

**Congress of the United States**  
**Washington, DC 20515**

June 18, 2008

H. Marshall Jarrett, Counsel  
Office of Professional Responsibility  
United States Department of Justice  
950 Pennsylvania Avenue, N.W., Suite 3266  
Washington, DC 20530

Re: Complaint for Prosecutorial Misconduct Against  
Johnny Sutton, United States Attorney, Western District of Texas

Dear Counsel Jarrett:

As Members of Congress, we write this letter to bring to your attention for investigation what we have concluded to be a serious miscarriage of justice by United States Attorney Johnny Sutton. Mr. Sutton supervised, and has vigorously defended, his office's actions in a case wherein two United States Border Patrol agents — Ignacio Ramos and Jose Alonso Compean — have been convicted, and each are now being punished by imprisonment of 10 years, for **a crime that does not exist**, and therefore, for a crime that could not have been committed.

Specifically, Mr. Ramos and Mr. Compean were charged with violating 18 United States Code Section 924(c)(1)(A) by the “knowing[] **discharge**[] [of] a firearm ... during and in relation to a crime of violence.” (Emphasis added). There is, however, no such crime. Rather, Section 924(c)(1)(A) makes it a crime to “**use or carry** ... during and in relation to any crime of violence” or to “**possess** a firearm” “in furtherance of” any such crime. And, as the United States Supreme Court recently pointed out, “discharge” is only a sentencing factor to be considered by the judge after conviction, not by the jury in the effort to determine whether the law has been violated. United States v. Watson, 169 L.Ed.2d 472 (2007).

While this distinction might, at first glance, be merely technical, the United States Court of Appeals for the Fifth Circuit, the circuit in which Mr. Ramos and Mr. Compean were convicted, ruled that an indictment that did not allege that a defendant had so used or carried, or so possessed, a firearm was insufficient to charge an offense under Section 924(c)(1)(A). *See United States v. McGilberry*, 480 F.3d 326, 329 (5th Cir. 2007). Indeed, six years before McGilberry, the Fifth Circuit ruled that “discharging a firearm during and in relation to a crime of violence” was **not an “actus reus” element of the offense** defined by 18 U.S.C. Section 924(c)(1)(A), but only a **factor to be considered at “sentencing”** after conviction. *See United States v. Barton*, 257 F.3d 433, 441-43 (5th Cir. 2001). And one year after Barton (and five years before Watson), the United States Supreme Court agreed, ruling that Section 924(c)(1)(A) did not define “discharge” of a firearm as a separate offense, but only as a “sentencing factor[]” to be considered by the trial judge **after** conviction. *See Harris v. United States*, 536 U.S. 545, 550-53 (2002).

Notwithstanding these binding precedents in the Western District of Texas, United States Attorney Sutton **secured an indictment charging Mr. Ramos and Mr. Compean with the non-existent crime of “discharging” a firearm “in relation to a crime of violence.”** By this charge Mr. Sutton facilitated the conviction of the two border control agents by means of **jury**

instructions that focused the jury's attention upon the "discharge" of the agents' firearms, rather than upon the lawfulness of the possession, carrying, and use of such firearms in the ordinary course of their employment. Moreover, by this indictment and these instructions, Mr. Sutton obtained a conviction of an offense that carried a **minimum 10-year sentence**, as provided by the statute, rather than the lesser-sentence for violation of Border Patrol rules and regulations. *See also*, Brief Amici Curiae of Congressman Walter B. Jones, Gun Owners Foundation, United States Border Control Foundation, United States Border Control, and Conservative Legal Defense and Education Fund, Inc. In Support of Appellants, United States of America v. Jose Alonso Compean and Ignacio Ramos, No. 06-51489, U.S. Court of Appeals, Fifth Circuit (May 27, 2007).

It is our firm conviction that, by these actions, Mr. Sutton is guilty of prosecutorial misconduct, the effect of which has imposed an irreversible and substantial effect upon Mr. Ramos and Mr. Compean and their families. Prior to the return of the indictment against Mr. Ramos and Mr. Compean, Mr. Sutton must have known that it was impossible for there to be probable cause for a "crime" never enacted by Congress, as authoritatively and previously decided by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. According to Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct, a prosecuting attorney is to "refrain from prosecuting ... a charge that the prosecutor knows is not supported by probable cause."

Indeed, the Comments to Rule 3.09 of the Texas Rules of Professional Conduct admonish prosecutors to remember their "responsibility to see that justice is done, and not simply be an advocate."

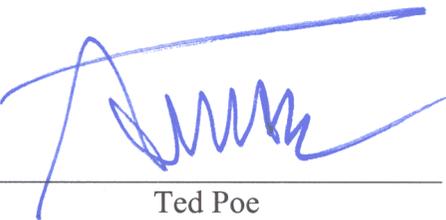
On April 1, 1940, then Attorney General Robert Jackson, speaking to United States Attorneys serving in each federal judicial district across the country, reminded them why justice should be their goal, not winning their cases. "The prosecutor," he said, "has more control over the life, liberty, and reputation than any other person in America. His discretion is tremendous ... We must bear in mind that we are concerned solely with the prosecution of acts which the Congress has made federal offenses."

Mr. Sutton has manipulated the federal criminal code to obtain a conviction against two U.S. Border Patrol agents, preferring to win at all costs over his duty as a United States Attorney, and his duty under the Texas Rules of Professional Conduct. This is a matter which your office has a duty to investigate and, on the basis of what we now know, to remedy.

Sincerely yours,



Walter Jones  
Member of Congress



Ted Poe  
Member of Congress



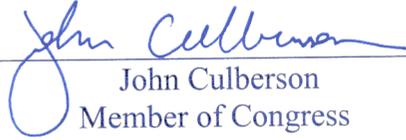
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