

**FOR PUBLICATION**

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## COUNSEL

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## OPINION

THOMAS, Circuit Judge:

In this appeal we consider, inter alia \_\_\_\_\_, whether a brief hiatus in otherwise continuous observation of a deported alien reentering the country is sufficient to establish that the alien was free from official restraint. Under the circumstances presented by this case, we conclude that sufficient evidence exists to support the defendant's conviction for being a deported alien found in the United States in violation of 8 U.S.C. § 1326 and affirm the judgment of the district court.

### I

On April 26, 2000, Christian Ramos-Godinez was deported to Mexico. On May 11, 2000, he reentered the United States a few miles west of the Calexico Port of Entry. Border Patrol

and flows east-west at the point that Agent Cweika watched through an infrared scope. A dirt "berm" is the actual physical border between the United States and Mexico. The agents were situated approximately 150 yards to a half-mile away from this border, on a field road east of Hammers Road and

approximately five minutes after Kozina. Kozina assumed that the three persons he encountered were part of the group of seven that had just crossed the canal. He did not think that

Ramos-Godinez in his post-arrest statement and were not in dispute.

Ramos-Godinez was charged with one count of being a deported alien found in the United States in violation of 8 U.S.C. § 1326. Subsequently, the government filed a superseding indictment adding another count, charging assault of a federal officer in violation of 18 U.S.C. § 111(a). After a trial, a jury returned a guilty verdict on both counts. At sentencing, the district court found that Ramos-Godinez was a category V offender with eleven criminal history points. The court sentenced Ramos-Godinez to a custodial term of twenty-seven months as to each count, with the sentences to run concurrently. The court imposed three years of supervised release as to the § 1326 conviction and two years as to the § 111(a) conviction, with the supervised release periods to run concurrently.

## II

It is a crime for any alien who has been previously deported to enter, attempt to enter, or at any time be found in the United States without the consent of the Attorney General. 8 U.S.C. § 1326(a). Ramos-Godinez was charged with being found in the United States in violation of § 1326(a). Although Ramos-Godinez was unquestionably within the borders of the

of § 1326. See Martin-Plascencia, 532 F.2d at 1317. On the other hand, if the alien is not free from official restraint while in our country, the alien has not "entered" the United States as that term is used in § 1326. Pacheco-Medina, 212 F.3d at 1163-64. Thus, in order to determine whether an alien is free from official restraint while in our country, the alien must be free from official restraint while in our country.

the point of capture. Id. Likewise, we have held that an alien was free from official restraint even though an undercover agent kept the alien under intermittent surveillance for seven months. United States v. Aguilar, 883 F.2d 662, 682-83 (9th Cir. 1989).

Thus, the most significant question in determining whether Ramos-Godinez was free from official restraint is whether he was under constant surveillance from the moment he crossed the border until his apprehension. In considering this question



beyond the statutory maximum. See United States v. Kentz,  
251 F.3d 835, 842 (9th Cir. 2001) (rejecting