses' contact information, its reliance on phone calls, and its failure to advance travel funds. He further suggests the government should not have waited over a month

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trial comes to an end, [that office] will also pay your expenses for your return trip home." The trial subpoenas also stated that "the United States Attorney's Office will provide assistance for travel arrangements."

after the witnesses' return to Guatemala to start trying to reestablish contact.

Gaspar-Felipe's arguments are unavailing. The fact that the government did not offer the witnesses work permits does not make its efforts to secure their presence at trial unreasonable. *See, e.g.*, *Tirado-Tirado*, 563 F.3d at 124–25 (explaining that "deporting a witness may still be consistent with 'good faith' and 'reasonable' efforts to procure the witnesses' availability at trial" (quoting *Allie*, 978 F.2d at 1408)). The government may choose in certain cases to offer work permits to removable aliens, *see Allie*, 978 F.2d at 1407, but not doing so does not automatically undermine the good faith of its other efforts.[5] Nor does the fact that one witness (Jimenez-Jimenez) was allegedly reached by his own attorney show that the government's efforts to contact Jimenez-Jimenez were unreasonable. Gaspar-Felipe cites no support for that proposition.

We are also unpersuaded by Gaspar-Felipe's argument that the government failed to verify Juan-Sebastian's and Jimenez-Jimenez's contact information before sending them back to Guatemala. The record shows otherwise. Jimenez-Jimenez's sworn deposition testimony was that he gave Avalos accurate contact information. "Such sworn statements . . . serve as a

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[5] *See Aguilar-Tamayo*, 300 F.3d at 566 ("We do not suggest that it is necessary for the government to take all of the steps referenced in *Allie*"—such as offering work permits—"to establish that it acted reasonably to secure a witness' presence"); *United States v. Calderon-Lopez*, 268 F. App'x 279, 289 (5th Cir. 2008) (unpublished) (government acted reasonably without offering work permits to witnesses who were deported).

vital form of verification in our legal system." *United States v. Foster*, 753 F. App'x 307, 315 (5th Cir. 2018) (per curiam) (Higginson, J., dissenting) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Additionally, the Spanish-language letters given to both men state they had "agreed to provide [the government] with [their] new address and phone number" in the event there were "any changes for any reasons."[6]

Similarly unpersuasive is Gaspar-Felipe's argument that the government waited too long before contacting Juan-Sebastian and Jimenez-Jimenez. To be sure, a lengthy delay can influence our assessment of good faith. *See, e.g.*, *Tirado-Tirado*, 563 F.3d at 125 (finding a "long period during which the government . . . made no effort to remain in contact with [a witness]" showed "a lack of good faith"). But here the government first reached out to the witnesses just over a month after their return to Guatemala. To support his argument that this delay impugns the government's good faith, Gaspar-Felipe cites only our unpublished decision in *Foster*, 753 F. App'x at 312. But *Foster* is not precedential; and even if it were, it is distinguishable. The delay criticized there was "over three months," *ibid.*,[7] three times longer than the period

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[6] *Cf. Tirado-Tirado*, 563 F.3d at 123 (government acted unreasonably when it "failed to make any concrete arrangements with [the witness] prior to his deportation" and did not "serve[] [the witness] with a subpoena" or provide "any sort of written notice regarding the trial prior to [the witness's deportation]").

[7] Moreover, the *Foster* panel was divided on this point. *See* 753 F. App'x at 315 (Higginson, J., dissenting) ("[T]he three-and-a-half months that elapsed between the witnesses' depositions and the government's first attempts to contact them was not an unreasonably long period of

here. *Cf. Tirado-Tirado*, 563 F.3d at 124 (government lacked good faith, in part due to a delay of "more than five months after [the witness's] deposition was taken"). So, we reject Gaspar-Felipe's argument that Avalos's roughly one-month delay in reaching out to the witnesses calls the government's good faith into doubt.

To sum up: Under the Confrontation Clause, the government must undertake reasonable efforts to secure the attendance of a deported witness at trial. *Tirado-Tirado*, 563 F.3d at 123. It did so here.

ii. Jury Instructions

Gaspar-Felipe next challenges the jury instructions. We afford the trial court substantial latitude regarding jury instructions and review a challenge to them for abuse of discretion. *United States v. Daniel*, 933 F.3d 370, 379 (5th Cir. 2019). In doing so, we examine "whether the charge, as a whole, was a correct statement of the law and whether it clearly instructed the jurors as to the principles of the law applicable to the factual issues confronting them." *Ibid.* (internal quotation marks and citation omitted).

Gaspar-Felipe was convicted on three counts of violating 8 U.S.C. § 1324(a)(1)(A)(ii), which prohibits the transportation or moving, or the attempt to transport or move, of an illegal alien within the United States. The maximum prison term doubles from five to ten years if "the offense was done for the purpose of commercial advantage or private financial gain." § 1324(a)(1)(B)(i), (ii). "Because § 1324(a)(1)(B)(i) increases the applicable statutory maximum sentence, it must be found by a jury beyond

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time.").

a reasonable doubt." *United States v. Ruiz-Hernandez*, 890 F.3d 202, 210 (5th Cir. 2018).

As to those counts, the jury instructions included the following definitions:

> The term "commercial advantage" means that the defendant participated in an alien smuggling venture and that members of that venture received or negotiated payment in return for the transportation or movement of the aliens. The government need not prove that the defendant was going to directly financially benefit from his part in the venture.
>
> The term "private financial gain" means any monetary benefit obtained by the defendant for his conduct, whether conferred directly or indirectly. It includes a promise to pay money in the future.

At trial, Gaspar-Felipe objected to the second sentence in the "commercial advantage" definition as overly broad, but his objection was overruled. Gaspar-Felipe repeats this challenge on appeal. He contends the sentence implied that proof of any smuggler's financial gain from the venture also proved Gaspar-Felipe had the requisite intent to profit. Because there was no direct evidence Gaspar-Felipe sought to profit, he contends that, but for the erroneous instruction, he would not have been convicted.

We disagree. Under our precedent, the challenged instruction correctly stated the law. In *United States v. Garcia*, 883 F.3d 570 (5th Cir. 2018), we addressed a defendant's conviction for bringing unlawful aliens into the United States "for the purpose of commercial advantage or private financial gain," in violation of

§ 1324(a)(2)(B)(ii). *Id.* at 571. These terms denote a "financial-purpose element"—namely, that a defendant "must seek to profit or otherwise secure some economic benefit from her smuggling endeavor . . . beyond that of a pure reimbursement." *Id.* at 573–74 (citing *United States v. Zheng*, 306 F.3d 1080, 1085–86 (11th Cir. 2002)). To show this financial purpose, however, "the Government need not prove an actual payment or even an agreement to pay." *Id.* at 575 (cleaned up) (quoting *United States v. Kim*, 435 F.3d 182, 185 (2d Cir. 2006) (per curiam)). Instead, the jury could infer the defendant's financial motive from circumstantial evidence, such as (1) the defendant's lack of familial connection with the aliens; (2) the high level of planning and coordination in the operation; and (3) the grave risk of legal consequences to the defendant. *Id.* at 576.

Even absent proof of direct payment to the defendant, *Garcia* supports the proposition that § 1324's financial-purpose element may be proven through circumstantial evidence that someone in the operation would be paid and, consequently, that the defendant would receive some of that payment. *See id.* at 575–77. Our cases following *Garcia* confirm that. For instance, in *Ruiz-Hernandez*, 890 F.3d at 210, we held that a jury could infer the requisite financial purpose in § 1342(a)(1)(B)(i) from, *inter alia*, "evidence that others in the same smuggling operation had received or would receive money."[8]

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[8] *See also United States v. Green*, 777 F. App'x 742, 743 (5th Cir. 2019) (per curiam) (holding, "notwithstanding the absence of direct evidence of financial motive," the evidence was sufficient because "[j]urors could reasonably infer both that Green did not previously know the individuals being

Applying *Garcia* and these other cases here, the government was not required to prove that Gaspar-Felipe directly received payments for transporting the illegal aliens. Instead, it could prove the financial-purpose element with circumstantial evidence, such as the fact that the illegal aliens had paid or would pay someone in the operation. Viewed in that light, the challenged instruction's statement that "[t]he government need not prove that the defendant was going to directly financially benefit from his part in the venture" accurately stated the law. Accordingly, the district court did not abuse its discretion by including that statement in the jury instructions. *See Daniel*, 933 F.3d at 379.

iii. Sufficiency of the Evidence

Finally, Gaspar-Felipe contests the sufficiency of the evidence. In assessing that challenge, we "view[] all evidence, whether circumstantial or direct, in the light most favorable to the Government with all reasonable inferences to be made in support of the jury's verdict." *United States v. Moser*, 123 F.3d 813, 819 (5th Cir. 1997). The government may prove its case by direct or circumstantial evidence, and "the jury is free

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smuggled and that others in the same smuggling operation had received or would receive money for their efforts"); *United States v. Allende- Garcia*, 407 F. App'x 829, 833-34 (5th Cir. 2011) (agreeing with two unpublished cases from this court and published cases from other circuits that there was sufficient evidence to support the financial-purpose element of § 1324(a)(1)(B)(i) when "there was evidence that the defendant was working with a smuggling network and that someone in the network had received or would receive money").

to choose among reasonable constructions of the evidence." *United States v. Mitchell*, 484 F.3d 762, 768 (5th Cir. 2007) (internal quotation marks and citation omitted). Determining "[t]he weight and credibility of the evidence [is] the sole province of the jury." *United States v. Parker*, 505 F.3d 323, 331 (5th Cir. 2007). The ultimate question on appeal is "whether [the jury] made a rational decision to convict or acquit." *United States v. Burton*, 126 F.3d 666, 677 (5th Cir. 1997) (internal quotation marks and citation omitted).[9]

To convict Gaspar-Felipe on the transportation counts, the jury had to find beyond a reasonable doubt that (1) an alien illegally entered or remained in the United States; (2) Gaspar-Felipe transported the alien within the United States intending to further that unlawful purpose; and (3) Gaspar-Felipe knew or recklessly disregarded the fact that the alien was illegally in the United States. 8 U.S.C. § 1324(a)(1)(A)(ii); *United States v. Nolasco-Rosas*, 286 F.3d 762, 765 (5th Cir. 2002). To convict Gaspar-Felipe of the financial-purpose element, the jury had to find beyond a reasonable doubt that he acted for the purpose of commercial advantage or private financial gain. § 1324(a)(1)(B)(i);

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[9] While the parties agree that Gaspar-Felipe preserved his sufficiency challenge, we are not so sure. Although Gaspar-Felipe unsuccessfully moved for acquittal on this basis at the close of the government's case, he called a rebuttal witness before resting his case. He did not renew his acquittal motion at that time. That likely means plain error review applies. *See United States v. Smith*, 878 F.3d 498, 502–03 (5th Cir. 2017). And the parties cannot waive the standard of review. *See United States v. Vasquez*, 899 F.3d 363, 380 (5th Cir. 2018) (citation omitted). We need not address this issue, however, because Gaspar- Felipe's challenge would fail regardless.

Ruiz-Hernandez, 890 F.3d at 210. On appeal, Gaspar-Felipe challenges only the transportation and financial-purpose elements. These challenges lack merit.

As to the transportation counts, Gaspar-Felipe attacks the credibility of three witnesses (Juan-Sebastian, Jimenez-Jimenez, and Carlos) who identified him as the person who guided the aliens across the Rio Grande, through the south Texas desert, and to the rendezvous point in Texas. On sufficiency of the evidence review, however, "[w]e do not make credibility determinations." *United States v. Garza*, 42 F.3d 251, 253 (5th Cir. 1994). Those are "the sole province of the jury." *Parker*, 505 F.3d at 331. Moreover, Gaspar-Felipe and his co-defendants launched similar credibility attacks on those witnesses during cross-examination. The jury was free to credit Gaspar-Felipe or the witnesses against him; it chose the latter.

Gaspar-Felipe's attack on the financial-purpose evidence fares no better. He claims the evidence fails to show he intended to profit from the venture. But he admits that two witnesses (Jimenez-Jimenez and Juan-Sebastian) testified that their family members paid people to smuggle them into the United States. Furthermore, the witnesses also testified their families were supposed to pay more money once they reached their destinations. Finally, there was testimony that one of the groups was to be paid "[a] thousand each person" for transporting the aliens into the United States. Under our cases, Gaspar-Felipe's financial purpose could be proven by this circumstantial evidence that the illegal aliens had paid or would pay someone in Gaspar-Felipe's operation and that Gaspar-Felipe would thus receive some of that payment for his role in the venture. *See Garcia*, 883 F.3d at 575–77; *Ruiz-Hernandez*, 890 F.3d at 210.

B. Challenges to Gaspar-Felipe's Sentence

We turn next to Gaspar-Felipe's challenges to his sentence.

i. Acceptance of Responsibility

Gaspar-Felipe first claims he was entitled to a downward adjustment for acceptance of responsibility. "We review a district court's interpretation or application of the [Sentencing] Guidelines *de novo* and its factual findings for clear error." *United States v. Cortez-Gonzalez*, 929 F.3d 200, 203 (5th Cir. 2019) (citation omitted).

Under the Sentencing Guidelines, a defendant's offense level is lowered two levels if he "clearly demonstrates acceptance of responsibility for his offense." U.S. Sent'g Guidelines Manual § 3E1.1(a) (U.S. Sent'g Comm'n 2018). But "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *Id.* cmt. app. n. 2.

Gaspar-Felipe was not entitled to this adjustment because he put the government to its burden of proof at trial. Though offered a plea bargain, he refused to accept it because the government insisted he plead guilty to Count Three (transportation of an alien resulting in a death). He refused. As his counsel explained at a pretrial status hearing, while Gaspar-Felipe was "willing to plead [guilty] to Counts 1, 2, or 4 . . . the government is refusing to allow him to plead to those counts [without also pleading guilty to Count 3] . . . and therefore, we will proceed to trial on all

[counts]." Gaspar-Felipe went on to contest his guilt on three of the four charges.

Gaspar-Felipe argues he merited the adjustment because he went to trial only to contest his responsibility for Juan-Tomas's death. He points to Guidelines commentary that "[i]n rare situations a defendant may clearly demonstrate an acceptance of responsibility . . . even though he [proceeds] to a trial." U.S.S.G. § 3E1.1(a) cmt. app. n. 2. An example is a defendant who "goes to trial to assert and preserve issues that do not relate to factual guilt." *Id*. Such a defendant's acceptance of responsibility "will be based primarily upon pre-trial statements and conduct." *Id.*

This argument fails. While Gaspar-Felipe expressed before trial willingness to plead guilty to Counts One, Two, and Four, he did not actually do so. Nothing stopped him from pleading guilty to those charges and going to trial only on Count Three. Instead, he went to trial on all counts and "put the government to its burden of proof by denying the essential factual elements of [his] guilt." U.S.S.G. § 3E1.1(a), cmt. app. n. 2.

ii. Death Enhancement

Gaspar-Felipe next contends he did not merit a ten-level enhancement to account for the death of one of the aliens. We disagree.

The Guidelines authorize a ten-level enhancement "[i]f any person died" in the course of smuggling, transporting, or harboring an unlawful alien. U.S.S.G. § 2L1.1(b)(7)(D). Gaspar-Felipe's PSR recommended this increase because "[Juan-Tomas] suffered death after being shot in the chest . . . by law enforcement." Gaspar-Felipe objected, arguing the enhancement

was unwarranted because he had been "acquitted by the jury of causing the death of . . . Juan-Tomas."[10] The district court overruled his objection, finding Juan-Tomas's death was "reasonably foreseeable" in light of "the risk [inherent] in the offense."

On appeal, Gaspar-Felipe principally[11] argues it was "not reasonably foreseeable that [his] agreement to guide individuals into the United States would lead to a high-speed pursuit by law enforcement nor to [Juan-Tomas's] death." He thus contends the government failed to prove facts necessary to sustain the enhancement.[12] We disagree.

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[10] As noted *supra*, although the jury found Gaspar-Felipe guilty on Count Three— transportation of an alien resulting in a death—it answered in the negative a special interrogatory asking whether the jury found beyond a reasonable doubt that Gaspar-Felipe was responsible for Juan-Tomas's death.

[11] His argument that the Constitution bars considering acquitted conduct during sentencing is foreclosed by Supreme Court precedent. *See United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam). And we have repeatedly rejected his follow-up argument that *Watts* is no longer good law. *See United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006); *United States v. Preston*, 544 F. App'x 527, 528 (5th Cir. 2013); *United States v. Cabrera- Rangel*, 730 F. App'x 227, 228 (5th Cir. 2018) (per curiam).

[12] *See United States v. Juarez*, 626 F.3d 246, 251 (5th Cir. 2010) ("The government must prove sentencing enhancements by a preponderance of the evidence."); *see also United States v. Barfield*, 941 F.3d 757, 762 (5th Cir. 2019) ("Like all factual findings used in sentencing, relevant conduct must be proven by a preponderance of the relevant and sufficiently reliable evidence.") (cleaned up).

To apply § 2L1.1(b)(7)(D) in our circuit, the government need show only that the defendant's alien-smuggling conduct was a but-for cause of someone's death. *United States v. Salinas*, 918 F.3d 463, 466 (5th Cir. 2019); *United States v. Ramos-Delgado*, 763 F.3d 398, 401 (5th Cir. 2014). This is "not a difficult burden to meet." *Ramos-Delgado*, 763 F.3d at 402. It "requires the government to show merely 'that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct.'" *Salinas*, 918 F.3d at 466 (quoting *Burrage v. United States,* 571 U.S. 204, 211 (2014)). Even when many factors converge to cause a result, "one of those single factors will still be considered a but-for cause so long as the result would not have occurred in its absence." *Ruiz-Hernandez*, 890 F.3d at 212–13. In *Ramos-Delgado*, we vividly illustrated the breadth of this concept:

> [I]f . . . defendants' actions had merely sprained [a person's] hand, making him go to the hospital, and the hospital exploded from a gas leak, the defendants' actions would still have been a but-for cause of [the person's] death. But for his sprained hand the [person] would not have gone to the hospital.

763 F.3d at 402.

An even more direct causal chain exists here. Absent Gaspar-Felipe's guiding Juan-Tomas from Mexico to the rendezvous point in Texas, Juan-Tomas would have not found himself in the Chrysler where he was killed by police firing at the fleeing car. The thread from Juan-Tomas's death to Gaspar-Felipe's criminal conduct stretches backwards in an unbroken line.

The district court held Juan-Tomas's death was a foreseeable consequence of Gaspar-Felipe's conduct. But foreseeability is a hallmark of proximate cause,[13] which is not required to apply § 2L1.1(b)(7)(D) in our circuit. So we need not decide whether the court erred in finding Juan-Tomas's death was proximately caused by Gaspar-Felipe. "[W]e may affirm an enhancement on any ground supported by the record," *Salinas*, 918 F.3d at 465, and the record easily shows Gaspar-Felipe's conduct was a but-for cause of Juan-Tomas's death.

iii. Procedural and Substantive Unreasonableness

Lastly, Gaspar-Felipe argues his sentence was procedurally and substantively unreasonable. We engage in a bifurcated review. *United States v. Gomez*, 905 F.3d 347, 351 (5th Cir. 2018). First, we ensure the district court committed no significant procedural error. *Ibid.* Second, if there was no procedural error, we review the substantive reasonableness of the sentence for abuse of discretion. *Ibid.*

Gaspar-Felipe argues the district court procedurally erred by failing to sufficiently explain its sentence and also by failing to consider the disparity between

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[13] *See*, *e.g.*, *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. Unit B June 1981) ("Proximate cause is defined in terms of foreseeability."); *see also CSX Transp., Inc. v. McBride*, 564 U.S. 685, 717 (2011) (Roberts, C.J., dissenting) ("[F]oreseeability has, after all, long been an aspect of proximate cause."); Dan B. Dobbs et al., The Law of Torts § 198 (2d ed.) (Proximate cause means that an individual is responsible for "harms he foreseeably risked by his negligent conduct . . . to the class of persons he put at risk by that conduct.").

his sentence and the much lower sentences of his co-defendants. We disagree. A within-Guidelines sentence like Gaspar-Felipe's requires "little explanation." *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). The record shows that, in giving Gaspar-Felipe a bottom-of-the-Guidelines sentence of 78 months, the court properly considered the evidence, the PSR, the parties' written and oral submissions, and the 18 U.S.C. § 3553(a) factors. Furthermore, the court also accepted the government's arguments, supported by the evidence, that Gaspar-Felipe was not similarly situated to his co-defendants, due, for instance, to their cooperating with the prosecution and to Gaspar-Felipe's fleeing from law enforcement and leaving two of the aliens behind in the south Texas desert. The district court was therefore not required to avoid sentencing disparities between them. *See United States v. Guillermo Balleza*, 613 F.3d 432, 435 (5th Cir. 2010).

Gaspar-Felipe's substantive attack on his sentence is similarly unavailing. "[A] sentence within a properly calculated Guideline range is presumptively reasonable." *United States v. Douglas*, 957 F.3d 602, 609 (5th Cir. 2020) (per curiam) (quoting *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006)). Gaspar-Felipe offers only a general, conclusory argument that the district court should have granted him a downward variance. He has therefore failed to rebut the presumption of reasonableness. *See ibid.*

III. Conclusion

Gaspar-Felipe's convictions and sentence are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

[filed Oct. 22, 2019]

UNITED STATES OF AMERICA

v.

ESTEBAN GASPAR-FELIPE,
Alias(es):
None.
Defendant.

Case Number:
4:18CR00682(4) DC
USM Number:
00965-480

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, Esteban Gaspar-Felipe, was represented by Stephanie Milliron and Damian Castillo.

The defendant was found guilty at trial to Count(s) 1, 2, 3, 4 of the Indictment on June 20, 2019. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Offense Ended	Count(s)
8 U.S.C. § 1324(a)(1)(A)(ii) &(B)(i)	Transportation of Illegal Aliens for Financial Gain	September 7, 2018	1
8 U.S.C. § 1324(a)(1)(A)(ii) &(B)(i)	Transportation of Illegal Aliens for Financial Gain	September 7, 2018	2

8 U.S.C. § 1324(a)(1)(A)(ii) &(B)(i)	Transportation of Illegal Aliens for Financial Gain	September 7, 2018	3
8 U.S.C. § 1326(a)(1)	Entry After Deportation	September 7, 2018	4

As pronounced on October 21, 2019, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 22nd day of October, 2019.

[signature]
David Counts
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of Seventy-Eight (78) months on Count 1; Seventy-Eight (78) months on Count 2; Seventy-Eight (78) months on Count 3; Twenty-Four (24) months on Count 4; All terms to run concurrent with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at F.C.I. Big Spring.

That the defendant participate in the Bureau of Prisons' Education Program while incarcerated.

The defendant shall remain in custody pending service of sentence.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years on Count 1; Three (3) years on Count 2; Three (3) years on Count 3; One (1) year on Count 4; All terms to run concurrent.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court and shall comply with the following additional conditions:

X The defendant shall not commit another federal, state or local crime during the term of supervision. If the defendant is excluded, deported, or removed upon release, the term of supervision shall be non-reporting.

X The defendant shall not illegally reenter the United States. If the defendant is released from confinement or not deported or lawfully reenters the United Sates during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

CONDITIONS OF SUPERVISED RELEASE
(As Amended November 28, 2016)

It is ORDERED that the Conditions of Probation and Supervised Release applicable to each defendant committed to probation or supervised release in any division of the Western District of Texas, are adopted as follows:

Mandatory Conditions:

[1] The defendant shall not commit another federal, state, or local crime during the term of supervision.

[2] The defendant shall not unlawfully possess a controlled substance.

[3] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

[4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

[5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et. seq.) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in

which the defendant resides, works, is a student, or was convicted of a qualifying offense.

[6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

[7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

[8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.

[9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

[1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

[2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

[3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

[4] The defendant shall answer truthfully the questions asked by the probation officer.

[5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change

[6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.

[7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

[8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

[9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

[10] The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

[11] The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

[12] If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

[13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

[14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

[15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

[16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

[17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

CRIMINAL MONETARY PENALTIES / SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes

imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 410 S. Cedar Street, Pecos, TX 79772.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Special Assessment	**JVTA Assessment***	**Fine**	**Restitution**
TOTAL:	$400.00	$0.00	$0.00	$0.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $400.00.

Fine

The fine is waived because of the defendant's inability to pay.

APPENDIX C

[1]IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS PECOS DIVISION

UNITED STATES OF AMERICA	) Case No.
Plaintiff,	) 4:18-CR-682
	)
vs.	) COA No. 19-50997
	) Pecos Texas
ESTEBAN GASPAR-FELIPE,	)
Defendant.	) October 21, 2019
	) 8:31 a.m.

TRANSCRIPT OF SENTENCING BEFORE THE HONORABLE DAVID COUNTS UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

MR. JAMES J. MILLER, JR., AUSA
Office of the United States Attorney
Pecos/Alpine Division
2500 North Highway 18, Suite A200
Alpine, Texas 79830

FOR THE DEFENDANT:

MS. STEPHANIE LEE MILLIRON
Milliron Law, PLLC
213 East Holland Avenue, Suite C
Alpine, Texas 79830

and

MR. DAMIAN CASTILLO
Attorney at Law
1120 N. Big Spring
Midland, Texas 79701

* * *

[4]PROCEEDINGS

(At 8:31 a.m., proceedings commenced with the assistance of an Akateko interpreter)

(Defendant present)

THE COURT: The United States of America vs. Esteban Gaspar-Felipe, Pecos 18-CR-682.

MR. MILLER: Jay Miller for the United States, Your Honor.

MS. MILLIRON: Stephanie Milliron and Damian Castillo on behalf of Mr. Gaspar-Felipe. We're present and ready, Your Honor.

THE COURT: Thank you. Good morning.

Sir, you're Esteban Gaspar-Felipe?

THE DEFENDANT: Yes.

THE COURT: And it's good to see you again, sir. You notice that we have an official court interpreter interpreting the proceeding. We're glad to have her back with us as well. Thank you for coming back. All the way from Florida, as I recall.

And so if you have any difficulty with her or your headphones, just like during the build up to your trial and your trial, let us know so you don't miss anything, okay?

And, Ms. Milliron, you and Mr. Castillo believe Mr. Gaspar-Felipe continues to be competent, correct?

MS. MILLIRON: Correct, Your Honor.

[5] THE COURT: Very good.

Have you reviewed with him the Presentence Investigation Report prepared in this case?

MS. MILLIRON: Yes, Your Honor.

THE COURT: And, Mr. Gaspar-Felipe, you've reviewed this report; is that correct?

THE DEFENDANT: Yes.

THE COURT: All right. Very well.

Ms. Milliron, I know there are a number of defense objections, correct?

MS. MILLIRON: That's correct, Your Honor.

THE COURT: Go right ahead and knock those off. Let's start with the first one, and we'll go with that.

MS. MILLIRON: One second, Your Honor.

THE COURT: Sure. Take your time. And I appreciate—I have reviewed the letter that you sent Ms. Torres, who is here.

There she is. Sorry. I was looking. I couldn't see.

MS. MILLIRON: Your Honor.

THE COURT: I've reviewed also the government's response to those objections, and I've reviewed Ms. Torres' response. But I would like you to speak to each one, if you would.

MS. MILLIRON: Yes, Your Honor. I believe our first [6] objection is to Paragraph 20 and related Paragraph 13 referencing the fewer than six unlawful aliens.

THE COURT: Yes, ma'am.

MS. MILLIRON: Our objection being that there were four who were apprehended from the Chrysler.

Only Gaspar-Felipe was in the Silverado. None of the other individuals in the Silverado were ever apprehended. Trial testimony indicated nobody actually checked identification of anybody. So we object to those paragraphs.

THE COURT: Okay. And the Court having—and I'll state this once for the—I'll probably state it repeatedly, but I'll state it once for the record. This Judge having sat through the trial takes—I take all of that into consideration. I also recall that codefendants in the case indicated that they had traveled to the Alpine, Texas area to pick up illegal aliens. There was a group of seven aliens entered the truck and a group of four aliens entered the Chrysler, and there were well over—I think the objection was that there were—it was not found that there were fewer than six unlawful aliens. And there were well over that, almost double that. I think we've counted 11.

So in relying upon all of these documents that have been submitted, including the response by the U.S. Probation Office as well as the United States Attorney's Office, that objection is overruled.

[7] Your next objection.

MS. MILLIRON: Our next objection is to Paragraph 21 and Paragraph 4, Your Honor, referencing eluding law enforcement under 2L1.1(b)(6).

THE COURT: And that was you basically stating that he did not elude or he should not be dinged for eluding law enforcement?

MS. MILLIRON: Correct, Your Honor. Whenever he entered the Chevy Silverado, at that point he became a mere passenger. He wasn't driving either one

of those vehicles. He had no control over what happened with the drivers of those vehicles.

THE COURT: And from the testimony as well as the response by the Government and the U.S. Probation Office, the Court will overrule that objection as well.

The Court finds the defendant's conduct, while not the driver of either vehicles, reckless at best and likely worse than that in continuing to flee from law enforcement officers on foot. After the truck, he was the passenger. I think that was the Chevy Silverado, you said—that's what my memory is at least—whenever he was able to—whenever they were stopped. He certainly created a substantial risk of death or serious bodily injury to himself or others.

And I think it's, as the government points out—Ms. Decker points out in her response, that there is a Fifth [8] Circuit case of Ruiz-Hernandez where at least citing Maldonado-Ochoa stating that: Creating the risk of harm is what matters here. No harm or actual—no actual harm has actually occurred or has to happen to warrant the application of the guideline. That objection is overruled.

Your next objection.

MS. MILLIRON: Yes, Your Honor, our next is to Paragraph 22 and related Paragraph 5 regarding acquitted conduct; and we also have a substantial sentencing memorandum filed on that.

THE COURT: And I have read your sentencing memorandum, and it's entitled—well, it's Document 180 sentencing memorandum regarding acquitted

conduct and acceptance of responsibility and alternative variance request. We'll get to the variance request in a moment.

Again, relying upon the evidence at trial, the U.S. Probation Officer Torres' response, to the objection as well as Ms. Decker's response to the objection as well, the Court certainly may consider acquitted—conduct for which the defendant has been acquitted, excuse me, and certainly by a preponderance of the evidence I believe that Mr. Gaspar-Felipe, keeping in mind that he agreed to guide these illegal aliens, his conduct certainly comes with substantial risks to all involved during the course of the smuggling, and the Court believes the eventual death, though tragic, was reasonably [9] foreseeable along with the other risks in the offense.

Ms. Milliron, that objection is overruled for those reasons.

Next objection.

MS. MILLIRON: You mentioned it before, Your Honor, Paragraph 38 and related Paragraph 16 regarding acceptance. I'm not clear as to your ruling as to that.

THE COURT: I haven't gotten—that's next, right—

MS. MILLIRON: Yes, Your Honor.

THE COURT:—acceptance of responsibility?

Yeah, again, from the—certainly going to trial does not necessarily preclude acceptance of responsibility. In looking at the totality of the evidence, though, from the trial, the information received through—from the U.S. Probation Office's response and the Presentence

Investigation Report, of course, through all of this and the government's response, I do believe that acceptance of responsibility should be denied, and the objection is overruled for those reasons that are stated there.

I do not—I find distinguishable—easily distinguishable a defendant who may go to trial to assert and preserve certain issues—for example, one that—I think we have a bench trial on later this morning—as opposed to issues that relate to factual guilt or innocence. And I find that Mr. Gaspar Felipe went to trial contesting his guilt and [10] continues to deny the relevant conduct involving all of the events of this offense, including the death of an alien as well. So that objection is overruled.

We'll get to the variance.

Are there other objections or any corrections to the report from the defense?

MS. MILLIRON: No, Your Honor, I think that is all of them.

THE COURT: Mr. Miller, from the government, any objections or corrections to the report?

MR. MILLER: No, Your Honor.

THE COURT: The Court has reviewed the Presentence Investigation Report prepared by U.S. Probation Officer Precilla Torres.

I find the report to be accurate. I adopt it and the application of the United States Sentencing Guidelines contained therein.

I find the total base offense level to be 28.

Criminal History Category is I.

The guideline range is 78 to 97 months.

The supervised release term is one to three years for Counts One through Three, Count Four is one year.

And he is ineligible for probation.

There is a $25,000 to $250,000 fine that's available in each count.

[11] And then there is a $100 mandatory special assessment for each count pursuant to the Victims of Crime Act.

There is a $5,000 JVTA, Justice for Victims of Trafficking Act assessment available for Counts One, Two and Three, not for Count Four—not applicable to Count Four.

With that, I know you have not only allocution but also a motion for a variance.

MS. MILLIRON: Yes, Your Honor.

THE COURT: Go right ahead.

MR. CASTILLO: If I can address that.

THE COURT: Of course, Mr. Castillo.

MR. CASTILLO: We do, and the motion is pretty thorough --

THE COURT: It is very thorough.

MR. CASTILLO:—and lengthy as well. I'll let that stand for itself, but I will highlight some points. Some personal facts about Mr. Gaspar: He's 41 years of age. He's married. He has four children. They're all back home in Mexico. He has been a trustee while he's been in jail. For about seven, eight months of that time, he

was trustee status working with confidence of the jail staff.

As far as Mr. Gaspar's case and the facts, I think we respect the Court's rulings, but we do believe that the facts are somewhat unique from prior cases dealing with this issue of acquitted conduct versus relevant conduct. Here you obviously [12] have the death count, which was Count Three, and the jury's finding in that count. They did not hold this defendant responsible for causing the death of that other individual.

THE COURT: Right.

MR. CASTILLO: We understand the prior case law and where it stands on that issue and the ability to use relevant conduct. This is somewhat of a unique case. If the Court would recall the facts, there were two separate vehicles. Mr. Gaspar was in one that was stopped quite a bit of time before the second vehicle encountered law enforcement. And then gunshots were what eventually killed the individual in the other vehicle. I think the jury considered all of that in their determination.

With that said, I would like to focus on the codefendants in this case because you do have several that have been sentenced. Ms. Alexandra Wharff was sentenced by this Court to, I believe, around eight months, time served. She was in the same vehicle as this defendant. Her situation in this case ended at the time that vehicle stopped. She was driving the vehicle. Mr. Gaspar was the passenger in the vehicle. And so that's sort of how those two defendants relate.

The other two defendants in that vehicle was Carlos. He was sentenced to 33 months. Now this defendant did come to testify. I don't think it's disputed that

he made some false statements under oath. In fact, one of the law enforcement [13] officers confirmed that while he was testifying. Despite that, his role in this was more of a leader-type role. He was directly communicating with the other vehicle.

Again, he was in this vehicle with Alexandra and this defendant; but he was directly communicating by phone with that vehicle while they were in pursuit. Those two defendants I think are important in viewing which one Mr. Gaspar is similarly situated with.

Mr. Gaspar was in this vehicle, did not communicate by phone with the other vehicle. He did not plead to Count Three which involves the death count. Ms. Wharff, again same vehicle, did not plead to Count Three.

Now, the government I think their argument is, Well, she cooperated. She helped us. What's interesting about that is she actually came to testify by our subpoena. So she actually was one of our witnesses, not one of the government's witnesses. That's important, again, if we're talking about whether these defendants are similarly situated and whether this defendant is looking at 78 months plus when Ms. Wharff got eight months time served.

If we go someone who is more culpable than her, well, it is probably Carlos. And Carlos, again, 33-month sentence. And the government is going to use the same argument, Well, he came and testified and cooperated as well. You have the two differences there. One, he actually pled to Count Three which [14] involved the death.

So if we're comparing two defendants and one is convicted of transportation resulting in death and one

is convicted of simply transportation, which is what we have here, it doesn't seem fair or just to give the one that was convicted of the death less time than the one that was convicted of simply transportation.

And if the counter-argument which the government is making is, well, this one went to trial, well, this is why we point to the acceptance of responsibility issue in the pretrial hearings which I think are in the memo, we make it clear from the start—and Mr. Miller won't contest this—that this defendant was willing to plead to every count other than Count Three which involved the death.

Yes, he went to trial. Yes, he put his innocence out there; but it was all sort of surrounding this count involving the death. And, again, that's important because Carlos pled to it. He was convicted of it. This defendant did not. He went to trial on that count, and he was not convicted of that one involving the death.

The next defendant that's pled is Orlando, and I believe he received 71 months. Now, this defendant was actually in the vehicle that evaded all the way to Monahans and was in the gunfire with law enforcement. This defendant was right in the thick of things. He did not testify. So he [15] didn't—as far as we know, he didn't cooperate at all. He just came here and got 71 months. That's still less time than what Mr. Gaspar is looking at.

Again, if—part of our argument, Judge, is the Court looks at similarly situated defendants; and if the Court were to look at these defendants, I think the most similar situation that Mr. Gaspar is Ms. Wharff.

She drove. She didn't talk to anyone. And she was in the vehicle, not involved in the gunfire. Same thing

with Mr. Gaspar. He got in the vehicle. He didn't drive, but we want to say he brought aliens into the vehicle. Okay. But, again, those conducts can sort of be combined together.

Again, Ms. Wharff driving this vehicle, taking responsibility for, you know, controlling the passengers and directing the passengers where they needed to go. Same thing with Mr. Gaspar up until the point where they were stopped which was long before the second vehicle was involved in the gunfire.

As I've stated, Carlos, completely different. Carlos was actually communicating, and he testified to that. And Ms. Wharff testified to that, that he was the one communicating directly with the other vehicle directing them where to go, directing them to evade law enforcement.

And so, if we're to evaluated those two, he's got more culpability in this conspiracy. And if that's the case, [16] and he got 33 months, then surely Mr. Gaspar should receive a sentence at that range or lower than Mr. Carlos who received that 33 months.

So that's sort of the—that's our variance request, Your Honor, based on the codefendants and their sentences and avoiding the sentence disparities for defendants that are in these similar situations.

The other parts of this is, of course, the facts of the case. I've already stated part of this, but the facts are unique. Again, understanding we did have a resulting death, but you did have two vehicles that were separated by—for a hundred miles, I believe, quite a bit of distance here.

And you did have a situation where law enforcement fired weapons at this vehicle. According to their

testimony, it was to stop it because it was coming on to incoming traffic. The jury heard that testimony. The jury played the role of the fact finder. They could have listened to that testimony and decided, Well, that's enough of a causal relationship to this defendant; but I think it's key that they didn't.

They evaluated that testimony. They saw what occurred. They saw the video of the way the shooting went down. And they decided that the insinuation was too far, and that Mr. Gaspar-Felipe was not going to be responsible for the death of that individual. Again, I think those facts are important in this variance request.

[17] The other part to this in our—I want to—again, a lot of this information is in there. I'm just pinpointing certain parts.

THE COURT: Sure.

MR. CASTILLO: The last part I want to pinpoint is we put a—sort of a Congressional statement in there, in the back. We thought that was important, again, getting to this acquitted conduct versus relevant conduct issue and the way Congress is addressing this. You have the First Step Act, of course, but there is an intent here to really get away from using this acquitted conduct as relevant conduct. And it's noted there by the bipartisan support to introduce legislation to do that.

We just want to note that because if we're dealing with a close case of whether we should do—we should apply acquitted conduct to this relevant conduct, and we believe this is a close case. I mean, this is a unique case from the other cases that are cited. I think one of the other cases is dealing with acquitted of a firearm,

but then you can find that he possessed the firearm as relevant conduct.

There is another heart attack case of some sort dealing with causal relationship. This is a unique one because, again, this is dealing with the death of an individual. And as far as I can tell, nobody has found case law dealing with that specific kind of fact.

[18] And if it is a close case, and that is the Congressional intent, is to do away with that conduct, I think that matters. Again, we understand the Court's ruling on that; but I think that does make a difference in the Court's consideration of a variance in this case.

With all that being said, we would ask the Court to consider a downward variance in this case of 12 levels from the current base offense level. And, again, partly is because of the ten levels that are assessed under the acquitted conduct here, the death, and the other two are dealing with acceptance of responsibility.

Again, we understand sort of the Court's position on those; but we think that would get this defendant down to a range where Carlos is and certainly even closer to where Ms. Wharff is where we believe that he is similarly situated as those defendants.

So we respectfully request that the Court consider that variance.

THE COURT: Thank you.

Mr. Miller, response?

MR. MILLER: Your Honor, step by step. Ms. Wharff, by the time the shooting incident occurred in Monahans, was already arrested and was already cooperating. She was telling us who was in the vehicles which led us to Carlos Gomez.

So at the time she pled guilty, her involvement in [19] the conspiracy, the aiding and abetting, had already ceased and she was already cooperating. That led us to Carlos. When Carlos was apprehended, he immediately told us where the guide was, that being this defendant, and told them how and where they could find him. "They" being law enforcement. And lo and behold exactly as he told us, we found Mr. Gaspar there at that residence near Seminole. So both of them cooperated.

In addition, Orlando and Carlos both pled guilty to the count and admitted that their actions were foreseeable and resulting in the death of an illegal alien. This defendant, true, the jury did not find unanimously that his conduct resulted in it. However, this defendant, in conjunction with others, he brought these folks up. He didn't stay in the vehicle that he was in with Ms. Wharff and stay there and say, Hey, you got me. He took off in the desert, and he didn't care less about the other people in the group.

He got up to Seminole. Never made any phone calls. There is no evidence that he made phone calls to make sure the people in the other vehicle were taken care of, were okay. All he was waiting for was a ride to go back south, and we would submit he was going back south to pick up another group of aliens to bring back north.

Also in addition is four months prior to this incident, he was just deported. Four months prior to this incident, he was deported. And he came back around, and he [20] brought in 13 people. We heard evidence that he left two people out in the desert, a male and female, and continued on. I don't believe that conduct overall is conducive for a variance in this case.

In addition is, Carlos did cooperate. He took the stand, and he got a benefit for that.

Orlando decided he ain't going to talk, and he got 71 months, but he pled guilty.

Now, the defense brings up he was willing to plead guilty, just that one element was causing the death, he wasn't willing to do it. Well, they could have stipulated everything saying, Hey, let's do a bench trial. Let's make this simple. We're guilty of all these offenses. Instead of putting the government at its burden for two full days, almost three days in this trial where we could have just focused on the one issue is whether or not his conduct resulted in the death of an alien. But the government was put through its hurdles and went through and did the whole case; therefore, the Court has to consider that.

If he truly wanted to accept responsibility, he still could have came and pled guilty and let the government—put the government at that time decide whether or not we were going to proceed on that one element.

THE COURT: Mr. Miller, I remember the testimony about Seminole in the trial. Where was this defendant [21] MR. MILLER: No. Hobbs is where Carlos was arrested.

THE COURT: That's where Carlos was arrested.

MR. MILLER: And then Carlos said, By the way, the foot guide, this defendant, is over at my dad's piece of land over in Seminole in a trailer. That's when the agents went over there. They went to the trailer. This defendant was sleeping in an abandoned car.

THE COURT: Oh, that's right. Thank you.

Mr. Castillo, go ahead.

MR. CASTILLO: Quickly respond. Carlos was actually arrested hiding underneath a mattress in that house. So, I mean, again, if we're comparing the behavior of these defendants, yes, he eventually talked, but he was hiding. He was evading for just the same amount of time.

Yes, the difference here I guess is Carlos came to testify; but, again, the government hasn't addressed the fact that he was convicted of the death count. This defendant was not. Key difference. And so—and also, I would ask the Court to recollect the testimony of Carlos and the agent that followed. Carlos said about two or three false facts under oath that were fact checked by the agent that testified right after him. And, you know, grateful for the agent for testifying to those, but Mr—Carlos perjured himself to a certain extent.

[22] And I'll go back to Ms. Wharff. Ms. Wharff was called as a witness by the defense because her testimony was helpful to us, not to the government. The government did not subpoena her; we did.

She—same situation. She was a driver. This defendant was not a driver. Yes, she stayed around in that area. But, again, we're talking about a sentence of eight months versus a sentence of 78 months considering all the similarities between these two defendants. They may not be equal, but they're certainly not that distance. Thank you.

THE COURT: Thank you.

The motion for—let's see, I guess it's—first of all, the sentencing memorandum the defense filed regarding acquitted conduct and acceptance of responsibility

alternative variance request is very well done. I appreciate that as well as the Government's response to the original objections.

The motion for variance is denied for all the reasons stated by Mr. Miller as well as the Presentence Report, all the information the Court has gleaned from the trial as well as the report and response from the probation officer.

The Court does not see a disparity in sentencing especially with Carlos as being very substantial, and the Court believes that his guidelines are appropriately applied. The defendant's—Mr. Gaspar-Felipe's guidelines are appropriately applied as stated in the report.

[23] Now, with that then, Ms. Milliron, Mr. Castillo, what would you have the Court consider before sentencing Mr. Gaspar-Felipe?

MS. MILLIRON: Your Honor, I think we would like you to consider the fact that he has four young children. We are informed they are 13, 11, 5, and 3 years old. He's been married for 15 years, and they're all waiting for him to get back to them.

THE COURT: He's 41, right?

MS. MILLIRON: He's 41 years old. Yes, Your Honor.

THE COURT: Okay.

MS. MILLIRON: He's also been on excellent behavior while he's been here. He's been a trustee.

THE COURT: He's been a trustee?

MS. MILLIRON: Yes, Your Honor.

THE COURT: That's good.

MS. MILLIRON: He's requested to be placed in Big Spring.

THE COURT: Okay.

MS. MILLIRON: And he would like to take as many classes as he can. I know English is one of those.

THE COURT: Okay. Great.

Mr. Gaspar-Felipe, I'll make the recommendation for Big Spring. Keep in mind—I try to tell people this because you're not here every day; we are. A lot of people here and in [24] Midland ask for Big Spring. And we make that recommendation if they ask for it. I don't know if it means a lot. It's up to the U.S. Bureau of Prisons to make that decision, and they have a lot of things to decide, that goes into that, the least of which is probably bed space, security issues, all kinds of things.

So I know they try—the Bureau of Prisons has told me—officials have promised me that they do their best to try to get you as close to—at least to home as they can. I assume in this instance your home would be Seminole, I would guess, I would think. And so I would hope that that's where you end up. It may or may not be. So I can't promise nor guarantee that.

Mr. Gaspar-Felipe, anything you would like to say? You're welcome to say whatever you'd like.

THE DEFENDANT: The only thing that I am asking, Your Honor, is forgiveness. And also, if you can look upon yourself and just let me go the least amount of time possible. I understand that there's things that have to be made and done, but I also have children. And if you can just, you know, from the bottom of your heart, look into my situation and, again, my children.

And that's all I'm asking for, if you can give me the least amount of time possible.

THE COURT: Thank you. Anything else? I don't want to cut you off. If you want to say anything else, you're [25] welcome to.

THE DEFENDANT: No, that's it.

THE COURT: Okay. Thank you, sir.

Mr. Miller?

MR. MILLER: We have nothing, Your Honor.

THE COURT: The Court does not depart from the recommended sentence.

Pursuant to the Sentencing Reform Act of 1984, which I have considered in an advisory capacity, and the sentencing factors set forth in 18 U.S.C., Section 3553(a), which I have considered in arriving at a reasonable sentence, I find the guideline range in this case to be fair and reasonable for each count.

The defendant is placed in the custody of the United States Bureau of Prisons to serve a term of imprisonment as follows:

For Count One, Count Two, and Count Three, 78 months, which is the bottom of the guidelines; Count Four, 24 months which is statutory maximum; all of those to run concurrently.

Upon release from the Bureau of Prisons, you are placed on supervised release to serve a term of supervision as follows:

For Counts One, Two, and Three, three years; and for Count Four, one year; all to run concurrently.

There is no fine in this case assessed. The Court [26] finding the defendant has an inability to pay a fine.

There is a $100 mandatory special assessment for each count. That's $400.

And the Court finds that the defendant is indigent; therefore, the Justice for Victims of Trafficking Act assessment does not apply—or will not be imposed.

As far as your conditions of supervision, Mr. Gaspar-Felipe, the standard and mandatory conditions of supervision are imposed, which include these conditions: The defendant shall not commit another federal, state, or local crime during the term of supervision.

And if the defendant is excluded, deported, or removed upon release, the term of supervision shall be nonreporting. The defendant shall not illegally reenter the United States.

Should the defendant lawfully reenter the United States during the term of release, the defendant shall immediately report to the nearest U.S. Probation Office.

Your Presentence Report will be sealed.

You have the right to appeal your conviction and your sentence. You must file Notice of Appeal in writing within 14 days of the entry of this judgment. If you are unable to afford an attorney or the transcript of the record of the case on appeal, those will be provided at no expense to you, sir.

Ms. Milliron, Mr. Castillo, anything further on [27] behalf of Mr. Gaspar-Felipe?

MS. MILLIRON: Yes, Your Honor. We object to the substantive and procedural reasonableness of the sentence.

THE COURT: And I'll make the recommendation to Big Spring. That's so note.

Yes, Mr. Castillo.

MR. CASTILLO: One more thing. If Mr. Gaspar pursues the appeal, which I imagine he will, does the Court want me to stay on? I mean, I handle those, but I would imagine the Court wants me to stay on if he wishes or do you want—

THE COURT: I think that's—if you wish to stay on, you're welcome to. Normally you would file the Notice of Appeal and then move to withdraw. I suspect that's probably the best way to handle that; but, you know, if Mr. Gaspar-Felipe is bound and determined to remain with you, then we can consider that.

MR. CASTILLO: Very good, Judge.

THE COURT: Whatever you file, the Court will respond to.

Mr. Miller, anything further?

MR. MILLER: No, Your Honor.

THE COURT: Mr. Gaspar-Felipe, I remand you to the custody of the United States Marshals to serve your sentences. I wish you the very best. Good luck.

MR. CASTILLO: Thank you, Your Honor.

[28] THE COURT: Yes, sir.

(Proceedings concluded at 9:08 a.m.)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS PECOS DIVISION

[filed Oct. 15, 2019]

UNITED STATES OF AMERICA	§	
	§	Case No.
vs.	§	PE-18-CR-682(4)
	§	
ESTEBAN GASPAR-FELIPE,	§	

SENTENCING MEMORANDUM REGARDING ACQUITTED CONDUCT AND ACCEPTANCE OF RESPONSIBILITY, AND ALTERNATIVE VARIANCE REQUEST

TO THE HONORABLE DAVID COUNTS:

COMES NOW Defendant, Esteban Gaspar-Felipe, and argues that this Court should not sentence him for jury-acquitted conduct and should award him acceptance of responsibility, or, in the alternative, vary downward from the recommended guideline range, and in support thereof shows the following:

I. This Court Should Not Attribute the Death to the Defendant Because the Jury Acquitted the Defendant of Transporting Illegal Aliens Resulting in Death.

The Supreme Court has held that a sentencing judge may consider acquitted conduct at sentencing only if the conduct meets two requirements: (1) it otherwise meets the definition of relevant conduct, and (2) it is demonstrated by a preponderance of the evidence. Office of General Counsel, U.S. Sentencing Commission, Primer Relevant Conduct 14 (March

2018); *United States v. Watts*, 519 U.S. 148, 156-57 (1997).

The jury found that on September 7, 2018, the Defendant guided a group of undocumented individuals to U.S. Route 90 in Brewster County, Texas, where they were picked up by a silver Chrysler 300 and a white Chevrolet Silverado truck. Subsequently, the drivers of those vehicles evaded law enforcement attempts to conduct traffic stops on them. The Defendant was a passenger in the Chevrolet Silverado, which was disabled by a controlled tire deflation device on U.S. Route 67 approximately one mile south of Interstate 10. The Chrysler 300 continued to evade law enforcement for over 50 more miles until it was disabled by a controlled tire deflation device on Texas State Highway 18 south of Monahans, Texas. Although the Chrysler 300 was already disabled, slowing down, and pulling over to the side of the road, and law enforcement could not see inside the darkly tinted windows, four Monahans police officers acted against their own policy when they shot the Chrysler over 40 times, killing Tomas Juan-Tomas who was a passenger inside of it. Based on those facts, the jury did not unanimously agree, by proof beyond a reasonable doubt, that the Defendant's offense conduct of smuggling resulted in Tomas Juan-Tomas's death.

A. The Acquitted Conduct is Not Relevant Conduct Because the Defendant's Actions Did Not Cause Tomas Juan-Tomas's Death and Because the Actions of Others Were Not Within the Scope of Agreement and Were Not Known or Reasonably Foreseeable in Connection with the Offense.

i. The Defendant's Actions

Relevant conduct includes actions of the defendant performed in preparation for the offense, during the offense, and after the offense to avoid detection, and always includes acts the defendant counseled, commanded, induced, procured, or willfully caused. U.S.S.G. §1B1.3.

Here, the Defendant's relevant conduct is guiding undocumented individuals into the United States to a pickup location, for which he was convicted in Counts One, Two, and Three. His relevant conduct ends there. During the trial, Carlos Gomez was the only witness who testified that the Defendant said anything at all after he got into the Chevrolet Silverado or that the Defendant directed or commanded the evasion of law enforcement. Carlos Gomez was also impeached, perjuring himself multiple times at trial, so, like the jury, this Court should allow his testimony no weight. Trial Tr. Vol. 3, 47, 77, 80, 82, 136, 138-39 Jun. 19, 2019.[1] Unlike Carlos Gomez, Alexandra Wharff was not impeached at trial. Her testimony was that the only person talking in the truck was Carlos Gomez on a cell phone to the driver or to Orlando Gomez in the Chrysler 300. Defendant did not say anything at all after getting into the Chevrolet Silverado and had become a mere passenger at that point. The Defendant did not

[1] See Exhibit 1.

communicate in any way with the occupants of the Chrysler 300 nor instruct them to evade law enforcement. Therefore, the Defendant did not counsel, command, induce, procure, or willfully cause either vehicle to evade law enforcement.

U.S.S.G. §1B1.3(a)(c) expands the definition of relevant conduct to include harm that resulted from the relevant conduct described above, including death. The Fifth Circuit employs a but-for causation standard to determine whether harm resulted from relevant conduct. In *Ramos-Delgado*, the defendant, who was driving a stolen truck with illegal alien passengers, attempted to evade border patrol agents by abruptly turning left over a median. *United States v. Ramos-Delgado*, 763 F.3d 398 (5th Cir. 2014). He crashed the truck through a fence into a tree, seriously injuring an unrestrained passenger in the bed of the truck who later died of skull fractures, a brain injury, and unknown infections while under medical care. *Id.* The Fifth Circuit affirmed that the death resulted from the crash because "the defendant's relevant conduct must be a but-for cause of a harm for that harm to be considered in assigning the guideline range," thereby resolving a circuit split on the causation required under §2L1.1(b)(7) between the Tenth and Eleventh Circuits (no causation requirement) and the Eighth and Ninth Circuits (proximate causation). *Ramos-Delgado*, 763 F.3d at 401.

In *Ruiz-Hernandez*, the defendant helped to arrange and attempted to swim across the Brownsville Ship Channel on inner tubes with the decedent, who was struck by a boat and killed. *United States v. Ruiz-Hernandez*, 890 F.3d 202 (5th Cir. 2018). The Court disagreed with the defendant's argument that the

boat was responsible for the death rather than the defendant because "but-for causation exists if the result would not have occurred without the conduct at issue." *Id.* at 212-13. "A particular result can be caused by multiple necessary factors—multiple but-for causes—yet one of those single factors will still be considered a but-for cause so long as the result would not have occurred in its absence." *Id.*

In *Salinas*, two brothers fled from law enforcement while smuggling undocumented individuals until they drove their truck into an empty lot and crashed into a tree; during the subsequent foot pursuit, one of the smuggled persons died of an acute myocardial infarction. *United States v. Salinas*, 918 F.3d 463 (5th Cir. 2019). Based on expert testimony that the heart attack was precipitated by the intensity of the situation, the Court held that the enhancement under U.S.S.G. §2L1.1(b)(7) applied because "but-for causation requires the government to show merely 'that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct.'" *Id.* at 466. The Court gives an example properly-applied but-for causation: an immigrant thrown from a truck, spraining his hand, going to the hospital because of the sprain, and then dying from a gas leak at the hospital. *Id.*

In all of the above cases, the defendants in question were on the inner tube next to the decedent or driving the vehicles. The §2L1.1(b)(7) sentencing enhancement under but-for causation has been properly applied to Carlos Gomez and Orlando Gomez, the individuals who instructed the drivers of the vehicles in this case to evade law enforcement. However, the Defendant neither drove nor commanded the drivers of either vehicle. Further, police officers killing Tomas Juan-Tomas because they fired over 40 bullets at the

Chrysler after it was already disabled, pulling over, and slowing down—against their own internal policy—is not at all similar to a death from thirst, starvation, or exposure in the desert or a heart attack during a pursuit in which the defendant drove the truck. More importantly, unlike in the above cases, in this case the jury actually acquitted the Defendant of criminal liability for Tomas Juan-Tomas's death, making a clear statement on causation given the Defendant's particular facts.

ii. The Actions of Others—Jointly Undertaken Criminal Activity.

In cases of jointly undertaken criminal activity, the defendant is liable for all acts and omissions of others: (1) within the scope of the jointly undertaken criminal activity; (2) in furtherance of that criminal activity; and (3) reasonably foreseeable in connection with that criminal activity, as determined by the defendant's actions and omissions, not those of an omniscient observer. U.S.S.G. §1B1.3, Application Note 3; *United States v. Hammond*, 201 F.3d 346 (5th Cir. 1999). In determining the scope of the jointly undertaken criminal activity, the court must first examine the scope of the specific conduct and objectives embraced by the defendant's agreement by making an individualized assessment of the circumstances of the case. U.S.S.G. §1B1.3, Application Note 3. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable, are not relevant conduct under U.S.S.G. §1B1.3(a)(1)(B). *Id.*

Here, the Defendant agreed to guide undocumented individuals into the United States to a pickup

location, from which they would be further transported by vehicles. That was the only objective embraced by his agreement. An agreement to guide would reasonably include duties like showing people where to walk, telling them when to walk and when to rest, and ensuring they are adequately supplied with food and water along the journey. The Defendant agreed to undertake such duties when he agreed to guide the undocumented individuals to the pickup location, but all of those duties ended when they were picked up by the vehicles. At that point, the Defendant had fulfilled his duties, his agreement was concluded, and he became a mere passenger. The Defendant did not know the drivers would evade law enforcement, nor was it reasonably foreseeable that they would do so, but *even if he had*, the drivers' actions of evading law enforcement in a high-speed pursuit was never the Defendant's objective nor within the scope of his agreement. Therefore, evading law enforcement—and everything that occurred after the drivers evaded law enforcement that was not the Defendant's conduct—is not relevant conduct and should not be considered at the Defendant's sentencing.

The criminal activity that the defendant agreed to jointly undertake and the reasonably foreseeable conduct of others in furtherance of that criminal activity are not necessarily identical. U.S.S.G. §1B1.3, Application Note 3. Reasonable foreseeability may extend beyond the activity the defendant explicitly agreed to undertake. *Id.* For example, a defendant who agreed to commit an offense with an obvious potential for violence, such as an armed bank robbery, will typically be liable for a co-defendant's acts of violence. U.S.S.G. §1B1.3, Application Note 4.

Alien smuggling is not an offense with an obvious potential for violence or for the kind of harm that occurred in this case. Hundreds of offenders are convicted every year of alien smuggling in the Western District of Texas, with fewer than 1% of those cases involving the death of an alien. United States Sentencing Commission, Quick Facts on Alien Smuggling, 2013-2017 Datafiles. It is not reasonably foreseeable that the Defendant's agreement to guide undocumented individuals into the United States to a pickup location would lead to a high-speed pursuit by law enforcement nor to a death. Specifically, it is not reasonably foreseeable from any vantage point, whether the Defendant's or an omniscient observer's, that Tomas Juan-Tomas's death would come at the hands of four Monahans police officers when the officers, acting against their own explicitly stated policies, indiscriminately peppered the Chrysler—and the inhabited civilian residence behind it, which they had not bothered to clear—with over 40 bullets after it had already been disabled and was already slowing down and pulling over to the side of the road.

In sum, Tomas Juan-Tomas's death does not fall under relevant conduct through the Defendant's jointly undertaken criminal activity because the drivers' evasion of law enforcement was not within the scope of his agreement and it was not known or reasonably foreseeable to the Defendant. It cannot logically then fall under relevant conduct due to the Defendant's even more attenuated actions of guiding the undocumented individuals into the United States, especially given the jury's acquittal. Holding so would create an impossible logical dissonance in the Guidelines and bloat the but-for causation standard to logically ridiculous horizons.

B. The Resulting-in-Death Evidence at Trial Did Not Meet the Preponderance of the Evidence Sentencing Standard Because Carlos Gomez Was Impeached and Because Law Enforcement Officers Killed Tomas Juan-Tomas.

"Acquittal communicates a message of legal innocence that cannot be found in the mere absence of a conviction. …[O]ne can as easily conclude that a verdict may mean the jury found the defendant completely innocent under any standard of proof." Erica K. Beutler, A Look at the Use of Acquitted Conduct in Sentencing, 88 J. Crim. L. & Criminology 809 (Spring 1998) [hereinafter *A Look at the Use*].

In this case, Carlos Gomez testified that the Defendant was talking on a cell phone after he got into the Chevrolet Silverado but that he could not understand what the Defendant was saying because it was not in a language he understood. Trial Tr. Vol. 3, 55 Jun. 19, 2019. Alexandra Wharff testified that the only person talking on a cell phone in the Chevrolet Silverado was Carlos Gomez. *Id.* at 167-68. Justin Abila testified that the Chrysler 300 had been successfully disabled by spike strip and slowing down over the course of 3 miles before Monahans police officers shot it, and further that the rim had started separating from the front left tire. Trial Tr. Vol. 2, 141-42 Jun. 18, 2019. He testified that he had communicated the positive spike to dispatch. *Id.* at 147. He also testified that the vehicle was pulling off to the side of the road before the shooting began. *Id.* at 141. He testified that the residence was in the line of fire behind the Chrysler 300 and that the windows of the Chrysler 300 were tinted very darkly and he could not see inside of it. *Id.* at 141, 144. Jeremy Kines of the Monahans Police Department testified that he had been made aware that

there had been a successful spike on the Chrysler 300 before the shooting. *Id.* at 171. He testified neither he nor any other officer attempted to see if the residence located parallel to his position was vacant, and that a bullet had indeed struck the gate in front of the residence. *Id.* at 166-67. He testified that over 40 casings were on the road after the shooting. *Id.* at 168. He testified that he was not aware of and had never read the Monahans Police Department policy on discharging a firearm at a moving vehicle. *Id.* at 172-74.[2]

The government did not prove by a preponderance of the evidence that the Defendant's smuggling resulted in Tomas Juan-Tomas's death because the Defendant's guiding undocumented individuals across the border to a pickup location in the United States was not causally linked to Tomas Juan-Tomas's death when the death occurred at the hands of four Monahans police officers acting against their own stated policy to shoot the Chrysler in a hail of bullets after it had already been disabled and was already slowing down and pulling over to the side of the road. The only evidence the government introduced that the Defendant did anything other than behave as a mere passenger after getting into the Chevrolet Silverado was through Carlos Gomez. Carlos Gomez was impeached at trial; Alexandra Wharff, whose testimony describes the Defendant as a mere passenger, was not. Jeremy Kines agreed with Justin Abila on all salient points – the Chrysler had been disabled, he knew about it before choosing to fire on it multiple times, it was slowing down and pulling over to the side of the road before he fired upon it, the windows were too darkly tinted to know at whom he was firing, and he fired toward a

[2] See Exhibit 2.

residence without clearing it first. The government has only the testimony of Carlos Gomez to meet preponderance of the evidence on the resulting-in-death element in this case. It is not enough.

Further, the jury's role in evaluating the credibility of witnesses and truthfulness of testimony at trial is even more important in this case because the jury evaluated Carlos Gomez, Alexandra Wharff, Justin Abila, and Jeremy Kines and determined that the intervening actions of law enforcement in terminating an already-ending pursuit with unnecessary lethal and indiscriminate force was at least unreasonable enough to acquit the Defendant of responsibility for Tomas Juan-Tomas's death. This Court should not eviscerate the jury as to the credibility of Carlos Gomez because he was not credible under any standard. It should also not eviscerate the jury as to the causation of Tomas Juan-Tomas's death because the actions of the Monahans police officers on that day were unreasonable, unforeseeable, and far too removed from the Defendant's actions for the Defendant to be held responsible for them under preponderance.

II. This Court Should Not Attribute Acquitted Conduct to the Defendant Because Precedent Does Not Apply to Defendant's Unique Facts and Trending Decisions Increasingly Implicate the Fifth and Sixth Amendments to the Constitution

Acquitted conduct refers to acts for which the offender was criminally charged and formally adjudicated not guilty, differing from uncharged or other unconvicted conduct because it represents a legal conclusion of innocence. *A Look at the Use* at 817. In *Watts*, the controlling case permitting the consideration of

acquitted conduct in sentencing, the jury convicted the defendant of cocaine base found in a kitchen cabinet but acquitted him of firearms found in a bedroom closet. *United States v. Watts*, 519 U.S. 148 (1997). The District Court found by a preponderance of the evidence that the defendant possessed the firearms in connection with the drug offense and added two levels to his guidelines. *Id.* Based on 18 U.S.C. §3661's language of no limitation and broad discretion, and further reasoning that juries do not reject facts when they return a verdict of not guilty but merely acknowledge that the government had failed to prove an essential element of the offense beyond a reasonable doubt, the Supreme Court held: "We are convinced that a sentencing court may consider conduct of which a defendant has been acquitted" because "…sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Id.* at 153-54. In this decision, the Supreme Court failed to address concerns about undercutting a verdict of acquittal, the effect of the Sentencing Reform Act of 1984, and other constitutional considerations including due process and double jeopardy. *Id.* at 170 (Kennedy, J., dissenting); *A Look at the Use* at 809. Subsequent decisions continue to restrict, limit, and question the *Watts* holding. The *Apprendi* court held that a sentence cannot be imposed on judge-found facts based on preponderance if it raises the statutory maximum because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (The Fifth Circuit agreed in *Williams* that "each additional fact—the

specific injury that resulted—must be alleged in the indictment, submitted to the jury, and found beyond a reasonable doubt. In short, each additional fact is an 'element' of a greater aggravated offense." *United States v. Williams*, 449 F.3d 635, 645 (5th Cir. 2006).)

The *Booker* court, which rendered the Guidelines advisory, remarked that the *Watts* court had only addressed a very narrow question regarding the interaction of the Guidelines with the double jeopardy clause and had not even had the benefit of full briefing or oral argument. *United States v. Booker*, 543 U.S. 220 (2005). In *Haymond*, the Supreme Court held that a sentence cannot be imposed on judge-found facts based on preponderance if it raises the statutory minimum. *United States v. Haymond*, 139 S. Ct. 2369 (2019). "The right to a jury is the heart and lungs, the mainspring and the center wheel of our liberties, without which the body must die, the watch must run down, the government must become arbitrary…No one may be deprived of liberty without due process of law." *Id.* at 2375 (citing Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). In a persuasive opinion on the subject, the *Kandirakis* district judge stated: "…[W]e have long possessed all the words we will ever need:

> [L]iberties . . . cannot but subsist, so long as this palladium [trial by jury] remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it[] by introducing new and arbitrary methods of trial. . . . And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it

> again be remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

4 Blackstone, *supra*, at 343-44. Heeding these words, this Court will continue to do its part to protect our citizens' voice in the judiciary. Will others do the same?" *United States v. Kandirakis*, 441 F. Supp. 2d 282, 336 (D. Mass. 2006).

Like *Farias*, which relied on *Mares* and *Alonzo*, post-*Watts* cases in the Fifth Circuit have agreed with the *Watts* holding that acquitted conduct may be considered at sentencing. However, they do not address the facts present in the Defendant's unique case because of procedural differences (*e.g. United States v. Mares*, 402 F.3d 511 (5th Cir. 2005) (subject to plain error review because no constitutional objection was made at sentencing)) or factual differences (*e.g. United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006) (the defendant admitted the conduct at sentencing)). *United States v. Farias*, 469 F.3d 393 (5th Cir. 2006).

Though it has come under increasing and whittling attack, including the introduction of the bipartisan *Prohibiting Punishment of Acquitted Conduct Act of 2019*, current law does permit—but not require—this Court to impose a sentence on the Defendant on judge-found facts based on preponderance. Regardless, to do

so would chip away at the Constitution, a consequence that all officers of the court and members of the public should staunchly oppose in the defense of liberty and protection of justice.

This Court should apply the canon of constitutional avoidance to avoid the serious constitutional problems created by the use of acquitted conduct in sentencing. Where a statute is susceptible of two interpretations, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the court's duty is to adopt the latter. *Jones v. United States*, 526 U.S. 227, 239 (1999). This Court should presume that Congress did not intend for the Commission to require the use of acquitted crimes in calculating the guideline range. Amy Baron-Evans and Jennifer Niles Coffin, National Federal Defender Sentencing Resource Counsel, Deconstructing the Relevant Conduct Guidelines: Challenging the Use of Uncharged and Acquitted Offenses in Sentencing (2008) [hereinafter *Deconstructing*].

A. Double Jeopardy, Due Process, and Fair Notice Pursuant to The Fifth Amendment.

The double jeopardy clause protects against a second prosecution for the same offense after acquittal and multiple punishments for the same offense. To the extent a judge's consideration of acquitted conduct amounts to a second review of the same offense, the Fifth Amendment squarely prohibits it. *A Look at the Use* at 840-41. The double jeopardy clause protects individuals, safeguards the finality of judicial decisions, conserves judicial resources, and ensures that court proceedings command the respect and confidence of the public. It also protects the integrity of the criminal

justice system as a whole by preventing harassment and inconsistent results. *Id.* at 842-43.

The Supreme Court has held that proof by a preponderance of the evidence is constitutionally sufficient for sentencing because acquittal only means a jury did not find guilt beyond a reasonable doubt. *Id.* at 837. Just like the judge does not have the power to issue a judgment of guilty notwithstanding an acquittal, however, the judge should not have the power to essentially do just that by circumventing a jury verdict at sentencing by a preponderance of the evidence. It is abhorrent to fairness, which is at the core of the due process clause, when a defendant receives the exact same sentence upon acquittal that he would have received upon conviction, and it undercuts the fundamental power of a jury trial. Further, the right to proof beyond a reasonable doubt protects against factual error whenever a potential loss of liberty is at stake, and a judicial finding of acquitted crimes by a preponderance of the evidence undeniably exposes the defendant to additional loss of liberty. *Deconstructing* at 35.

It is not unreasonable for a defendant to expect that conduct underlying a charge of which he has been acquitted to play no determinative role in his sentencing. *Id.* at 36. A judge's subsequent use of acquitted conduct eviscerates the right to fair notice function of the due process clause.

B. The Right to a Jury Trial Pursuant to the Sixth Amendment.

The use of acquitted conduct in sentencing determinations eviscerates the jury's ability to protect the citizen from government overreach. *A Look at the Use* at 836. It tells the jury that its efforts in assessing evidence and weighing different charges are of limited

importance, overridden by the opinion of one judge. *Id.* The Defendant has a right to have a jury confirm or reject every accusation and to a sentence wholly authorized by the jury's verdict pursuant to the Sixth Amendment. When a judge uses acquitted conduct to calculate the guideline range, he necessarily finds facts beyond the elements of the offense of conviction, and whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence. *Deconstructing* at 31. Under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge. *Id.* at 32; *See also United States v. Cunningham*, 127 S. Ct. at 863-64. If the defendant's sentence would not be upheld but for the existence of a fact found by the sentencing judge and not the jury, the sentence violates the Sixth Amendment. *Deconstructing* at 33.

III. This Court Should Not Attribute Acquitted Conduct to the Defendant Because It Would Create Significant and Unwarranted Sentencing Disparities.

The co-Defendants in this case are Orlando Gomez, Carlos Gomez, and Alexandra Wharff. Orlando Gomez was the front passenger in the Chrysler 300 who instructed the juvenile driver to evade law enforcement and was himself shot multiple times in the leg after Monahans police opened indiscriminate and deadly fire on the Chrysler 300. He pleaded guilty to Count Three and was sentenced to 71 months, 5 years of supervised release, no fine, and $100 special assessment. Carlos Gomez was the front passenger in the Chevrolet Silverado who instructed the drivers of both vehicles to evade law enforcement. He committed perjury multiple times during trial. He pleaded guilty to

Count Three and was sentenced to 33 months, 60 months supervised release, a $15,000.00 fine, and $100 special assessment. Alexandra Wharff was driving the Chevrolet Silverado and was already in law enforcement custody before Monahans police opened indiscriminate and deadly fire on the Chrysler 300 over 50 miles away. The Government permitted her to plead guilty only to Count One, which did not involve Tomas Juan-Tomas's death. On May 20, 2019, approximately eight months after her apprehension, she was sentenced to time served, 36 months of supervised release, no fine, and $100 special assessment.

A. Congress and the Sentencing Commission Instruct Courts to Avoid Sentencing Disparities Among Defendants.

Congress directed the United States Sentencing Commission to avoid "unwarranted sentencing disparities among defendants…who have been found guilty of similar criminal conduct." 28 U.S.C. §991(b)(1)(B). Courts shall impose a sentence sufficient, but not greater than necessary to reflect the seriousness of the offense and to provide just punishment for the offense and in doing so to consider…the need to avoid unwarranted sentencing disparities among defendants who have been found guilty of similar criminal conduct. 18 U.S.C. §3553(a)(6).

B. The Government's Recommended Sentencing Guideline Level 28 (78-97 Months) Would Create Significant Unwarranted Sentencing Disparities Between the Defendant's and the Co-Defendants' Sentences.

If this Court sentences the Defendant at the bottom of the guideline level recommended by the Gov-

ernment, the Defendant's sentence would still far exceed the sentences received by his co- Defendants—an unwarranted and unjust outcome. The Defendant is the only one who took his case to trial. Because the Government would not permit him to plead to any Count other than Count Three, he went to trial solely on the issue of whether his conduct resulted in Tomas Juan-Tomas's death. On that point he was successful.

Unlike Carlos Gomez, the Defendant did not testify for the Government, but he also did not instruct the driver of either vehicle to evade law enforcement nor did he perjure himself under oath during a federal criminal trial.

Unlike Alexandra Wharff, the Defendant was not already in law enforcement custody when Monahans police officers killed Tomas Juan-Tomas. Unlike Alexandra Wharff, he did not drive the Chevrolet Silverado and he had no power to disengage that vehicle from the pursuit, which Alexandra Wharff chose not to do until after it had already been disabled.

Unlike Orlando Gomez, the Defendant was not in the same vehicle as Tomas Juan-Tomas and did not instruct the juvenile driver to evade law enforcement.

The Government, which refused to allow the Defendant to plead guilty unless it was to Count Three, forcing the Defendant to trial on an issue that the Defendant subsequently won at trial but also effectively hamstringing Defendant's acceptance of responsibility, now wants this Court to sentence him to at least twice (if not 86 times) the sentence of the person who drove the Chevrolet Silverado and, astonishingly, greater even than the person who was actually in the same vehicle as Tomas Juan-Tomas. If Carlos Gomez and Orlando Gomez were convicted of an offense with

a statutory maximum sentence of life but received sentences of 33 and 71 months respectively, a fortiori, the Defendant's conviction of an offense with a ten-year maximum sentence should not result in a greater sentence than those co-Defendants. The Defendant is more similarly situated to Alexandra Wharff and should therefore receive a sentence similar to hers. While some disparity is warranted, given each defendant's different conduct and case procedure, the outcome the Government desires is too disparate to be warranted, just, or in compliance with the explicit directives of Congress and the Sentencing Commission.

IV. This Court Should Not Attribute Acquitted Conduct to the Defendant Because the Sentencing Reform Commission Exceeded Congressional Intent and Authority.

The Sentencing Reform Act does not explicitly authorize the Commission to issue commentary. Congress does not review Guideline commentary, which is the only place acquitted conduct language and the Commission's belief that a preponderance of the evidence is the appropriate burden of proof at sentencing occurs. Further, there is nothing in the legislative history of the Sentencing Reform Act to support the use of acquitted offenses in calculating the guideline range, and much to indicate that it is contrary to congressional intent. *Deconstructing* at 4. The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit "real offense" sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties. H.R. Rep. No. 98-1017, at 98 (1984). The sentencing court may still consider factors not directly estab-

lished as an element of the offense, but is not permitted the use of factors justifying a conviction for a different, more serious crime. *Deconstructing* at 4. "In the only reference in the SRA to offenses in the 'same course of conduct,' Congress directed the Commission to 'insure that the guidelines' reflect the 'appropriateness of imposing an incremental penalty for each offense' when the defendant is convicted of multiple offenses committed in the same course of conduct or 'multiple offenses committed at different times'. *Id.* at 5; 28 U.S.C. §994(*l*)(1). Congress could not have intended such incremental punishment for multiple offenses committed in the same course of conduct but simultaneously the equivalent of consecutive sentences for acquitted offenses. *Id.* The Commission exceeded its authority by permitting the consideration of acquitted conduct at sentencing, and, as many other courts and lawmakers have been doing, this Court should use its discretion to curtail such excess.

V. This Court Should Not Attribute Acquitted Conduct to the Defendant Because It Would Undermine Finality and Faith in the Justice System and Because It Wags the Dog of Justice.

"The encroachment on constitutional rights resulting from the use of acquitted conduct in sentencing outweighs the arguments for permitting the use of acquitted conduct at sentencing." *A Look at the Use* at 834. When courts calculate guideline ranges based on acquitted crimes, prosecutors enjoy the massive twin benefits of increased punishment based on a lower standard of proof and inadmissible evidence, and increased power to coerce guilty pleas because they can obtain the same sentence even if no charge is brought

or conviction obtained. *Deconstructing* at 24. Moreover, jurors care when their verdicts are not given the proper weight. *Id.* at 26. It shakes the faith, weakens the finality, and negates the power and purpose of a jury-based justice system when courts, for all practical purposes, overturn a jury's verdict of acquittal. *Id.* at 25.

Further, using acquitted conduct to sentence the Defendant in this case wags the dog. Defendant's recommended guideline level would be level 18 without the consideration of acquitted conduct, and level 28 with the consideration of acquitted conduct. Acquitted conduct in this case represents more than a 50% increase in the loss of liberty to the Defendant – an outcome that shocks the conscience that this Court should use its discretion to avoid.

VI. This Court Should Award Acceptance of Responsibility to the Defendant Because He Went to Trial Solely to Challenge the Applicability of 18 U.S.C. §1324(a)(1)(B)(iv) to His Conduct, and the Jury Acquitted the Defendant Accordingly.

During multiple conversations with the Assistant United States Attorney in the months leading up to trial, including on December 13, 2018 and March 27, 2019, the Defendant consistently relayed his intent to plead guilty to all counts, including Count Three, except for the "resulting in death" language in Count Three. On February 5, 2019, well before the Government initiated trial preparations, the defense counsel told the Assistant United States Attorney: "Because he says he can't plead to something he didn't do Mr. Gaspar-Felipe has elected to set for trial…" referring only to Tomas Juan-Tomas's death. The Assistant

United States Attorney confirmed that was the nature of defense counsel's request in his June 4, 2019 email to defense counsel denying yet another request to plead to a non-death Count: "The rationale is that 1. Stephanie had already asked for it and it was declined. 2. Now that Damian asked for it—it would send the wrong signal." Further, at the June 4, 2019 status hearing held in Pecos, Texas and the June 7, 2019 status hearing held in Alpine, Texas, defense counsel stated the Defendant's request to plead guilty to anything but the "resulting in death" language. On June 4, 2019 during a status hearing, defense counsel stated: "The government did make an offer proposal, but all their offers have been centered around Count 3 in this indictment, which is the charge that ends with the element of resulting in the death of said alien. We have conveyed to the government that Mr. Gaspar, we would entertain an offer where he would plead to any of the other counts or all the other counts, but just not that one." Status Hr'g Tr. 6:22-7:7 June 4, 2019. On June 7, 2019 during a status hearing, defense counsel stated: "We have been talking with Mr. Miller on behalf of the government. They have refused our proffer of pleading to any other count besides Count 3. So to note for the Court, we want to make it clear that we're representing on behalf of Mr. Gaspar-Felipe, he is willing to plead to Counts 1, 2, or 4, but the government is refusing to allow him to plead to those counts; and therefore, we will proceed to trial on all." Status Hr'g Tr. 3:5-13 June 7, 2019. The Court inquired whether the government's position was that it would only accept a plea as to Count 3, and the Assistant United States Attorney said: "Your Honor,

that is the government's position on this case." *Id.* at 3:19-20.[3]

A. The Sentencing Guidelines Permit the Award of Acceptance of Responsibility When the Defendant Goes to Trial to Challenge the Applicability of a Statute to Conduct.

"Conviction by trial…does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct." U.S.S.G. §3E1.1, Application Note 2. In *Broussard*, the 5th Circuit agreed that the Defendant had accepted responsibility despite going to trial because he admitted ownership of guns found in his home and went to trial to contend that §924(c)(1) did not apply to those uncontested facts. *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993).

[3] See Exhibit 3.

B. But-For the Government's Refusal, the Defendant Would Have Pleaded Guilty to Any Count Not Involving "Resulting in Death"; Instead, the Defendant Successfully Challenged the Applicability of 18 U.S.C. §1324(a)(1)(B)(iv) to His Offense Conduct at Trial and Therefore Merits Acceptance of Responsibility at Sentencing.

Here, like in *Broussard*, the Defendant only went to trial to challenge the applicability of the "resulting in death" language in 18 U.S.C. §1324(a)(1)(B)(iv) to his offense conduct of guiding a group of undocumented individuals into the United States to a pickup location at U.S. Route 90. After the group was picked up by two vehicles, the Defendant ceased to be a major participant in any of the subsequent events. According to Alexandra Wharff, the only witness to testify on the subject who was not impeached at trial, the Defendant did not even speak once he was inside the Chevrolet Silverado. He did not instruct nor encourage the driver to evade law enforcement, and he was over 50 miles away when Monahans police opened indiscriminate and deadly fire on the Chrysler 300 and killed Tomas Juan-Tomas. The Defendant clearly went to trial to assert and preserve this issue not relating to his factual guilt and should therefore receive a two-level downward adjustment for acceptance of responsibility.

VII. In the Alternative, This Court Should Award a Downward Variance to the Defendant Because It Would Meet the Purposes of 18 U.S.C. §3553.

A. 18 U.S.C. §3553 and United States v. Gray.

"The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) [below]. The court, in determining the particular sentence to be imposed, shall consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from future crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. §3553.

In a persuasive opinion that questioned the *Watts* court on the use of acquitted conduct in sentencing determinations, the authoring judge used beyond a reasonable doubt to inform his sentencing decision under the preponderance standard. *United States v. Gray*, 362 F. Supp. 2d 714 (D. SDWV—Huntington 2005). "Clearly, it is a long-standing and deeply cherished tradition of this nation to bar the state from depriving a person of their liberty without certainty of guilt. This desired certainty has long been quantified as proof beyond a reasonable doubt." *Id.* at 720. "It is the responsibility of district courts to develop principled methods for…determining how much weight to put in the advisory Guideline range, especially in light of the

3553(a) factors that we must also consider." *Id.* at 722. "I have found that the reasonable-doubt standard offers a principled means of evaluating the credibility of the advisory Guideline range, reducing the risk of erroneous factual determinations, and informing the exercise of my discretion under the advisory Guideline regime. Accordingly, after I calculate and consider the advisory Guidelines for each defendant by a preponderance of the evidence in accordance with *Booker*, I will consider what the Guideline range would be if based solely on conduct that I have found beyond a reasonable doubt." *Id.* at 723. Using beyond a reasonable doubt to inform the sentencing decision can work in tandem with the §3553(a) factors to ensure the justness of a defendant's sentence and the preservation of individual liberties.

B. This Court Should Vary Downward Because the Defendant was Acquitted of "Resulting in Death" and Because the Defendant's Conduct in Relation to Tomas Juan-Tomas's Death was Attenuated.

If Tomas Juan-Tomas's death is not attributed to the Defendant at sentencing, as the jury intended, his Guideline level would be reduced by ten levels from Level 28 to Level 18. If the Defendant were to be awarded acceptance of responsibility at sentencing, his Guideline level would be Level 16. The Defendant was not even in the vehicle when Tomas Juan-Tomas was killed by law enforcement. He was over 50 miles away, following Carlos Gomez's instructions. The Defendant tried multiple times to plead guilty to anything not resulting in death, and the government would not permit him to do so, forcing him to trial on that sole issue. He was successful before the jury on

that issue. If this Court is unpersuaded by the arguments in the preceding sections, an alternative downward variance would best meet the requirements of 18 U.S.C. §3553 because it would still reflect the seriousness of the offense while providing a far more just punishment and outcome in this case than the government's draconian recommendation of Level 28.

Respectfully submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS PECOS DIVISION

[filed June 20, 2019]

UNITED STATES OF AMERICA	§	
	§	
v.	§	P-18-CR-682
	§	
ESTEBAN GASPAR-FELIPE,	§	
Defendant.	§	

VERDICT FORM

Answer "not guilty" or "guilty."

COUNT ONE

We the Jury find that Defendant **ESTEBAN GASPAR-FELIPE** is Guilty of the offense charged in Count One of the Indictment.

Jury Interrogatory for Count One

If you find the defendant, **ESTEBAN GASPAR-FELIPE**, guilty of the crime charged in Count One, please answer the following:

Do you unanimously agree, by proof beyond a reasonable doubt, that the defendant committed the offense charged in Count One for the purpose of commercial advantage or private financial gain?

X Yes __ No

Proceed to Count Two.

COUNT TWO

We the Jury find that Defendant **ESTEBAN GASPAR-FELIPE** is Guilty of the offense charged in Count Two of the Indictment.

Jury Interrogatory for Count Two

If you find the defendant, **ESTEBAN GASPAR-FELIPE**, guilty of the crime charged in Count Two, please answer the following:

Do you unanimously agree, by proof beyond a reasonable doubt, that the defendant committed the offense charged in Count Two for the purpose of commercial advantage or private financial gain?

X Yes __ No

Proceed to Count Three.

COUNT THREE

We the Jury find that Defendant **ESTEBAN GASPAR-FELIPE** is Guilty of the offense charged in Count Three of the Indictment.

Jury Interrogatory for Count Three

If you find the defendant, **ESTEBAN GASPAR-FELIPE**, guilty of the crime charged in Count Three, please answer the following:

Do you unanimously agree, by proof beyond a reasonable doubt, that the defendant committed the offense charged in Count Three for the purpose of commercial advantage or private financial gain?

X Yes __ No

Do you unanimously agree, by proof beyond a reasonable doubt, that the offense charged in Count Three resulted in the death of said alien Tomas Juan-Tomas?

__ Yes X No

Proceed to Count Four.

COUNT FOUR

We the Jury find that Defendant **ESTEBAN GASPAR-FELIPE** is Guilty of the offense charged in Count Four of the Indictment

	Original Signed
June 20, 2019	by Foreperson of Jury
DATE	JURY FOREPERSON

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS PECOS DIVISION

[filed June 20, 2019]

UNITED STATES OF AMERICA	§	
	§	
v.	§	P-18-CR-682
	§	
ESTEBAN GASPAR-FELIPE,	§	
Defendant.	§	

COURT'S INSTRUCTIONS TO THE JURY

INTRODUCTION TO FINAL INSTRUCTIONS

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the Jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened–that is, in reaching your decision as to the facts–it is your sworn

duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. You are to decide this case only on the evidence which has been admitted into court during trial. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

The indictment or formal charges against the defendant are not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The defendant begins with a clean slate. The law does not require the defendant to prove his innocence or produce any evidence at all and no inference whatever may be drawn from the election of the defendant not to testify.

The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant. While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond. a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs.

EVIDENCE–EXCLUDING WHAT IS NOT EVIDENCE

As I told you earlier, it is your duty to determine the facts. To do so, you must consider only the evidence presented during the trial. Evidence is the sworn testimony of the witnesses, including stipulations, and the exhibits. The questions, statements, objections, and arguments made by the lawyers are not evidence.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial I sustained objections to certain questions. You must disregard those questions entirely. Do not speculate as to what the witness would have said if permitted to answer the question Also, certain testimony or other evidence has been ordered removed from the record and you have been instructed to disregard this evidence. Do not consider any testimony or other evidence which has been removed from your consideration in reaching your decision. Your

verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own verdict.

EVIDENCE–INFERENCES–DIRECT AND CIRCUMSTANTIAL

In considering the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

Do not be concerned about whether the evidence is "direct evidence" or "circumstantial evidence." You should consider and weigh all of the evidence that was presented to you.

"Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of events and circumstances indicating that something is or is not a fact.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. But the law requires that you, after weighing all of the evidence, whether direct or circumstantial, be convinced of the guilt of the defendant beyond a reasonable doubt before you can find him guilty.

FLIGHT AFTER ACCUSATION / CONSCIOUSNESS OF GUILT

Intentional flight of a person immediately after a crime has been committed or after he is accused of a crime is not sufficient in itself to establish his guilt but is a fact which, if proved, may be considered by you, in light of all the other evidence in the case, in determining guilt or innocence. Whether the defendant's conduct in this case constituted flight is exclusively for you to determine. And if you do so determine, whether or not that flight showed a consciousness of guilt on his part, and the significance to be attached to that evidence, are also matters exclusively within your province.

In your consideration of any evidence of flight, if you should find that there was any flight, you should also consider that there may be reasons for this which are fully consistent with innocence. There may be many reasons for a person to be reluctant to be interviewed by law enforcement agents, which are perfectly innocent reasons, and which in no way show any consciousness of guilt on the part of that person. Also, a feeling of guilt does not necessarily reflect actual guilt of a crime you may be considering. You should always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however,

that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to each witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe all, some part, or none of what each person had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself some questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he or she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden

or duty of calling any witnesses or producing any evidence.

ACCOMPLICE–INFORMER–IMMUNITY

The testimony of an alleged accomplice, and/or the testimony of one who provides evidence against a defendant as an informer for pay, for immunity from punishment, or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness's testimony has been affected by these circumstances, by the witness's interest in the outcome of the case, by prejudice against the defendant, or by the benefits that the witness has received either financially or as a result of being immunized from prosecution.

You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

CAUTIONARY INSTRUCTION–TRANSCRIPT OF RECORDED CONVERSATION

Government's Exhibits 16 and 17 were identified as typewritten transcripts of the oral conversations which can be heard on the recordings received in evidence as Government's Exhibits 25 and 26, respectively. The transcripts purport to identify the speakers engaged in such conversations.

I admitted the transcripts for the limited and secondary purpose of aiding you in following the content

of the conversations as you listen to the recordings, and also to aid you in identifying the speakers.

You are specifically instructed that whether the transcripts correctly or incorrectly reflect the content of the conversations or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcripts, and from your own examination of the transcripts in relation to your hearing of the recordings themselves as the primary evidence of their own contents; and, if you should determine that the transcripts are in any respect incorrect or unreliable, you should disregard them to that extent. It is what you hear on the recordings that is evidence, not the transcripts.

CAUTION–CONSIDER ONLY CRIME CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of any of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

CAUTION–PUNISHMENT JUDGE'S DUTY

If the defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

"ON OR ABOUT"

You will note that the indictment charges that the offenses were committed on or about a specified date.

The government does not have to prove that the crimes were committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crimes on dates reasonably near September 7, 2018, the date stated in the indictment.

SINGLE DEFENDANT–MULTIPLE COUNTS

A separate crime is charged in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

OFFENSE CHARGED

The indictment contains multiple counts, which read as follows:

COUNT ONE

[8 U.S.C. § 1324(a)(l)(A)(ii) & (B)(i)]

That on or about September 7, 2018, in the Western District of Texas, the Defendants,

ALEXANDRA WHARFF,
ORLANDO GOMEZ,
CARLOS GOMEZ,
ESTEBAN GASPAR-FELIPE,

knowing and in reckless disregard of the fact that an alien, Juan Juan-Sebastian, had come to, entered, and remained in the United States in violation of law, did transport and move, and attempted to transport and move said alien, by means of transportation or otherwise, for the purpose of commercial advantage and private financial gain.

A violation of Title 8, United States Code, Section 1324(a)(l)(A)(ii) & (B)(i).

COUNT TWO

[8 U.S.C. § 1324(a)(l)(A)(ii) & (B)(i)]

That on or about September 7, 2018, in the Western District of Texas, the Defendants,

ALEXANDRA WHARFF,
ORLANDO GOMEZ,
CARLOS GOMEZ,
ESTEBAN GASPAR-FELIPE,

knowing and in reckless disregard of the fact that an alien, Miguel Cobo-Lainez, had come to, entered, and remained in the United States in violation of law, did transport and move, and attempted to transport and move said alien, by means of transportation or otherwise, for the purpose of commercial advantage and private financial gain.

A violation of Title 8, United States Code, Section 1324(a)(l)(A)(ii) & (B)(i).

COUNT THREE

[8 U.S.C. § 1324(a)(l)(A)(ii) & (B)(iv)]

That on or about September 7, 2018, in the Western District of Texas, the Defendants,

ALEXANDRA WHARFF,
ORLANDO GOMEZ,
CARLOS GOMEZ,
ESTEBAN GASPAR-FELIPE,

knowing and in reckless disregard of the fact that an alien, Tomas Juan-Tomas, had come to, entered, and remained in the United States in violation of law, did transport and move, and attempted to transport and

move said alien, by means of transportation or otherwise, for the purpose of commercial advantage and private financial gain, and such offense resulted in the death of said alien.

A violation of Title 8, United States Code, Section 1324(a)(l)(A)(ii) & (B)(iv).

COUNT FOUR

[8 U.S.C. § 1326]

That on or about September 7, 2018, in the Western District of Texas, Defendant,

ESTEBAN GASPAR-FELIPE,

an alien, attempted to enter, entered, and was found in the United States having previously been denied admission, excluded, deported, and removed therefrom on or about March 22, 2018, and that the defendant had not received consent to reapply for admission to the United States from the U.S. Attorney General or the Secretary of the Department of Homeland Security, the successor for this function pursuant to Title 6, United States Code, Sections 202(3), 202(4), and 557.

A violation of Title 8, United States Code, Section 1326.

EXPLANATION OF COUNTS

COUNTS ONE, TWO & THREE:

TRANSPORTING ALIENS INTO OR WITHIN THE UNITED STATES

8 U.S.C. § 1324(a)(l)(A)(ii)

Title 8, United States Code, Section 1324(a)(l)(A)(ii), makes it a crime for anyone to transport an alien or attempt to transport an alien

within the United States, knowing or in reckless disregard of the fact that the alien is here illegally, and in furtherance of the alien's violation of the law.

For you to find the defendant guilty of Count One, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Juan Juan-Sebastian was an alien that had entered or remained in the United States in violation of the law;

Second: That the defendant knew or recklessly disregarded the fact that the alien was in the United States in violation of the law; and

Third: That the defendant transported the alien within the United States with intent to further the alien's unlawful presence.

For you to find the defendant guilty of Count Two, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Miguel Cobo-Lainez was an alien that had entered or remained in the United States in violation of the law;

Second: That the defendant knew or recklessly disregarded the fact that the alien was in the United States in violation of the law; and

Third: That the defendant transported the alien within the United States with intent to further the alien's unlawful presence.

For you to find the defendant guilty of Count Three, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Tomas Juan-Tomas was an alien that had entered or remained in the United States in violation of the law;

Second: That the defendant knew or recklessly disregarded the fact that the alien was in the United States in violation of the law; and

Third: That the defendant transported the alien within the United States with intent to further the alien's unlawful presence.

If you find the defendant guilty of Counts One, Two, or Three, you will then have to unanimously agree, by proof beyond a reasonable doubt, whether the defendant committed the offense charged in Counts One, Two, or Three for the purpose of commercial advantage or private financial gain.

If you find the defendant guilty of Count Three, you will then have to unanimously agree, by proof beyond a reasonable doubt, whether the offense charged in Count Three resulted in the death of said alien Tomas Juan-Tomas.

The term "commercial advantage" means that the defendant participated in an alien smuggling venture and that members of that venture received or negotiated payment in return for the transportation or movement of the aliens. The government need not prove that the defendant was going to directly financially benefit from his part in the venture.

The term "private financial gain" means any monetary benefit obtained by the defendant for his conduct, whether conferred directly or indirectly. It includes a promise to pay money in the future.

A person acts with "reckless disregard" when she is aware of, but consciously disregards, facts and circumstances indicating that the person transported was an alien who had entered or remained in the United States in violation of the law.

An alien is any person who is not a natural-born or naturalized citizen of the United States.

In order for transportation to be in furtherance of the alien's unlawful presence, there must be a direct and substantial relationship between the defendant's act of transportation and its furtherance of the alien's presence in the United States. In other words, the act of transportation must be more than merely incidental to a furtherance of the alien's violation of the law.

"Transportation," as used in these instructions means, not only the physical conveying of an alien, but also includes leading or guiding an alien, in furtherance of the alien's illegal entry.

COUNT FOUR:

ILLEGAL REENTRY

8 U.S.C. § 1326

Title 8, United States Code, Section 1326, makes it a crime for an alien to enter, attempt to enter, or be found in the United States without consent of the Secretary of the Department of Homeland Security or the

Attorney General of the United States to apply for re-admission after being deported, removed, excluded or denied admission.

For you to find the defendant guilty of Count Four, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was an alien at the time alleged in the indictment;

Second: That the defendant had previously been deported, denied admission, excluded, or removed from the United States;

Third: That thereafter the defendant knowingly entered, attempted to enter, or was found in the United States; and

Fourth: That the defendant had not received the consent of the Secretary of the Department of Homeland Security or the Attorney General of the United States to apply for readmission to the United States since the time of the defendant's previous deportation.

As noted previously, an "alien" is any person who is not a natural-born or naturalized citizen of the United States.

AIDING AND ABETTING (AGENCY)

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through the · direction of another person as his or her

agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

For you to find the defendant guilty of Count One, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the offense of transportation of an illegal alien, Juan Juan-Sebastian, was committed by some person;

Second: That the defendant associated with the criminal venture;

Third: That the defendant purposefully participated in the criminal venture; and

Fourth: That the defendant sought by action to make that venture successful.

For you to find the defendant guilty of Count Two, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the offense of transportation of an illegal alien, Miguel Cobo-Lainez, was committed by some person;

Second: That the defendant associated with the criminal venture;

Third: That the defendant purposefully participated in the criminal venture; and

Fourth: That the defendant sought by action to make that venture successful.

For you to find the defendant guilty of Count Three, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the offense of transportation of an illegal alien, Tomas Juan-Tomas, was committed by some person;

Second: That the defendant associated with the criminal venture;

Third: That the defendant purposefully participated in the criminal venture; and

Fourth: That the defendant sought by action to make that venture successful.

"To associate with the criminal venture" means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal's criminal venture.

"To participate in the criminal venture" means that the defendant engaged in some affirmative conduct designed to aid the venture or assist the principal of the crime.

"KNOWINGLY"–TO ACT

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

PROOF OF INTENT

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.

DUTY TO DELIBERATE

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are the judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A verdict form has been prepared for your convenience. The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security officer. I will either reply in writing or bring you back into court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.