FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 00-50276
00-50411

v.

D.908rN Tj -3220255 Tc -0.0255 Tw (

15859

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COUNSEL

Joel Levine, Joel Levine, Esq., A Professional Corporation, Encino, California, for defendant-appellant Ted Stevenson Angwin; Jerry M. Leahy, Law Offices of Jerry M. Leahy, San Diego, California, for defendant-appellant Christine Khamis.

Gregory A. Vega, United States Attorney, Bruce R. Castetter, Assistant United States Attorney, Chief, Appellate Section, Criminal Division, Mark R. Rehe, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

ORDER

to the area by the side of the road where they hid to await the
motorhome. Vincente-Morales stated that approximately fif-
teen minutes after they arrived, the motorhome pulled up and
he saw a person who was not a member of their group wave
towards the group as if to signal them. While he could not tell
whether the person waving was a man or a woman, he said
that the person waroc28F9709.2 Trwront side ofvehic. Won saidthadefendants. Ce ons Oneled up anda)(2)(B)(ii)v

training and experience with rescuing distressed ships while serving in the Coast Guard Auxiliary. The United States objected td* -tg perienceas notth levant,ng an -tgg disictes o

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States v. Sarkisian, 197 F.3d 966, 978 (9th Cir. 1999), cert. denied sub nom. Mikayelyan v. United States, 120 S.Ct. 2230

that their defenses can be considered antagonistic. First, their theories were barely inconsistent, let alone antagonistic. Khamis claimed that there was insufficient evidence to show that she knew about the illegal activity, while Angwin argued that he acted under duress and therefore lacked the requisite criminal intent. Those defenses are not irre* - gDle, waate

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Angwin's first argument is also unpersuasive. While

that he was lying again.[2] The material witness Vincente-Morales also testified that the motorhome stopped right where

have shown that his reactions when the aliens entered the motorhome and at the USBP checkpoint were consistent with his training and experience in the Auxiliary, which, he claims, had taught Angwin to take the least confrontational course of action in potentially dangerous situations. Angwin interprets the district court's remarks in excluding the evidence as doing so because the defe0atin innderedoin iroduencmultipleng
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vant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . ." Fed. R. Evid.

First, the district court did not reject Angwin's proffered evidence on the ground that Angwin wanted to show too many examples of his conduct and training. Instead, the court found that his training simply was not sufficiently parallel to his conduct on the day of the crime. The district court's comment that Angwin's Auxiliary training was not parallel implies that the court was skeptical about the probative value of the evidence, not that the court misinterpreted Rule 406. In other words, as the United States explains, the district court was not objecting to the quantity of Angwin's evidence but its quality. Because Angwin's experience in rescuing distressed boats at sea is not particularly similar to the the evidence, noted

of aiding and abetting a violation of 8 U.S.C. section 1324(a)(2).**5**
In Angwin's view, subsection (a)(2) does not subject defendants to aiding and abetting liability, while subsection (a)(1) does expressly impose such liability. A district court's decision regarding whether to dismiss an indictment based on its interpretation of a federal statute is reviewed de novo. See United States v. Hagberg, 207 F.3d 569, 571 (9th Cir. 2000).

Subsection (a)(1)(A) provides t 0eperstiowho, knongwgn-

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violation results in a mandatory minimum sentence of three
years and a maxtence of three

purpose of commercial advantage is subject to a ten-year maximum term. But for subsection (a)(1)(A)(v)(II), a defendant who aided and abetted that offense would also face a ten-year maximum term. Under the aiding and abetting provision, however, a defendant who aids and abets the offense only faces a five-year maximum sentence.

Thus, IIRIRA's amendments do not operate to impose aiding and abetting liability where such liability does not otherwise exist. Given the general presumption of Title 18, a defendant could always have been found guilty of aiding and abetting the offenses in subsection (a)(1), even before IIRIRA. Instead, the addition of the aiding and abetting provision in subsection (a)(1)(A)(v)(II) and the corresponding adjustments to the penalty provisions in subsection (a)(1)(B) operate to impose lesser penalties for aiders and abettors of

tors under subsection (a)(2). In other words, subsection (a)(1)

inducement, harboring, and transportation prohibitions, and for those who aid and abet such crimes." H.R. Rep. No. 104-828 (1996), 1996 WL 563320 (Leg. Hist.) (page numbers unavailable) (emphasis added). A court should interpret statutes in a manner consistent with the legislature's overall intent. See SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943).

b. Whether the Government Proved Financial Gain

Crim. Jury Instr. 9.2 (2000); see also United States v. Hernandez, 913 F.2d 568, 569 (8th Cir. 1990).

Standing alone, Khamis' presence in the motorhome would

Second, Khamis made a statement to Agent Searle that was inconsistent with Angwin's testimony at trial with respect to certain details about their travel such as the time they left the rest area and why they stopped along the highway and that otherwise failed to corroborate Angwin's version of the events.

Third, there was indirect evidence that Khamis waved to the aliens as if to encourage them to enter the motorhome. When the defendants stopped along the highway, Khamis exited on the passenger side and toward the front of the vehi-

1191 (2000). The district court's factual findings are reviewed for clear error. See United States v. Maldonado, 215 F.3d 1046, 1050 (9th Cir. 2000), cert. denied, 121 S.Ct. 1141 (2001).

was seated, let alone wearing a seatbelt. Angwin even testified that the motorhome was very top-heavy, that he was worried the vehicle could flip over, and that he was concerned about driving on the narrow highway with steep shoulders. Since the district court did not commit clear error in finding those facts, it is difficult to conclude that the court abused its discretion in applying the adjustment.

Moreover, it is clear that a district court does not abuse its discretion by applying the upward adjustment in such a factual context. The commentary to Guidelines section 2L1.1 specifically notes that transporting an excessive number of passengers in a vehicle presents a risk of serious bodily injury or death:

> 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, or harboring persons in a crowded, dangerous, or inhumane condition).

USSG § 2L1.1, commentary n.6 (emphasis added). Angwin's argument is particularly unavailing in light of United States v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 2000), in which this Court recognized that overloading a vehicle can

III. CONCLUSION

onstrate this level of criminal intent. See United States v. Nguyen, 73 F.3d 887, 893 (9th Cir. 1995).

The majority states that "there can be little doubt that Khamis knew or recklessly disregarded the fact that the aliens were not lawfully in the United States." Maj. op. at 15886. The majority seems to believe that Khamis' mere presence in the motor home infers her knowledge of the particular criminal activity of whicg the pwasactcused.Khamis' mresence in

There was no testimony that Khamis actually saw the aliens until the motor home was searched at the border checkpoint.

Hilario Vincente-Morales, one of the aliens, testified that the only person he saw other than the people in his group was Angwin. The only testimony indicating that the aliens knew someone else might be present was Vincente-Morales' statement that he saw a hand waving. This testimony is ambiguous at best. Vincente-Morales did not actually see the person who was waving the hand, and he could not tell if the hand belonged to a male or female because he was distracted -- the hand was toward the front of the motor home, he was running through tall grass that partially blocked his view, there were fourteen other aliens running with him, and people were tripping in their rushed attempt to get into the back of the motor home. Testimony about a briefly-glimpsed, unidentifiable hand does nothing to support Khamis' conviction. Moreover,

the tall grass? There are just too many unknowns to support
a guilty verdict on this basis.

The majority's citation to United States v. Loya, 807 F.2d
1483, 1486 (9th Cir. 1987), does not strengthen the Govern-
ment's case. While circumstantial and indirect evidence may
support an inference that a defendant knew that aliens were
illegally in the United States, it pre-supposes that the person
actually saw the aliens and spoke to them. In Loya 0.07dupport anpt6 3