

**FOR PUBLICATION**

Before: Procter Hug, Jr., John M. Duhe, Jr.,\* and  
Richard C. Tallman, Circuit Judges.

Opinion by Judge Hug

---

Tj 0 -13.20 0 rf -0.10 0 r\* 0\*

8339

## **COUNSEL**

Knut S. Johnson, San Diego, California, Sylvia Baiz, San Diego, California, and Stephen D. Lemish, El Cajon, California, for the appellants.

John N. Parmley, Assistant United States Attorney, San Diego, California, for the appellee.

---

## **OPINION**

HUG, Circuit Judge:

### **I. Introduction**











ing a package of donuts and a liter of water, we would say, "You are just asking for trouble."

That is what they were doing, they were asking for trouble. They knew that there was a substantial risk, but they were willing to take the substantial risk because that would get them into the United States and would result for them in compensation.

And under the circumstances, the court believes that 2L1.1(b)(5) has been established . . . I incorporate all of the findings made previously durllingheo-

A. U.S.S.G. § 2L1.1(b)(5)

U.S.S.G. § 2L1.1 is the Guideline for transporting, harboring illegal aliens. It provides: "If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18." U.S. Sentencing Guidelines Manual § 2L1.1(b)(5) (2000). Application Note six explains:

Reckless conduct to which the adjustment from subsection (b)(5) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, harboring persons in a crowded, dangerous, or inhumane condition).

Id., cmt. n.6. Application Note one to U.S.S.G. § 2A1.4

It provides that the adjustments apply to offenses to which the adjustments

way of food, water, clothing, and equipment; nevertheless, Appellants agreed to participate in the venture. They could

that specifies intent, is a clear indication that no intent is necessary for an increase under § (b)(6).

United States v. Herrera-Rojas, 243 F.3d 1139, 1144 (9th Cir. 2001). The district court, deciding the issue before our opinion in Herrera-Rojas, correctly reasoned to the same conclusion. Because Appellants were subject to § (b)(5) for recklessly creating the risk, an additional eight-level increase was required by § (b)(6)(4) for the death that resulted from that risk.

C. Mia0pole RegarcidinRodriguez-Cruzas

guiding aliens. Thus, his role was less significant than El Pajaro's but more significant than Gutierrez-Sanchez's or

ture that increased sentencing range from 151-188 months to 324-405 months); United States v. Green, 1522 F.3d 1202, 1209 (9th Cir. 1998) (per curiam) (affirming 11-level downward departure for rehabilitation). However, we wil.6 -13.8 sej 0 -T\*.0496886c 0.0433886c 0warifat e excint