

THE HONORABLE JAMAL N. WHITEHEAD

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	No. CR25-131-JNW
Plaintiff,	)	
v.	)	DEFENSE TRIAL BRIEF
VICTOR VIVANCO-REYES,	)	
Defendant.	)	

Victor Vivanco-Reyes, through counsel, respectfully submits the following trial brief to address issues that may arise throughout trial. Motions in limine have been filed and fully briefed.

**I. FACTUAL BACKGROUND**

In May 2025, agents from Homeland Security Investigations began preparing to serve Victor Vivanco-Reyes with an administrative immigration warrant. On June 6, 2025, agents learned that Mr. Vivanco-Reyes’s employer, Primescapes, LLC, was performing a job on Camano Island and that he would likely be working there.

Agents used helicopter surveillance of the property and established that two people got into a small work truck with a trailer and pulled out of the driveway on the property. The truck drove southbound on Cascade View Drive at a normal speed. A black Jeep Cherokee with tinted windows pulled into the southbound lane and drove at the Primescapes truck. The truck swerved into the northbound lane to avoid a collision. The Jeep turned towards the truck before stopping. As the truck drove around the Jeep,

1 the front-seat passenger of the Jeep opened and then closed the front door. The side of  
2 the truck then made contact with the Jeep.

3 A second car, a gray Dodge Charger with tinted windows, drove behind the Jeep  
4 and stopped in the northbound lane. The truck drove around the gray Charger and did  
5 not hit it. When passing the Jeep and avoiding the Charger, the side of the truck and  
6 trailer scraped the side of the Jeep. The contact with the Jeep occurred after the driver  
7 and passenger had passed the front of the car, and the trailer lifted off the ground and  
8 tipped to the left.

9 A third car, a black Nissan Murano SUV with tinted windows, followed behind  
10 the Charger and drove into the southbound lane. The front-seat passenger exited  
11 Murano as the truck turned into the southbound lane. The truck avoided the front-seat  
12 passenger but made contact with the front-right corner of the Murano. As the truck  
13 drove around the Murano, the trailer hit the front of the Murano. The truck drove a  
14 short distance before stalling, hitting a pole, and coming to a stop.

15 The driver, later identified as Mr. Vivanco-Reyes, jumped out of the front seat  
16 and ran. The officers, clad in balaclavas, face masks, and hats, pursued him until he  
17 tried to jump a fence and failed. When apprehended, Mr. Vivanco-Reyes did not punch,  
18 kick, or harm the officers. The masked men handcuffed Mr. Vivanco-Reyes and posed  
19 with him for a photo.

20 The government charged Mr. Vivanco-Reyes with four counts of assault of a  
21 federal officer—one count for each officer in the vehicles that made contact with the  
22 truck—in violation of 18 U.S.C. § 111(b). Dkt. 12. In each count, the government  
23 alleges Mr. Vivanco-Reyes made physical contact with each victim and used a  
24 dangerous weapon during the commission of the assault. *Id.* Counts 2 and 4 allege that  
25 he inflicted bodily injury on Victims 2 and 4 respectively. *Id.*

1 **II. BOND STATUS**

2 Mr. Vivanco-Reyes stipulated to detention and is in custody at the Federal  
3 Detention Center at SeaTac.

4 **III. ELEMENTS OF THE OFFENSES**

5 Mr. Vivanco-Reyes is charged with four counts of Assaulting a Federal Officer  
6 with a dangerous or deadly weapon in violation of 18 U.S.C. §§ 111(a) and (b). In each  
7 count, he is charged with making physical contact with each officer and using a deadly  
8 weapon, to wit: a truck and trailer. Counts 2 and 4 allege that he inflicted bodily injury.  
9 Physical contact with the alleged victims, the use of a deadly weapon, and whether the  
10 assault involved bodily injury are all elements that must be found by the jury beyond a  
11 reasonable doubt because they increase the maximum statutory penalty.

12 **IV. ANTICIPATED LEGAL AND EVIDENTIARY ISSUES**

13 **A. Mens Rea**

14 The mens rea is the core of this case. And the government’s claim that  
15 Mr. Vivanco-Reyes’s “state of mind is irrelevant” is inconsistent with black-letter law.  
16 Dkt. 35 at 6. A forcible assault occurs “when one person *intentionally* strikes  
17 another...” *Id.* (emphasis added). The government must therefore prove that  
18 Mr. Vivanco-Reyes intentionally assaulted the officers. *United States v. Acosta-Sierra*,  
19 690 F.3d 1111, 1123 (9th Cir. 2012). Recklessness is insufficient. This issue has been  
20 fully briefed in motions in limine, and this brief summarizes previous filings.

21 The Supreme Court has illustrated where that distinction between recklessness  
22 and intentionality lies when the alleged assault involves driving a car. In *Borden v.*  
23 *United States*, 593 U.S. 420, 425–27 (2021), the Court addressed whether reckless  
24 crimes are “violent felonies” under the Armed Career Criminal Act, 18 U.S.C.  
25 § 924(e)(2)(B)(i). As the Court explained, a person “acts knowingly when he is aware  
26 that a result is practically certain to follow from his conduct, whatever his affirmative

1 desire.” *Id.* at 426 (cleaned up). In contrast, “[a] person acts recklessly . . . when he  
2 consciously disregards a substantial and unjustifiable risk attached to his conduct, in  
3 gross deviation from accepted standards.” *Id.* at 427 (cleaned up, citing, *inter alia*,  
4 Model Penal Code § 2.02(2)(c)). To illustrate the point, the Court explained,  
5 “[s]peeding through a crowded area may count as reckless even though the motorist’s  
6 ‘chances of hitting anyone are far less [than] 50%.’” *Id.* (quoting 1 W. LaFave,  
7 Substantive Criminal Law § 5.4(f) (2018) (citing cases involving low-probability  
8 events)).

9         When the Court turned to address whether the force clause excludes reckless  
10 conduct, it explained that “purposeful conduct” would include “a person [who] drives  
11 his car straight at a reviled neighbor, desiring to hit him.” *Id.* at 431. In addition, “a  
12 getaway driver [who] sees a pedestrian in his path but plows ahead anyway, knowing  
13 the car will run him over” has acted purposefully because “[a]lthough he would prefer a  
14 clear road, he too drives his car straight at a known victim.” *Id.* In contrast, a “reckless  
15 driver has not directed force at another: He has not trained his car at the pedestrian  
16 understanding he will run him over.” *Id.* Thus, to convict Mr. Vivanco-Reyes, the jury  
17 must be convinced beyond a reasonable doubt either that Mr. Vivanco-Reyes drove  
18 forward intending to hit the officers’ cars or that he drove forward in an attempt to flee,  
19 knowing he would hit the officers’ cars.

20         The government has claimed they need prove only that Mr. Vivanco-Reyes  
21 intended to drive. Dkt. 35 at 6 (“[T]he Government need only prove that Vivanco-  
22 Reyes acted volitionally on June 6, 2025: that he meant to drive as he did and in a  
23 manner that meets at least one of the three options for ‘forcible assault.’ His state of  
24 mind is irrelevant.”). The government’s reading renders the term “forcible”  
25 meaningless. After all, in *Borden*, the Supreme Court interpreted the meaning of  
26 “physical force against the person of another” and concluded that “[t]he phrase ‘against

1 another,' when modifying the 'use of force,' demands that the perpetrator direct his  
2 action at, or target, another individual." 593 U.S. at 429.

3 The Court has excluded Mr. Vivanco-Reyes's proposed expert who would testify  
4 about the effects of post-traumatic stress disorder. Dkt. 69. The defense maintains that  
5 this testimony is permissible and relevant for the jury to understand why Mr. Vivanco-  
6 Reyes did not intentionally strike the agents and his potential claim of self-defense.  
7 Because of the Court's ruling, this trial brief does not address any issues related to the  
8 proposed expert testimony. Mr. Vivanco-Reyes is not, however, waiving or forfeiting  
9 any arguments about the propriety, admissibility, and relevance of such testimony.

10 As an alternative to full-blown expert testimony—which he still maintains is  
11 necessary—Mr. Vivanco-Reyes proposes admitting his PTSD diagnosis contained in  
12 his medical records, defense exhibit A-2, under Federal Rule of Evidence 803(4) and  
13 (6).

#### 14 **B. "Dangerous or Deadly Weapon"**

15 Whether the government can prove Mr. Vivanco-Reyes used a "dangerous  
16 weapon" also turns on his state of mind. A truck and trailer may be a "dangerous  
17 weapon" if "used in a way that is capable of causing death or serious bodily injury." 9th  
18 Cir. Pattern Instr. 8.2. However, "for a car to qualify as a deadly weapon, the defendant  
19 must use it as a deadly weapon and not simply as a mode of transportation." *United*  
20 *States v. Arrington*, 309 F.3d 40, 45 (D.C. Cir. 2002). "The use of a car purely for flight  
21 would not satisfy the fourth element of § 111(b): that the object be used in a deadly or  
22 dangerous manner." *Id.*; *see also United States v. Easterday*, 729 F. Supp. 3d 17, 23  
23 (D.D.C. 2024) (citing this as *Arrington*'s holding).

#### 24 **C. Bodily Injury**

25 The government has acknowledged courts have used slightly different  
26 definitions of "bodily injury." Dkt. 35 at 7 & n.4. This Court should use the definition

1 provided by the U.S. Sentencing Guidelines: “any significant injury; *e.g.*, an injury that  
2 is painful and obvious, or is a type for which medical attention ordinarily would be  
3 sought.” USSG § 1B1.1, cmt. n.1(B); 5th Cir. Pattern Crim. Jury Instr. 2.07 (2024);  
4 10th Cir. Pattern Crim. Jury Instr. 2.09 (2025).

#### 5 **D. Defining Reasonable Doubt**

6 Ninth Circuit Model Jury Instruction 6.5 (2022) defines reasonable doubt in  
7 terms of being “firmly convinced.” Mr. Vivanco-Reyes has submitted an instruction  
8 that instead uses “hesitate to act” language.

9 The Supreme Court has described the reasonable doubt standard as “impressing  
10 upon the factfinder the need to reach a subjective state of *near certitude* of the guilt of  
11 the accused[.]” *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (emphasis added). The  
12 “firmly convinced” language of the Model Instruction does not convey as demanding a  
13 standard as “near certitude.”

14 On the other hand, in *Victor v. Nebraska*, 511 U.S. 1 (1994), the Court described  
15 “hesitate to act” language as “a formulation we have repeatedly approved[.]” *Id.* at 20.  
16 In conjunction with an instruction’s reference to “substantial doubt” (which the Court  
17 had found “problematic”), the “hesitate to act” language “gives a common-sense  
18 benchmark for just how substantial such a doubt must be.” *Id.* at 20–21.

19 The Ninth Circuit has frequently expressed the same approval of “hesitate to act”  
20 language. In *United States v. Nolasco*, 926 F.2d 869 (9th Cir. 1991) (en banc), the court  
21 remarked, “We have generally warned against significant departure from the ‘hesitate  
22 to act’ language.” *Id.* This latter warning was reiterated in *United States v. Jaramillo-*  
23 *Suarez*, 950 F.2d 1378, 1385 (9th Cir. 1991): “We have said, however, that once the  
24 district court chooses to define reasonable doubt, it should not depart significantly from  
25 the ‘hesitate to act’ language.”  
26

1           These comments followed a long history of preference for this language. *See*,  
 2 *e.g.*, *United States v. Clabaugh*, 589 F.2d 1019, 1022 (9th Cir. 1979) (describing it as  
 3 the Ninth Circuit’s “preferred . . . formulation”); *United States v. Robinson*, 546 F.2d  
 4 309, 313–14 (9th Cir. 1976) (“[The courts of appeals] have also exhorted their district  
 5 judges to follow *Holland* and use the preferred “hesitate to act” language. We do the  
 6 same.”). Counsel is not aware of any Ninth Circuit case describing the “firmly  
 7 convinced” language as preferable to the “hesitation to act” wording.

8           Of the eight Circuits (besides the Ninth) that recommend definitions of  
 9 reasonable doubt, only one recommends a definition that does not include “hesitate to  
 10 act” language.<sup>1</sup> If this Court is hesitant to reject the Model Instruction completely,  
 11 Mr. Vivanco-Reyes does not object to following the recommendations of the District of  
 12 Columbia and Eighth Circuit, using both the “firmly convinced” and “hesitate to act”  
 13 language. Judge Friendly stated of the “hesitation to act” language, “it is fair to both  
 14 sides, touches all the bases and, being largely founded on decisions of the Supreme  
 15 Court and courts of appeals, is seemingly immune from challenge having any  
 16 possibility of success and therefore is not likely to become the basis of one.” *United*

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17 <sup>1</sup> The Fourth Circuit does not have model instructions; the First and Seventh Circuits do  
 18 not define reasonable doubt.

19 For Circuits recommending “hesitate to act” language, see Third Circuit Model  
 20 Criminal Jury Instructions 3.06 (2018); Fifth Circuit Pattern Jury Instructions (Criminal  
 21 Case) 1.05 (2019); Sixth Circuit Pattern Criminal Jury Instructions 1.03 (2023);  
 22 Eleventh Circuit Pattern Jury Instructions, Criminal Cases B3 (2022). The Second  
 23 Circuit does not have model instructions but has recommended on multiple occasions  
 non-Circuit pattern instructions that include “hesitate to act” language. *United States v.*  
*Rowe*, No. CR02-756(LMM), 2006 WL 1993252, at \*1 (S.D.N.Y. July 14, 2006).

24 The Tenth Circuit recommends “firmly convinced” but not “hesitate to act” language.  
 25 Tenth Circuit Criminal Pattern Jury Instructions (2021) 1.05. The District of Columbia  
 26 Circuit and the Eighth Circuit recommend using both terms. 1 Criminal Jury  
 Instructions for District of Columbia Instruction 2.108 (2023); Manual of Model  
 Criminal Jury Instructions for the District Courts of the Eighth Circuit 3.11 (2023).

1 *States v. Ivic*, 700 F.2d 51, 69 (2d Cir. 1983), *overruled on other grounds by National*  
2 *Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

3 **E. Photographs, Videos, Diagrams, Maps, and Demonstratives**

4 The government intends to offer photographs, including still frames of aerial  
5 surveillance video, images taken from Google Maps, and slow-motion versions of the  
6 video. Illustrative aides are permitted “if the aid’s utility in assisting comprehension is  
7 not substantially outweighed by the danger of unfair prejudice, confusing the issues,  
8 misleading the jury, undue delay, or wasting time.” Fed. R. Evid. 107(a). Mr. Vivanco-  
9 Reyes cannot say at this time whether the government will lay the appropriate  
10 foundation. However, he may object if the presentation of the video or photos is  
11 misleading. The entire incident at issue lasted less than ten seconds. If the government’s  
12 presentation misleadingly suggests more time elapsed, he will object to the use of the  
13 photographs and still images or slow-motion versions of the video.

14 The government indicated that it has significant concerns about the use of  
15 undisclosed demonstratives during opening and closing statements. To avoid any  
16 misleading presentation to the jury, the Court should order disclosure of any  
17 demonstrative exhibits before they are shown to the jury.

18 **F. Officers’ Arrest Conduct**

19 To convict Mr. Vivanco-Reyes, the government must prove that the officers  
20 were engaged in official duties and not a personal frolic of their own. And if  
21 Mr. Vivanco-Reyes argues self-defense, the government must prove that they did not  
22 use unlawful force, or that he knew they were federal officers and they did not use  
23 excessive force. For these reasons, the officers’ conduct and appearance immediately  
24 after the alleged assault and during the arrest are relevant to several elements of the  
25 case. This issue has been fully briefed in motions in limine.

1           **G. Rule of Completeness**

2           The government plans to admit, through Gov't Ex. 19A, an excerpt from one of  
3 Mr. Vivanco-Reyes's jail calls. Mr. Vivanco-Reyes may move under Rule 106 to  
4 introduce another part of the call that in fairness ought to be considered as necessary  
5 context to clarify what he said in the government's cherry-picked excerpt. Federal Rule  
6 of Evidence 106 "provides that if the existing fairness standard requires completion,  
7 then that completing statement is admissible over a hearsay objection." Fed. R. Evid.  
8 106, cmt. to 2023 amends. "A party that presents a distortion can fairly be said to have  
9 forfeited its right to object on hearsay grounds to a statement that would be necessary to  
10 correct the misimpression." *Id.*

11           **V. JURY INSTRUCTIONS**

12           Mr. Vivanco-Reyes has proposed modified and additional jury instructions.  
13 Dkt. 53.

14           First, a modified preliminary instruction summarizes the charged counts. Dkt. 53  
15 at 2–3. This is modified to: call Mr. Vivanco-Reyes by name instead of defendant;  
16 define forcible assault as an intentional strike and remove other methods that the  
17 government has forfeited; state that a vehicle is not used as a deadly or dangerous  
18 weapon if used only for flight; and summarize self-defense if Mr. Vivanco-Reyes has  
19 elected to argue that.

20           Second, a proposed preliminary instruction defines reasonable doubt. Dkt. 53  
21 at 4–5. This is discussed above.

22           Third, a proposed in-trial instruction directs the jury to treat officers like any  
23 other witness. Dkt. 53 at 6. This is necessary because all of the government's witnesses  
24 are officers. If Mr. Vivanco-Reyes chooses to testify, the jury will be told they should  
25 treat his testimony as they would the testimony of any other witness. 9th Cir. Model  
26 Crim. Instr. 6.4. The jury should be similarly instructed that the testimony of officers

1 who may also be alleged victims should be treated no differently than any other  
2 witness's testimony.

3 Fourth, a modified final instruction defines the charged counts. Dkt. 53 at 7–8.  
4 This is modified to: call Mr. Vivanco-Reyes by name instead of defendant; define  
5 forcible assault as an intentional strike, remove other methods that the government has  
6 forfeited, exclude a reckless strike, and define intentional and reckless; state that a  
7 vehicle is not used as a deadly or dangerous weapon if used only for flight; and define  
8 bodily injury.

9 Fifth, a modified final instruction provides theories of the defense. Dkt. 53 at 9–  
10 10. This explains that if the jury finds it reasonable to believe that Mr. Vivanco-Reyes  
11 recklessly struck the officers, used his vehicle for flight, or acted in self-defense (if  
12 elected), he is not guilty.

13 Sixth, a modified final instruction defines self-defense, if Mr. Vivanco-Reyes  
14 elects to argue that. Dkt. 53 at 11. This defines two different paths to self-defense: one  
15 if the government does not prove Mr. Vivanco-Reyes knew the four men were federal  
16 officers, and another if the government does prove that. “If the defense theory has a  
17 basis in fact and law, the failure to give a proffered jury instruction on that theory is per  
18 se reversible error” unless other instructions adequately cover the defense theory.

19 *United States v. Romm*, 455 F.3d 990, 1002 (9th Cir. 2006). The proposed instruction  
20 must be included because the description of the substantive charge does not adequately  
21 distinguish between reckless and intentional conduct or explain self-defense.

22 Seventh, a proposed final instruction advises the jury on penalties if convicted.  
23 Dkt. 53 at 12. Mr. Vivanco-Reyes recognizes the Court's motion in limine prohibiting  
24 argument about potential penalties, but he has submitted the proposed instruction to  
25 preserve the issue for appeal.

1 **VI. DEFENSE DISCOVERY**

2 Mr. Vivanco-Reyes has produced discovery in accordance with Federal Rule of  
3 Criminal Procedure 16(b). He will continue to produce discovery, as necessary,  
4 consistent with his obligations under Rule 16(c).

5  
6 DATED this 23rd day of December 2025.

7 Respectfully submitted,

8 *s/ Colleen P. Fitzharris*

9 *s/ Mukund Rathi*

10 Assistant Federal Public Defenders

11 Attorneys for Victor Vivanco-Reyes