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**COUNSEL**

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ing at 9,000 to 10,000 feet, he spotted several vehicles on the Mexico side in an area called the "Sand Pit" or "Gravel Pit." It is an area where smuggling happens daily. About 9 a.m., three of the vehicles began driving north. Through his binoculars, Basse could discern a white van, light blue van, and a Ford Bronco. He radioed Agent Serna, who was patrolling on foot in the general area, with the vehicle descriptions; Serna then got in his car and drove east on Interstate 8 in the direction of the Sand Pit. All three vehicles co "Gravel Pit."hite-0.1558lin the dirx41p0.0787 heado "Gowa (FI-8 (ay. A

mat, which was denied; and for a judgment of acquittal on the footing that he was never free from official restraint. The district court originally held that Hernandez-Garcia was not under official restraint, and that the transportation statute does not require that he be, but TD -0.0838 Tc 0.0ly held th18etato inhe ucn statjury T 0.1073 Tw 56t requir56t rinalic

Section 1324(a)(1)(A)(ii) provides:

(1)(A) Any person who--

. . .

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

. . .

shall be punished . . . .

On its face the statute prohibits transportation within the United States of an alien who has "come to, entered, or remains in the United States." These are disjunctive concepts. The crime is the transportation

any means of transportation who-- . . . (2) knowing

In a variation on the theme, Hernandez-Garcia argues that a defendant may only be convicted under § 1324(a)(1)(A)(ii) if he transports an alien within the United States, and he can't be transporting others within the United States if neither he

entry was required. Hernandez-Garcia maintains that even if we were to conclude (contrary to his position) that "entry" is not required, we cannot affirm because the jury was not instructed on a "come to" theory. While literally correct, the

agents had seen the white van and two others come across the border in an area frequently used by alien smugglers, at a place not designated as a point of entry, then cross traffic onto the interstate over the median, not at an entryway, and proceed west in a hurry. We see no basis for invalidating the arrest, or suppressing evidence, on account of use of the spike mat. Hernandez-Garcia alludes to the knock-and-announce rule, but offers no reason why it should apply to vehicle stops. Nor, apart from





into [sic] the United States [sic] soil. However, an alien who is able to exercise his free will subsequent to physically crossing the border is not under official restraint. Constant observation and surveillance of the alien by an agent who is reasonably able to apprehend the alien after the alien has crossed the border constitutes official restraint. The constant surveillance must be of such a degree that it would prevent the alien from escaping into the general population of the United States.

defendant acted in furtherance of the alien's violation of the law.

However, the Government concedes that the jury was not instructed that Hernandez-Garcia could be convicted if the aliens with Hernandez-Garcia had merely "come to " the United States. Instead, the jury was expressly instructed that in order to convict Hernandez-Garcia the jury would have to find that the undocumented Mexican nationals "entered the United States."

The majority holds that the official restraint instructions were superfluous "because to come to the United States is a step subsumed by 'entry'." (Emphasis in the original). However, this reasoning is circuitous because entry can only be found if there is an absence of official restraint. See United States v. Ruiz-Lopez, 234 F.3d 445, 448 (9th Cir. 2000).

The majority's holding also ignores the fact that the indictment charged that the aliens "had come to, entered, **and** remained in the United States." (Emphasis added). Her-

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distance the aliens traveled into the United States, the characteristics of the area in which the aliens crossed the border **and any other factor that bears on the issue.**" (Emphasis added).

Faced with these nebulous and erroneous instructions, I cannot comfortably rely on any finding of entry made by the jury in this case. In Ruiz-Lopez, we explained that to "enter" or be "found" an alien must be present in the United States free from official restraint. 234 F.3d at 448. Official restraint is construed "broadly to include constant government surveillance of an alien, regardless of whether the alien was aware of the surveillance or intended to evade inspection." Id.