

1 GERALD SINGLETON, State Bar No. 208783
2 BRODY McBRIDE State Bar No. 270852
3 SINGLETON LAW FIRM, APC
4 115 West Plaza Street
5 Solana Beach, CA 92075
6 Tel: (760) 697-1330
7 Fax: (760) 697-1329
8 Emails: gerald@geraldsingleton.com
9 brody@geraldsingleton.com

10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 MARIA DEL SOCORRO QUINTERO
15 PEREZ, BRIANDA ARACELY
16 YANEZ QUINTERO, CAMELIA
17 ITZAYANA YANEZ
18 QUINTERO, and J.Y., a minor,

19 Plaintiffs,

20 vs.

21 UNITED STATES OF AMERICA,
22 UNITED STATES DEPARTMENT OF
23 HOMELAND SECURITY, UNITED
24 STATES CUSTOMS AND BORDER
25 PROTECTION OFFICE OF BORDER
26 PATROL, JANET NAPOLITANO,
27 THOMAS S. WINKOWSKI, DAVID
28 AGUILAR, ALAN BERSIN, KEVIN K.
McALLEENAN, MICHAEL J. FISHER,
PAUL A. BEESON, RICHARD
BARLOW, RODNEY S. SCOTT, CHAD
MICHAEL NELSON, and DORIAN
DIAZ, and DOES 1 – 50

Defendants.

Case No. 3:13-cv-01417 -WQH
(BGS)

**REPORT OF THOMAS
FRAZIER**

1 **I. Qualifications and Experience**

2 1. My name is Thomas Frazier and I was retained by the Law Offices of
3 Hilliard & Shadowen LLP to provide a report and testimony in this matter.

4 2. I have more than more than forty-seven years of combined active law
5 enforcement service and consulting experience in the policing field.

6 3. From 1967 to 1994, I served as a Police Officer with the San Jose
7 Police Department, including serving in positions ranging from Police Officer up
8 through the ranks to Deputy Chief of Police. My assignments included Patrol
9 Officer, Tactical Unit, Criminal Intelligence (Undercover operator in an FBI Title
10 3 investigation). Patrol Sergeant, Field Training Sergeant, Vice Supervisor,
11 Internal Affairs Investigator, Planning and Research Commander, Captain-Watch
12 Commander, Chief of Field Operations (Patrol, Traffic, Special Operations), Chief
13 of Detectives (Homicide, Narcotics etc.), Chief of Technical Services (Records,
14 Communications, Information Technology) and Chief of Administration
15 (Personnel, Training, Budget, Property and Evidence).

16 4. From 1994 to 1999 I served as Police Commissioner of the Baltimore
17 Police Department, with responsibility for all departmental operations to include
18 ensuring the goals established by city leadership were achieved, developing a
19 strategic vision for the Department, reorganizing the Department, creating and
20 updating policies and directives, and building and maintaining positive
21 relationships with the community and other criminal justice system partners. The
22 Department employed approximately thirty-one hundred sworn police officers and
23 seven hundred non-sworn members.

24 5. From 1999 to 2001 I was the Director of the United States Department
25 of Justice's Office of Community Oriented Policing Services ("COPS Office")
26 which had responsibility for implementing key provisions of the 1994 Crime Act.
27 The budget for this program at that time was slightly over \$10 billion. My role
28

1 was to institutionalize Community Oriented Policing as a national strategy. This
2 effort included involving local agencies in reducing crime and disorder, and
3 developing partnerships with public entities such as community organizations and
4 the faith and business communities. During this time I travelled frequently to meet
5 with federal, state, and local leaders to develop practical and effective strategies to
6 achieve the federal objectives. The direct federal goal was to provide support for
7 the hiring of 100,000 police officers on local and tribal lands, supporting
8 technology and training programs for sworn and community members alike, and
9 developing evaluation and research programs to measure the effectiveness of the
10 funded programs.

11 6. Since 2001 I have been a private consultant and President of my
12 company, Frazier Group LLC. Simultaneously I served for ten years as Executive
13 Director of the Major Cities Police Chief's Association ("MCCA"), one of the
14 nation's most influential law enforcement organizations. This Association
15 represents the chief executives of the seventy largest law enforcement agencies in
16 the United States and Canada. There I supported the Board of Directors of MCCA
17 in responding to current critical issues, coordinated MCCA activities among
18 member agencies, the National Sheriffs Association, the International Association
19 of Chiefs of Police ("IACP"), the Major County Sheriffs Association, the
20 International Association of Fire Chiefs, the Department of Homeland Security
21 ("DHS") Grants Administration Division, the DHS Intelligence and Analysis
22 Division, all components of the Department of Justice, as well as representing
23 MCCA in matters before Congress and the White House.

24 7. I served as a Deputy Monitor for eight years on the Consent Decree
25 Monitor Team of the Los Angeles Police Department, and for three years on the
26 Monitor Team of the Detroit Police Department. My areas of expertise in
27 reforming those departments focused on their policies and practices in Use of
28

1 Force and Training. As a primary or sub-contractor I have performed
2 organizational assessments of many law enforcement agencies ranging from larger
3 agencies such as the Tennessee Highway Patrol, King's County Sheriff's
4 Department, Louisville Police Department (Consolidation with the County Police
5 Department), Boston Police Department, and the Philadelphia Police Department.
6 In addition I have provided consulting services to many mid-sized and smaller
7 police departments, the most recent being Beverly Hills, California and
8 Spartanburg, South Carolina. Frazier Group LLC investigated and reported on
9 Oakland Police Department's response to the Occupy Oakland demonstrations. I
10 was subsequently appointed Compliance Director for the City of Oakland and the
11 Oakland Police Department. There I had ultimate authority to lead the Department
12 into compliance with their fourteen-year-old Negotiated Settlement Agreement.
13 My efforts led to a complete change in top level command, reforming departmental
14 policies and procedures, implementation of new hiring practices, revised in-service
15 and specialized training of personnel, selection process and promotional upgrades,
16 effective investigation of community and internally generated misconduct
17 complaints, and implementation of an early warning system to identify officers or
18 work units that may be involved in discriminatory practices. In my consulting
19 practice, I have researched and evaluated the organizational structure and
20 operational effectiveness of dozens of police and sheriff's agencies. This include
21 review of policies and procedures, strategic planning, performance auditing,
22 recruiting and hiring practices, executive recruitment, and supervisory and
23 management accountability.

24 8. In the past four years, I provided expert testimony at a deposition in
25 one case, Allen v. City of Oakland, 00-cv-4599 (N.D. Cal.).
26
27
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1 9. My fees for professional services are at a rate of \$250 per hour for
2 report review, research, writing; my rates for testimony at deposition and at trial
3 are \$2,500 for the first four hours and \$250 per hour thereafter.

4 **II. Assignment**

5 10. I have been asked to offer opinions, from the perspective of an expert
6 in police practices, polices, and procedures, on (i) the propriety of a law
7 enforcement officer justifying his or her use of a firearm by claiming a suspect
8 threw or was about to throw a projectile, such as a rock, (ii) whether Border Patrol
9 use of force practices or training before Agent Dorian Diaz’s shooting of Yañez
10 would have been a cause for concern for a person in Michael J. Fisher’s position as
11 Chief of Border Patrol, (iii) the propriety of Chief Fisher’s actions or inactions, and
12 (iv) the effect of Chief Fisher’s actions or inactions, if any, on Agent Diaz’s
13 application of use of force.

14 11. This report is based on materials reviewed to date. I am aware that
15 discovery is ongoing in this matter and should any subsequent information cause
16 me to expand, add or revise any of my opinions, I will supplement this report.

17 12. At this point, I do not know whether I will be using any demonstrative
18 aids during my testimony. Should I decide to use any such tool, I will assure that
19 they are made available for review, if requested, prior to their use.

20 **III. Summary of Opinions**

21 13. Based on my review of the materials listed herein, and set forth in
22 Exhibit B, as well as my knowledge and experience, as described in the
23 Curriculum Vitae attached as Exhibit A, I offer the following opinions with a
24 reasonable degree of professional certainty:

- 25 a. It would be highly suspect for a law enforcement officer to justify use
26 of deadly force based on the threat of a hurled rock. Virtually all
27 thrown objects fail to meet the “Imminent Peril” standard to justify
28

1 use of deadly force, and in such circumstances, officers are trained to
2 take evasive or defensive action, not escalate the encounter with
3 gunfire.

4 b. Before June 21, 2011, there was a particular need to train Border
5 Patrol agents on how to respond to rock throwing and an astonishing
6 pattern of Border Patrol agents using deadly force in response to rock
7 throwing, to which a reasonable supervisor would not have been
8 indifferent.

9 c. A reasonable supervisor in Fisher’s position would have clarified the
10 use of force policy, promoted proper safe tactics and techniques,
11 provided scenario based training, and corrected the culture of , all of
12 which Fisher failed to do.

13 d. The use of deadly force against Yañez was a highly predictable
14 consequence of Fisher’s failures.

15 **IV. Background**

16 **A. Relevant Organizational Structure**

17 14. The United States Customs & Border Protection (“CBP”) is a law
18 enforcement agency and a component of the Department of Homeland Security
19 (“DHS”), with a law enforcement mission to enforce the laws at and near the
20 borders of the United States.¹ CBP is headed by a Commissioner and employs
21 over 44,000 law enforcement officers.²

22 15. The Office of Border Patrol (“OBP”) is one of three operational
23 components of CBP.³ The other two operational components of CBP are the
24 Office of Field Operations (“OFO”) and the Office of Air and Marine (“OAM”).⁴

26 ¹ CBP Integrity Report at 13.

27 ² *Id.*

28 ³ Fisher Dep. Tr. 14.

⁴ CBP Integrity Report at 13.

1 OBP is headed by the Chief of Border Patrol, while each of OFO and OAM is
2 headed by an Assistant Commissioner. OBP contains approximately 21,000
3 Border Patrol Agents (“Agents”), while OFO contains approximately 22,000
4 officers (“Officers”).⁵

5 16. CBP contains other offices that support the functions of the three
6 operational components.⁶ The Office of Internal Affairs (“IA”) is one such office.
7 Another office is the Office of Training and Development (“OTD”). Within OTD
8 is the Use of Force Policy Division (“UFPD”).⁷

9 **B. Organization of the Office of Border Patrol**

10 17. The primary mission of Border Patrol is to detect and prevent the
11 illegal entry of aliens into the United States.⁸ In contrast with Officers in OFO,
12 who operate at land, air, and sea ports of entry, Agents in OBP operate between
13 ports of entry along the country’s borders.⁹

14 18. OBP is divided into 20 Border Patrol sectors,¹⁰ with each sector
15 headed by a Chief Patrol Agent.¹¹ Border Patrol sectors are further divided into
16 stations, with each station headed by a Patrol Agent in Charge.¹² Supervisory
17 Border Patrol Agents are the immediate supervisors of Agents.¹³

18 19. As noted below, more than 85% of all agents operate in one of the
19 nine sectors among the Southwest border region. The Southwest border region
20 spans from California through Texas along the nearly 2000 miles¹⁴ of shared
21
22

23 ⁵ CBP Integrity Report at 13.

24 ⁶ <http://www.cbp.gov/sites/default/files/documents/U.S.CBP-4.9.15-orgchart.pdf>

25 ⁷ DHS OIG Report at 11.

26 ⁸ <http://www.cbp.gov/border-security/along-us-borders/overview>

27 ⁹ DHS OIG Report at 3.

28 ¹⁰ Border Patrol Staffing Report (02032-Yanez-Reyes) at 2.

¹¹ Fisher Dep. Tr. 41.

¹² Fisher Dep. Tr. 41.

¹³ Fisher Dep. Tr. 41.

¹⁴ https://help.cbp.gov/app/answers/detail/a_id/578/~/_border-in-miles.

1 border between the United States and Mexico. The remaining 11 Border Patrol
2 sectors are located within either the Coastal or Northern border regions.

3 **C. Use of Force Policies and Training**

4 20. In 2004, DHS provided an umbrella use of force policy applicable to
5 all DHS components.¹⁵ The policy sets forth general principles consistent with the
6 overarching United States Constitutional standard on use of force under the Fourth
7 Amendment. The policy states that “[l]aw enforcement officers and agents of the
8 Department of Homeland Security may use deadly force only when necessary, that
9 is, when the officer has a reasonable belief that the subject of such force poses an
10 imminent danger of death or serious physical injury to the officer or to another
11 person.”¹⁶ After providing other broad guidance (such as restricting the use of
12 warning shots, and prohibiting the use of deadly force solely to prevent the escape
13 of a fleeing suspect), DHS Policy states that “Homeland Security Directorates and
14 Agencies shall, to the extent necessary, supplement this policy with policy
15 statements or guidance consistent with this policy.”¹⁷

16 21. The relevant CBP use of force policy was established in October 2010
17 and is entitled U.S. Customs and Border Protection Use of Force Policy Handbook.
18 The 2010 Handbook sets forth a unifying reference for use of force applicable to
19 all CBP components, “while enabling CBP operational component leadership to
20 address use of force related issues unique to their respective workplace
21 environments and adopt more detailed operational guidance.”¹⁸

22 22. In Chapter 3, the 2010 Handbook states that the Chief of Border
23 Patrol, Chief Patrol Agents, and the Assistant Commissioners for OFO, OAM, IA,
24 and OTD, as well as their respective directors, are each defined as a Responsible
25

26 ¹⁵ 2010 Handbook at 65.

27 ¹⁶ 2010 Handbook at 68.

28 ¹⁷ 2010 Handbook at 67.

¹⁸ 2010 Handbook at i.

1 Official (“RO”).¹⁹ The 2010 Handbook states “[a] RO is responsible for all aspects
2 of the CBP use of force program as it relates to the offices and personnel under his
3 or her supervision, and for ensuring compliance with the CBP Use of Force Policy
4 by all officers/agents within his or her area of responsibility.”²⁰ The 2010
5 Handbook also states that “[e]ach RO has primary responsibility for inventory
6 control, maintenance, and security of all CBP use of force equipment within his or
7 her area of responsibility.”²¹ Finally, the Handbook states “[e]ach RO shall
8 designate a Primary Firearms Instructor/Inventory Officer (PFI), a Primary
9 Intermediate Force Instructor (PIFI) and/or Co-Authority (COA) to manage the
10 firearms and ammunition program within his or her area of responsibility. These
11 designees are responsible for overseeing the shipment, receipt, issuance and the
12 periodic inventory of use of force equipment.”²²

13 23. Chapter 4 of the 2010 Handbook provides CBP’s policy on use of
14 force.²³ Subsection A of Chapter 4 provides “general guidelines,” stating “[o]nly
15 that force which is both reasonable and necessary may be used in any given
16 situation. Reasonable means that there are objective reasons that justify the degree
17 of force to be used in the given situation, up to and including deadly force. ...
18 Necessary means that some force is required to carry out one’s duties as a law
19 enforcement officer/agent.”²⁴ Subsection B provides CBP’s “Use of Force
20 Continuum,” which is “used to illustrate the levels of force an Authorized
21 Officer/Agent may need to utilize to gain control over a subject.”²⁵ It further states
22 that “[i]t is not necessary to mechanically apply every step of the continuum. An
23 officer/agent may have to rapidly escalate or de-escalate through the Continuum,

24 ¹⁹ 2010 Handbook at 10.

25 ²⁰ 2010 Handbook at 10.

26 ²¹ 2010 Handbook at 10.

27 ²² 2010 Handbook at 10.

28 ²³ 2010 Handbook at 14.

²⁴ 2010 Handbook at 14.

²⁵ 2010 Handbook at 14.

1 depending on the totality of the circumstances present.”²⁶ Subsection C, entitled
2 “Use of Deadly Force,” states “[a]uthorized Officers/Agents may use deadly force
3 only when necessary, that is, when the officer/agent has a reasonable belief that the
4 subject of such force poses an imminent danger of death or serious physical injury
5 to the officer/agent or to another person” in addition to providing specific
6 guidelines to address certain use of force circumstances.²⁷ Subsection D provides
7 the policy on “Use of Intermediate Force” which states “[a]uthorized
8 Officers/Agents shall be trained in alternative methods and tactics for handling
9 resisting subjects that may be used when the use of deadly force is not
10 appropriate.”²⁸ This includes physical tactics, such as hand-to-hand combat, and
11 use of “intermediate force devices,” *i.e.*, less-lethal weapons, such as Collapsible
12 Straight Batons (CSB), riot batons, Oleoresin Capsicum (OC) sprays, munition
13 launchers, such as a Pepper Ball Launching System, and other intermediate force
14 devices authorized by the leadership of the operational components and the
15 Director of UFPD (and contingent on the Officer or Agent’s certification to use the
16 particular device).²⁹

17 24. CBP agents and officers receive use of force training in basic
18 academies, which “includes instruction in firearms proficiency and judgment
19 shooting, threat assessment and response, the use of force continuum, use of force
20 legal authorities, physical techniques, baton certification, and pepper spray
21 certification.”³⁰ Agents and Officers “are required to qualify quarterly with their
22 firearms and recertify annually with any less-lethal devices they are certified to
23 carry, such as a baton, pepper spray, or taser. To achieve these requirements,
24 agents and officers complete at least 16 hours of firearms training and 16 hours of

25 ²⁶ 2010 Handbook at 14.

26 ²⁷ 2010 Handbook at 15.

27 ²⁸ 2010 Handbook at 17.

28 ²⁹ 2010 Handbook at 17, 36, 39.

³⁰ DHS OIG Report at 9.

1 less-lethal force training yearly, with 4 hours of each quarterly.”³¹ The quarterly
2 training includes classroom instruction and exams, a demonstration of proficiency
3 with the firearm or less lethal device, and a demonstration appropriate judgment in
4 scenario-based training.³²

5 25. The 2010 Handbook does not address rock throwing and does not
6 provide guidance on safe tactics and techniques to be used when a suspect throws
7 rocks or other projectiles. Nor is there any such mention in the use of force training
8 materials I reviewed. And as of June 21, 2011, the date of the incident here,
9 apparently rock throwing was not a part of Agents’ scenario-based training.³³

10 **D. Documenting, Reporting, and Briefing Incidents**

11 26. All incidents involving an assault on an Agent or the use of a firearm
12 or less-lethal weapons must be reported to a supervisor within one hour of the
13 incident.³⁴ According to DHS OIG, information regarding an assault on an agent is
14 inputted into the Assault Module of the CBP e3 system,³⁵ and since 2010,
15 information on the location, type of force used by the agent, and type of weapon
16 used by the suspect, is also inputted into the Use of Force Reporting System
17 (“UFRS”) within 72 hours of the incident occurring.³⁶ There appears to be
18 additional systems or databases where reportable use of force incidents are
19 documented by Agents or their supervisors as well.³⁷

20 27. Next, for at least during the time Fisher was Chief of Border Patrol,
21 every significant incident—which includes all incidents involving the discharge of
22 a firearm, as well as other significant events that might evoke media interest—
23

24 ³¹ DHS OIG Report at 10; 2010 Handbook at 29.

25 ³² DHS OIG Report at 10.

26 ³³ Fisher Dep. Tr. 120-21.

27 ³⁴ DHS OIG Report at 15; Fisher Dep. Tr. at 25.

28 ³⁵ DHS OIG Report at 15.

³⁶ DHS OIG Report at 12.

³⁷ See, e.g., Deft-1035-39 (showing use of force incident data on CBP Form 318-E, and referring to an “Incident Number,” “Orig. SIR No,” and an “Event No” for additional descriptions on the incident).

1 would be reported up the chain of command to the Chief of Border Patrol and other
2 leadership officials through two rounds of what Fisher characterizes as a
3 “Significant Incident Report.”³⁸

4 28. The first round of reporting usually would occur within or around one
5 hour after the incident.³⁹ Either the agent, his or her supervisor, or both, would
6 make a call from the field to the Commissioner’s Situation Room in Washington
7 D.C. The call would then be transcribed by Situation Room staff and emailed to
8 Fisher and others, “basically putting the leadership on notice that an event took
9 place.”⁴⁰

10 29. The second round of reporting would generally occur within the first
11 three or four hours of the incident. This would be a supervisor-written report that
12 explains the “who, what, where, when, and why” relating to the incident.⁴¹ That
13 report would again be sent to the Situation Room and distributed to Fisher and
14 other leadership at headquarters.⁴²

15 30. In addition, before or following the significant incident report
16 emailing to the situation room, Border Patrol agents would, on occasion, collect
17 and send information to Fisher, briefing him on important facts of the incident.⁴³

18 31. Next, Fisher would brief leadership in Washington D.C. about any
19 updates on the incident during the Commissioner’s Morning Brief.⁴⁴ The
20 Commissioner’s Morning Brief would be held every morning at 9:00 AM and
21 normally attended by the Commissioner, his deputy, and the heads of each CBP
22 office. After an incident unfolded, there would be investigative agents on the
23 ground reporting to their local leadership, who then “would prepare for [Fisher]

24 ³⁸ Fisher Dep. Tr. 24-25.

25 ³⁹ Fisher Dep. Tr. 24-25.

26 ⁴⁰ Fisher Dep. Tr. 25.

27 ⁴¹ Fisher Dep. Tr. 25-26.

28 ⁴² Fisher Dep. Tr. 26.

⁴³ Fisher Dep. Tr. 152-153.

⁴⁴ Fisher Dep. Tr. 27-32.

1 any additional information that [he] would require to be able to take to the meeting
2 in the event that there were questions about the incident.”⁴⁵ That information
3 would be put together in what he refers to generally as an Issue Paper.⁴⁶ If the
4 reporting continued, the information would be further collected and compiled into
5 a document generally called an Evolving Situation Report, which also was used
6 during the Commissioner’s Morning Brief.⁴⁷

7 32. In addition, Fisher states that he would receive what he calls “form
8 letters” from the Mexican consul general whenever an agent uses deadly force.⁴⁸

9 **E. Criminal and Administrative Investigations on Use of Force**

10 33. When there is a fatal shooting by an Agent, a criminal investigation
11 typically commences at both the federal and state level. The state criminal
12 investigation may be opened by the state or local jurisdiction in which the incident
13 occurred. Apparently, under the then-existing procedures, DHS OIG has the option
14 to investigate or decline to investigate an allegation of excessive force.⁴⁹ If DHS
15 OIG declines, the Immigration Customs and Enforcement (“ICE”) Office of
16 Professional Responsibility (“OPR”) and then IA, respectively, decide whether to
17 investigate. Apparently OIG would investigate all or nearly all incidents involving
18 the use of deadly force that results in the death of an individual.⁵⁰ Apparently after
19 its investigation into a fatal use of force incident, DHS OIG would provide its
20 investigative report to OPR for a determination of whether the conduct violated
21 policy.⁵¹

22 34. It is not clear who is responsible for discipline at the Border Patrol.
23 Fisher testifies that he had no such authority to issue discipline when he was Chief

24 ⁴⁵ Fisher Dep. Tr. 30.

25 ⁴⁶ Fisher Dep. Tr. 31-32.

26 ⁴⁷ Fisher Dep. Tr. 32; 179-180; Deft-1054-89.

27 ⁴⁸ Fisher Dep. Tr. 155.

28 ⁴⁹ Fisher Dep. Tr. 86.

⁵⁰ Tomsheck Dep. Tr. 72.

⁵¹ Fisher Dep. Tr. 35.

1 of Border Patrol; instead, “[i]t would be at the command and control, which was at
2 the sector headquarters.”⁵² But Fisher also states that sector chiefs had this
3 authority because it had “been delegated by my office” as such.⁵³ According to the
4 former Assistant Commissioner of IA, James Tomsheck, this delegation confirms
5 that the Chief of Border Patrol had responsibility over disciplining agents.⁵⁴ He
6 states Border Patrol had purposely delegated disciplinary decisions at the sector
7 level to ensure no meaningful discipline was ever issued, has since fought hard to
8 ensure that Border Patrol discipline decisions remain within the Border Patrol.⁵⁵

9 **V. Facts**

10 35. In 1987, Fisher became a Border Patrol Agent, assigned to Douglas
11 Station, Tucson Sector, Arizona.⁵⁶ He was then assigned from 1994 to 1998 as a
12 field operation supervisor for the Border Patrol tactical unit in Biggs Army
13 Airfield, El Paso, Texas.⁵⁷ From 1998-99 he was Deputy Chief Patrol Agent in
14 Detroit Sector. From 2000 to 2003 he was an Assistant Chief Patrol Agent in
15 Tucson Sector. In 2003-04 he was reassigned as a deputy director for the Office of
16 Antiterrorism in Washington D.C.⁵⁸ In 2006, Fisher became Deputy Chief Patrol
17 Agent for San Diego Sector.⁵⁹ In June 2007, Fisher became Chief Patrol Agent for
18 San Diego Sector.⁶⁰ In January 2010, Fisher was named Acting Chief of Border
19 Patrol, assuming the position of Chief in May 2010.⁶¹ Chief Fisher retired on
20 November 30, 2015.⁶²

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22
23 ⁵² Fisher Dep. Tr. 80; 188-90.

⁵³ Fisher Dep. Tr. 80; 195-196.

⁵⁴ Tomsheck Dep. Tr. 136, 141.

⁵⁵ Tomsheck Dep. Tr. 135-36.

⁵⁶ Fisher Dep. Tr. 8.

⁵⁷ Fisher Dep. Tr. 8.

⁵⁸ Fisher Dep. Tr. 9.

⁵⁹ Fisher Dep. Tr. 9.

⁶⁰ Fisher Dep. Tr. 9.

⁶¹ Fisher Dep. Tr. 10.

⁶² Fisher Dep. Tr. 10.

1 36. Fisher, as Chief, had responsibility for ensuring compliance with the
2 CBP use of force policy by all agents.⁶³ He was responsible for assessing the need
3 for changes in policies, tactics, training, and equipment with respect to use of force
4 by agents⁶⁴ and directing Chief Patrol Agents to identify high risk zones in their
5 sectors⁶⁵ and develop operational plans to minimize the use of deadly force. He
6 was also responsible for directing that agents be given proper equipment to address
7 use of force situations, including less-than-lethal alternatives.⁶⁶ He was also
8 capable of recommending to OTD specific scenario-based training that addressed
9 situations unique to Border Patrol agents.⁶⁷ Finally, and perhaps most importantly,
10 Fisher was responsible for clarifying use of force policy and providing operational
11 guidance for use of force situations unique to .⁶⁸

12 **A. Assaults on Agents**

13 37. As noted by DHS OIG, Border Patrol underwent a considerable surge
14 in its workforce over a relatively short period of time.⁶⁹ In FY 2006, Border Patrol
15 had a total of 12,349 Agents, with 11,032 (89%) operating in Southwest border
16 sectors.⁷⁰ By FY 2009, the nationwide total of Border Patrol agents became
17 20,119, with 17,408 (87%) operating in Southwest border sectors.⁷¹ That quantity
18 and proportion of Agents staffed nationwide and within the Southwest region
19 generally remained constant ever since.⁷²

20 38. In addition, DHS completed more than 600 miles of fencing along the
21 Southwest border and installed surveillance technology to detect and inhibit illegal
22

23 ⁶³ Fisher Dep. Tr. 22, 76.

24 ⁶⁴ Fisher Dep. Tr. 13-16.

25 ⁶⁵ Fisher Dep. Tr. 12-13.

26 ⁶⁶ Fisher Dep. Tr. 21.

27 ⁶⁷ Fisher Dep. Tr. 123

28 ⁶⁸ Fisher Dep. Tr. 21.

⁶⁹ DHS OIG Report at 3.

⁷⁰ Staffing Report at 2.

⁷¹ Staffing Report at 2.

⁷² Staffing Report at 2.

1 border crossings into the United States.⁷³ This limits the areas along the Southwest
2 border where people can attempt to enter the United States. The surge in
3 workforce, coupled with the additional infrastructure, increased the chance that any
4 suspect attempting to cross the border illegally will be intercepted by Border
5 Patrol.⁷⁴

6 39. Not surprisingly, the number of reported assaults on Agents began to
7 rise during this time as well. According to DHS OIG, in FY 2006, Border Patrol
8 reported 752 assaults, and by FY 2010, the total number of reported assaults was
9 1062.⁷⁵ Moreover, “99 percent of assaults on Border Patrol Agents occurred along
10 the southwest border of the United States.”⁷⁶

11 **B. Assaults by Hurlled Rocks**

12 40. It appears the most frequent type of reported assault on Agents was
13 rocks. Fisher testified that it is common that Border Patrol agents get rocks thrown
14 at them, and that, depending on where the Border Patrol is stationed, it is
15 something a Border Patrol agent could expect to happen to him or her.⁷⁷ One
16 document shows that for a three year period from June 1, 2008 to June 1, 2011,
17 there were 2958 reported assaults on agents, with 2094 (approx. 71%) of those
18 incidents categorized as “Rocking.”⁷⁸ The next highest number is categorized
19 under “Physical” – 430 (15%), followed by “Vehicle” – 136 (5%), followed by
20 “Firearms” – 120 (4%), followed by “Other” – 63 (2%), and the remaining
21 reported incidents are split between several other common assault categories (e.g.,
22 “Knife” – 10 , “Blunt Instrument” – 25).⁷⁹

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24 ⁷³ DHS OIG Report at 4.

25 ⁷⁴ DHS OIG Report at 4.

26 ⁷⁵ DHS OIG Report at 4.

27 ⁷⁶ DHS OIG Report at 4.

28 ⁷⁷ Fisher Dep. Tr. 43-44.

⁷⁸ Deft-958.

⁷⁹ Deft-958.

1 41. In addition, apparently every reported rocking assault originated from
2 one of the nine sectors in the Southwest Border Patrol region.⁸⁰ In San Diego
3 Sector (apparently abbreviated as “SDC”), there were 546 total reported assaults
4 during that three year time frame, with 419 (approx. 77%) of those incidents
5 categorized as “Rocking,” which appears to be the third highest among the
6 sectors.⁸¹ The next highest reported assault in San Diego Sector during that time
7 period appears to be “Physical” – 73, followed by “Vehicle” – 36, followed by
8 “Other” – 10, followed by “Firearm” – 7.

9 42. According to DHS OIG, “rock attacks were the most frequent type of
10 assault on agents in FY 2011 and the second most frequent type of assault in FY
11 2012.”⁸²

12 **C. The Culture of Border Patrol and the Belief that Rock Throwing**
13 **Is a Justification for Use of Deadly Force**

14 43. Around the time Border Patrol began growing, leadership of Border
15 Patrol began identifying with a certain culture. Tomsheck states that Border Patrol
16 leadership self-identified the agency as a paramilitary organization, with the
17 normal rules of law enforcement not applying to it. There were vocal efforts to
18 “militarize the Border Patrol—from the way Border Patrol agents are hired to the
19 operational tactics Border Patrol agents were encouraged to take to the field.”⁸³

20 44. For example, during the Harper’s Ferry Meeting, which was attended
21 by Fisher, the Border Patrol Sector Chiefs, and other leadership within CBP,
22 Tomsheck gave a presentation to everyone discussing the fatal shootings by agents
23 and the constitutional restraints that are placed on all law enforcement officers.
24 Tomsheck was interrupted during that presentation and told “[w]e’re not cops, we
25

26 ⁸⁰ Deft-958; *see also* Deft-997.

27 ⁸¹ Deft-958.

28 ⁸² DHS OIG Report at 14.

⁸³ Tomsheck Declaration ¶12.

1 don't have to respond like they do.”⁸⁴ Border patrol leadership also claimed during
2 that meeting that “We're now the premier paramilitary homeland security
3 agency.”⁸⁵

4 45. Tomsheck also states that throughout the eight years of his tenure with
5 CBP, the Chief of Border Patrol consistently supported and permitted Agents' use
6 of deadly force whenever a rock was thrown.⁸⁶ Tomsheck states that the “mantra
7 from Border Patrol management was that rocking is lethal force.”⁸⁷

8 46. David Aguilar was the Chief of Border Patrol before Fisher, who later
9 became Deputy Commissioner of CBP when Fisher became Chief of Border
10 Patrol. According to Tomsheck “[s]ome part of every briefing on rocks being
11 thrown, the term policy with regard to rocks being thrown or rocking policy would
12 be used by Mr. Aguilar and/or other leadership from the Border Patrol.”⁸⁸
13 Tomsheck states that “[w]eeks into my time at CBP [I] traveled to the southwest
14 border and David Aguilar did a detailed briefing and orientation on the threat that
15 he believed and Border Patrol believed were posed by rocks and he described that
16 as the justification for their policy which was to use lethal force in response to
17 rocks being thrown. Some part of this because the demonstration that he did, the
18 briefing that he did was done not just for then new Commissioner Ralph Basham
19 but for a Time Magazine reporter who wrote about it at some point afterwards.”⁸⁹

20 47. According to Tomsheck, he would consistently witness during the
21 Commissioner's Morning Brief Mr. Aguilar describe any shooting incident of a
22 rock thrower as a “good shoot.” He recalls that when he first arrived at CBP in
23 2006 “there were a number of shootings that some fatal and some not fatal were in
24

25 ⁸⁴ Tomsheck Declaration ¶14.

26 ⁸⁵ Tomsheck Declaration ¶14.

27 ⁸⁶ Tomsheck Declaration ¶7.

28 ⁸⁷ Tomsheck Declaration ¶7.

⁸⁸ Tomsheck Dep. Tr. 184.

⁸⁹ Tomsheck Dep. Tr. 186.

1 then Chief of the Border Patrol David Aguilar included in every synopsis of what
2 had occurred at the Commissioner's morning brief the statement, it's a good shoot
3 or it looks like a good shoot. It became very clear in many of the instances that it
4 was not a good shoot and was highly suspect."⁹⁰ Tomsheck stated that when Fisher
5 became Chief of Border Patrol, he continued this practice of encouraging use of
6 deadly force against rock throwers.⁹¹

7 **D. Shootings of Rock Throwers 2006-2009**

8 48. **On or around December 30, 2005**, a Border Patrol agent shot and
9 killed Guillermo Martinez Rodriguez, according to a news story by the San Diego
10 Union-Tribune released the following week.⁹² The article states: "Mexican officials
11 from San Diego to Mexico City yesterday condemned the fatal shooting of a
12 teenager by a U.S. Border Patrol agent and announced a homicide investigation
13 into the migrant's death."⁹³ Guillermo, believed to be 18, was apparently shot in
14 the back as he was attempting to flee back across the border to Mexico.⁹⁴
15 According to a press release by local police, after discovering Guillermo crossing
16 the border, "[t]he agent ran toward the migrant, who retreated to the south and
17 'scooped up what the agent believed to be several rocks. ... As the agent
18 unholstered his duty weapon, the male cocked his arm and made a throwing
19 motion toward the agent."⁹⁵ The agent then shot Guillermo, who apparently was
20 hit in the back of his shoulder.⁹⁶ Guillermo continued back to Mexico, but died the
21 next day.⁹⁷ The news article states that a Border Patrol spokesperson named Raul
22 Martinez said the agent "believed his life was threatened when an assailant began
23

24 ⁹⁰ Tomsheck Dep. Tr. 150-51.

25 ⁹¹ Tomsheck Declaration ¶10.

26 ⁹² 01257-YANEZ-REYES.

27 ⁹³ *Id.*

28 ⁹⁴ *Id.*

⁹⁵ *Id.* at 2.

⁹⁶ *Id.* at 1.

⁹⁷ *Id.*

1 throwing rocks at him. ... Agents are routinely pelted with rocks, sticks, bottles
2 and other objects that, if thrown at close range, can cause serious injury or
3 death....”⁹⁸ The article then quotes Martinez: ““If I was put in the same shoes of
4 this agent, that’s exactly what we’d have to do. The possibility of a rock striking
5 me or possibly killing me—it’s unfortunate situations have to come to this
6 point.””⁹⁹

7 **49. On August 26, 2006**, it appears another Agent shot and killed a man
8 crossing the California border.¹⁰⁰ A Border Patrol agency spokesman, named
9 Xavier Rios, told the New York Times that “the Agent killed a man who was
10 throwing rocks from the Mexican side of the border.”

11 **50. On January 17, 2007**, according to the New York Times, a Border
12 Patrol agent shot and killed Francisco Javier Domínguez, a 22-year-old Mexican
13 national claimed to be throwing rocks.¹⁰¹ The article states that “Lt. Cmdr. Mark
14 Dannels, a sheriff’s department spokesman, said the shooting was prompted by
15 stone throwing. A Border Patrol statement called it a scuffle but did not mention
16 stone throwing.” The shooting prompted condemnation from Mexican President
17 Felipe Calderon and Mexican Government, with the news article stating that “[t]he
18 Mexican Ministry of Foreign Relations sent a formal note to the State Department
19 expressing ‘its serious concern over the recurrence of this type of incident.’”¹⁰²

20 The agent was later charged with first-degree murder, second-degree murder,
21 manslaughter, and negligent homicide.¹⁰³ The agent “testified that he shot Mr.
22 Domínguez because he had picked up a stone and was poised to ‘crush my skull’
23
24

25 ⁹⁸ *Id.*

26 ⁹⁹ *Id.*

27 ¹⁰⁰ 02041-Yanez-Reyes.

28 ¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 02026-Yanez-Reyes.

1 with it.”¹⁰⁴ The prosecutor stated that scientific and testimonial evidence shows the
2 Agent had lied to supervisors about what occurred.¹⁰⁵ The case twice ended in a
3 hung jury mistrial,¹⁰⁶ which, according to the New York Times, “illustrates the
4 difficulty prosecutors have in trying to hold Border Patrol agents criminally
5 accountable for on-duty actions. The only other agent tried on murder charges in
6 recent decades was acquitted in 1994.”¹⁰⁷

7 51. **On March 26, 2007**, a news article published the next day reports that
8 a Border Patrol agent shot and killed a man near Calexico, California.¹⁰⁸ According
9 to the news story, Border Patrol Agent David Kim said that “agents saw the man,
10 along with a group of people, scale the international fence and use a raft to cross
11 the nearby All-American Canal. Kim said, according to initial reports from agents,
12 the man attempted to return into Mexico and was involved in a struggle with a
13 Border Patrol agent. After the struggle he grabbed a softball-sized rock and began
14 walking toward the border fence, Kim said, and an agent with an M-4 assault rifle
15 was approached by the man with the rock.”¹⁰⁹ The agent then shot the man with
16 his rifle.¹¹⁰ “Four of the men who climbed the fence began throwing rocks at
17 agents on the north and south side of the All-American Canal and an agent fired a
18 shotgun round in their direction, Kim said.”¹¹¹ The four men then fled back into
19 Mexico.¹¹²

20 52. **On June 30, 2007**, according to a news article, “an agent shot at a
21 group of suspected illegal immigrants throwing rocks in Calexico.”¹¹³

23 ¹⁰⁴ 02023-Yanez-Reyes.

24 ¹⁰⁵ 02028-Yanez-Reyes.

25 ¹⁰⁶ 02023-Yanez-Reyes; 02022-Yanez-Reyes.

26 ¹⁰⁷ 02023-Yanez-Reyes.

27 ¹⁰⁸ 02020-Yanez-Reyes.

28 ¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 02062-Yanez-Reyes.

1 53. **On July 16, 2007**, Luis Cabrera, Consul General of Mexico, wrote to
2 Fisher, who was then Chief Patrol Agent of San Diego Sector, stating: “On Friday
3 July 13th, we learned about an incident that took place on the same day around
4 6:30 p.m. at the border in the area of Smugglers’ Gulch by Imperial Beach, in
5 which apparently a group of persons from the Mexican side assaulted a Border
6 Patrol agent throwing him rocks. According to the preliminary information we
7 received, the BP Agent fired his gun.”¹¹⁴ The responsive letter to Mr. Cabrera
8 states that “[a]t the time of the incident agents had just apprehended four
9 individuals out of approximately 30 that were observed fleeing back over the
10 border to Mexico. Once across the border, numerous individuals began rocking the
11 agents on the ground. In self defense, one of the officers fired one round from his
12 weapon. ... Based on the information I have to date, this shooting appears to be
13 within Agency guidelines.”¹¹⁵

14 54. **On July 25, 2007**, Mr. Cabrera wrote to Fisher stating that “[o]n
15 Monday July 23, 2007 we were informed by the U.S. Border Patrol (BP) of an
16 incident that took place Saturday July 21st, 2007 around 11:30 p.m. in the area of
17 Imperial Beach, California, in which a BP agent fired his hand gun several times in
18 response to an aggression involving rock throwing.” The responsive letter to Mr.
19 Cabrera states, among other things, that “I will ensure a thorough investigation is
20 made; and will inform you of the results.”¹¹⁶

21 55. **In August 2007**, a Border Patrol agent shot and killed Jose Alejandro
22 Ortiz Castillo, according to an associated press article.¹¹⁷ After the incident, a
23 Border Patrol spokesperson named Doug Mosier apparently told reporters that the
24 “agent spotted Ortiz apparently leading two men and a woman through a hole in
25

26 ¹¹⁴ Deft-1105.

27 ¹¹⁵ Deft-1104

28 ¹¹⁶ Deft-1106.

¹¹⁷ 02063-Yanez-Reyes.

1 the border fence just east of downtown El Paso. Ortiz, who was carrying bolt
2 cutters, picked up a rock as the agent was arresting the woman, Mosier said.”¹¹⁸
3 “The agent fired several shots, hitting Ortiz ‘multiple times,’ Mosier said.”¹¹⁹ In
4 response, Mexico’s Foreign Relations Department apparently said that “[t]he
5 Mexican government expresses a firm protest against the use of lethal weapons in
6 the face of situations that do not represent a proportionate risk.”¹²⁰ The Border
7 Network for Human Rights apparently stated to reporters that “[w]hen one
8 incident happens, and it seems it’s an isolated incident and the reasons are because
9 ... there was a real threat against an agent, that seems reasonable... But when there
10 is a series of events you start questioning things.”¹²¹ “‘Agents have the authority
11 and the obligation to protect themselves and innocent parties,’ Mosier said.”¹²²
12 “He said shootings are on the rise because more agents are being assaulted. Agents
13 have suffered serious head injuries after being pelted with rocks and other
14 projectiles.”¹²³

15 **56. In October 2007**, a news article reports that “U.S. Border Patrol
16 agents fired on a group of Mexican nationals hurling rocks at them.”¹²⁴ The article
17 states that “[t]he unspecified number of Border Patrol agents was apprehending six
18 to seven suspected illegal immigrants near the New River basin just west of the
19 downtown Calexico Port of Entry when they were assaulted by rock throwers.”¹²⁵
20 Supervisory Border Patrol Agent Quinn Palmer apparently told reporters that
21 “[t]he agents fired an unspecified number of rounds ‘in defense of their personal
22

23 ¹¹⁸ *Id.*

24 ¹¹⁹ *Id.*

25 ¹²⁰ *Id.*

26 ¹²¹

27 https://news.google.com/newspapers?nid=861&dat=20070810&id=258_AAAAIBAJS&sjid=OIYMAAAAIBAJS&pg=2623,4989322&hl=en

28 ¹²² *Id.*

¹²³ *Id.*

¹²⁴ 02067-Yanez-Reyes.

¹²⁵ *Id.*

1 safety,” after which “the rock throwers fled south.”¹²⁶ “Palmer said the
2 subsequent investigation on last week’s incident has been completed and the agents
3 involved were determined to have acted within the agency’s use of deadly force
4 policy.”¹²⁷

5 **57. On August 11, 2008**, a Border Patrol agent near San Ysidro,
6 California, likely under the command of Fisher within San Diego Sector, shot
7 across the border and severely wounded Edgar Israel Ortega Chávez.¹²⁸
8 Apparently a Border Patrol agent saw three to four suspects trying to scale the
9 border fence and when the agent drove toward the group, he was met, according to
10 a San Diego homicide detective, “by a barrage of rocks and concrete thrown from
11 the other side.”¹²⁹ The San Diego Union-Tribune reported that “[a]bout four to six
12 agents responded to a call for backup and used a gate in the fence to get to its south
13 side, an area still within the United States.”¹³⁰ “The agents fired pepper balls and
14 other chemical agents at a group of seven to 15 people to disperse them” after
15 which most of the crowd ran away.¹³¹ “However, two of the suspects remained,
16 still armed with rocks, and directed their attention toward the Border Patrol
17 agents,” the San Diego detective stated.¹³² “From about 50 feet away, an agent
18 fired two rounds from his rifle, striking a 23-year-old man who was standing on
19 Mexican soil.”¹³³ “Throwing objects at agents is a common practice, said
20 Supervisory Border Patrol Agent Daryl Reed. Smugglers often throw rocks and
21 concrete as a diversion.”¹³⁴ Apparently the San Diego detective “said the
22 unidentified agent, who has been with the Border Patrol for 10 years, feared for his

23 ¹²⁶ *Id.*

24 ¹²⁷ *Id.*

25 ¹²⁸ 02069-Yanez-Reyes.

26 ¹²⁹ *Id.*

27 ¹³⁰ *Id.*

28 ¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

1 life and the safety of other agents when he fired his gun. No Border Patrol agents
2 were injured during the incident.”¹³⁵ After the shooting the ACLU and other
3 organizations apparently wrote to Senator Kennedy and Representative Lofgren
4 asking that their “subcommittees investigate the U.S. Border Patrol’s practice of
5 shooting rock throwers” because the latest shooting is an example of “another
6 instance of this disproportionate use of force...”¹³⁶ They write that “[t]he U.S.
7 Border Patrol appears to fully support the shooting of rock-throwers” and that
8 Congress should have the then-DHS Secretary “make clear to his Border Patrol
9 agents that it is not acceptable to use deadly force when confronted with rock
10 throwers.”¹³⁷

11 **58. On September 24, 2008**, Fisher received a significant incident report
12 via email from a supervisory border patrol agent reporting shots fired by a Border
13 Patrol agent at around 11:45 pm the day prior.¹³⁸ According to the initial report, the
14 agent stated that “[w]hile cutting sign on the border road, the agent was assaulted
15 by five individuals, in Mexico, who threw rock projectiles that struck his Agency
16 vehicle. The agent took cover behind his vehicle and as the assault continued the
17 agent fired one round from his Agency issued weapon at the assaultive individuals.
18 The five individuals withdrew from the immediate area and appeared to have
19 received no injuries. The agent was not injured and the damage to the Agency
20 vehicle consisted of dents and broken windows.”¹³⁹

21 **59. On September 29, 2009**, a significant incident report via email states
22 that “[o]n September 29, Border Patrol agents assigned to the McAllen, Texas
23 Station reported that an agent fired his Service issued handgun at an unknown
24 subject who was assaulting him with rocks near Penitas, TX. Agents were on boat

25 ¹³⁵ *Id.*

26 ¹³⁶ 01209-YANEZ-REYES; *see also* 01189-YANEZ-REYES.

27 ¹³⁷ *Id.*

28 ¹³⁸ Email re: SIR: 08SDCECJ-092408000147 (Sep. 24, 2008).

¹³⁹ *Id.*

1 patrol when several subjects on the Mexican side of the Rio Grande River threw
2 rocks, striking the Service boat several times. No injuries were reported.”¹⁴⁰

3 **60. On December 7, 2009**, the UFRS shows an agent from Nogales
4 Station fired a pistol at a suspect and reported a rock assault.

5 **61. On December 22, 2009**, a significant incident report via email states
6 that “Border Patrol agents assigned to the Douglas, Arizona Station reported that
7 an on-duty agent discharged a round from his Service handgun at an unidentified
8 subject on December 21, 2009, near Douglas, AZ. The agent attempted to
9 apprehend three subjects, they began throwing rocks, the agent discharged one
10 round and the subjects absconded to Mexico. No injuries or damages were reported
11 and it is unknown if the subjects were struck. A duffle bag with thirty unloaded
12 AK-47 magazines was recovered.”¹⁴¹

13 **E. Shootings from January 2010 until June 21, 2010**

14 **62. On January 4, 2010**, the UFRS shows an agent from Douglas Station
15 used a pistol and reported a rock assault.¹⁴² Among the remaining materials I
16 received and reviewed, it appears there are no Border Patrol reports, briefs, or
17 other government documents that evidence the circumstances of this incident.
18 However, according to a news article found on the Internet, “Solis Palma, 28, was
19 shot to death Jan. 4, 2010, by Border Patrol Agent Miguel Torres Vasquez, near
20 Douglas, Ariz. Palma, an undocumented migrant, had thrown rocks at an agent and
21 his dog. Torres Vasquez said he opened fire when Solis Palma threatened him with
22 a rock. The Department of Justice and the Cochise County attorney closed their
23 investigations without bringing any civil or criminal charges against the agent.”¹⁴³

24
25
26 ¹⁴⁰ Email re: Initial Telephonic Report - Shots Fired - No Injuries - Penitas, TX (Sep. 29, 2009)

27 ¹⁴¹ Email re: Shot Fired by Agent - Initial Telephonic - Tucson Sector - Douglas Station (Dec. 22, 2009).

28 ¹⁴² Deft-1002 (UFRS).

¹⁴³ 02000-Yanez-Reyes.

1 63. **On January 18, 2010**, the UFRS shows an agent from El Paso Station
2 used a pistol and reported a rock assault.¹⁴⁴ Chief Fisher received a significant
3 incident report via email that states “[o]n January 18, 2010, Border Patrol agents
4 assigned to the El Paso, Texas Station reported that an agent fired one round at
5 four individuals in Mexico who were throwing rocks at agents and had failed to
6 disperse even after agents deployed less than lethal munitions. No injuries or
7 damages were reported. The four individuals fled further south into Mexico. All
8 appropriate notifications have been made.”¹⁴⁵

9 64. **On February 8, 2010**, the UFRS shows an agent from McAllen
10 Station used a pistol and reported a rock assault.¹⁴⁶ Chief Fisher received an initial
11 telephonic report that states “[o]n February 8, Border Patrol agents assigned to the
12 Mission, Texas Station reported that agents fired their service issued weapons at
13 several subjects near Mission, TX. The agents were conducting boat patrol duties
14 when several subjects began throwing rocks and bottles at them. No injuries were
15 reported.”¹⁴⁷

16 65. **On February 19, 2010**, the UFRS shows that an agent fired a rifle at
17 a suspect and reported a rock assault.¹⁴⁸

18 66. **On March 31, 2010**, according to a significant incident report via
19 email received by Fisher the following day, “Border Patrol agents assigned to the
20 McAllen, Texas Station reported that an on duty agent discharged a Service issued
21 M-4 rifle at an unidentified number of individuals who were throwing rocks at the
22 agent. At the time of the incident the agent was working narcotics traffic. No
23 injuries were reported.”¹⁴⁹ There is no entry in the UFRS for this incident.

24
25 ¹⁴⁴ Deft-1002 (UFRS).

26 ¹⁴⁵ Email re: Initial Telephonic - Shots Fired El Paso, TX (Jan. 18, 2010).

27 ¹⁴⁶ Deft-1003 (UFRS).

28 ¹⁴⁷ Email re: Initial Telephonic Report - Shots Fired, Mission, Texas (Feb. 8, 2010).

¹⁴⁸ Deft-1003 (UFRS).

¹⁴⁹ Email re: Shot Fired - Initial Telephonic - BP Rio Grande Valley Sector - McAllen Station (Apr. 1, 2010).

1 67. **On May 4, 2010**, UFRS shows that an agent fired a pistol at a suspect
2 and reported a rock assault.¹⁵⁰ On that same day Fisher received a significant
3 incident report via email stating “Border Patrol agents assigned to the Sonoita,
4 Arizona Station reported that an agent discharged an unknown number of rounds
5 from his Service issued sidearm in response to being rocked by an unknown
6 number of subjects in Mexico near Naco, AZ. The assailants absconded farther
7 into Mexico. No agents on scene were injured. None of the assailants have been
8 reported injured at this time. Appropriate notifications were made.”¹⁵¹

9 68. **On May 21, 2010**, the UFRS shows an agent fired a pistol at a suspect
10 and reported a rock assault.¹⁵² An initial reporting to Chief Fisher states: “Chief,
11 Tucson, Casa Grande station is reporting that an agent has fired his service
12 weapon, defending himself from a rocking assault. One person is injured (gunshot
13 wound) in the arm. No employee injury reported. Supervisory and medical
14 response en route. SIr forth coming.”¹⁵³ Fisher received follow-up emails stating:
15 “This event began when the Alvarez West MSS called out a group of 4 suspected
16 illegal aliens. Three agents responded to the MSS detection and upon their arrival,
17 3 subjects immediately absconded from the area. The subject who was shot
18 remained and reportedly threatened the agent with rock in his hand. Agent []
19 discharged his service issued sidearm at the subject. The subject suffered a wound
20 to the upper right quadrant of his right arm. His wound does not appear to be life-
21 threatening. It was suspected that these subjects were trafficking narcotics as 4
22 bundles of marijuana were found at the scene. TOPD has arrived at the scene. All
23 other notifications have been or are in the process of being made.”¹⁵⁴

24 _____
25 ¹⁵⁰ Deft-1005 (UFRS).

26 ¹⁵¹ Email re: INITIAL TELEPHONIC: Shots Fired by Employee - BP Tucson Sector - Sonoita Station (May 4,
2010).

27 ¹⁵² Deft-1006 (UFRS).

28 ¹⁵³ Fisher Email re: Tucson Sector Shooting Report (May 22, 2010).

¹⁵⁴ Deft-1049-50.

1 69. **On May 31, 2010**, the UFRS shows a Border Patrol agent from El
2 Paso Station fired a pistol and reported a rock assault.¹⁵⁵ Fisher received a
3 significant incident report via email stating “a Border Patrol agent assigned to the
4 Rio Grande City, Texas Station fired two shots from his Service issued firearm
5 after a group of suspected illegal aliens threw several rocks at him near Rio Grande
6 City, TX. The agent was patrolling the border on foot about 2 miles north of the
7 International Boundary when the incident occurred. No injuries or damages were
8 reported. Agents are searching for the group at this time. All appropriate
9 notifications were made. UPDATE TO FOLLOW.”¹⁵⁶

10 70. **On June 7, 2010**, the UFRS shows a Border Patrol agent from El
11 Paso station, Texas, fired a pistol in response to a reported rock throwing.¹⁵⁷
12 Among the materials I reviewed there is no significant incident report or other
13 internal Border Patrol or CBP documents that describes the reported circumstances
14 of this shooting. However, news stories indicate that on this day a Border Patrol
15 agent shot and killed 15-year-old Sergio Hernandez-Guereca. One newspaper
16 article reports what a cell phone video of the incident shows. “In it, a Border Patrol
17 agent on a bicycle arrives in the riverbed as several men attempt to run back to
18 Mexico. He detains one on the U.S. side and once he has him on the ground, fires
19 shots toward Mexico. In a more complete version of the cell phone video aired
20 Thursday night, three shots are apparently fired.”

21 71. It appears that same cell phone video of the incident can be found on
22 the Internet.¹⁵⁸ From the video, it appears that three or four males ran from a
23 culvert up a slope towards what appears to be a border fence. The boys then ran
24 back down the culvert and away from what apparently is a Border Patrol agent

25
26 ¹⁵⁵ Deft-1006 (UFRS).

27 ¹⁵⁶ Email re: INITIAL TELEPHONIC REPORT - Shots Fired By Agent (May 31, 2010).

28 ¹⁵⁷ Deft-1006 (UFRS).

¹⁵⁸ <https://www.youtube.com/watch?v=mzFqhSkQpFo&feature=youtu.be>

1 who arrived on scene. The Border Patrol agent appears to apprehend one suspect,
2 as the others run out of view from the camera. The video shows that the agent,
3 while holding the apprehended suspect with his left hand, unholsters what appears
4 to be a firearm with his right. The agent is standing and appears to be aiming at
5 someone or something out of view from the camera. The agent then drags the
6 apprehended suspect by the shirt and walks a few paces forward in the direction of
7 where the boys ran away. Still holding the apprehended suspect, the Agent then
8 kneels, aims, and eventually fires at least 2 rounds. At the time the agent fires, the
9 video is unable to capture any other persons within the frame, despite the agent's
10 location at the far right edge of the picture. After the shooting, the video panes to
11 the left to show a person lying on the ground. Another video located on the Internet
12 and recorded by a local NBC news affiliate shows reporters interviewing one eye
13 witness, who is translated as stating "one of the [suspects] hid behind a wall. When
14 he glanced from the wall he got shot. He was on the Mexican side, and the agent
15 was on the American side. His mistake was peeking from behind the wall."¹⁵⁹

16 72. After the incident, apparently the Mexican government, organizations,
17 and others heavily protested the agent's actions, and "stories of the killing have
18 filled the media for days."¹⁶⁰ A news article states that the President of Mexico
19 issued a statement saying "[w]e are worried by this surge of violence against
20 Mexicans...."¹⁶¹ Interior Secretary of Mexico, Fernando Gomez Mont, also
21 protested to then-DHS Secretary Janet Napolitano.¹⁶² In addition, the "State
22 Department spokesman P.J. Crowley said Thursday that the agency had received a
23 formal diplomatic note from Mexico on Wednesday expressing concern about the
24
25

26 ¹⁵⁹ <https://www.youtube.com/watch?v=ETETyYoxUTw>

27 ¹⁶⁰ 01202-YANEZ-REYES, at 2.

28 ¹⁶¹ 01196-YANEZ-REYES, at pg 2.

¹⁶² 01196-YANEZ-REYES, at pg 2.

1 shooting.”¹⁶³ Apparently “[t]he head of the Mexican delegation to the 49th U.S.-
2 Mexico Inter-Parliamentary Group on June 11 opened the meeting” stating that
3 “[t]he Mexican people are terribly offended by these deeds[,]” after which the
4 legislators dedicated a moment of silence.¹⁶⁴ Apparently the shooting was also
5 condemned by global human rights groups, such as Amnesty International¹⁶⁵ and
6 Human Rights Watch.¹⁶⁶

7 73. Shawn Moran, the Vice President of the National Border Patrol
8 Council, which represents Border Patrol agents, authored and published a national
9 press release on behalf of the union two days after the incident,¹⁶⁷ a copy of which
10 can be found on a Local’s web site.¹⁶⁸ The press release starts off with a
11 subheading stating “Rock Assaults are Deadly Force, says Border Patrol Union.”
12 The release then states:

13 Since biblical times, rocks have been used as a crude but effective
14 weapon to injure and kill humans. On June 8, 2010 [sic], when Border
15 Patrol Agents [sic] were assaulted at the U.S./Mexico border by
16 several individuals armed with rocks, they were forced to defend
themselves and their fellow agents.

17 Border Patrol Agents are not trained, nor paid to withstand violent
18 assaults without the ability to defend themselves. Rocks are weapons
19 and constitute deadly force. If an agent is confronted with deadly
20 force they will respond in kind. No agent wants to have to shoot
21 another human being, but when an agent is assaulted and fears for his
22 life then his hand is forced.

23 The government of Mexico has done their usual grandstanding where
24 they hurled baseless accusations at the Border Patrol agents, made
claims of racism, and portrayed the deceased criminal as an innocent

25 ¹⁶³ 01196-YANEZ-REYES, at pg 3.

26 ¹⁶⁴ 01202-YANEZ-REYES, at pg 2.

27 ¹⁶⁵ 01271-YANEZ-REYES.

28 ¹⁶⁶ 01263-YANEZ-REYES.

¹⁶⁷ Moran Dep. at 16:9-13, 87:15 – 88:8, Ex 4.

¹⁶⁸ <http://www.nbpc2366.org/content/nbpc-press-release-rock-assaults> (last visited February 25, 2016).

1 boy who had never done a thing wrong in his life. None of these
2 statements have any merit. Mexico bears quite a bit of responsibility
3 whenever one of its citizens dies along the border due to its allowing
4 criminal organizations free-reign and its refusal to police its northern
border.

5 While the loss of this teenager’s life is regrettable, it is due solely to
6 his decision to pick up a rock and assault a United States Border
7 Patrol Agent. We stand behind the actions of the agents who did their
8 duty in El Paso, and are confident that the investigation into his
incident will justify their actions.¹⁶⁹

9 74. A news article credited to the associated press and published two days
10 after the NBPC press release states that “Border Patrol agents are allowed to use
11 lethal force against rock-throwers.”¹⁷⁰

12 75. A press release by the Department of Justice (“DOJ”) dated April 27,
13 2012 states that “[t]he Justice Department conducted a comprehensive and
14 thorough investigation into the shooting, which occurred while smugglers
15 attempting an illegal border crossing hurled rocks from close range at a CBP agent
16 who was attempting to detain a suspect.”¹⁷¹ The release states that the DOJ
17 interviewed more than 25 law enforcement and civilian witnesses and “collected,
18 analyzed and reviewed: evidence from the scene of the shooting; civilian and
19 surveillance video; law enforcement radio traffic; 911 recordings; volumes of CBP
20 agent training and use of force materials; and the shooting agent’s training,
21 disciplinary records, and personal history.”¹⁷² The DOJ declined to prosecute the
22 agent criminally and stated that “[t]he investigation also revealed that, on these
23
24
25

26 ¹⁶⁹ 01226-YANEZ-REYES.

27 ¹⁷⁰ 01196-YANEZ-REYES.

28 ¹⁷¹ 01200-YANEZ-REYES.

¹⁷² *Id.*

1 particular facts, the agent did not act inconsistently with CBP policy or training
2 regarding use of force.”¹⁷³

3 76. James Tomsheck testified that “the Sergio Hernandez case and the
4 events surrounding it and the outcome of the investigation was something that was
5 widely known throughout all of CBP.”¹⁷⁴ He further testified that he has seen a
6 video taken by CBP “that became available to us early on that clearly demonstrated
7 Sergio Hernandez was not throwing rocks at the time he was shot.”¹⁷⁵ He further
8 testified that this is one of 9 “highly suspect” fatal incidents since 2010 that he can
9 recall.¹⁷⁶ He also testified that this is an example of a case where Border Patrol
10 distorted the facts regarding the shooting in an attempt to make the Border Patrol
11 agents’ actions appear to those outside CBP to be justified.¹⁷⁷ At his deposition on
12 January 15, 2016, Fisher testified that he is “[v]aguely familiar” with the incident.
13 He further testified that he remembers seeing a video from a case in El Paso, but
14 “can’t be 100% sure it’s the same case.”¹⁷⁸

15 77. **On June 18, 2010**, Fisher received a significant incident report via
16 email stating “[o]n June 18, 2010, Border Patrol agents assigned to the Nogales,
17 Arizona Station reported two on-duty agents discharged a combined three rounds
18 from their Service handguns at rock throwers near Nogales, AZ. One agent was
19 struck in the leg by a rock and declined medical attention. The rock throwers
20 absconded back to Mexico and it is unknown at this time if anyone was injured.
21 Agents did not arrest nor seize any contraband. UPDATE TO FOLLOW.”¹⁷⁹ The
22 incident also appears to be logged in the UFRS.¹⁸⁰

23
24 ¹⁷³ *Id.*

25 ¹⁷⁴ Tomsheck Dep. at 309:17-20.

26 ¹⁷⁵ Tomsheck Dep. at 305:1-7.

27 ¹⁷⁶ Tomsheck Dep. 34:23 – 35:10; 211:13-15.

28 ¹⁷⁷ Tomsheck Dep. 146:1-13.

¹⁷⁸ Fisher Dep. 139:8 – 140:8.

¹⁷⁹ Email re: INITIAL TELEPHONIC- Shot Fired by Employees - Nogales, AZ (Jun 18, 2010).

¹⁸⁰ Deft-1006 (UFRS).

1 78. **On August 31, 2010**, Fisher received an initial notification via a
2 “High” importance email which forwarded a message that states “[a]t
3 approximately 1620hrs, Border Patrol Agent [] who is assigned to the Sonoita
4 Border Patrol Station, was involved in a reportable shooting. Preliminary reports
5 include that Agent [] was walking along a trail within Border Zone 26 when he
6 came upon two subjects. These two subjects reportedly began throwing rocks and
7 water bottles at Agent []. Agent [] who was reported to be uninjured in the
8 incident, drew his service issued sidearm and discharged one round in the direction
9 of the two subjects. Both subjects then absconded from the area running northeast.
10 ... Agent [] was alone on the trail at the time of the incident, but other agents were
11 within a few hundred yards. At this point, there is no indication that either of the
12 two subjects were hit.... [The agent] is in route to the station where he will be
13 posed the eight questions...”¹⁸¹ Fisher forwarded the email to then-Deputy
14 Commissioner David Aguilar, stating “Deputy-for visibility. We will provide
15 update at 0830 or sooner if there are any significant updates to this initial
16 report.”¹⁸² The incident also appears to be logged in the UFRS.¹⁸³

17 79. **On November 5, 2010**, according to the UFRS, agents from
18 Boulevard Station fired a rifle and a pistol and reported a rock assault.¹⁸⁴

19 80. **On November 8, 2010**, according to the UFRS, an agent from Chula
20 Vista Station fired a pistol and reported a rock assault.¹⁸⁵

21 81. **On November 16, 2010**, according to the UFRS, an agent from
22 Nogales Station fired a pistol and reported a rock assault. Apparently Fisher and
23 the Mexican government discussed via an exchange of letters an Agent’s shooting
24 of Mexican national (both names apparently redacted) that occurred on November

25 ¹⁸¹ Deft-1045-46.

26 ¹⁸² Deft-1046-47.

27 ¹⁸³ Deft-1008 (UFRS).

28 ¹⁸⁴ See Deft-1010 (UFRS) (UFRS report# UFB20101105002); see also Deft-999.

¹⁸⁵ Deft-1010 (UFRS).

1 13, 2010 in the vicinity of Nogales. The underlying facts of the incident are not
2 discussed and among the remaining materials I received and reviewed, it appears
3 there are no Border Patrol reports, briefs, or other internal government documents
4 that evidence the circumstances of this incident. However, on February 6, 2015,
5 Judge Soto for the United States District Court for the District of Arizona issued
6 findings of fact and conclusions of law following a bench trial in a case brought by
7 Jesus Castro Romo against the United States of America.¹⁸⁶ According to the
8 court's ruling, on November 16, 2010, a Border Patrol agent named Abel Canales
9 was on horseback when he intercepted Castro leading a group of undocumented
10 immigrants across the border near Walker Canyon, west of Nogales, Arizona.
11 Upon discovery, Castro ran away, and according to the Government, "Castro
12 ignored orders to return to the group, defied Canales verbally and physically, and
13 threatened Canales with a rock before beginning a throwing motion which put
14 Canales in fear for his physical safety."¹⁸⁷ Agent Canales then shot Castro, who
15 was around three feet away, severely and permanently injuring him. The court
16 found the "use of force was not justified because there was no situation that
17 reasonably provoked such use."¹⁸⁸ The court first rejected Agent Canales's
18 testimony as not credible, and then held "even assuming that Canales' testimony
19 was true, his use of force was still not justified...."¹⁸⁹

20 82. **On January 5, 2011**, according to the UFRS, an agent from Nogales
21 Station fired a "machine gun" and reported a rock assault.¹⁹⁰ According to the
22 DOJ's "Notice to Close File," accessible on the Internet,¹⁹¹ the agent, referred to as

24 ¹⁸⁶ 02044-Yanez-Reyes.

25 ¹⁸⁷ *Id.* at 1-2.

26 ¹⁸⁸ *Id.* at 16 ¶11.

27 ¹⁸⁹ *Id.* at 16 ¶11-12.

28 ¹⁹⁰ Deft-1012 (UFRS).

¹⁹¹ <http://www.azcentral.com/news/arizona/articles/20140214border-federal-reports-torres-death.html#document/p4/a144833> (hereinafter "DOJ Report") (02004-Yanez-Reyes).

1 the “subject,” was standing approximately 40 feet from the border fence¹⁹² and 15
2 feet in front of another agent,¹⁹³ when he shot an M4 rifle through the border fence
3 fatally wounding 17-year-old Mexican national Ramses Barron-Torres.¹⁹⁴
4 According to the DOJ’s report, the incident occurred around 3:00am after “[r]adio
5 operators confirmed the presence of individuals who appeared to be carrying
6 bundles of narcotics over the U.S. border into Mexico.”¹⁹⁵ “The subject, driving a
7 service vehicle, responded to the area and was immediately attacked with rocks
8 that were being thrown from the Mexico side of the fence” while another
9 individual with a bundle of narcotics “was running parallel to the fence on the U.S.
10 side as if he was looking for a place to run south into Mexico.”¹⁹⁶ Apparently a
11 colleague of the subject, whose identity is redacted from the report, “called for
12 backup over the service radio and assistance from any agent with a PepperBall
13 Launching System (PLS).”¹⁹⁷ The subject and someone else issued commands in
14 Spanish telling the individuals to stop throwing rocks.¹⁹⁸ One agent “was forced to
15 take protective cover due to the rocks being thrown” when the subject, apparently
16 15 feet behind that other agent, fired his rifle “through the slats in the fence.”¹⁹⁹
17 The report states that a video shows Barron Torres “falling to the ground suddenly
18 while he was in the midst of throwing a rock.”²⁰⁰ Before reaching its conclusion
19 not to prosecute the subject for criminal homicide, the DOJ noted that the
20 applicable use of force policy “does not provide that an officer or agent must
21 attempt to flee prior to using deadly force.”²⁰¹ The report also states that while the
22

23 ¹⁹² DOJ Report at 8.

24 ¹⁹³ DOJ Report at 6.

25 ¹⁹⁴ DOJ Report at 1.

26 ¹⁹⁵ DOJ Report at 1-2.

27 ¹⁹⁶ *Id.* at 2.

28 ¹⁹⁷ DOJ Report at 4.

¹⁹⁸ DOJ Report at 2.

¹⁹⁹ DOJ Report at 6, 8.

²⁰⁰ DOJ Report at 2.

²⁰¹ DOJ Report at 9.

1 2010 Handbook “does not specifically mention incidents involving rock throwing,
2 the Border Patrol Union released a statement on June 10, 2010 providing that
3 ‘Border Patrol agents are not trained nor paid to withstand violent assault without
4 the ability to defend themselves.’”²⁰² Days following the incident, Barron-Torres’s
5 death was apparently discussed on NBC Nightly News, where Mr. TJ Bonner,
6 representing the Border Patrol Union, stated on national television: “When you
7 pick up a rock and throw it at a police officer, you should expect to have deadly
8 force directed back toward you.”²⁰³

9 83. **On February 8, 2011**, the UFRS shows that an agent from McAllen
10 Station fired a pistol at a suspect and reported a rock assault.²⁰⁴

11 84. **On February 15, 2011**, the UFRS shows that an agent from Nogales
12 Station fired a pistol at a suspect and reported a rock assault.²⁰⁵

13 85. **On March 21, 2011**, the UFRS shows that an agent from Douglas
14 Station fired a pistol at a suspect and reported a rock assault.²⁰⁶ News stories
15 reveal that 19-year-old Carlos LaMadrid, a U.S. citizen, was fleeing toward the
16 border in a pickup truck carrying 48 pounds of marijuana when, as he attempted to
17 climb a ladder placed against the fence, Border Patrol Agent Lucas Tidwell shot
18 and killed him.²⁰⁷ Apparently Tidwell justified his use of force on LaMadrid by
19 claiming the LaMadrid’s accomplices were throwing rocks at the agent from atop
20 the fence. A news story following the shooting indicates that a march was held
21 after the incident in Arizona “to highlight what activists call the increasing use
22 excessive and sometimes lethal force against illegal immigrants and even Hispanic
23
24

25 ²⁰² *Id.*

26 ²⁰³ 01193-YANEZ-REYES, at 2.

27 ²⁰⁴ Deft-1012 (UFRS).

28 ²⁰⁵ Deft-1012 (UFRS).

²⁰⁶ Deft-1013 (UFRS).

²⁰⁷ 01224-YANEZ-REYES. *See also* 02000-Yanez-Reyes.

1 citizens in rock-throwing incidents.”²⁰⁸ The news article also states “The National
2 Border Patrol Council says agents have a right to defend themselves. ‘When rocks
3 are thrown at us, that is considered deadly force,’ union spokesman Shawn Moran
4 says and adds that such assaults have severely injured agents.” On July 7, 2011,
5 Border Patrol representatives reported to Fisher and others via email regarding the
6 criminal investigation into the incident.²⁰⁹ The first email in the chain states:

7 The Cochise County Attorney has concluded that BPA [Tidwell]
8 shooting of [LaMadrid] was justified under Arizona law. According
9 to Cochise County Attorney [] Arizona law allows a law enforcement
10 officer to use deadly force against an accomplice to someone who is
11 using deadly force against the officer. Several factors were
12 considered when determining that [LaMadrid] was an accomplice:

13 1. [LaMadrid] was in constant communication via cellular phone
14 during the pursuit preceding the shooting incident, presumably with
15 his accomplices.

16 2. The suspects on top of the International Boundary Fence (IBF)
17 throwing rocks at BPA [Tidwell] had pre-positioned themselves in a
18 coordinated location to assist [LaMadrid to] avoid being taken into
19 law enforcement custody.

20 3. The suspects on the top of the IBF positioned a ladder at a
21 coordinated location for [LaMadrid to] use to evade law enforcement,
22 travel over the IBF, and enter into Mexico.

23 4. The suspects at the top of the fence were throwing rocks at BPA
24 [Tidwell] to assist [LaMadrid] as he climbed the ladder in his attempt
25 to flee from law enforcement and travel into Mexico.²¹⁰

26 The next email adds others to the chain and states:

27 Chiefs, ...I spoke with Criminal Chief at the [United States Attorney’s
28 Office] earlier this afternoon and he confirmed an open CR case by

²⁰⁸ 01224-YANEZ-REYES.

²⁰⁹ Deft-1051-53.

²¹⁰ Deft-1052-53.

1 their office and the OIG. Review [of] this case is standard procedure
2 in these types of shooting cases. The USAO will rely heavily on the
3 investigation and findings of the CCSO and CCA before making a
determination. ...²¹¹

4 The next email adds more people to the chain and states “Chiefs, Good
5 news, but not totally official.”²¹² And the last email on the chain includes
6 Fisher and others, stating:

7 This [is] related to the BPA [Tidwell] shooting in Douglas on 21
8 March – this is the event that the reporting of which caused issues
9 related to timeliness and accuracy of initial reports. Please note that
10 this is preliminary information and maybe subject to change, and as
11 indicated, based on what the OIG investigation determines. As noted
this is not for release beyond LEA circles on a need to know, but I
know that C1 and C2 will want to know.²¹³

12 On August 9, 2013, the Department of Justice issued a press release closing the
13 investigation.²¹⁴ The press release states “[a]t the time the shots were fired by the
14 agent, LaMadrid was in the line of fire between the rock-throwing male and the
15 agent. LaMadrid was struck by four bullets, causing him to fall to the ground.”²¹⁵
16 The release concludes “there is insufficient evidence for the government to
17 disprove that the agent was acting in self-defense when he fired at the rock thrower
18 and mistakenly struck the victim, who was in his line of fire.”²¹⁶

19 86. **On May 1, 2011**, the UFRS shows an agent from Nogales Station
20 fired a rifle at a suspect and reported a rock assault.²¹⁷ That same day Fisher
21 received an initial significant incident report via email stating “an agent discharged
22 his Service issued M-4 rifle after illegal aliens threw rocks at an agent in Nogales,
23

24 ²¹¹ Deft-1051-52.

25 ²¹² Deft-1051.

26 ²¹³ *Id.*

27 ²¹⁴ <http://www.justice.gov/opa/pr/federal-officials-close-investigation-death-carlos-lamadrid>.

28 ²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Deft-1014 (UFRS).

1 AZ.”²¹⁸ Before receiving the initial telephonic notification, Fisher received
2 additional reporting of the shooting via email, which states, among other things,
3 that “6 to 8 shots [were] fired towards rock throwers through fence ballards” as
4 “agents were attempting to arrest an illegal alien.”²¹⁹ “No known injuries at this
5 time to either side.”²²⁰

6 **F. Agent Diaz’s Use of Force Against Yañez on June 21, 2011**

7 87. On June 21, 2011, Agent Diaz, a defendant in this case, shot and
8 killed Jose Alfredo Yañez Reyes.

9 88. The UFRS shows an agent from Imperial Beach Station fired a pistol
10 and reported a rock assault.

11 89. It appears that in advance of the significant incident report, Chief
12 Fisher received an email that day stating: “SDC is reporting a shooting by agents.
13 Agents at the fence fired into Mexico to defend against rocking assault. Initial
14 reports are that a rock thrower was likely shot. Mexican authorities are notified and
15 in route. As the conditions change or reports warrant I will advise. SIR
16 forthcoming.”²²¹

17 90. Fisher was included on a high importance email on June 22, 2011 in
18 which a deputy chief provides an update about the situation. Under that email a
19 Southwest Border Division Chief states: “[the Mexican Ambassador] stated that
20 although extremely professional, he has the same concerns that the [Government of
21 Mexico] normally does when something like this occurs.” The email further states
22 that “Mexican President Calderon is at a conference with Secretary of State Hillary
23 Clinton “and the two have already talked on this matter. He has voiced his
24

25
26 ²¹⁸ Email re: Shots Fired By Employee-Initial Telephonic Report-Nogales, AZ (May 1, 2011).

27 ²¹⁹ Deft-1096-99.

28 ²²⁰ Deft-1096.

²²¹ Email re: Shots Fired (Jun 21, 2011).

1 concerns to her and we fully expect the Department to start pinging us for anything
2 and everything on this matter. Stand ready to deliver on short notice.”

3 91. On June 22, 2011, Chief Fisher also received an email attaching an
4 Issue Paper on the incident, which is 4 pages long.²²² The Issue Paper states,
5 among other things, that “Agent Nelson Struggled with Suspect #1, [Yañez] struck
6 Agent Nelson with a piece of lumber. [Yañez] then threw rocks and sand at
7 Agent[] Nelson’s face and kicked him in the face as well. He then fled to the
8 primary border fence and attempted to throw an additional rock at Agent Nelson.
9 Agent Diaz, fearing for Agent Nelson’s life, fired on round from his service
10 handgun that struck [Yañez] in the face. [Yañez] fell off the primary fence into
11 Mexico.”²²³

12 92. There is also a summary report outlining the background of the
13 incident, the status of investigations, and investigative key facts.²²⁴ Fisher testified
14 that he customarily received summary reports such as this for deadly force
15 incidents during the time he was Chief of Border Patrol.²²⁵ However the summary
16 report for this incident appears to be the only report among the materials I
17 obtained.

18 93. In addition, I reviewed the investigation files concerning this incident,
19 and the photos of the scene. It is worth noting that at this time Agent Nelson was
20 handcuffing the suspect and yelling to Officer Diaz for “Help”. Officer Diaz’
21 choice was either to assist Agent Nelson, or provide cover from additional thrown
22 objects. Officer Diaz chose to maintain a cover position and fire the fatal round
23 though he could not see another object in Mr. Yanez’ hand. This was opposed to
24
25

26 ²²² Deft-608-12.

27 ²²³ Deft-611.

28 ²²⁴ Deft-1100.

²²⁵ Fisher Tr. 102.

1 helping Officer Nelson handcuff the suspect and pull him further away from the
2 fence.

3 **G. Shootings after Yañez Incident**

4 94. I reviewed the information on the shootings that occurred after
5 Yañez’s death. It appears that there were many “firearm” entries logged in the
6 UFRS, but no other materials evidencing the facts of these incidents, other than the
7 evolving situation report and issue paper regarding a Border Patrol agent’s killing
8 of a rock thrower in October 2012.²²⁶

9 **H. CBP and DHS Seek Internal and External Review of Shootings** 10 **from 2010 – Oct 2012.**

11 **1. PERF Finds That Policy and Practice Regarding Shots Fired** 12 **at Rock Throwers is in Need of Significant Change.**

13 95. The Police Executive Research Forum (“PERF”) was commissioned
14 by U.S. Customs and Border Protection to conduct a review of the Use of Force by
15 CBP officers and agents. The review consisted of government furnished
16 information on 67 use of force incidents from January 2010 through October
17 2012—all of which involved agents²²⁷—and use CBP use of force policies,
18 equipment, tactics, and training. It issued its report on February 2013. Of the 67
19 incidents, 25 “involved shots being fired by agents who had been the victim of
20 rock attacks while on land”²²⁸ and “[f]our cases involved rocks being thrown at
21 agents who were in boats.”²²⁹

25 ²²⁶ Deft-1054-89.

26 ²²⁷ CBP Integrity Report at 13 (“All 67 instances of use of force referenced in the PERF review involved Border
Patrol Agents.”).

27 ²²⁸ PERF Report at 8.

27 ²²⁹ PERF Report at 7.

1 96. In the introduction, the report states “[t]wo policy and practice areas
2 especially need significant change.”²³⁰ “The case reviews raise a number of
3 concerns, especially with regard to shots fired at vehicles and shots fired at
4 subjects throwing rocks and other objects at agents. Improvements are also
5 recommended in initial reporting, investigation, incident review, weapons,
6 personal protective equipment, and training.”²³¹

7 97. The report states that “officers/agents should be prohibited from using
8 deadly force against subjects throwing objects not capable of causing serious
9 physical injury or death to them. Officers/agents should be trained to specific
10 situations and scenarios that involve subjects throwing such objects. The training
11 should emphasize pre-deployment strategies, the use of cover and concealment,
12 maintaining safe distances, equipping vehicles and boats with protective cages
13 and/or screening, de-escalation strategies, and where reasonable the use of less-
14 lethal devices.”²³²

15 98. The report states that “[b]ecause these changes are significant
16 departures from current practice CBP will need to craft an implementation strategy
17 for re-orientation and training before new policies go into effect.”²³³

18 99. Regarding weapons, the report states:

19 PERF’s review revealed that in most cases when agents used deadly
20 force, specialized less lethal weapons were not ... readily available. In
21 some cases, the use of such less lethal weapons *may* have reduced the
22 risk to agents and prevented the need for deadly force. ... Each field
23 vehicle and boat should be equipped with the best available less lethal
24 weapons, and agents should be required to consider the use of less
25 lethal weapons.²³⁴

26 ²³⁰ PERF Report at 2.

27 ²³¹ PERF Report at 2.

28 ²³² PERF Report at 2.

²³³ PERF Report at 3.

²³⁴ PERF Report at 5.

1 100. Regarding personal protective equipment, the report states:

2 “Agents assigned to marine patrol and agents assigned to patrol or
3 who respond near the International Border Fence (IBF) are
4 particularly vulnerable to rock attacks. All agents assigned to these
5 high risk areas should be provided protective equipment to include a
6 helmet with face shield....”²³⁵

6 101. With regards to training, the report states:

7 Policy and skills training is essential to agent safety and appropriate
8 deadly force decisions. ... Agents should receive regular retraining in
9 deadly force policy, use of force decision making, tactical skills and
10 shooting. Command level monitoring of training is particularly
11 important when implementing policy changes where resistance is
12 anticipated.²³⁶

12 102. With regards to “shooting at rock throwers” generally, the report
13 states:

14 Review of shooting cases involving rock throwers revealed that in
15 some cases agents put themselves in harm’s way by remaining in
16 close proximity to the rock throwers when moving out of range was a
17 reasonable option. Too many cases do not appear to meet the test of
18 objective reasonableness with regard to the use of deadly force. In
19 cases where clear options to the use of deadly force exist and are not
20 utilized in rock-throwing incidents, corrective actions should be taken.
21 CBP should improve and refine tactics and policy that focus on
22 operational safety, prioritization of essential activities near the border
23 fence, and use of specialized less lethal weapons with regard to rock
24 throwing incidents.

25
26 The state[d] CBP policy should be: **“Officers/agents are prohibited
27 from using deadly force against subjects throwing objects not
28 capable of causing serious physical injury or death to them.”**²³⁷

26 ²³⁵ PERF Report at 6.

27 ²³⁶ PERF Report at 6.

28 ²³⁷ PERF Report at 7.

1 103. PERF also states that the use of force policy handbook should be
2 amended to clarify use of safe tactics and techniques in response to rock throwing:

3 Thrown or hurled missiles aimed at officers/agents may represent a
4 threat of imminent danger of death or serious physical injury. When
5 sufficient time exists officers/agents should seek cover and/or move
6 out of range. Such action may be especially viable when the attack is
7 coming from the other side of the border. *Officers/agents are
prohibited from using deadly force against subjects throwing objects
not capable of causing serious physical injury or death to them.*

8 104. Specifically with regards to the 4 reviewed cases where agents in
9 boats used firearms in response to rock throwing:

10 It is not clear that all shootings by agents on water to counter rock
11 throwers meet the standard of objective reasonableness. The tactics
12 and strategies that agents are using may unnecessarily put them in
13 harm's way. Moving to a safer location when possible is preferable to
14 using deadly force and such action should be considered as part of
objective reasonableness.²³⁸

15 105. Specifically with regards to the 25 reviewed cases where agents on
16 land used firearms in response to rock throwing:

17 Most of the cases involved enforcement activities that took place near
18 the IBF, while a limited number were in remote mountainous regions
19 miles from the border. Some cases seemed to be a clear cut self-
20 defense reaction to close and serious rock threats or assaults, while
21 other shootings were of more questionable justification. The more
22 questionable cases generally involved shootings that took place
23 through the IBF at subjects who were throwing rocks at agents from
24 Mexico. In some cases, agents shot at suspects who were attempting
25 to interfere with arrests on the U.S. side of the border fence. In at least
26 one case, rocks were being thrown in an attempt to allow drugs to be
taken back over the IBF. In other cases, agents shot at suspects who
started throwing rocks over the fence at them after agents stopped
when their CBP vehicles had been hit by rocks. As with vehicle
shootings, some cases suggest that frustration is a factor motivating

27 ²³⁸ PERF Report at 8-9.

1 agents to shoot at rock throwers. Likewise, it is felt that some of the
2 weapons discharges are actually intended as warning shots. Two or
3 more shooting cases involving rock throwers on land were ruled by
4 CBP as violations of policy.

5 **It is clear that agents are unnecessarily putting themselves in**
6 **positions that expose them to higher risk. While rock throwing**
7 **can result in injuries or death, there must be clear justification to**
8 **warrant the use of deadly force. CBP needs to train agents to de-**
9 **escalate these encounters by taking cover, moving out of range**
10 **and/or using less lethal weapons. Agents should not place**
11 **themselves into positions where they have no alternative to using**
12 **deadly force.**²³⁹

13 2. Internal Review

14 106. Apparently there was an internal review conducted parallel to the
15 PERF's external review. There was also a report and recommendations regarding
16 PERF's report. I understand that this information will be produced at a time
17 subsequent to the issuance of this report.

18 3. DHS OIG Report

19 107. In September 2013 DHS OIG issued a revised report "CBP Use of
20 Force Training and Actions To Address Use of Force Incidents."²⁴⁰ The report
21 states that "[i]n April 2012, the Public Broadcasting Service (PBS) aired a report
22 regarding the death of a person while in the custody of CBP in May 2010. This
23 incident and others raised concerns regarding use of force training and
24 accountability within DHS and CBP. U.S. Senator Robert Menendez and 15
25 members of Congress requested that we review the use of force within CBP."²⁴¹

26 108. Among other things, the report collected and reported on information
27 from the e3 Assault Module and the UFRS.

28 ²³⁹ PERF Report 8-9.

²⁴⁰ DHS OIG Report.

²⁴¹ DHS OIG Report at 2.

1 109. For FY 2011, DHS OIG found that a firearm was used by Agents 69
2 times and by Officers 11 times. It furthermore found that there were “339 reported
3 rock assaults” and that Agents responded with a firearm to 33 (or 10 percent), used
4 lethal force in response to 118 (or 35 percent), and did not respond with force to
5 188 (or 55 percent).

6 110. For FY 2012, DHS OIG found that a firearm was used by Agents 53
7 times and Officers twice. It furthermore found that there were “185 rocking
8 assaults” and that Agents responded with a firearm to 22 (or 12 percent), used less-
9 lethal force in response to 42 (or 23 percent), and did not use force to respond to
10 121 (or 65 percent).

11 111. The report also states that “[d]uring its internal review of use of force
12 issues, UFPD determined that CBP basic academies do not train new agents and
13 officers on all less-lethal options that will be available to them. UFPD also
14 identified high-risk situations, such as vehicular and rock assaults, that are not
15 sufficiently trained at the basic academies.”

16 **I. Fisher Memo**

17 112. On March 7, 2014, Fisher issued a memorandum for all personnel
18 with the subject “Use of Safe Tactics and Techniques.”²⁴² It states “[a]s Chief of
19 the United States Border Patrol, our border security mission and your safety are my
20 highest priorities and ultimate responsibility.”²⁴³ It continues

21 U.S. Border Patrol agents are among the most frequently assaulted
22 law enforcement personnel in the country. Since 2007, there have
23 been over 6,000 assaults against Border Patrol agents resulting in
24 numerous injuries to our agents and the tragic death of three agents. In
25 the face of these dangers, Border Patrol agents continue to show
26 exemplary restraint and professionalism. Since 2010, agents have
27 been assaulted with rocks 1,713 times. In these situations, agents

27 ²⁴² Fisher Memo.

28 ²⁴³ Fisher Memo at 2.

1 responded and used deadly force 43 times which regrettably resulted
2 in the death of 10 individuals.

3 ...
4 During the past year, I have asked Chief Patrol Agents (CPAs) to
5 identify the high risk zones within their respective areas of
6 responsibility in order to develop operational plans to address these
7 risks. Additionally, my staff and I work closely with the Office of
8 Training and Development and through the Centers of Excellence, to
9 further enhance our training and preparedness.

10 ...
11 In order to lessen the likelihood of deadly force situations and reduce
12 the risk of injury or death to agents and others, I am implementing the
13 following directive effective immediately, which clarifies existing
14 guidelines contained in the CBP Use of Force Policy:

15 Agents should continue, whenever possible, to avoid placing
16 themselves in positions where they have no alternative to using deadly
17 force. Agents shall not discharge firearms in response to thrown or
18 hurled projectiles unless the agent has a reasonable belief, based on
19 the totality of the circumstances, to include the size and nature of the
20 projectiles, that the subject of such force poses an imminent danger of
21 death or serious injury. Agents should obtain a tactical advantage in
22 these situations, such as seeking cover or distancing themselves from
23 the immediate area of danger.²⁴⁴

24 VI. Opinions

25 A. It Is Inherently Suspect for a Law Enforcement Officer to Use 26 Deadly Force in Response to Rock Throwing.

27 113. In my experience I have never heard of, and do not know of, any law
28 enforcement agency that considers a thrown projectile as per se “Deadly Force.”
Key principles in modern law enforcement, which CBP Policy endorses, are
“Force Continuum” and “Imminent Peril.” Virtually all thrown objects fail to meet
the “Imminent Peril” standard.

²⁴⁴ Fisher Memo at 2-3.

1 114. One can theorize limited circumstances where a rock might pose a
2 risk of death. For example, if an officer were on the ground and a suspect was
3 standing over his/her upper body with a cinder block or large stone raised over
4 their head, the aggressor would have the ability to seriously injure or kill the
5 officer on the ground. The officer on the ground would clearly be in “imminent
6 peril.” At that point use of deadly force by themselves or any other officer present
7 would be within policy.

8 115. A hurled object causing death to a state or local officer is extremely
9 rare. I am aware of one incident where an officer was reported killed by a thrown
10 rock or projectile, this occurring in 1942, and none in the Border Patrol.²⁴⁵

11 116. In my experience in law enforcement, I have been subjected to thrown
12 objects (rocks, bottles, frozen canned sodas, Molotov cocktails). For example, one
13 incident involved a demonstration in a park where the Ku Klux Klan was holding a
14 recruiting rally. Robed Klan members were violently attacked. Multiple objects
15 were thrown at Klan members, who were surrounded in a protective ring of police
16 officers commanded by myself. Thrown objects struck both the officers and the
17 Klan members, and with Molotov cocktails breaking and burning, my SJPD
18 Tactical unit evacuated the Klan members to a safe location. No shots were fired.
19 During the recent Baltimore riots 160 officers were injured, a majority by thrown
20 objects. No shots were fired by BPD or their Mutual Aid partners over the course
21 of the several days of intense conflict.

22 117. Training for instances of assault by rock or bottle throwing depends
23 on the location, distance, and weaponry of the antagonist(s). If the confrontation is
24 unexpected, officers are trained to seek distance, cover, and await backup. If pre-
25 planned, they are trained to deploy and utilize safety equipment, and obey the
26 commands of the incident commander. Less lethal weapons may be deployed

27 ²⁴⁵ 02042-Yanez-Reyes.

1 depending on the circumstances. Response tactics are determined by the number
2 of persons involved, reason for the confrontation, type of objects thrown,
3 availability of cover and concealment options, and arrival of backup resources, to
4 name a few. These decisions must be made on a case by case basis in any type of
5 law enforcement situation. But to rely on use of deadly force is virtually unheard
6 of.

7 **B. A Reasonable Supervisor Would Not have Been Indifferent to the**
8 **Situation that Fisher Confronted.**

9 118. Based on my review of the facts and circumstances of Border Patrol
10 use of force practices before Yañez's death, it is my opinion that any reasonable
11 chief in Fisher's shoes would have recognized a serious need for correction in
12 practice and training.

13 119. Before Yañez's death it appears there are more than 30 incidents
14 involving shots fired in response to a reported rock assault since 2006, eight
15 involving a fatality. Of those, there appears to be at least 18 incidents that
16 involved shots fired at rock throwers while Fisher was Chief, four involving a
17 fatality. I understand that these use of force numbers are likely lower than what
18 occurred on the field and will be revised as more information becomes available.
19 Indeed, the DHS OIG Report found that there were 33 deadly force responses to
20 rock assaults in FY 2011 alone. According to DHS OIG, that is 10% of all rocking
21 assaults and nearly 50% of all use of force encounters within OBP.²⁴⁶

22 120. It is not only my assessment, but also the opinion of the Police
23 Executive Research Forum, that the practice of Border Patrol agents using deadly
24 force to respond to rock throwers is a serious concern. Although a large number of
25 cases have far too little factual detail for me to form an opinion about the
26 individual circumstances, the totality of the use of force incidents alone is

27 ²⁴⁶ DHS OIG Report at 14.

1 astonishing. Furthermore, based on a review of the cases that includes information
2 in the public domain, I agree with PERF that too many cases do not appear to meet
3 the test of objective reasonableness, or otherwise appear highly suspect. Some
4 cases involve individuals who were shot in the back. Other cases involve
5 situations where the threat of a rock was contradicted by video or scientific
6 evidence. Particularly troubling are cases involving shots fired at suspects
7 throwing rocks over or on the border fence, or from Mexican territory, where any
8 threat is substantially diminished by distance and where sufficient time would
9 appear to exist for agents to seek cover or move out of range.

10 121. In my opinion, Chief Fisher was well informed about “rockings,” and
11 these use of lethal force incidents by his Agents. Every police chief in a law
12 enforcement agency is well briefed on significant shooting incidents. The
13 information I was provided to review each use of force incident concerns only a
14 scintilla of what Border Patrol protocols would appear to require Chief Fisher to
15 receive. Apparently Chief Fisher is notified twice about the circumstances of each
16 deadly force incident within 4 hours of the incident occurring. And for every
17 shooting, he is also supplied an Issue Paper to discuss at briefings, and he is likely
18 receiving follow up emails, summary investigative reports, and letters from
19 Mexico. That is in addition to the what he reads in the news about some incidents.

20 122. Tomsheck testified that the Hernandez incident was well known
21 among everyone in CBP. Fisher likely saw a video of that incident, which
22 Tomsheck stated very clearly shows Hernandez did not throw any rocks. If I were
23 in Fisher’s shoes, the Hernandez incident would have given me a significant sense
24 of urgency to reform Border Patrol use of force practices.

25 123. In addition, no reasonable supervisor would think it necessary to wait
26 years until an official investigative determination about the reasonableness of a
27 particular incident. Waiting all that time simply perpetuates a problem that requires
28

1 immediate action. There was a significant employment surge in a short period of
2 time, with many young or inexperienced agents looking for guidance. In addition,
3 rock assaults were frequent in 2010. And because this was a particular use of force
4 circumstance that was unique to the Office of Border Patrol, not the other
5 operational components, use of force policy requires that Fisher be the one who
6 provides the operational guidance. Chief Fisher was a lifelong Border Patrol
7 officer, and witnessed the evolution of the “rocking” phenomenon as it became
8 more prevalent over the years. He was a Chief Patrol Agent in one of the busiest
9 sectors on the southern border and whose agents were one the most frequently
10 “rocked.” His indifference is not explainable.

11 **C. Chief Fisher Failed to Train, Equip, and Provide Operational**
12 **Guidance to Agents to Address the Unique Threat of Rock**
13 **Throwing.**

14 124. Chief Fisher failed to deal with the increasingly obvious and more
15 frequent application of deadly force by his subordinates. He failed to properly
16 address the string of highly suspect, and often fatal shootings, and the increasing
17 community concern and associated political interest in them.

18 125. In my opinion, there are a number of actions Chief Fisher should have
19 taken. Early in his tenure he should have modified or clarified policy to ensure
20 agents were evaluating their options in light of proper escalation/de-escalation and
21 imminent peril use of force considerations. These evaluations include seeking
22 cover, and increasing the distance between the agent and the threat. He should
23 have ensured that all agents had proper and sufficient equipment. If that
24 equipment did not currently exist, ensure that it was developed (protective head
25 gear with face shields and communications capability, adequate less lethal
26 capability). He should have developed adequate training, especially scenario-
27 based training to address rock attacks. He should have confronted and
28

1 countermanded the labor organization’s assertions that all “rocking” incidents were
2 deadly force and would be responded to as such. He should have created a
3 disciplinary system that ensured adequate and timely discipline. None of these
4 actions occurred before the death of Yañez.

5 **D. Agent Diaz’s Use of Deadly Force Against Yañez Was a Highly**
6 **Predictable Consequence of Fisher’s Failures.**

7 126. The failings of Chief Fisher to correct the agents use of force practices
8 before Yañez’s death perpetuated the pattern and practice where unprincipled
9 agents may believe that they may violate the constitutional rights of others with
10 impunity or where poorly trained agents may unwittingly follow in those agents
11 footsteps. This is evidenced by fisher himself who issued the memorandum in
12 order to lessen the likelihood of deadly force situations and reduce the risk of
13 injury or death.

14 127. The culture of Border Patrol was led by Chief Fisher. The leadership
15 of a police department is important as it sets the tone and culture within the
16 department and creates a department that is either supportive of the Constitutional
17 rights of others or one that engages in a pattern and practice of abusing those
18 Constitutional rights of others. True, it apparently was Aguilar who first
19 implemented the “paramilitary” culture, and who described the shooting of a rock
20 thrower as a “good shoot,” but Fisher did nothing to undo the culture that he
21 inherited, he merely perpetuated the problem of hyper-aggressive, provocative, and
22 intense policing.

23 128. Recognizing activities that pose threats to your subordinates is also a
24 paramount responsibility of leadership. If you knew as a leader that your agents
25 faced rock throwing on a daily basis, you must develop not only response, but
26 prevention options as an equally important agent and public safety issue. Here,
27 problem recognition, new policy development, creation and delivery of effective
28

1 training (scenario for example), equipment evaluation and acquisition, and
2 accountability processes were required.

3 129. The person in command of the Border Patrol has a number of
4 professional obligations when evaluating situations of this nature. They must be
5 aware of every use of deadly force. They must realize that lethal force against a
6 rock thrower is inherently suspect. A leader must recognize if a less-lethal option
7 was appropriate, available, and could have been utilized. These options include
8 taking cover, increasing distance, or release of the subject. They must realize that
9 the labor organization representing the agent has a self-serving point of view, a
10 duty of fair representation of their agents, and a highly visible and vocal platform
11 from which to comment and significantly affect practice. They must understand
12 that the frequency of deaths caused by agents' use of firearms is subject to and an
13 obligation of command review, as is the quality, accuracy, and integrity of the
14 investigation. The leader must adjudicate the event in light of the Agent's
15 escalation of force options, and the presence of imminent peril to the agent or
16 another person. Absent these considerations, the leader is negligent in fulfilling
17 his/her responsibilities to the organization and the nation.

18 130. It is no surprise that Agent Diaz here justified his use of deadly force
19 by claiming a rock was thrown, when he could and should have employed de-
20 escalation techniques and considered the proper imminent peril standard. Agent
21 Diaz's actions were a highly predictable consequence of the lack of proper training
22 and direction that a reasonable chief would have provided in these circumstances.

23
24 Dated: February 29, 2016

25 *Thomas Frazier*
26 _____
27 Thomas Frazier
28

Exhibit A

Thomas C. Frazier

Frazier Group, LLC
P.O. Box 50218
Baltimore, Maryland 21210



Professional Experience

2001-present Frazier Group LLC President

Founder and CEO of a global consulting firm providing customized services to clients in the government, corporate, and nonprofit sectors. Establish and oversee advisory, intervention, and study teams working in the areas of strategy development, executive management, operations, administration, organizational assessment, executive search, and civil rights compliance. Develop innovative, cost-efficient programs, proposals, and curricula. Established and developed a nationally recognized team of subject matter experts. Frazier Group, LLC, has served clients including the Department of Homeland Security, NASA, Johns Hopkins University, U.S. Department of Justice, State of Sao Paulo (Brazil), National Association of Public Administrators, and the Cities of Philadelphia, Boston, and Louisville. Served as a Federal Monitor of the Consent Decrees of both the Cities of Los Angeles and Detroit, leading the assessment of training and force encounters. As an expert in Fusion Center operations and assessment, visited and assessed dozens of centers across America. Taught Suspicious Activity Reporting (nationwide SARS Initiative) to police chiefs and sheriffs across the country.

From 2001 to 2010, served as Executive Director of the Major Cities Chiefs Association (MCCA), one of the nation's oldest and most influential law enforcement organizations. This association represents the chief executives of the 70 largest law enforcement agencies in the United States and Canada. Supported the Board of Directors of MCCA in responding to critical issues, coordinated MCCA activities and promoted relationships among member agencies, the National Sheriffs Association, the Major County Sheriffs Association, the International Association of Fire Chiefs, DHS Grants Administration, DHS Intelligence and Analysis, the Department of Justice, and represented MCCA in matters before Congress and the White House.

Served as the MCCA representative to policy councils on Intelligence Led Policing, Suspicious Activity Reporting, the Senior Law Enforcement Interagency Advisory Group, ODNI Partners Group, the Fusion Center Management Group, the Criminal Intelligence Coordinating Council, the Global Intelligence Working Group, and the MCC Intelligence Commanders Group. Responsible for leading delivery of the Chief Executive Officers Briefings to State and Regional Chiefs and Sheriffs on Suspicious Activity Reporting, and the value of the nation's Fusion Center network. Held face-to-face issue meetings with Attorney General Eric Holder, Secretary of DHS Janet Napolitano, White House and Congressional staff, and former attorneys general and Presidential appointees.

- Board Member, Mid-Atlantic Regional Community Policing Institute
- Member, MD. Lt. Governor's and Attorney General's Family Violence Council
- Former Chair, MD. Governor's Community Oriented Policing Subcommittee
- Former Chair, MD. Governor's Juvenile Justice Subcommittees
- Co-Chair, MD. Governor's Council on Criminal and Juvenile Justice

Professional Organizations

- International Association of Chiefs of Police
- FBI National Executive Institute Association
- Police Executive Research Forum
- National Organization of Black Law Enforcement Executives
- Maryland Chiefs of Police
- Texas Chiefs of Police Association
- Texas Sheriffs Association

Awards and Honors

- 2001 - Edmund J. Randolph Award for Outstanding Service, United States Department of Justice
- 2000 - Brigadeiro Tobias Honor Medal, Police of the State of Sao Paulo, Brazil
- 1999 - IACP Webber-Seavey Award for Quality in Law Enforcement
- 1998 - John Jay College Man of the Year
- 1996 - President's Award, Fullwood Foundation
- 1996 - Make A Difference Award, Baltimore Chamber of Commerce
- 1996 - Outstanding Citizenship Award, Baltimore Commission on Aging and Retirement

Community Service

- Commissioner, Los Gatos PAL Soccer, 500 Youth Players
- Vestry, Episcopal Church of the Redeemer, Baltimore, MD.
- President, Blythewood Neighborhood Association, Baltimore, MD.
- Board of Directors, Chesapeake Bay Outward Bound
- Vestry, St. Luke's Episcopal Church, Los Gatos, CA.
- Rector Search Committee, St. Luke's Episcopal Church, Los Gatos, CA.
- Coach, Towson Recreation Girl's Soccer, Baltimore, MD.
- Advisor, Baltimore Police Athletic League
- Board of Directors, Baltimore Municipal Employees Credit Union
- Advisor, Signal 13 Foundation, Baltimore Police Department
- Board of Directors, Baltimore Council, Boy Scouts of America
- Board of Directors, Baltimore Substance Abuse System
- Board of Directors, Chesapeake Bay Outward Bound

Exhibit B

Materials Considered

- Third Amended Complaint
- Yañez Incident
 - Police Investigation SDPD Bates 001
 - Significant Incident Report (Deft-1035-39)
 - CBP - Photos - Aerials - Agent Berry (65 Combined)
 - CBP - Photos - US Side - Daylight - Agent Berry (57 Combined)
 - Photos - Scene MX Side (6.8.11)
 - Photos - Scene US Side (Unknown Author or Date)
- Depositions
 - Transcript of Deposition Testimony of Michael Fisher, January 15, 2016 (“Fisher Dep. Tr.”)
 - Transcript of Deposition Testimony of James F. Tomscheck, January 12, 2016 (“Tomscheck Dep. Tr.”)
 - Transcript of Deposition Testimony of Dorian Diaz, January 19, 2016 (“Diaz Dep. Tr.”)
 - Transcript of Deposition Testimony of Chad Nelson, January 21, 2016 (“Nelson Dep. Tr.”)
 - Transcript of Deposition Testimony of Shawn Moran, January 8, 2016 (“Moran Dep. Tr.”)
- News
 - 01253-YANEZ-REYES)
 - 01271-YANEZ-REYES
 - 01189-YANEZ-REYES
 - 01193-YANEZ-REYES
 - 01209-YANEZ-REYES
 - 01224-YANEZ-REYES
 - 01226-YANEZ-REYES
 - 01257-YANEZ-REYES
 - 01268-YANEZ-REYES
 - 02000-Yanez-Reyes
 - 02004-Yanez-Reyes
 - 02041-Yanez-Reyes
 - 02026-Yanez-Reyes
 - 02023-Yanez-Reyes
 - 02028-Yanez-Reyes
 - 02022-Yanez-Reyes
 - 02020-Yanez-Reyes
 - 02062-Yanez-Reyes
 - 02063-Yanez-Reyes
 - 02067-Yanez-Reyes
 - 02069-Yanez-Reyes
 - 01202-YANEZ-REYES
 - 01196-YANEZ-REYES
 - 02044-Yanez-Reyes
- Data
 - UFRS Rocking Data from 9/28/15 (Deft-1002) (“UFRS”)
 - UoF Count from 6/1/2008 to 6/1/2011 (Deft-957)
 - Nationwide Rocking Assaults and Responses via Deadly Force (Agent Shooting)

- FY2010-FY14TD) as of 3/7/14 (Deft-998)
 - USBP Nationwide Rocking Assaults by Sector and Station CY2008* - CY 2015TD through August (Deft-997)
 - USBP Nationwide Annual Rocking Assault Data to 3-7-15 (Deft-998)
- Training Documents
 - Basic Shotgun Training (Deft-802)
 - Firearms Safety Rules (Deft-785)
 - Integrated Firearms (Deft-827)
 - Off Range Safety (Deft-819)
 - Diaz All My Training (192)
 - Nelson All My Training (Deft-669)
 - Border Patrol Academy Physical Techniques (Deft-701)
 - Interim Firearms and Use of Force Police Guidance (Deft-724)
- Significant Incident Report Emails
- Memorandum from Michael J. Fisher to All Personnel, (Mar. 7, 2014) (00131-YANEZ-REYES) (“Fisher Memo”)
- Department of Homeland Security, Office of Inspector General, CBP Use of Force Training and Actions to Address Use of Force Incidents, OIG-13-115 (Redacted) (September 2013) (“DHS OIG Report”)
- October 2010 Use of Force Policy Handbook (“2010 Handbook”) (00002-YANEZ-REYES)
- Use of Force Incident Summary Report, (Deft-1100)
- February 2013 U.S. Customs and Border Protection Use of Force Review, Cases and Policies conducted by the Police Executive Research Forum, (“PERF Report”) (00110-YANEZ-REYES to -130)
- Associated Press news article titled “Border Patrol agents will continue to use deadly force against rock throwers” (Nov 5, 2013)
- Homeland Security Advisory Council Interim Report of the CBP Integrity Advisory Panel (“CBP Integrity Report”)
- Email (Deft-1049)
- Email (Deft-1045-46)
- Email (Deft-1051-53)
- Email (Deft-1106-08)
- Letter from Arturo Sarukhan to Janet Napolitano cc Michael J. Fisher (01169-YANEZ-REYES)
- Letter from Eduardo Medina Mora Icaza to Janet Napolitano, (01177-YANEZ-REYES)
- Summary spreadsheet of disciplinary action, (Deft-1155-57)
- Jim Tomsheck Document Notes
- Jim Tomsheck Declaration
- Border Patrol Staffing Report (02032-Yanez-Reyes)
- 02004-Yanez-Reyes (“DOJ Report”)
- 02042-Yanez-Reyes
- <https://www.youtube.com/watch?v=mzFqhSkQpFo&feature=youtu.be>
- <https://www.youtube.com/watch?v=ETETyYoxUTw>
- <http://www.nbpc2366.org/content/nbpc-press-release-rock-assaults>
- <http://www.justice.gov/opa/pr/federal-officials-close-investigation-death-carlos-lamadrid>.