No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 2019 TERM

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DENNY REYES
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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APPENDIX A—Court of Appeals Opinion (Nov. 20, 2019)

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**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

# SUMMARY ORDER

**Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of November, two thousand nineteen.**

PRESENT: JOSÉ A. CABRANES,
REENA RAGGI,
*Circuit Judges*,
EDWARD R. KORMAN,
*District Judge*.[*]

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UNITED STATES OF AMERICA

*Appellee,* 18-1745-cr

v.

DENNY REYES,

*Defendant-Appellant*.

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**FOR APPELLEE:** NICOLE P. CATE (Abigail E. Averbach, Julia L. Torti, Gregory L. Waples, *on the brief*), Assistant United States Attorneys, *for* Christina E. Nolan, United States

[*] Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

Attorney, District of Vermont, Burlington, VT.

**FOR DEFENDANT-APPELLANT:** BARCLAY T. JOHNSON (David L. McColgin, Michael L. Desautels, *on the brief*) Office of the Federal Public Defender for the District of Vermont, Burlington, VT.

Appeal from a May 29, 2018 judgment of the United States District Court for Vermont (Christina Reiss, *Judge*).

**UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court be and hereby is **AFFIRMED**.

Defendant-Appellant Denny Reyes ("Reyes") appeals from a May 29, 2018 judgment of conviction for aiding and abetting alien smuggling in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2, and for unlawful transportation of aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). The District Court sentenced Reyes principally to 36 months' imprisonment on the alien smuggling charge and 10 months' imprisonment on the unlawful transportation charge, to be served concurrently. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

In this appeal, Reyes claims that the District Court erred in its instructions to the jury on the alien smuggling charge because the instruction permitted the jurors to convict if they found that Reyes acted with reckless disregard of the smugglees' illegal status. Reyes argues further that the District Court abused its discretion in denying his post-trial motion to interview jurors regarding potential racial bias during their deliberations, in violation of his Sixth Amendment and Due Process rights.

## I. Jury Instructions for Aiding and Abetting Alien Smuggling

This Court reviews challenges to jury instructions *de novo*, "reviewing the charge as a whole to see if the entire charge delivered a correct interpretation of the law," and reversing "only when the error [in the instruction] was prejudicial." *United States v. Vargas-Cordon*, 733 F.3d 366, 379 (2d Cir. 2013) (internal quotation marks and citation omitted). If there was indeed an error in the instructions, we review under the harmless error standard, and will affirm a conviction "if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013) (internal quotation marks and citation omitted). If the defendant did not raise an objection to an instruction before the district court, we review the challenge on appeal for plain error. *See id.* Under that standard, we may correct a "clear or

obvious error" – *i.e.*, an error that is "obviously wrong in light of existing law," *see United States v. Pipola*, 83 F.3d 556, 561 (2d Cir. 1996) – if the error "affected the appellant's substantial rights" and "the error seriously affects the fairness, integrity[,] or public reputation of judicial proceedings," *United States v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016).

Reyes contends on appeal, as he did before the District Court, that actual knowledge of an alien's illegal status is a requisite for a conviction of aiding and abetting alien smuggling because of the Supreme Court's decision in *Rosemond v. United States*, 572 U.S. 65 (2014). For the first time on appeal, Reyes further contends that this knowledge must be "advance knowledge," which we review only for plain error. *See Botti*, 711 F.3d at 308.

*Rosemond* does not warrant relief from judgment in this case. In *Rosemond*, the Supreme Court reviewed a conviction for aiding and abetting the use of a firearm in connection with a drug trafficking or violent crime. *See* 18 U.S.C. § 924(c). The Supreme Court stated that "an aiding and abetting conviction requires . . . a state of mind extending to the entire crime." *Rosemond*, 572 U.S. at 76. Thus, to be guilty of aiding and abetting a § 924(c) crime, the defendant not only had to aid the underlying drug or violent crime, but also had to do so with knowledge that another perpetrator would use a gun in connection therewith. It is that advance knowledge of the crime's *actus reus* in *Rosemond* – use of a gun in particular circumstances – that enables a defendant to make a "relevant legal (and, indeed, moral) choice" to aid its commission. *Id.* at 67; *see id.* at 77 (explaining that a defendant who "actively participates in a criminal scheme knowing its extent and character intends that scheme's commission").

The crime here is alien smuggling. A defendant is guilty of that crime if he, "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 . . . in furtherance of such violation of law." 8 U.S.C. § 1324(a)(2)(B)(ii) (emphasis added). As the statutory text makes clear, a principal need not have actual knowledge of a smuggled alien's illegal status to be convicted; he is equally guilty if he recklessly disregards that status. Congress thus effectively codified in § 1324(a)(2)(B)(ii) what the law generally recognizes: that the knowledge element of a crime can be satisfied by proof of actual knowledge or conscious avoidance of such knowledge. *See United States v. Ferguson*, 676 F.3d 260, 278 (2d Cir. 2011) (holding that the "government need not choose between an 'actual knowledge' and a 'conscious avoidance' theory" (citing *United States v. Kaplan*, 490 F.3d 110, 128 n.7 (2d Cir. 2007)). Nothing in *Rosemond* requires that an aider and abettor have a higher degree of knowledge than that required of the principal. Indeed – as Reyes himself recognizes – "the aider and abettor must have knowledge of each element of the crime f*or which the principal must have knowledge*." Sand et al., *Model Federal Jury Instructions*, Criminal Instruction 11-1 Commentary (emphasis added); *see also* Appellant Br. at 33 & n. 8 ("Judge Sand's *Modern Federal Jury Instructions* now expressly incorporates [the] *Rosemond* rule and specifies that the jury must find that the defendant shared the mental state required for the principal offense."). Thus,

an aider and abettor of alien smuggling, like the principal of that crime, has the requisite *mens rea* where he "kno[w]s or . . . reckless[ly] disregard[s]" the illegal status of the smuggled alien. 8 U.S.C. § 1324(a)(2)(B)(ii). Accordingly, the district court was not required to instruct the jury that it needed to find that Reyes actually knew, much less actually knew in advance, that the individuals he picked up after they crossed the U.S.-Canadian border were aliens unlawfully in this country. It sufficed for him to have aided such smuggling with reckless disregard of the aliens' status.

In any event, Reyes' urged charging error was harmless, because the parties' singular focus at trial was on Reyes' actual knowledge, and the evidence overwhelmingly proved that knowledge. Notably, in summation, the prosecution argued only Reyes' actual knowledge, never referencing reckless disregard, or any variation thereof. *See* Joint App'x 298 ("How can you be sure from all the evidence you have heard that Denny Reyes knew what was going to happen that night?"); *id.* at 300 ("[T]here's the real question: Did he really know these people were aliens?"); *id.* at 302 ("Chino knew that he was smuggling illegal aliens across the border. . . . [Reyes'] behavior tells you that he would have understood that too."). The defense, meanwhile, argued that the evidence did not "show that [Reyes] knew in advance or that he even knew when he picked [the smugglees] up that these were going to be aliens." *Id.* at 304. In this context, the District Court's instructions – incorporating language directly from *Rosemond* – adequately explained the knowledge element in telling the jury that aiding and abetting "requires . . . a state of mind extending to the entire crime" and that the jury could not convict Reyes of aiding and abetting unless it found that he participated in the smuggling scheme "knowing its extent and character." Joint App'x 76.

Moreover, the evidence at trial overwhelmingly established Reyes' actual knowledge. Undisputed evidence showed that (1) on the night when four undocumented individuals crossed the U.S.-Canada border; (2) Reyes drove an SUV to that border location; (3) the four individuals who had crossed the border immediately headed towards Reyes' vehicle; (4) when law enforcement ordered them to stop, three of the undocumented individuals entered Reyes' vehicle; and (5) Reyes sped away. Joint App'x 142, 147, 149-52, 156, 165. Further evidence showed that (6) post-arrest, Reyes admitted that he drove to Vermont to pick up persons whom he effectively described as undocumented aliens, *see id.* at 228, 243; (7) in a controlled post-arrest call to "Chino," the crime's principal, Reyes expressed no surprise about what and whom he had picked up at the border, instead telling Chino that law enforcement was going to send the persons back "because they don't have papers," *id.* at 248, 249; and (8) records demonstrated extensive phone communications between Chino and Reyes in the days leading up to the smuggling event, *id.* at 217-18, 226. On this record, we are persuaded beyond a reasonable doubt that any reasonable jury presented with this evidence

"would have found the defendant guilty absent [the urged charging] error." *Botti*, 711 F.3d at 308 (internal quotation marks omitted).[1] Accordingly, Reyes' instruction challenge warrants no relief.

## II. Reyes' Post-Trial Motion to Interview Jurors

We review challenges to the denial of a motion to interview jurors for "abuse of discretion." *See United States v. Baker*, 899 F.3d 123, 130 (2d Cir. 2018). "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks, alteration, and citations omitted); *see also In re City of New York*, 607 F.3d 923, 943 n.21 (2d Cir. 2010) (explaining that "abuse of discretion" is a nonpejorative "term of art").

Based on the record before us, we cannot conclude that the District Court abused its discretion in denying Reyes' post-trial motion to interview the members of the jury. As this Court stated in *Baker*, such an inquiry is only appropriate "when there is clear, strong, substantial and incontrovertible evidence … that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant." *Baker*, 899 F.3d at 130 (internal quotation marks and citation omitted). The mere facts of Reyes' ethnicity and national origin, without more, do not lend themselves to an inference that the jurors were motivated by racial bias. And the bare assertion that "issues of race and ethnicity were front and center throughout the presentation of the evidence," by itself, is an insufficient basis to support an examination into potential racial animus by jurors. Appellant's Br. at 41. Accordingly, the District Court did not abuse its discretion in denying Reyes' post-trial motion.

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[1] Indeed, a reasonable jury would have to conclude that Reyes' actual knowledge was "advance," because he had a "realistic opportunity to quit the crime," *Rosemond*, 572 U.S. at 78, not only when the persons who had crossed the border approached his car, but even after these persons ignored a law enforcement order to stop and, instead, entered Reyes' vehicle. Reyes could have quit the crime then by himself exiting his car or at least declining to transport the aliens from the scene. The fact that, instead, he fled the scene with aliens who had just crossed the border is strong evidence of his guilty knowledge that they were illegal aliens and that his intent was to assist in alien smuggling. *See United States v. Seabrooks*, 839 F.3d 1326, 1335 (11th Cir. 2016) (stating that "knowledge . . . arising after the initiation of the offense may be sufficient to support an aiding and abetting conviction"). On these facts, the jury could easily have found him guilty of alien smuggling as a principal, even if he acted at the direction of others.

## CONCLUSION

We have reviewed all of the arguments raised by Reyes on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the May 29, 2018 judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

No. _____

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OCTOBER 2019 TERM

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DENNY REYES,
Petitioner
v.
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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APPENDIX B—District Court Decision (trial transcript excerpts Dec. 21, 2017)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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| UNITED STATES OF AMERICA | * | |
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| DENNY REYES | * | CRIMINAL FILE NO. 16-69 |

JURY TRIAL
Thursday, December 21, 2017
Burlington, Vermont

BEFORE:

THE HONORABLE CHRISTINA R. REISS
District Judge

APPEARANCES:

ABIGAIL E. AVERBACH, ESQ. and EUGENIA A.P. COWLES, ESQ., Assistant United States Attorneys, Federal Building, Burlington, Vermont; Attorneys for the United States

DAVID L. McCOLGIN, ESQ. and STEVEN L. BARTH, ESQ., Assistant United States Federal Defenders 126 College Street, Suite 410, Burlington, Vermont; Attorneys for the Defendant

ANNE NICHOLS PIERCE
Registered Professional Reporter
United States District Court
Post Office Box 5633
Burlington, Vermont 05402
(802) 860-2227

# I N D E X

## E X A M I N A T I O N



## E X H I B I T S



## M I S C E L L A N E O U S



## M I S C E L L A N E O U S



## M I S C E L L A N E O U S

to renew your motion. I am going to rule on it. We will go. We will come back for our charge conference.

I looked at Rosemond, and I added some language. It's on a green piece of paper, and Nick will give it to you. We will have a long discussion about that.

MR. BARTH: Thank you.

THE COURT: That was a 924(c) case, and the issue was knowing that there was going to be drug distribution but not knowing it was going to be armed. So it's a little bit different, but some of what Mr. Barth told me this morning I think should be included in the jury instructions, so I am going to address that. We will talk about that more, and we will have plenty of time to do it.

MR. BARTH: I will bring the case that -- from the Ninth Circuit that says -- that literally uses the language "prove every essential element of the crime charged."

THE COURT: Okay. And do you have your additional jury instructions that you wanted us --

MR. BARTH: Oh, I do. They are very short. I haven't talked to Mr. -- my colleague, Mr. McColgin. What I can do is just talk to him really quickly. I brought copies of them, if we want to use them. Maybe one of your clerks can stick around; I will give it to

THE COURT: Any challenge from the defendant?
MR. BARTH: No.
THE COURT: Instructions on the substantive law of the case. Any challenge from the government?
MS. COWLES: No, your Honor.
THE COURT: Any challenge from the defendant?
MR. BARTH: No, your Honor.
THE COURT: Count 1. Aiding and abetting alien smuggling. Any challenge from the government to that section?
MS. COWLES: I'm sorry. No, your Honor.
THE COURT: Any challenge from the defendant?
MR. BARTH: No.
THE COURT: Aiding and abetting, with the new language. Any challenge from the government?
MS. COWLES: No, your Honor.
THE COURT: Any challenge from the defendant?
MR. BARTH: Yes, your Honor.
We -- this is getting back to our concerns from the earlier discussion. And I take it the blue is the same as the green, because I made my notes on the green?
THE COURT: The blue is straight out of Rosemond. So I told you I would read it, and I agreed in part with what you were saying, and I took the language right out of Rosemond to make it clear that you

have to kind of, as an aider and abettor, embrace the whole crime. And before we broke, I said Rosemond's not really a great example because it's a 924(c), and if you understand that you are aiding and abetting drug distribution but you don't know the person's carrying a firearm in furtherance, it's not a good case.

We don't have that kind of breakdown in this case, to my knowledge, by way of the facts. So I included all of the language from Rosemond I thought was appropriate.

MR. BARTH: And, your Honor, we think that Rosemond stands for the proposition that the defendant would have to know all of the essential elements of the crime. I have a case, U.S. V Encarnación Ruiz, which was decided post-Rosemond.

In that case, the government -- in that case, a defendant pleaded guilty to aiding and abetting a child pornography case, and he moved to withdraw his plea. And he did so on the basis that he -- they used the wrong standard for aiding and abetting the possession of child pornography. And what he said was he had to know that the children who were depicted in the images were actually under the age of 18, whereas as a principal, you would not.

And the Encarnación court said, first, that he's right, as a principal you would not, but as an aider and

that would leave the jury confusing. I think we have to specifically tell the jury that, in an aiding and abetting crime, you have to know all of the elements. Here, that includes knowing that the alien -- that is really the corpus of the crime here, that the person was an alien -- that -- you have to know that the -- that the person who's alleged to be an alien was actually an alien.

So if the Court prefers its language to the language we offered -- which we think was pretty clear. It just laid out the elements again except this time the aider and abettor has no know each one of the elements of alien smuggling, including that the alien is an alien -- that's fine. I suggested some language to add to what the Court already wrote.

THE COURT: All right. So this is straight out of Rosemond, so it's not my language. It's right out of the court's opinion. And they -- the Supreme Court talks about a state of mind extending to the entire crime.

MR. BARTH: Right.

THE COURT: A person participating in a scheme, knowing its extent and character intends that scheme's commission, and the intent must go to the specific and entire crime charged. It's enough. It's

covered. And I am going to stick with this modified instruction finding it sufficient under Rosemond.

MR. BARTH: May I then inquire of the Court, if you believe it's covered, may I inform my colleague that he can argue that this covers that an aider and abettor must know -- in order to be guilty, the aider and abettor must know that the alleged aliens are, in fact, aliens?

THE COURT: You can -- he can make any permissible argument, and as you know, the safeguard is, The judge is going to instruct you on the evidence, and -- I mean on the law, and obviously you go with her instruction as opposed to my summary, but -- you know, and address it that way.

But, yeah, this is the one I am going to be giving.

MR. BARTH: Okay. I just -- I know that Mr. McColgin, under the -- at least under the aiding and abetting, is going to want to argue that they haven't proven that the -- that my client knew -- Mr. Reyes knew that these folks were aliens. And I wanted to just --

THE COURT: I think that's a permissible argument.

MR. BARTH: Okay. Very well. I just didn't -- if you were going to find it impermissible, I wanted to warn him so he doesn't do it.

No. _____

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FOR THE SECOND CIRCUIT

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APPENDIX C—Jury Instructions

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Case No. 2:16-cr-00069 |
| | ) | |
| DENNY REYES, | ) | |
| | ) | |
| Defendant. | ) | |

**JURY CHARGE**

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

This case is a criminal prosecution brought by the United States against the defendant DENNY REYES. DENNY REYES is charged in two counts.

The first count of the indictment charges the defendant with aiding and abetting the bringing of aliens to the United States for commercial advantage and private financial gain. Count I alleges:

> On or about February 7, 2015, in the District of Vermont, the defendant, DENNY REYES, knowing and in reckless disregard of the fact that certain aliens had not received prior official authorization to come to, enter, or reside in the United States, aided and abetted bringing to the United States, such aliens, for the purpose of commercial advantage and private financial gain.

This count charges the defendant with violating Section 1324(a)(2)(B)(ii) of Title 8 of the United States Code and Section 2 of Title 18 of the United States Code. Section 1324(a)(2)(B)(ii) makes it a crime for "[a]ny person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in

any manner whatsoever, such alien . . . for the purpose of commercial advantage or private financial gain[.]" Section 2 of Title 18 states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Count II of the indictment charges the defendant with transporting illegal aliens within the United States. Count II alleges:

> On or about February 7, 2015, in the District of Vermont, the defendant, DENNY REYES, knowing and in reckless disregard of the fact that certain aliens had come to, entered, or remained in the United States in violation of law, transported and moved, and attempted to transport and move such aliens within the United States by means of transportation, in furtherance of such violation of law.

This count charges the defendant with violating Sections 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(ii) of Title 8 of the United States Code. Section 1324(a)(1)(A)(ii) makes it a crime for "[a]ny person who 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[.]"

**ROLE OF INDICTMENT**

At this time, I would like to remind you of the function of an indictment. An indictment is merely a formal way to accuse a defendant of a crime before trial. An indictment is not evidence. An indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the charges against the defendant. The defendant has pleaded not guilty to the counts in the indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations in the indictment and the denial made by the not guilty plea of the defendant. You are to perform this duty without bias or prejudice against the defendant or the government.

## REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE

The government must prove the defendant guilty beyond a reasonable doubt. The question is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a whim, speculation, or suspicion. However, a reasonable doubt may arise from a lack of evidence. It is not an excuse to avoid the performance of an unpleasant duty and it is not sympathy.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require the government to prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to a defendant, which means that it is always the government's burden to prove each element of the crime charged beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

If, after a fair and impartial consideration of all the evidence against the defendant, you have a reasonable doubt, then it is your duty to find the defendant not guilty. On the other hand, if, after a fair and impartial consideration of all the evidence, you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict.

The law presumes the defendant is innocent of the charges against him. The presumption of innocence is a piece of evidence that lasts throughout the trial and during your deliberations. The presumption of innocence ends only if you, the jury, find beyond a reasonable doubt that the defendant is guilty. Should the government fail to prove the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

## EVIDENCE

You have seen and heard the evidence produced in this trial, and it is the sole province of the jury to determine the facts of this case. The evidence consists of the

sworn testimony of the witnesses, any exhibits that have been admitted into evidence, and all the facts that have been admitted or stipulated. I would now like to call your attention to certain guidelines by which you are to evaluate the evidence.

There are two types of evidence that you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something he or she knows by virtue of his or her own senses—something he or she has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. You infer on the basis of reason, experience, and common sense from one established fact, the existence or non-existence of some other fact. For example, if you were to see cow tracks in a pasture, that would be circumstantial evidence that there are or were cows in the pasture.

Circumstantial evidence is of no less value than direct evidence. Circumstantial evidence alone may be sufficient evidence of guilt.

You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the defendant's guilt beyond a reasonable doubt, then you must find him not guilty. Your verdict must be based solely on the evidence introduced at trial, or the lack thereof.

**GOVERNMENT NOT REQUIRED TO UTILIZE PARTICULAR INVESTIGATIVE METHODS**

The government is not required to pursue any particular investigative method or methods in the investigation or prosecution of a crime. I remind you, however, that the government is always required to prove the defendant's guilt beyond a reasonable doubt.

**STRICKEN TESTIMONY, ATTORNEYS' STATEMENTS AND OBJECTIONS, AND THE COURT'S RULINGS**

I caution you that you should entirely disregard any testimony or exhibit that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. By the rulings the court

made in the course of the trial, I did not intend to indicate to you any of my own preferences, or to influence you in any manner regarding how you should decide the case. The attorneys have a duty to object to evidence they believe is not admissible. You must not hold it against either side if an attorney made an objection.

**CREDIBILITY OF WITNESSES**

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider: their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any, toward the defendant; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper. You may accept all of it, some of it, or reject it altogether.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses or the most evidence. Remember, a defendant in a criminal prosecution has no obligation to present any evidence or call any witnesses.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may hear or see things differently, or may have a different point of view regarding various occurrences. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant

details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

## INTEREST IN THE OUTCOME OR OFFER OF BENEFIT

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest may create a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering has an interest in the outcome of this trial, or has been offered benefits or assistance for testimony, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it only with great care.

This is not to suggest that any witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

## LAW ENFORCEMENT WITNESSES

You have heard the testimony of law enforcement officials. The fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his or her testimony is deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is proper for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of a law enforcement witness and to give to it what weight, if any, you find it deserves.

## GOVERNMENT'S CONFIDENTIAL INFORMANTS

There has been evidence introduced at trial that the government used one or more confidential informants in this case, and you have heard the testimony of some of these

confidential informants. There is nothing improper about the government's use of informants. You, therefore, should not concern yourselves with how you personally feel about the informants, but you should be concerned with deciding whether the government has proved the guilt of the defendant beyond a reasonable doubt, regardless of whether evidence was obtained via a confidential informant.

On the other hand, when an informant testifies, his or her testimony must be examined with greater scrutiny than the testimony of an ordinary witness. You should consider whether the informant received any benefits or promises from the government that would motivate him or her to testify falsely against the defendant. For example, the informant may believe that he or she will only continue to receive these benefits if he or she produces evidence of criminal conduct.

If you decide to accept an informant's testimony, after considering it in the light of all the evidence in this case, then you may give it whatever weight, if any, you find it deserves.

**WITNESSES WHO HAVE RECENTLY**
**OR ARE CURRENTLY USING CONTROLLED SUBSTANCES**

There has been evidence introduced at trial that some of the individuals who the government called as witnesses were using controlled substances when the events they observed or participated in took place. There is nothing improper about calling such witnesses to testify about events within their personal knowledge.

However, testimony from such witnesses must be examined with greater scrutiny than the testimony of other witnesses. The testimony of a witness who was using controlled substances at the time of the events he or she is testifying about, or who has recently or is currently using controlled substances during the time of his or her testimony, may be less believable because of the effect the controlled substances may have on his or her ability to perceive or remember the events in question.

If you decide to accept the testimony of such a witness, after considering it in light of all the evidence in this case, then you may give it whatever weight, if any, you find it deserves.

## USE OF RECORDINGS AND TRANSCRIPTS

Some of the evidence in this case includes audio recordings. In some cases, the parties were permitted to display a transcript containing the parties' interpretation of what can be heard on the recordings but the transcripts themselves were not admitted in evidence as exhibits.

In those cases, the transcripts were provided as an aid or guide to assist you, the jury, in listening to and watching the recordings; however, the transcripts themselves are not evidence. The audio recordings are evidence, and, as such, you must rely on your own interpretation of what you heard on these recordings. If you think you heard something different on the recording than what was represented on the transcript, then what you heard on the recording must control.

In other cases, transcripts of recorded conversations that took place in Spanish were admitted into evidence. Those transcripts are evidence, and you may evaluate them as you would any other piece of admissible evidence.

## CHARTS AND SUMMARIES

The charts and summaries were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these summaries than you would give to the evidence upon which they are based. It is for you to decide whether the charts or summaries correctly present the information contained in the testimony and in the exhibits on which they were based. You are entitled to consider the charts and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

## IMPERMISSIBLE TO INFER PARTICIPATION FROM PRESENCE

You may not infer that a defendant is guilty of participating in criminal conduct merely from the fact that he or she may have been present at the time a crime was being committed or may have had knowledge that it was being committed. A defendant's mere presence at the scene of a crime, his general knowledge of criminal activity, or his simple

association with others engaged in a crime are not, in themselves, sufficient to prove the defendant is guilty.

**JURORS' EXPERIENCE OR SPECIALIZED KNOWLEDGE**

Anything you have seen or heard outside the courtroom is not evidence, and must be disregarded entirely. It would be a violation of your oath as jurors to consider anything outside the courtroom in your deliberations. But in your consideration of the evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of the evidence. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

**JURORS' SYMPATHY, PASSION, OR PREJUDICE**

In arriving at a verdict, you must not permit yourselves to be influenced in the slightest degree by sympathy, passion, or prejudice, or any other emotion in favor of or against either party. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, or prejudice.

**DEFENDANT NOT TESTIFYING**

You may have observed that the defendant did not testify in this case. The defendant has a constitutional right not to do so. He does not have to testify, and the government may not call him as a witness. The defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. A defendant is never required to prove that he or she is not guilty. Therefore, in determining the defendant's guilt or innocence of a crime charged, you are not to consider, in any manner, the fact that the defendant did not testify. Do not even discuss it in your deliberations.

## OTHER ACTS

The government has offered evidence tending to show that on a different occasion the defendant engaged in conduct similar to the charges in the indictment.

I remind you that the defendant is not on trial for committing any act not alleged in the indictment. Accordingly, you may not consider any evidence of similar acts as proof that the defendant committed the crime charged. Nor may you consider this evidence as proof that the defendant has a criminal personality or bad character. Any evidence of other, similar acts was admitted for a much more limited purpose and you may consider it only for that limited purpose.

If you determine that the defendant committed the acts charged in the indictment and the similar acts as well, then you may, but you need not draw an inference that in doing the acts charged in the indictment, the defendant acted knowingly and intentionally and not because of some mistake, accident or other innocent reason.

Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because the defendant committed the other act he must also have committed the acts charged in the indictment.

## RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

You may not consider the race, religion, national origin, sex, or age of the defendant or any of the witnesses in your deliberations over the verdict or in the weight given to any evidence.

## BIAS, PREJUDICE, AND EQUALITY BEFORE THE COURT

You are to perform the duty of finding the facts without bias or prejudice toward any party. You are to perform this duty in an attitude of complete fairness and impartiality. You must not allow any of your personal feelings about the nature of the crimes charged to interfere with your deliberations, or to influence the weight given to any of the evidence.

This case is important to the parties and the court. You must give it the fair and serious consideration that it deserves.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the court.

## INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

The parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

## COUNT I

## AIDING AND ABETTING ALIEN SMUGGLING

Count I of the indictment charges that the defendant, Denny Reyes, aided and abetted bringing an alien to the United States for commercial advantage or private financial gain in violation of Section 1324(a)(2)(B)(ii) of Title 8 of the United States Code and Section 2 of Title 18 of the United States Code. I remind you that Section 1324(a)(2)(B)(ii) makes it criminal for "[a]ny person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien . . . for the purpose of commercial advantage or private

financial gain." Section 2 of Title 18 states that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

I will first explain what it means to aid and abet a crime. I will then explain the essential elements of the crime of bringing an alien to the United States for commercial gain.

**AIDING AND ABETTING**

Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crimes with which he is charged in order for the government to sustain its burden of proof. A person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you must find the defendant guilty of the offense charged if you find beyond a reasonable doubt that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

To find the defendant guilty of aiding or abetting, you must first find that another person has committed the crime charged. No one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of that entire crime.

In order to aid or abet another in the commission of a crime, it is necessary that the defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed. That is, an aiding and abetting conviction requires not just an act facilitating one or another element of the crime, but also a state of mind extending to the entire crime. An intent to advance some different or lesser offense is not sufficient: instead, the intent must go to the specific and entire crime charged – so here, to the full scope of alien smuggling. So for purposes of aiding and abetting, a person participating in a criminal scheme knowing its extent and character intends that scheme's commission.

To establish that defendant knowingly associated himself with the crime, the government must establish that the defendant acted with the knowledge that a crime was being committed. To establish that the defendant participated in the commission of the crime, the government must prove that the defendant engaged in some affirmative conduct or overt act with the specific intent of bringing about the crime. In other words, to aid and abet a crime, a defendant must not just in some way associate himself with the venture, but also participate in it as something he seeks to bring about and seeks by his acts to make succeed.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or merely associating with others who were committing a crime is not sufficient to establish aiding and abetting. One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether a defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

Did he participate in the crime charged as something he wished to bring about?

Did he knowingly associate himself with the criminal venture?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense. If, on the other hand, your answer to any one of these questions is "no," then the defendant is not an aider or abettor, and you must find him not guilty.

**ESSENTIAL ELEMENTS OF THE OFFENSE OF ALIEN SMUGGLING**

As I have explained, in order to prove the defendant guilty of aiding and abetting bringing an alien to the United States for commercial advantage or private financial gain, the government must first prove that the crime was committed by someone else (the

"principal"). Here, the government alleges that an individual named Chino was one of the principals involved in the charged crime.

The government must establish each of the following elements beyond a reasonable doubt as to the principal.

First, that the principal knowingly brought to the United States an individual who was an alien at the time of the offense alleged in the indictment;

Second, that the principal knew or was in reckless disregard of the fact that the person brought to the United States had not received official authorization to come to, enter, or reside in the United States; and

Third, that the principal acted for the purpose of commercial advantage or private financial gain.

**BRINGING ALIENS TO THE UNITED STATES**

The first element the government must prove beyond a reasonable doubt is that the principal knowingly brought (or attempted to bring) an alien to the United States.

Bringing an alien to the United States means guiding, leading, escorting, or causing the alien to come.

**ALIEN STATUS**

The government must prove beyond a reasonable doubt that the person brought to the United States was an alien at the time of the offense alleged in the indictment.

An alien is a person who is not a natural-born or naturalized citizen, or a national of the United States.

**KNOWLEDGE OF ALIEN STATUS**

The second element the government must prove beyond a reasonable doubt is that at the time of the offense alleged in the indictment, the principal knew or was in reckless disregard of the fact that the person brought to the United States had not received prior official authorization to come to, enter, or reside in the United States.

To satisfy this element, the government must prove that the person brought to the United States did not have prior official authorization to come to, enter, or reside in the United States. To "come to" or "enter" the United States means simply to cross the

border into the United States. If you find that the person brought to the United States did have such authorization, then you must find the defendant not guilty.

Next, the government must prove that the principal knew or was in reckless disregard of the fact that the person brought to the United States did not have this authorization. Whether or not the principal had this knowledge is a question of fact to be determined by you on the basis of all the evidence. An act is done knowingly when it is done purposely and deliberately, and not because of accident, mistake, negligence, or other innocent reason. If you find that the evidence establishes beyond a reasonable doubt that the principal actually knew that the person brought to the United States did not have prior official authorization, then this element is satisfied.

Even if the evidence does not establish actual knowledge, this element may be satisfied if you find that the government has proven beyond a reasonable doubt that the principal acted with reckless disregard of the fact that the person brought to the United States did not have prior authorization to come to the United States. The phrase "reckless disregard of the fact" means deliberate indifference to facts that, if considered and weighed in a reasonable manner, indicate the highest probability that the person brought to the United States did not have prior official authorization to come to the United States.

Under section 1324(a)(2)(B)(ii), it is not relevant that any of the aliens subsequently received authorization to stay in the United States. It is the principal's knowledge that they did not have such authorization at the time of coming to the United States that is important in this case.

**COMMERCIAL ADVANTAGE OR PRIVATE FINANCIAL GAIN**

The third element the government must prove beyond a reasonable doubt is that the principal acted for the purpose of commercial advantage or private financial gain. The phrase "commercial advantage or private financial gain" should be given its ordinary and natural meaning. "Commercial advantage" is a profit or gain in money or property obtained through business activity. "Private financial gain" is profit or gain in money or property specifically for a particular person or group.

The government is not required to prove that the principal actually received some financial gain, although, of course, you may consider evidence that the principal did or did not receive financial gain in deciding whether he acted for the purpose of achieving financial gain.

**COUNT ONE**

**LESSER INCLUDED OFFENSE**

**AIDING AND ABETTING ALIEN SMUGGLING**

I have just explained what the government has to prove for you to find the defendant guilty of the offense charged in Count One of the indictment, aiding and abetting alien smuggling for commercial advantage. The law also permits the jury to decide whether the government has proven the defendant guilty of another, lesser offense which is, by its very nature, necessarily included in the offense of aiding and abetting alien smuggling for commercial advantage or private financial gain.

The offense of aiding and abetting alien smuggling for commercial advantage or private financial gain necessarily includes the lesser offense of aiding and abetting alien smuggling. In order to find the defendant guilty of aiding and abetting this lesser included offense, the government must first prove that the crime was committed by someone else (the "principal"), and then that the defendant aided and abetted the principal's commission of the crime.

To prove that the principal committed the crime, the government must prove the following elements beyond a reasonable doubt:

First, that the principal knowingly brought to the United States an individual who was an alien at the time of the offense alleged in the indictment; and

Second, that the principal knew or was in reckless disregard of the fact that the person brought to the United States had not received official authorization to come to, enter, or reside in the United States.

Note that the government does not need to prove that the principal acted for the purposes of commercial advantage or private financial gain as an element of the lesser included offense.

If you find unanimously that the government has proved beyond a reasonable doubt each of the essential elements of the offense of aiding and abetting alien smuggling for commercial advantage or private financial gain charged in Count One of the indictment, then you should find the defendant guilty of that offense and your foreperson should check "guilty" in the space provided on the verdict form for that offense. You will not consider the lesser included offense and will move on to consider Count Two.

However, if you find unanimously that the government has not proved beyond a reasonable doubt each essential element of the offense of aiding and abetting alien smuggling for commercial advantage or private financial gain, then you must find the defendant not guilty of that offense and your foreperson should check "not guilty" in the space provided for that offense on the verdict form. You should then go on to consider whether the government has proved beyond a reasonable doubt all the elements of the lesser included offense of aiding and abetting alien smuggling.

If you find unanimously that the government has proved beyond a reasonable doubt each of the elements of this lesser included offense, then you should find the defendant guilty of this lesser included offense and your foreperson should check "guilty" in the space provided on the verdict form.

If you find unanimously that the government has not proved beyond a reasonable doubt each essential element of this lesser included offense, then you must find the defendant not guilty of this offense and your foreperson should write "not guilty" in the space provided for this lesser included offense on the verdict form.

You should remember that the burden is always on the government to prove, beyond a reasonable doubt, each and every element of the offense charged in the indictment or of any lesser included offense.

## COUNT II

## TRANSPORTING AN ILLEGAL ALIEN WITHIN THE UNITED STATES

Count II of the indictment charges the defendant with transporting an alien within the United States. I remind you that Section 1324(a)(1)(A)(ii) makes it a crime for "[a]ny person who 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[.]"

**ESSENTIAL ELEMENTS OF THE OFFENSE OF TRANSPORTING AN ILLEGAL ALIEN WITHIN THE UNITED STATES**

In order to prove the defendant guilty of knowingly transporting an illegal alien within the United States, the government must establish beyond a reasonable doubt each of the following elements:

First, that an alien was in the United States in violation of the law;

Second, that the defendant knew, or acted in reckless disregard of the fact, that the person was an alien who had come to, entered, or remained in the United States in violation of the law;

Third, that the defendant knowingly transported the alien within the United States; and

Fourth, that the defendant acted willfully in furtherance of the alien's violation of law.

**ALIEN STATUS**

The first element that the government must prove beyond a reasonable doubt is that the transported person is an alien who had entered (or came to or remained in) the United States in violation of the law.

An alien is a person who is not a natural-born or naturalized citizen, or a national of the United States.

**KNOWLEDGE OR RECKLESS DISREGARD**

The second element of the offense that the government must prove beyond a reasonable doubt is that the defendant knew that the alien he transported had come to, entered, or remained in the United States in violation of the law, or that the defendant acted in reckless disregard of that fact.

As I have previously instructed you, whether or not the defendant had this knowledge is a question of fact to be determined by you on the basis of all the evidence.

I remind you that an act is done knowingly only if it is done purposely and deliberately, and not because of accident, mistake, negligence, or other innocent reason. If you find that the evidence establishes, beyond a reasonable doubt, that the defendant actually knew of the alien's illegal status, then this element is satisfied.

Even if the evidence does not establish actual knowledge, this element is satisfied if you find that the government has proved beyond a reasonable doubt that the defendant acted with reckless disregard of the facts concerning the alien's status. I reiterate that the phrase "reckless disregard of the facts" means deliberate indifference to facts that, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged alien was in fact an alien and was in the United States unlawfully.

**TRANSPORTING OR MOVING AN ALIEN**

The third element of the offense that the government must prove beyond a reasonable doubt is that the defendant knowingly transported an alien who had come to (or entered or remained in) the United States in violation of law.

If you find, based on all the evidence, that the government has proved, beyond a reasonable doubt, that the defendant transported someone who was an alien who had come to the United States in violation of law, this element has been satisfied.

**TRANSPORTATION IN FURTHERANCE OF ALIEN'S VIOLATION OF LAW**

The fourth element of the offense that the government must prove beyond a reasonable doubt is that the defendant acted willfully in furtherance of the alien's violation of the law.

In order to establish this element, the government must prove that the defendant knowingly and intentionally transported the alien in furtherance of the alien's unlawful presence in the United States. In other words, the evidence must show a direct and substantial relationship between the transportation and its furtherance of the alien's unlawful presence in the United States. Transportation of illegal aliens is not, by itself, a violation of the statute if it is merely incidental to the alien's presence in the United States, for the law proscribes such conduct only when it is in furtherance of the alien's unlawful presence.

## "ON OR ABOUT" EXPLAINED

The indictment charges that the offenses were committed "on or about" a certain date. Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on dates reasonably near the date alleged in the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged

## UNANIMOUS VERDICT REQUIRED

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous regarding each essential element of each count.

## MULTIPLE COUNTS

The indictment contains multiple counts. Each count charges the defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each. Whether you find the defendant guilty or not guilty as to one offense should not control your verdict as to the other offenses charged.

## DISCREPANCIES BETWEEN THE SPECIAL VERDICT FORM AND THESE INSTRUCTIONS

If you find that there are any discrepancies between the special verdict form I will provide you with and any of the instructions I give to you now, my instructions must govern your deliberations.

## JUROR NOTE TAKING

During this trial, you have been provided with pencil and paper, and some of you have taken notes. As I explained at the beginning of the trial, all jurors should be given equal attention during the deliberations regardless of whether they have taken notes. Any notes you have taken may only be used to refresh your memory during deliberations. You may not use your notes as authority to persuade your fellow jurors as to what a witness did or did not say. In your deliberations you must rely upon your collective memory of the evidence in deciding the facts of the case. If there is any difference between your memory of the evidence and your notes, you may ask that the record of the

proceedings be read back. If a difference still exists, the record must prevail over your notes.

## RECOLLECTION OF EVIDENCE

Let me remind you that in deliberating upon your verdict, you are to rely solely and entirely upon your own memory of the testimony.

If, during your deliberations, you are unable to recall with any degree of accuracy, a particular part of the testimony, or a part of these instructions, you may do the following:

(1) Write out your question, and have the foreperson sign it;

(2) Knock on the door of the jury room; and

(3) Deliver your note to the Court Officer to give to me.

After the attorneys have been consulted, and the record has been reviewed, I will decide what action to take, and I will tell you my ruling.

## CONCLUSION

I caution you, members of the jury, that you are here to determine whether the defendant before you today is not guilty or guilty solely from the evidence in this case. I remind you that the mere fact that a defendant has been indicted is not evidence against him. Also, a defendant is not on trial for any act or conduct or offense not alleged in the indictment. Nor are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

You should not consider the consequences of a guilty or not guilty determination. The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however,

surrender your honest convictions about the case solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. If a vote is to be taken, your foreperson will ensure that it is done. A verdict form has been prepared for your conclusions. If the verdict form varies in any way from the instructions provided within this jury charge, I instruct you that you are to follow the instructions provided within this jury charge.

If you have reached an agreement, the foreperson will record a verdict of guilty or not guilty. Your foreperson will then sign and date the verdict form and you will return to the courtroom. In all other respects, a foreperson is the same as any other juror. His or her vote does not count more than any other member of the jury.

If, during your deliberations you should desire to communicate with the court, please put your message or question in writing signed by the foreperson, and pass the note to the Court Officer who will bring it to my attention. I will then confer with the attorneys and I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at that time. You should also never communicate the subject matter of your note or your deliberations to any member of the court's staff.

I appoint [redacted] as your foreperson.

Dated at Burlington, in the District of Vermont, this 21 day of December, 2017.

Christina Reiss, District Judge
United States District Court

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 2019 TERM

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DENNY REYES,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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APPENDIX D—May 30, 2018 Judgment of Conviction (2:16-cr-069 (D.Vt.))

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AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1



# UNITED STATES DISTRICT COURT

District of Vermont

UNITED STATES OF AMERICA
v.
DENNY REYES

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 2:16-cr-069-1

USM Number: 78405-054

David McColgin, AFPD
Defendant's Attorney

## THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. Counts 1s & 2s

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 8:1324(a)(2)(B)(ii) | Alien Smuggling for Purpose of Commercial Advantage & Private Financial Gain | 2/7/2015 | 1s |
| 8:1324(a)(1)(A)(ii), | see next page | | |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/29/2018
Date of Imposition of Judgment

Signature of Judge

Christina Reiss, U.S. District Judge
Name and Title of Judge

5/30/2018
Date

JUDGMENT ENTERED ON DOCKET
DATE: 5/30/2018

DEFENDANT: DENNY REYES
CASE NUMBER: 2:16-cr-069-1

## ADDITIONAL COUNTS OF CONVICTION

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 8:1324(a)(1)(B)(ii) | Transporting Aliens in the United States | 2/7/2015 | 2s |

DEFENDANT: DENNY REYES
CASE NUMBER: 2:16-cr-069-1

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

that the defendant be committed to the custody of the Federal Bureau of Prisons for 36 months on count one and 10 months on count two, to run concurrent to each other.

☑ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be incarcerated at a camp facility as close to New York City as possible, or in the lowest security setting available to him, to facilitate contact and bonding with his two very young children, and to facilitate reentry back into his community.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 7/10/2018 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DENNY REYES
CASE NUMBER: 2:16-cr-069-1

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

2 years

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DENNY REYES
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## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DENNY REYES
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## ADDITIONAL SUPERVISED RELEASE TERMS

You must comply with the standard conditions of supervision recommended by the Sentencing Commission, as set forth in Part G of the presentence report with the exception of condition (l) listed in paragraph 90 of the presentence report. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

DEFENDANT: DENNY REYES
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# CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | JVTA Assessment* | Fine | Restitution |
|---|---|---|---|---|
| TOTALS | $ 200.00 | $ | $ | $ |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss** | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

| | | |
|---|---|---|
| TOTALS | $ 0.00 | $ 0.00 |

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DENNY REYES
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# SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 2019 TERM

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DENNY REYES,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# APPENDIX E—8 U.S.C. § 1324

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8 U.S.C. § 1324—"Bringing in and harboring certain aliens"

(a) Criminal penalties

(1)(A) Any person who--

(i) knowing 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;

(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;

(iii) 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, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs--

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as

defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

(C) It is not a violation of clauses (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs--

(A) be fined in accordance with Title 18 or imprisoned not more than one year, or both; or

(B) in the case of--

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or

second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who--

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.