

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

8910

8911

COUNSEL

Debra A. DiIorio, DiIorio & Hall, San Diego, California, for the appellant.

Kevin J. Kelly, Assistant U.S. Attorney, San Diego, California, for the appellee.

ORDER

The slip opinion filed March 27, 2001 and amended April 25, 2001, is amended as follows:

At slip opinion 5225, lines 4-6 of the text, delete the sen-

said that he was from Mexico and had no such right. The border patrol agents did not advise the group of their

We have decided many Miranda cases with language that seems to bear on various circumstances of this case. The few

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the questioning of a
not custodial interroga-
were two reasons. First,
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protects against, either in the roadside stop circumstances of Berkemer

order, suffice to establish alienage.²⁶ Here, the government presented evidence of Galindo-Gallegos's prior deportation orders, his repeated admissions of alienage during the numerous prior deportation hearings, his admission of alienage at the scene of his apprehension, and the circumstances surrounding his apprehension, all of which together sufficiently would enable a rational trier of fact to conclude that alienage had been established beyond a reasonable doubt.

III. Aggravated felony.

Galindo-Gallegos's sentencing guideline level was adjusted upward 16 levels based on his prior conviction for an aggravated felony.²⁷ The predicate felony was a conviction for transporting aliens within the United States, knowing that they were there illegally and in furtherance of the illegal entry or presence.²⁸ The conviction was not for smuggling aliens into the country, just for transporting them after they were in. The guideline refers to the statute defining aggravated felonies,²⁹ and the statute has a parenthetical phrase referring to "smuggling."³⁰

[3] The statute on "bringing in and harboring aliens"³² criminalizes numerous categories of conduct. The first section applies to one who brings an alien to the United States at a place other than a proper port of entry.³³ The second applies to one who knowingly transports an illegal alien within the United States.³⁴ The aggravated felony statute refers to both of these sections, and then has the parenthetical "relating to alien smuggling."³⁵

Appellant argues, correctly, that we use a "categorical" analysis, which is to say, we look at the statute, not the conduct that was the basis for conviction.³⁶ He then argues that because the aggravated felony statute expressly uses the parenthetical phrase "relating to smuggling," and his offense of conviction consisted only of transporting aliens already in the United States and not smuggling them across the border, the aggravated felony provision excludes him from coverage.

³² See 8 U.S.C. § 1324.

³³ See 8 U.S.C. § 1324(a)(1)(A)(i) which applies criminal penalties to any person who:

[K]nowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien.

[4] We reject Galindo-Gallegos's reading, because it does not make sense of all the words of the statute. All subsection (ii) "transporting" offenses involve aliens who are already in the United States. The aggravated felony provision expressly includes subsection (ii) "transporting" offenses. Therefore the aggravated felony provision has to include transporting aliens who are already in the United States. Also, the subsection (ii) "transporting" offense requires, as one of its elements, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of

States illegally should not have been suppressed, as well as

