

No. _____

IN THE
Supreme Court of the United States

MAGDALY SULEYDY PEREZ-VELASQUEZ AND
JENIFER MILADIS ALVARADO-DIAZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI**

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FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 16, 2021

**Christopher M. Wolpert
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MAGDALY SULEYDY PEREZ-
VELASQUEZ,

Defendant - Appellant.

No. 19-2118
(D.C. No. 2:19-PO-00044-RB-KRS-1)
(D. N.M.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JENIFER MILADIS ALVARADO-DIAZ,

Defendant - Appellant.

No. 19-2134
(D.C. No. 2:18-PO-04579-RB-GJF-1)
(D. N.M.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 25, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 19-2118

MAGDALY SULEYDY PEREZ-
VELASQUEZ,

Defendant - Appellant.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 19-2134

JENIFER MILADIS ALVARADO-DIAZ,

Defendant - Appellant.

Appeals from the United States District Court
for the District of New Mexico
(D.C. No. 2:19-PO-00044-RB-KRS-1)
(D.C. No. 2:18-PO-04579-RB-GJF-1)

Gia McGillivray, Assistant Federal Public Defender (Margaret Katze, Federal Public Defender, and Stephanie Lynne Wolf, Assistant Federal Public Defender, with her on the briefs), Las Cruces, New Mexico, for Defendants-Appellants.

Dustin C. Segovia, Assistant United States Attorney (Fred J. Federici, United States Attorney, with him on the briefs), Las Cruces, New Mexico, for Plaintiffs-Appellees.

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

TYMKOVICH, Chief Judge, Circuit Judge.

In this consolidated appeal, Jenifer Miladis Alvarado-Diaz and Magdaly Suleydy Perez-Velasquez appeal the district court’s affirmance of their convictions for entering the United States in violation of 8 U.S.C. § 1325(a)(1). They contend they did not illegally “enter” the country, within the meaning of § 1325(a)(1), because they were under continuous surveillance and because they did not intend to evade inspection. We reject these arguments and affirm the judgments of the district court.

I. Background

The relevant facts are not in dispute, and they are substantially similar for each Defendant. Alvarado and Perez crossed the U.S.-Mexico border into New Mexico by walking around a fence, miles away from the nearest designated port of entry.

Alvarado was stopped by a border patrol agent after she made it about 180 yards past the border, and a border patrol agent saw Perez just as she walked into the country.

Each was detained. Alvarado and Perez admitted to the agents that they were nationals of El Salvador and Guatemala, respectively, and had no authorization to enter the country. They were arrested and charged with illegal entry in violation of 8 U.S.C. § 1325(a)(1). Section 1325(a)(1) provides criminal punishment to “any alien (1) who enters or attempts to enter the United States at any time or place other than

as designated by immigration officers” 8 U.S.C. § 1325(a)(1). They then faced bench trials before magistrate judges, where they were convicted.

Alvarado and Perez appealed their convictions in the New Mexico District Court, contending their convictions should be overturned because they had not illegally “entered” the country in violation of the statute. They contended “enter” is a term of art that requires more than a physical intrusion; it also requires “freedom from official restraint” and “inspection or intentional evasion of inspection.” Alvarado ROA 162; Perez ROA 278.

The district court affirmed the convictions because, even assuming freedom from official restraint is required for an “entry,” the Defendants were not under official restraint. The Defendants argued they were under official restraint because they had been continuously surveilled, but the court noted that continuous surveillance alone does not equate to restraint.

On appeal, the Defendants make similar arguments.

II. Analysis

In requesting that we overturn their convictions, Alvarado and Perez urge us to reconsider our decision in *United States v. Gaspar-Miguel*, 947 F.3d 632 (10th Cir. 2020), and hold that (1) “enter” requires freedom from official restraint and inspection or intentional evasion of inspection, and (2) continuous surveillance alone can constitute official restraint. *See* 947 F.3d at 632. We decline to do so.

Our court and other circuits have aptly traced the history and development of the freedom from official restraint doctrine for “entry,” so we will be brief in our

review. *See Gaspar-Miguel*, 947 F.3d at 633–34; *see United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016) (Bybee, J., concurring in the judgment only). The doctrine is a legal fiction that began in the early 1900s in the civil immigration context, and it was used to determine whether procedural and substantive rights would be apportioned to foreign nationals. *Argueta-Rosales*, 819 F.3d at 1162–63. Those who “entered” the country were given certain rights, while those who had not “entered” could be excluded without process. *Id.* Eventually, this concept was imported into the criminal law by some circuits. *See, e.g., United States v. Vasilatos*, 209 F.2d 195 (3d Cir. 1954) (holding that a ship crewmember “entered” the country under § 1326 when his request for admission was decided, not when he merely crossed the border into the United States); *United States v. Oscar*, 496 F.2d 492 (9th Cir. 1974) (reversing a conviction for aiding and abetting an illegal entry into the United States because a Honduran had not “entered” the country, despite physically crossing into American territory, because he was under official restraint).

In interpreting “entry,” “we must acknowledge Congress [used] a term with a settled meaning.” *Gaspar-Miguel*, 947 F.3d at 634. But this court has never required freedom from official restraint for an “entry” under § 1325(a), and we need not decide whether it is required here. Even assuming for purposes of argument that freedom from official restraint is required for an “entry,” neither Alvarado nor Perez were under official restraint because, at most, they were only surveilled. Their only

argument for restraint is continuous surveillance.¹ This argument was disposed of in *Gaspar-Miguel*, where we held that continuous surveillance alone cannot constitute restraint. 947 F.3d. at 634. We cannot reconsider that decision absent en banc review by this court. *United States v. Meyers*, 200 F.3d 715, 721 (10th Cir. 2000).

Perez attempts to distinguish her situation from Gaspar-Miguel's. She notes her surveillance was different from Gaspar-Miguel's because Gaspar-Miguel was surveilled "from a distance via binoculars by an agent who could not identify whether he was observing humans or animals." Perez Br. at 22. On the other hand, Perez was observed right as she crossed the border, and the border agent saw her from a shorter distance unaided by binoculars. But these distinctions are inconsequential because they are just different forms of surveillance. Regardless of the distance of observation—or whether surveillance is aided by technologies such as binoculars—surveillance on its own cannot transform into restraint.

Finally, the Defendants also request that we require inspection or intentional evasion of inspection for § 1325(a)(1). Section 1325(a) provides three independent ways for an alien to commit an illegal entry:

(1) enter[ing] or attempt[ing] to enter the United States at any time or place other than as designated by immigration

¹ Perez argues the magistrate court committed clear error in finding she was not under continuous surveillance. She contends that because she was seen by the border patrol agent as she crossed the border, she was surveilled for the entirety of her presence in the country until she was detained. We need not decide whether an error occurred, because even assuming she is correct, the error would be harmless since continuous surveillance alone does not constitute restraint. *See United States v. Caldwell*, 589 F.3d 1323, 1334 (10th Cir. 2009) (holding that jury verdicts will be undisturbed if the court commits a harmless error).

officers, *or* (2) elud[ing] examination or inspection by immigration officers, *or* (3) attempt[ing] to enter or obtain[ing] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact

8 U.S.C. § 1325(a) (emphases added).

The language of the statute provides three separate ways of committing the offense. Congress used the disjunctive “or,” rather than the conjunctive “and”. If we required inspection or intentional evasion of inspection for a violation of § 1325(a)(1), we would impermissibly collapse subsections (a)(1) and (a)(2).

Consequently, § 1325(a)(1) does not require inspection or intentional evasion of inspection.

Alvarado and Perez, both foreign nationals, crossed the border at a time and place other than as designated by immigration officers. And neither alleges any sort of restraint other than continuous surveillance. Consequently, they both “entered” the country within the meaning of § 1325(a)(1), so their convictions were proper.

III. Conclusion

Alvarado and Perez each “entered” the country at a time or place other than as designated by immigration officers. Inspection or intentional evasion of inspection is not required for a conviction. And even if we assumed that freedom from official restraint is required, neither can establish official restraint because they only rely on a theory of continuous surveillance, and continuous surveillance alone does not equate to restraint.

For those reasons, the judgments of the district court are AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 18-po-4579 RB-GJF

JENIFER MILADIS ALVARADO-DIAZ,

Defendant.

MEMORANDUM OPINION AND ORDER

Defendant Jenifer Miladis Alvarado-Diaz appeals her judgment and conviction imposed by United States Magistrate Judge Gregory J. Fouratt on January 18, 2019, and entered on January 28, 2019. (Docs. 14; 16.) Defendant was found guilty of illegal entry without inspection in violation of 8 U.S.C. § 1325(a)(1). (Doc. 14.) On appeal, Defendant asserts that the Government failed to prove that she actually “entered” the United States for two reasons. First, because the Magistrate Judge incorrectly applied the law regarding the doctrine of official restraint and Defendant was “never free to go at large within the United States.” (Doc. 24 at 6, 17–18.) Second, because she did not “actually and intentionally evade[] inspection.” (*Id.* at 18.) Accordingly, Defendant argues that since she never actually “entered” the United States and entry is a required element of a § 1325(a) violation, her conviction should be overturned.¹ (*Id.*)

This Court previously declined to adopt the Ninth Circuit’s doctrine of surveillance as official restraint in the criminal context. *See United States v. Gaspar-Miguel*, 362 F. Supp. 3d 1104, 1107 (D.N.M. 2019), *appeal docketed*, No. 19-2020 (10th Cir. Feb. 5, 2019). The Court

¹ Defendant was convicted only of entry without inspection in violation of § 1325(a), and Judge Fouratt did not discuss the merits of her case under an attempt theory. Thus, though it is addressed in Defendant’s brief, the sufficiency of the evidence for an attempt conviction is not properly before the Court in this appeal. (*See* Doc. 24 at 20–22.)

declines to reconsider the issue here. Further, the Court agrees with United States District Judge Kenneth Gonzales’s recent and well-reasoned conclusion in *United States v. Montes-Guzman* that defining “entry” to include “actual and intentional evasion of inspection” would “impermissibly collapse[] § 1325(a)(1) with § 1325(a)(2) . . . [and] render § 1325(a)(2) entirely superfluous” No. 18-PO-4491 KG/SMV, 2019 WL 2211090, at *6 (D.N.M. May 22, 2019). Thus, the judgment of the United States Magistrate Judge finding Defendant guilty of entry without inspection in violation of 8 U.S.C. § 1325(a)(1) is **affirmed**.

I. Background²

Defendant is a citizen of El Salvador. (Doc. 23 at 69:2–3.) Around 12:05 p.m. on December 29, 2018, United States Border Patrol Agent Ernesto Campos was conducting line watch duties approximately half a mile from the end of the international boundary fence near Sunland Park, New Mexico. (*See id.* at 15:10–13, 16:22–17:2.) Agent Campos saw two individuals, including Defendant, approaching him. (*See id.* at 17:2–6.) Agent Campos testified that he did not see them on the Mexican side of the border because he could not see through the border fence from where he was parked, but noticed them when he looked in their direction “and saw them running toward” him. (*See id.* at 23:18–25.) When the individuals reached Agent Campos, he identified himself and Defendant admitted that she was a citizen of El Salvador and had crossed the border without documentation to enter or remain in the United States. (*See id.* at 24:5–24.)

Defendant testified that she left El Salvador because she was being threatened by gangs in her hometown and came to the United States to seek asylum. (*See id.* at 69:24–70:12, 71:22–24.) She hoped that, after several years living in the United States, it would be safe for her to return to

² The Court recites only that factual and procedural background necessary to resolve this appeal. “The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries.” Fed. R. Crim. P. 58(g)(2)(b).

El Salvador. (*See id.* at 70:12–20.) Defendant stated that her goal was to be “turned over to Immigration, not to just simply cross [] into the United States, but to see if [she] could ask for asylum.” (*Id.* at 71:16–19.) She testified that the woman she hired to help her reach the United States suggested she try to cross at night and evade Border Patrol Agents, but the Defendant told her “no, that’s not what I wanted to do, I wanted to surrender myself for asylum, and so . . . we stayed in Juarez in a hotel and we did not cross that night, not until the next day.” (*Id.* at 72:21–24.) The next day, the woman took her to the end of the fence near Sunland Park and directed her to approach Agent Campos’s vehicle. (*Id.* at 73:4–23.)

At the close of trial, Judge Fouratt made a finding of fact that Agent Campos’s “surveillance, awareness, [and] visibility of the two people on foot began after they had crossed into the United States.” (*Id.* at 114:21–23.) Judge Fouratt also found that Defendant “was free to at least try to mill about the country” and that “her entry[,] governed only by general intent[,] was completed at the time that she crossed the border . . . and her purpose for doing so, although understandable, is not relevant.” (*Id.* at 116:5–8.) Judge Fouratt concluded that “[w]hen a defendant chooses to knowingly and voluntarily cross the border at a place that she decides, and not one that the immigration authorities decide, the general intent crime of entry is completed . . . so long as her action in crossing the border was a volitional act.” (*Id.* at 116:18–23.) He found Defendant guilty of entry without inspection, and this appeal ensued. (*See id.* at 117:13.)

II. Standard of Review

The Court has jurisdiction in this matter under 18 U.S.C. § 3402: “In all cases of conviction by a United States magistrate judge an appeal of right shall lie from the judgment of the magistrate judge to a judge of the district court of the district in which the offense was committed.” However, “[t]he defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the

same as in an appeal to the court of appeals from a judgment entered by a district judge.” Fed. R. Crim. P. 58(g)(2)(D). The Court will review “the legal conclusions de novo and factual findings for clear error.” *United States v. Morrison*, 415 F.3d 1180, 1184 (10th Cir. 2005). The Court must “review the record for sufficiency of the evidence . . . to determine whether a reasonable jury could find the defendant guilty beyond a reasonable doubt” *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) (citations omitted).

III. Discussion

A. Official Restraint

One week after Defendant’s bench trial, this Court affirmed a similar conviction and held that “freedom from official restraint is a required element of ‘entry’ in the immigration context, but that continuous surveillance by law enforcement does not qualify as ‘official restraint’ for purposes of 8 U.S.C. § 1325(a).” *Gaspar-Miguel*, 362 F. Supp. 3d at 1121. The Court thoroughly analyzed the history and evolution of the doctrine of official restraint in the immigration context and incorporates by reference here the Memorandum Opinion and Order in *United States v. Gaspar-Miguel*. *See id.* Of particular note, the Court reasoned that “the Tenth Circuit has never explicitly adopted or rejected the concept of surveillance as constructive official restraint[.]” but “the Court finds it likely that, given the Fifth Circuit’s well-articulated concerns about the concept of surveillance as official restraint and the Ninth Circuit’s unique position applying the doctrine in criminal cases, the Tenth Circuit will decline to adopt the concept of surveillance as constructive restraint.” *Id.* at 1119.

Defendant urges the Court, “[w]ith all due respect,” to essentially reconsider its decision in *Gaspar-Miguel* by reevaluating the same caselaw and legal arguments that it carefully considered in that case. (*See* Doc. 24 at 7.) The Court declines to do so. Thus, even if Agent

Campos had continuously surveilled Defendant from *before* she crossed the border until the time she was detained, such surveillance would not negate her “entry” into the United States. Further, Judge Fouratt’s finding that Agent Campos’s “surveillance, awareness, [and] visibility” of Defendant “began *after* [she] had crossed into the United States” was based on a reasoned credibility assessment of conflicting testimony from Agent Campos and Defendant. (*Id.* at 114:21–23 (emphasis added), 113:25–115:14.) The Court finds no clear error in that factual finding, and thus Defendant was not under constructive restraint even if the Tenth Circuit had adopted that doctrine in the criminal context. *See Morrison*, 415 F.3d at 1184.

Judge Fouratt also rejected Defendant’s argument that, surveillance aside, she was never truly free from official restraint because as soon as Agent Campos saw her she was unable to move freely throughout the country and was “as good as caught.” (*See id.* at 111:11–19.). The Judge explained: “I am finding that she had a range of choices, she could have gone in any direction and for reasons that we all understand she chose to turn in the direction of a Border Patrol vehicle . . . seeking the relief about which she testified.” (*Id.* at 115:17–23.) Thus, he went on to find, Defendant “was free to at least try to mill about the country” (*Id.* at 115:23–116:2.) Based on the record, the Court concludes that this finding was reasonable and was not a clear error. *See Morrison*, 415 F.3d at 1184.

On appeal, Defendant argues that “the question upon which official restraint hinges, however, is not whether she was free to *try* to go about and mix with the population . . . but whether she was actually free to do so.” (Doc. 24 at 17 (emphasis added).) The cases upon which Defendant relies, however, are cases in which courts held surveillance to equate to official restraint, but also held that gaps in surveillance did not defeat such restraint if the individuals were not capable of avoiding capture and moving freely throughout the United States. (*See id.* (citing *Yang v. Maugans*,

68 F.3d 1540, 1550 (3d Cir. 1995); *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1228 (9th Cir. 2017); *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002). Though the Court has held that freedom from official restraint remains a required element of “entry” in the immigration context, *see Gaspar-Miguel*, 362 F. Supp. 3d at 1121, Defendant was free from official restraint in this case and clearly entered the United States.

B. Actual and Intentional Evasion of Inspection

Next, the Court rejects Defendant’s argument that “inspection and admission by an immigration officer or actual and intentional evasion of inspection” is a required and “well-established” element of “entry” for immigration purposes. (*See* Doc. 24 at 18.) Section 1325(a) criminalizes:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact

8 U.S.C. § 1325(a). Defendant would add to this statutory definition the definition of “entry” first articulated by the Board of Immigration Appeals in a civil case: “inspection and admission by an immigration officer or actual and intentional evasion of inspection” (Doc. 24 at 18 (citing *In re Pierre*, 14 I. & N. Dec. 467 (BIA 1973)).)

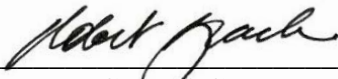
Judge Gonzales carefully considered this issue in *Montes-Guzman* and held that applying such a definition of entry to § 1325 and §1326 cases would improperly “render § 1325(a)(2) entirely superfluous, as ‘actual and intentional evasion of inspection’ would already be an element of ‘enter[ing] or attempt[ing] to enter the United States’ for purposes of § 1325(a)(1).” *See* 2019 WL 2211090, at *6. As Judge Gonzales explained:

Section 1325(a) provides three ways in which an alien may commit illegal entry or attempted entry: he or she may enter the United States other than at a port of entry

during designated hours; he or she may elude or evade, or attempt to do so, inspection by immigration officers at a port of entry; or he or she may present false documents or information to immigration officers at a port of entry. The three options are mutually exclusive. This Court declines to read the statute in a manner that renders one of three disjunctive subsections redundant.

Id. The Court agrees. To show that an individual “entered” the United States for purposes of sections 1325 and 1326, the Government need not prove that the individual actually and intentionally evaded inspection. Thus, the Magistrate Judge’s conclusion that Defendant entered the United States was not in error. (*See* Doc. 23 at 116:18–117:4.)

The Court concludes that there was sufficient evidence in the record to find that Defendant (1) is not a citizen of the United States; and (2) entered the United States at a place other than a designated port of entry. Her conviction for entry without inspection in violation of 8 U.S.C. § 1325(a)(1) is **AFFIRMED**.



ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 19-po-0044 RB-KRS

MAGDALY SULEYDY PEREZ-VELASQUEZ,

Defendant.

MEMORANDUM OPINION AND ORDER

Defendant Magdaly Perez-Velasquez appeals the judgment and conviction imposed by United States Magistrate Judge Kevin R. Sweazea on January 23, 2019, and entered on January 28, 2019. (Doc. 18.) Defendant was found guilty of illegal entry without inspection in violation of 8 U.S.C. § 1325(a)(1). (Doc. 16.) She argues that Judge Sweazea incorrectly applied the law regarding the definition of “entry” and the doctrine of official restraint, and that the Court erred when it found that she was not under constant surveillance as she crossed the border. (*See* Doc. 25 at 9.) This Court previously declined to adopt the Ninth Circuit’s doctrine of surveillance as official restraint in the criminal context. *See United States v. Gaspar-Miguel*, 362 F. Supp. 3d 1104, 1107 (D.N.M. 2019), *appeal docketed*, No. 19-2020 (10th Cir. Feb. 5, 2019). The Court declines to reconsider the issue here. Thus, the judgment of the United States Magistrate Judge finding Defendant guilty of entry without inspection in violation of 8 U.S.C. § 1325(a)(1) **is affirmed**.

I. Background¹

Defendant is a citizen of Guatemala. (Doc. 22 at 13:8–12, 44:9–18, 92:2–6.) Around 1:30 p.m. on January 6, 2019, United States Border Patrol Agent Roberto Tellez was conducting line

¹ The Court recites only that factual and procedural background necessary to resolve this appeal. “The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries.” Fed. R. Crim. P. 58(g)(2)(b).

watch duties when he “saw three individuals[,]” including Defendant, “crossing into the United States where the fence ends in Sunland Park, New Mexico.” (*See id.* at 10:11–11:10, 11:14–16.) Agent Tellez approached the individuals in his marked vehicle and they admitted that they were not citizens of the United States and had crossed the border without documentation. (*See id.* at 11:24–13:22.)

During Defendant’s bench trial on January 23, 2019, Agent Tellez testified that “at [no] point in time did [he] see the Defendant when she was on the Mexican side of the wall[.]” (*Id.* at 24:19–21.) He also testified, however, that he “observed three individuals cross into the United States illegally” (*id.* at 33:2–3), and that his view of Defendant “as she was crossing into the United States[] was unobstructed” (*Id.* at 35:9–11.) After the Government presented its evidence, Defendant moved for a judgment of acquittal, arguing that freedom from official restraint is a required element of “entry” into the United States and that she was never free from official restraint because Agent Tellez was continuously watching her as she crossed the international border and until she was apprehended. (*See id.* at 58:2–20.)

At the close of trial, Judge Sweazea made a finding of fact that Agent Tellez “was looking perpendicular down the fence and couldn’t see through it so [he] did not see the Defendant or the other two people who were with her approach the fence or actually cross the international boundary.” (*Id.* at 78:5–9.) He denied Defendant’s motion for acquittal, noting that “[t]he Court declines to adopt the construct [of] official restraint, and particularly the construct of continuous surveillance equating with official restraint.” (*Id.* at 92:21–23.) He did note, however, that even if “the issue of official restraint and continuous surveillance were the law of the Tenth Circuit, . . . the Court would find that based upon the facts of this case[] the Defendant has not demonstrated, and . . . the Government has proven by the necessary standard of proof[,] that it is inapplicable.”

(*Id.* at 94:9–14.) Defendant appeals both the Magistrate Judge’s decision not to apply the doctrine of surveillance as official restraint and his factual finding that Defendant was not continuously observed by Agent Tellez as she crossed the border. (*See* Doc. 25 at 9.)

II. Standard of Review

The Court has jurisdiction in this matter under 18 U.S.C. § 3402: “In all cases of conviction by a United States magistrate judge an appeal of right shall lie from the judgment of the magistrate judge to a judge of the district court of the district in which the offense was committed.” However, “[t]he defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.” Fed. R. Crim. P. 58(g)(2)(D). The Court will review “the legal conclusions de novo and factual findings for clear error.” *United States v. Morrison*, 415 F.3d 1180, 1184 (10th Cir. 2005). The Court must “review the record for sufficiency of the evidence . . . to determine whether a reasonable jury could find the defendant guilty beyond a reasonable doubt” *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) (citations omitted).

III. Discussion

Just two days after Defendant’s bench trial, this Court affirmed a similar conviction and held that “freedom from official restraint is a required element of ‘entry’ in the immigration context, but that continuous surveillance by law enforcement does not qualify as ‘official restraint’ for purposes of 8 U.S.C. § 1325(a).” *Gaspar-Miguel*, 362 F. Supp. 3d at 1121. The Court thoroughly analyzed the history and evolution of the doctrine of official restraint in the immigration context and incorporates by reference here the Memorandum Opinion and Order in *United States v. Gaspar-Miguel*. *See id.* Of particular note, the Court reasoned that “the Tenth Circuit has never explicitly adopted or rejected the concept of surveillance as constructive official

restraint[,]” but “the Court finds it likely that, given the Fifth Circuit’s well-articulated concerns about the concept of surveillance as official restraint and the Ninth Circuit’s unique position applying the doctrine in criminal cases, the Tenth Circuit will decline to adopt the concept of surveillance as constructive restraint.” *Id.* at 1119.

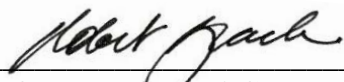
Defendant urges the Court, “[w]ith all due respect,” to essentially reconsider its decision in *Gaspar-Miguel* by reevaluating the same caselaw and legal arguments that it carefully considered in that case. (*See* Doc. 25 at 13.) The Court declines to do so. To the extent that the Magistrate Judge “decline[d] to adopt the construct [of] official restraint” in its entirety, (Doc. 22 at 92:21–23), the Court clarifies that freedom from official restraint remains an element of “entry” whenever entry is a required element in a criminal or civil immigration proceeding. *See Gaspar-Miguel*, 362 F. Supp. 3d at 1121. However, Defendant’s argument on appeal is entirely dependent on considering continuous surveillance by law enforcement to be a form of official restraint, which the Court has explicitly declined to do in the § 1325(a) context. (*See* Doc. 25 at 12–24.) *See also Gaspar-Miguel*, 362 F. Supp. 3d at 1121.

Thus, the Magistrate Judge’s expressions of “discontent with the doctrine of official restraint” and musings that established seizure and custody law might be a better fit for defining entry (*see* Doc. 25 at 21 (citing Doc. 22 at 79:1–80:25)) were not dispositive. Defendant’s conviction was based on a rejection of the claim that Agent Tellez’s continuous observation of Defendant as she crossed the border would negate her “entry” into the United States (*see* Doc. 22 at 92:19–23), and the Court affirms that holding.

Similarly, the Court need not reconsider the Magistrate Judge’s factual finding that Agent Tellez “did not see the Defendant or the other two people who were with her approach the fence or actually cross the international boundary” (*id.* at 78:5–9), because even if this factual finding

were clearly erroneous, it would have no effect on Defendant's conviction because this Court has rejected the Ninth Circuit's construction of continuous surveillance as constructive restraint. A de novo review of the Magistrate Judge's legal conclusions leaves no question that "a reasonable jury could find the defendant guilty beyond a reasonable doubt" *Diaz*, 679 F.3d at 1187 (citations omitted).

Thus, there was sufficient evidence in the record to find that Ms. Perez-Velasquez (1) is not a citizen of the United States; and (2) entered the United States at a place other than a designated port of entry. Her conviction for entry without inspection in violation of 8 U.S.C. § 1325(a) is **AFFIRMED**.



ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
LAS CRUCES DIVISION

UNITED STATES OF AMERICA,)	CASE NO: 2:19-PO-00044-RB-KRS
)	
Plaintiff,	)	CRIMINAL
)	
vs.	)	Las Cruces, New Mexico
)	
MAGDALY SULEYDY PEREZ-VELASQUEZ,	)	Wednesday, January 23, 2019
	)	( 8:42 a.m. to 10:38 a.m.)
Defendant.	)	(11:08 a.m. to 11:32 a.m.)

BENCH TRIAL

BEFORE THE HONORABLE KEVIN R. SWEAZEA,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff:	RYAN ELLISON, ESQ. KRISTOPHER JARVIS, ESQ. United States Attorney's Office 555 S. Telshore, Suite 300 Las Cruces, NM 88011
For Defendant:	GIA A. MCGILLIVRAY, ESQ. Federal Public Defender's Office 506 S. Main St., Suite 400 Las Cruces, NM 88001
Court Reporter:	Recorded; LCR ORGAN
Clerk:	V. Ruiz
Transcribed by:	Exceptional Reporting Services, Inc. P.O. Box 18668 Corpus Christi, TX 78480-8668 361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 A Like you said, first I identify myself.

2 The next question I ask is if they are -- if I
3 encounter somebody if they are a citizen, and where are they a
4 citizen and national of.

5 Q Okay.

6 A And if they have any documentation or papers to be -- to
7 enter and be in the United States legally.

8 Q Okay. What sort of evidence would you be looking for to
9 determine if a person is lawfully in the United States?

10 A Passports, any type of identification.

11 Q Okay. I want to turn now to January 6th of this year.

12 Were you working on January 6th, 2019?

13 A Yes.

14 Q And what shift were you working on that date?

15 A Day shift.

16 Q Okay. And what times does that cover?

17 A I enter on duty at 0700 hours to approximately 1700 hours.

18 Q Okay. And what were your assigned duties on that date?

19 A I was assigned line watch duties in Sunland Park, New
20 Mexico.

21 Q Okay. Is that within the District of New Mexico?

22 A Yes.

23 Q Okay. And how familiar are you with that specific area?

24 A Very familiar.

25 Q And why is that?

1 A I've been employed at the same station for approximately
2 12 years and I've been assigned this particular area quite
3 often throughout my career.

4 Q Okay. Did anything of significance to this case happen
5 around 1:30 p.m. during your shift on that date?

6 A Yes.

7 Q And what happened?

8 A I observed three individuals cross into the United States
9 at the end of the fence -- illegally into the United States at
10 the end of the fence in Sunland Park, New Mexico.

11 Q Okay. And at what point did you first see these
12 individuals?

13 A At what point? As soon as from where I was parked in my
14 marked Border Patrol unit I immediately saw three individuals
15 crossing into the United States where the fence ends in Sunland
16 Park, New Mexico.

17 Q Okay. At any point in time did you see them on the
18 Mexican side of the border?

19 A No.

20 Q Okay. How many people were in this particular group?

21 A Three.

22 Q Okay. And what did you do after this group came around
23 the end of the wall?

24 A I proceeded to put my vehicle in drive and proceed to
25 their location.

1 Tellez has identified the Defendant?

2 **THE COURT:** Agent Tellez has identified Ms. Perez-
3 Velasquez.

4 **BY MR. ELLISON:**

5 Q Agent Tellez, did you ask the Defendant any biographical
6 questions?

7 A Yes.

8 Q In the course of doing so did the Defendant make any
9 admissions regarding her citizenship?

10 A Yes.

11 Q And what did she say?

12 A She admitted that she was a citizen of Guatemala.

13 Q Okay. Did the Defendant make any admissions regarding the
14 nature of her crossing the US border?

15 A Yes.

16 Q And what did she say?

17 A She stated that she was aware that she crossed into the
18 United States illegally.

19 Q Okay. Was the Defendant in possession of any documents
20 that would allow her to legally enter or remain in the United
21 States?

22 A I asked her and she did not have any documents.

23 Q Okay.

24 **MR. ELLISON:** Permission to approach the witness,
25 your Honor?

1 end of a fence here, this is the Anapra bowl in the southern
2 part of New Mexico, and Monument 2B would be approximately
3 right around this area.

4 **THE COURT:** I couldn't understand what you said when
5 you were holding your hand up above where the border line is.
6 You said this is the something?

7 **THE WITNESS:** Yes, sir, this is the international
8 border fence that separates the United States and Mexico. The
9 end of the fence is here and this is located in Sunland Park,
10 New Mexico.

11 **THE COURT:** Okay. Agent --

12 **MS. MCGILLIVRAY:** Your Honor, I have an objection.
13 He's pointing out where the monument was, if we could have him
14 mark that, otherwise -- if we could have him mark these
15 locations on that particular exhibit again, your Honor?

16 **THE COURT:** That's not a legal objection, but I do
17 agree for purposes of the record it would be better if you --
18 instead of pointing and saying something is here or there, if
19 you'd mark it precisely so that the record is complete.

20 **MR. ELLISON:** Sure.

21 **BY MR. ELLISON:**

22 Q Agent Tellez, could you please get the black marker and
23 would you please trace, make a thick black line along the
24 international border wall.

25 A Yes. By "line" that means completely straight --

1 (Witness indicates)

2 Q That's fine. On Government's Exhibit 1 you placed a, I
3 believe it was a red dot on Border Monument 2B. Could you
4 place a red X at the location where that is on this map?

5 A Yes. This is approximate. (Witness indicates)

6 Q Okay.

7 MR. ELLISON: Let the record reflect that the witness
8 has drawn a black line along the international border wall and
9 placed a red X directly to the east of the international border
10 wall where the approximate location of Monument 2B is.

11 THE COURT: The Court can see that the witness has
12 drawn the line and placed the X as you mentioned. Proceed.

13 BY MR. ELLISON:

14 Q Is the location where you were positioned when you first
15 saw the Defendant, is that located within the bounds of this
16 map?

17 A No.

18 Q Okay. And which direction off of this map would your
19 location have been? Out in the western direction of this map?

20 A Yes.

21 Q Okay. Now could you please --

22 A I'm approximately 200 yards west of the end of the fence.

23 Q Okay. Would you please get the blue marker that's on the
24 table there and would you place a blue X at the location where
25 you first observed the Defendant?

1 **MS. MCGILLIVRAY:** No, your Honor.

2 **THE COURT:** Exhibit 4 is admitted into evidence.

3 **(Government's Exhibit Number 4 was received in evidence)**

4 **BY MR. ELLISON:**

5 Q Agent Tellez, I'm going to show you what has been
6 previously marked as Government's Exhibit 5.

7 Was this photograph taken from the New Mexico side of
8 the border?

9 A Yes.

10 Q And which general direction is this photograph facing?

11 A Southeast.

12 Q Okay. Could you please take the red marker and place a
13 red X at the location where you first saw the Defendant?

14 A Yes. **(Witness indicates)**

15 **MR. ELLISON:** Let the record reflect that the witness
16 has placed a red X at the eastern-most point of the
17 international border wall.

18 **THE COURT:** The agent did place a red X on Exhibit 5.

19 **BY MR. ELLISON:**

20 Q When somebody steps over that concrete barrier what state
21 are they stepping into?

22 A The State of New Mexico.

23 Q Okay. And is the location shown on this picture, is that
24 a designated port-of-entry?

25 A No, it is not.

1 activities and your interactions are composed and you don't
2 review them? Is that a standard procedure?

3 A I'm sorry, can you repeat the question?

4 A Is it a standard procedure that your information regarding
5 your apprehension of an individual, so your actions, your
6 interactions with them, are reported and you don't review those
7 reports? Is that standard procedure?

8 A Yes.

9 Q So standard procedure is that you don't review the reports
10 about your apprehension?

11 A I advise the transport agent as to the entry and they
12 input the information.

13 Q Okay. So if the report reads that:

14 "At approximately 13:30 hours Agent Tellez observed
15 three subjects cross the international border in
16 between International Monuments 2B and 2C and
17 approach his marked Border Patrol vehicle."

18 Is that narrative correct?

19 A Yes, it is.

20 Q Okay. So what could have been written is that you saw her
21 as she came from the US side of the wall, but that wasn't
22 written, was it?

23 A I don't understand your question.

24 Q So the report said that you observed her as she --
25 observed the subject cross the international border, and you

1 Q Now when you saw the individuals crossing the border, or
2 as they were crossing the border into the United States, you
3 said that you were a couple hundred yards away, correct?

4 A Approximately 200 yards west.

5 Q Okay. And you also said that it took you about a minute
6 to approach them in your vehicle?

7 A Yes, approximately.

8 Q When you approached them in your vehicle Ms. Perez came
9 right up to you, correct?

10 A She and the other two individuals were walking towards my
11 location.

12 Q You didn't tell her to come to you, did you?

13 A No.

14 Q Okay. And she did come directly to you?

15 A Yes.

16 Q She didn't run from you?

17 A No.

18 Q You do have people that do run from you, right?

19 A Yes.

20 Q She also did not try to hide from you, did she?

21 A No.

22 Q But you do have people that do try to hide, correct?

23 A Yes.

24 Q They hide behind rocks, I assume?

25 A Yes.

1 Q And sometimes behind brush?

2 A Correct.

3 Q She didn't do any of that, did she?

4 A No.

5 Q So she didn't try to conceal herself at all?

6 A I'm sorry, can you --

7 Q She did not try to conceal herself at all, did she?

8 A No.

9 Q So your view of Ms. Perez, as she was crossing into the
10 United States, was unobstructed?

11 A Correct.

12 Q So to see Ms. Perez you didn't need to use binoculars?

13 A No.

14 Q You didn't need to use infrared devices?

15 A No.

16 Q Closed circuit cameras, you didn't --

17 A No.

18 Q Or -- and you didn't need to use a drone, did you?

19 A No.

20 Q So you didn't need to use any other governmental
21 surveillance device other than your own vision?

22 A Correct.

23 Q Which may not be a government surveillance device, but --

24 Okay, and at that point where you were there's no
25 mountains directly at the borderline, correct?

1 **THE COURT:** Exhibit 3, correct?

2 **MS. MCGILLIVRAY:** Yes.

3 **THE COURT:** Yes, he is referring to Exhibit 3.

4 **BY MS. MCGILLIVRAY:**

5 Q So, and that looks to be a fairly barren area, right?

6 Right there? Other than some sage brush?

7 A There is a couple of ravines, but it is a barren area.

8 Q Okay. If you'd like to you may sit back down, thank you.

9 A Oh, okay.

10 Q So you -- from your observation you know where Ms. Perez
11 crossed, correct?

12 A Yes.

13 Q And you have identified that on several exhibits.

14 A Yes, ma'am.

15 Q And you saw her right as she reached the borderline?

16 A Can you rephrase that question?

17 Q So you saw her right as she crossed into the US?

18 A Correct.

19 Q Okay. And you said that she came directly to you when --
20 after you brought -- or came over in your vehicle she came
21 directly to you, correct?

22 A She walked towards my direction --

23 Q Okay.

24 A -- with the other two individuals.

25 Q If she had gone to the east of you you would have pursued

1 her, right?

2 A Yes.

3 Q If she had gone to the west you would have followed her?

4 A If she went to the west of me we would have encountered
5 each other.

6 Q Okay. If she had tried to get away from you in any
7 direction you would have followed her and pursued her, correct?

8 A Yes, ma'am.

9 Q But she didn't do any of those things, did she?

10 A No, ma'am.

11 Q She came directly to you?

12 A She walked towards my direction and I proceeded to make
13 contact with her by driving towards her location.

14 Q Okay. And you did not -- okay, so you did not --

15 During this time she wasn't -- had not exercised free
16 will to go anywhere else in the United States, correct?

17 A Can you repeat the question?

18 Q So in your observations of her she didn't, at any time
19 between when you first saw her and then when you approached one
20 another, she didn't go anywhere else in the United States? She
21 wasn't free to go to the east or free to go to the west,
22 correct?

23 A I don't understand the question.

24 Q Okay. So --

25 **MS. MCGILLIVRAY:** Strike that, your Honor.

1 what we communicated in our brief, the Tenth Circuit addressed
2 that in the exact opposite way the Ninth Circuit was because
3 this was a person who was being charged with aiding and
4 abetting the illegal -- the attempted illegal reentry of a
5 couple of immigrants. And they said that his substantive
6 offense was completed. He was under official restraint the
7 whole time at a port of entry. I found it shocking that he had
8 completed the substantive offense but for being defeated by
9 immigration inspectors. The Ninth Circuit would never have
10 said that because he was clearly under official -- he was at a
11 port of entry. The Ninth Circuit never would have said that.
12 So when I tell you that the Tenth Circuit has taken a different
13 tact, it could not be more opposite than the Ninth Circuit. So
14 arguing that this should be applied in the Tenth is something
15 the United States utterly disagrees with. And, frankly, we
16 look forward to that appeal, your Honor. Thank you.

17 **THE COURT:** Thank you. I am prepared to rule on this
18 matter. And I believe it goes to a construction of the 1325
19 and specifically to the word "entered" or has a person entered
20 or not and what the definition of that word is. The ordinary
21 definition of it that I have seen from dictionaries is to
22 actually physically cross into an area. What the Defendant is
23 trying to argue, though, is that some form of official
24 restraint factors into that consideration and when physical --
25 when surveillance, constant surveillance, equates official

1 restraint. Under the facts of this case, the facts are that
2 Ms. Perez crossed from Mexico into New Mexico at the point
3 where the Santa Teresa border fence ends about seven miles east
4 of the Santa Teresa border checkpoint. The evidence is that
5 the agent was positioned about 200 yards to the west of where
6 that fence ends and was looking perpendicular down the fence
7 and couldn't see through it so did not see the Defendant or the
8 other two people who were with her approach the fence or
9 actually cross the international boundary. The evidence is the
10 agent, upon the individuals crossing the boundary, soon
11 thereafter at some point saw the individuals and began to
12 approach them. When the agent began approaching the
13 individuals, they started walking towards the agent. In -- the
14 Tenth Circuit has not addressed the issue as to whether
15 official restraint is a defense to 1325 charges or as some have
16 argued and some circuits have adopted is an element of that
17 charge. As I indicated, the plain language of the statute
18 requires that the Defendant have entered the U. S. at a place
19 other than a designated port of entry. It's a general intent
20 crime that requires that the person have intended to cross the
21 U. S. boundary at a place other than a designated port of
22 entry. I've already made that ruling, that it's a general
23 intent crime.

24 However, in the event I'm wrong in that regard, then
25 the Court has to also address the issue of official restraint

1 and whether the constant surveillance of someone equates with
2 official restraint. In my view -- again, Tenth Circuit hasn't
3 adopted that view. My view is that continuous surveillance
4 does not equate with official restraint or custody. It's a
5 legal fiction that really defies common sense. And the
6 specific facts of this case point to exactly why it's not a
7 common sense argument. There were three individuals who
8 crossed the border illegally and were observed by Agent Tellez.
9 Now, the facts are that those three individuals, once they saw
10 the Border Patrol vehicle, started walking towards it. Just as
11 easily, though, those three individuals could have run in three
12 different directions. The agent then might have been able to
13 apprehend one person, maybe none of them, maybe all of them.
14 That just goes to the legal fiction that's developed with the
15 official restraint doctrine, that it's not -- in this case, the
16 Defendant and the other two individuals had a discreet interval
17 of time when they were in the United States and free to make
18 the decision what they were going to do. They could have
19 decided at that moment that they were going to split and run
20 like a covey of quail, or they could have done what they did.
21 But it is a brief interval of time when they were free to make
22 their decisions in the United States, and they did just exactly
23 that. Instead of trying to evaluate whether someone has
24 entered the United States by taking the legal fiction of
25 official restraint, it seems to make more sense to me to rely

1 on the well-established rules that judges and attorneys turn to
2 all the time to determine whether someone has been seized or
3 whether someone is in custody. For a seizure to occur, there
4 must be a show of force and submission. That seems to be an
5 easily reliable standard to evaluate in reality whether there
6 is official restraint, if that needs to be done. As I've
7 indicated, the Tenth Circuit hasn't adopted that rule and the
8 Court isn't going to adopt that rule today. But if that were
9 the case, that would seem to be a more appropriate basis for
10 evaluating one's legal status because there's ample
11 constitutional law that one can refer to determine that status
12 without having to resort to legal fictions about breaks even
13 for a few seconds and in surveillance or someone hiding under a
14 bush or behind a truck or something along those lines. It's
15 easy to evaluate, number one, if there has been a show of
16 force, someone demanding that another submit and submission,
17 that -- those are easy things to evaluate.

18 My decision also based -- is based upon an evaluation
19 of the policy, that the policy of if the concept of constant
20 surveillance and official restraint were to be adopted, it
21 would encourage -- or discourage border agents from vigilantly
22 watching the border, which is what certainly the Illegal
23 Immigration Reform and Immigrant Responsibility Act encourages.
24 It encourages the forward mobility of agents so that they can
25 have a show of force and, if need be, apprehend illegal

1 crossings at the border rather than encouraging them to turn a
2 blind eye until an individual has illegally crossed and is
3 somewhere north of that border. It also leads to uncertainty.
4 Cases have said seismic sensors are not sufficient to
5 constitute continuous surveillance; night scopes are; losing
6 sight for a few seconds is not. It's -- it just leads to
7 unnecessary uncertainty to have that rule so the Court would
8 deny your motion for acquittal and declines to adopt a
9 requirement that official restraint be a defense to the crime.
10 Do you understand my ruling?

11 **MR. ELLISON:** Yes, your Honor, thank you.

12 **THE COURT:** Counsel, do you understand?

13 **MS. MCGILLIVRAY:** Yes, your Honor.

14 **THE COURT:** You had mentioned you also would like to
15 take a brief recess before we proceed further with the case.
16 Now that there's been a ruling, do you continue to want to take
17 a recess?

18 **MS. MCGILLIVRAY:** Yes, your Honor.

19 **THE COURT:** Very well. How long do you think you
20 need?

21 **MS. MCGILLIVRAY:** About ten minutes.

22 **THE COURT:** Fair enough. Okay, we'll start back at
23 maybe ten minutes until 11:00; does that give you enough time?

24 **MS. MCGILLIVRAY:** Yes.

25 **THE COURT:** Okay.

1 During that time, he indicated that he did not lose sight of
2 her. And, your Honor, he observed her the whole time crossing
3 over until the point when he apprehended her. He also -- the
4 evidence was that he called another agent who transported her
5 to the Border Patrol station and then at the Border Patrol
6 station, your Honor, the agent who had -- who was actually in
7 charge of writing the report in this case indicated that she
8 was never free to leave from that location. Your Honor, it's
9 still the defense's position that in order to -- in order for
10 there to be an entry, Ms. Perez, one, had to cross into the
11 territorial limits of the United States; two, inspection --
12 there had to be inspection and admission by an immigration
13 officer or actual and intentional evasion of inspection at the
14 nearest inspection point; and, three, freedom from restraint.
15 And the facts in this case, your Honor, show that there --
16 she -- there was no freedom of restraint. The officer
17 testified that if she had gone to the west, gone to the east,
18 he would have apprehended her, that the whole time he had
19 visual contact with her. And for that purpose, your Honor, she
20 was under official restraint for that whole period of time.
21 And she in fact did not enter the United States.

22 And, your Honor, I would like to specifically
23 incorporate into my closing all the arguments that I made in
24 support of my motion for acquittal.

25 **THE COURT:** Thank you, counsel. I have read

1 everything that was prepared and filed and will consider and
2 have considered all that information.

3 **MS. MCGILLIVRAY:** Thank you, your Honor.

4 **THE COURT:** Yes, ma'am. Do you wish to reply?

5 **MR. ELLISON:** No rebuttal, your Honor.

6 **THE COURT:** All right, then the Court is prepared to
7 rule. The elements of the charge of illegal entry without
8 inspection are, number one, that the Defendant is not a citizen
9 of the United States and, number two, that the Defendant
10 entered the United States at a place other than a designated
11 port of entry. As I've already ruled, the Court's ruling is
12 that the crime of illegal entry without inspection is a general
13 intent crime, so what the Government is obligated to prove
14 concerning entry is that the individual, Ms. Perez-Velasquez,
15 intended to cross the border or she did.

16 Concerning findings the Court will make, the Court
17 finds that Agents Tellez and Mondel (sic) are both credible
18 witnesses. On January 6th, 2019, Agent Tellez was on the
19 dayshift patrol, which goes from 7:00 a.m. to 5:00 p.m., in the
20 District of New Mexico, the Santa Teresa Border Patrol station,
21 conducting line watch duties between Monuments 2-B and 2-C,
22 which is east of the Santa Teresa Border Patrol checkpoint
23 about seven miles. He was dressed in full Border Patrol
24 uniform and in a marked Border Patrol vehicle at the time.
25 Agent Tellez was situated conducting his line watch duties

1 along the United States/Mexico border approximately 200 yards
2 west of the east end of the border fence that is in the area of
3 2-B and 2-C and was sitting in his vehicle, looking in an
4 easterly direction, generally looking down the fence line
5 fairly near the fence. Agent Tellez saw three people appear on
6 the United States/New Mexico side of the border fence at the
7 east end of the fence. Agent Tellez observed the Defendant
8 from the time he first saw her when she was located north of
9 the fence until the time he arrested her. There wasn't an
10 interruption in his observation of her. The border fence in
11 the area in question is a tall -- I don't know how tall. It
12 appears much taller than a vehicle. There wasn't evidence as
13 to the exact dimensions of it but the border fence is a tall
14 fence of steel construction that appears to be steel posts of
15 some kind that are several inches in width, spaced with a space
16 of a few inches between them with a solid sheet located on top
17 of the steel posts. So -- and is located somewhere along the
18 U. S./Mexico border on the north side of the border an
19 undetermined distance. I don't think it's a great deal of
20 distance but I don't know if it's a foot or five feet or ten
21 feet or what it is, some distance north of the border. When
22 one is near the border fence, if one is looking south, one can
23 see through the fence because of the slats between the steel
24 posts or columns that comprise the fence. However, when one is
25 for instance sitting in an automobile, looking down the fence

1 perpendicular to it, one cannot see through the fence at any
2 distance. You know, one can see through it right close to
3 them, but when you're looking down the fence, you can't see any
4 distance through the fence, so that Agent Tellez was not able
5 to see or observe the three individuals who crossed, Ms. Perez-
6 Velasquez and the other two individuals, until those
7 individuals were on the north side of the fence. After
8 Ms. Perez-Velasquez crossed from Mexico into the United States
9 and crossed north of the fence, there was a brief interval of
10 time before Agent Tellez saw her. Exhibits 1, 2, 3, 4, and 5
11 were introduced into evidence and show the area in question,
12 the border fence, where the Defendant crossed the U. S./Mexico
13 border, and where Agent Tellez was located when he first
14 observed the Defendant in the United States. The Defendant
15 admitted to Agent Tellez and Agent Mondello to being a citizen
16 of Guatemala. Agent -- or, excuse me, Ms. Perez-Velasquez
17 admitted to Agent Tellez that she had crossed into the United
18 States illegally. Ms. Perez-Velasquez admitted to Agent Tellez
19 that she did not have documentation to enter or remain in the
20 United States. I think she told that both to -- well, I'm not
21 certain. I think she told it to Agent Tellez and to Agent
22 Mondello, but I'm not sure about Agent Mondello. I can't
23 remember that. Perhaps she didn't tell him that. Ms. Perez-
24 Velasquez gave her home address to Agent Mondello as being in
25 Guatemala, which is circumstantial evidence that she's from

1 Guatemala. Ms. Perez-Velasquez stated to Agent Mondello that
2 she is a citizen of Guatemala. The Court finds that Ms. Perez-
3 Velasquez is not a citizen of the United States. The Court
4 also finds that Ms. Perez-Velasquez is a citizen of Guatemala
5 and that she did not have authorization to enter or remain in
6 the United States.

7 As the Court previously ruled, to enter, as that is
8 described in Section 1325(a), means actually physically
9 crossing the U. S. border into the United States, in this case
10 from Mexico. The Tenth Circuit hasn't spoken on the function
11 of "official restraint" or whether that is a defense to a claim
12 of illegal entry without inspection. The statute certainly
13 doesn't mention it so it determine -- it hinges on definition
14 of the word "enter" and whether all of those other factors are
15 important there. Since the Court has ruled that the -- this is
16 a general intent crime, the Court has also found that the
17 intention of Ms. Perez-Velasquez, whatever it might have been,
18 for her entry is not important. What is important is that she
19 intended to enter the United States, which the Court does find
20 she did intend to enter the United States at the place and time
21 she did enter. The Court declines to adopt the construct of
22 official restraint, and particularly the construct of
23 continuous surveillance equating with official restraint. It's
24 not something the Tenth Circuit has addressed yet. As I
25 mentioned, it's contrary to the policy stated in the Illegal

1 Immigration Reform and Immigrant Responsibility Act. And it
2 discourages vigilant border surveillance by those agencies that
3 are in charge of it, as well as leading to uncertainty and
4 disparate decisions in cases about whether seismic sensors or
5 night scopes or losing sight for a few seconds or a person
6 hiding under a bush, or various things like that break the
7 chain or constitute surveillance or continuous surveillance.
8 As the Court indicated, it makes more sense to this Court to
9 evaluate the issue of -- if the Court were required to evaluate
10 the issue of official restraint, to evaluate that issue in the
11 context of the established laws concerning seizures and
12 custody, were to constitute a seizure, which one would equate
13 with official restraint, that a restraint and seizure seems to
14 be very similar, to require a show of force and submission to
15 that authority rather than trying to figure out whether there's
16 some break or not in the surveillance that has occurred.

17 I note also that in connection with some of the cases
18 that were cited and discussed by the parties where the courts
19 talk about official restraint, those -- the context a lot of
20 the times has been where someone is in presenting themselves at
21 a border checkpoint or at the immigration authority in an
22 airport or something like that. That's a lot different
23 context. Some of those cases have I think in my view have
24 gotten a little off track because they start talking about
25 whether entry is completed when one presents themselves at a

1 border checkpoint or in the airport immigration services. But
2 really, that's an unnecessary consideration because if one does
3 that, then one is by definition not guilty of a 1325 because
4 you -- an element of it is that you're crossing at a place
5 other than a designated port of entry, which both of those
6 would be ports of entry. So it doesn't make sense to me to be
7 discussing cases that have gotten off on that track in those
8 circumstances.

9 If it were to be determined that the issue of
10 official restraint and continuous surveillance were the law of
11 the Tenth Circuit, in this case the Court would find that based
12 upon the facts of this case, the Defendant has not
13 demonstrated, and the Plaintiff or the Government has proven by
14 the necessary standard of proof that it is inapplicable. There
15 was a brief interval of time first when Agent Tellez -- before
16 Agent Tellez saw the Defendant, and also in the circumstance
17 because there were three individuals, one agent easily it could
18 have been a circumstance where those three individuals instead
19 of staying together and waiting for the agent to approach them
20 could have run in different directions. And in that
21 circumstance, very well one or more of them anyway could have
22 gotten away. So I find that it is inapplicable.

23 Any questions, Mr. Jarvis? I -- and, well, and based
24 upon all of those factors, the Court would find that Ms. Perez-
25 Velasquez is guilty of illegal entry without inspection. Any

1 questions?

2 **MR. ELLISON:** Not from the United States, your Honor.

3 **MS. MCGILLIVRAY:** No, your Honor.

4 **THE COURT:** And of course the proof level is proof
5 beyond a reasonable doubt.

6 You mentioned also that you wished to proceed with
7 sentencing. Do you continue to wish to do so?

8 **MS. MCGILLIVRAY:** Yes, your Honor.

9 **THE COURT:** All right, is the Government in agreement
10 with proceeding with sentencing?

11 **MR. ELLISON:** Yes, your Honor.

12 **THE COURT:** And what does the Government suggest is
13 an appropriate sentence?

14 **MR. ELLISON:** Time served, your Honor.

15 **THE COURT:** Okay. And concerning the special penalty
16 assessment?

17 **MR. ELLISON:** The Government will waive the special
18 penalty assessment.

19 **THE COURT:** Okay. Counsel, are you -- do you have
20 any objection to the sentence that is suggested?

21 **MS. MCGILLIVRAY:** No, your Honor.

22 **THE COURT:** Okay. Ms. Perez-Velasquez, you have the
23 right to tell me something before I proceed to sentence you.
24 But I want you to know that the Court would be inclined to
25 impose a sentence for you of time served with a waiver of the

1 special penalty assessment against you and without the
2 imposition of any fine. That would mean that this criminal
3 case against you would promptly conclude. There would be --
4 not be a financial cost to you of the sentence that the Court
5 imposes, and you'll be turned over to Immigration authorities
6 for removal proceedings. Do you want to tell me anything
7 before I sentence you?

8 **(Responses translated through interpreter)**

9 **THE DEFENDANT:** No.

10 **THE COURT:** Your sentence is time served with a
11 waiver of the special penalty assessment. You have a right to
12 appeal your sentence to a district judge. If you can't afford
13 to appeal, you can appeal for free. And you must appeal within
14 14 days. Do you understand your right to appeal your sentence?

15 **THE DEFENDANT:** Yes.

16 **THE COURT:** All right, that concludes this case. And
17 I want to wish you good luck, Ms. Velasquez, Ms. Perez-
18 Velasquez. We're adjourned.

19 **(This proceeding was adjourned at 11:32 a.m.)**

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
LAS CRUCES DIVISION

UNITED STATES OF AMERICA,	)	CASE NO: 2:18-PO-04579-RB-GJF
)	
Plaintiff,	)	CRIMINAL
)	
vs.	)	Las Cruces, New Mexico
)	
JENIFER MILADIS ALVARADO-DIAZ,	)	Friday, January 18, 2019
	)	(1:31 p.m. to 2:49 p.m.)
Defendant.	)	(2:58 p.m. to 4:38 p.m.)

BENCH TRIAL / SENTENCING

BEFORE THE HONORABLE GREGORY J. FOURATT,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff:	NICOLE HAMMOND, ESQ. RANDY CASTELLANO United States Attorney's Office 555 S. Telshore, Suite 300 Las Cruces, NM 88011
For Defendant:	STEPHANIE L. WOLF, ESQ. Federal Public Defender's Office 506 S. Main St., Suite 400 Las Cruces, NM 88001
Interpreters:	Juan Ramirez / Barbara Espinosa
Court Reporter:	Recorded; LCR-ORGAN
Clerk:	Kristin Solis
Transcribed by:	Exceptional Reporting Services, Inc. P.O. Box 18668 Corpus Christi, TX 78480-8668 361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

Campos - Direct / By Ms. Hammond

10

1 **ERNESTO CAMPOS, GOVERNMENT'S WITNESS SWORN**

2 **THE WITNESS:** I do.

3 **THE CLERK:** If you'll now state and spell your name
4 for the record?

5 **THE WITNESS:** My name is Ernesto Campos, that's
6 E-R-N-E-S-T-O C-A-M-P-O-S.

7 **DIRECT EXAMINATION**

8 **BY MS. HAMMOND:**

9 Q Agent Campos, where are you employed?

10 A I'm employed with the United States Border Patrol Santa
11 Teresa station.

12 Q And what is your job title?

13 A I'm a Border Patrol agent.

14 Q What is your role as a Border Patrol agent?

15 A Patrol the line.

16 Q And how long have you worked as a Border Patrol agent?

17 A Approximately 11 years, six months.

18 Q Were you working on December 29th, 2018?

19 A Yes, I was.

20 Q And where were you working?

21 A I was working in Sunland Park, New Mexico.

22 Q What is the closest port-of-entry to Sunland Park, New
23 Mexico?

24 A There's -- it's seven miles -- Santa Teresa port-of-entry
25 is seven miles to the west.

1 A Yes, ma'am. **(Witness indicates)**

2 **MS. HAMMOND:** For the record Agent Campos has circled
3 an area along the white -- directly above the white line that
4 says "United States" on one side and "Mexico" below it on the
5 left bottom quadrant of the screen.

6 Q Approximately how far were you from the Santa Teresa port-
7 of-entry again, Agent Campos?

8 A Approximately seven miles.

9 Q And approximately how far were you from Mt. Cristo Rey?

10 A About half a mile.

11 Q And for the record I mentioned this white line. Can you
12 explain what that is?

13 A That white line divides the United States and Mexico, it's
14 a boundary line.

15 Q Now I'm going to zoom in. You'll see that across the
16 white line there runs a black line. I can circle it.

17 A Right.

18 Q Can you explain what that is?

19 A That's the international boundary fence.

20 Q Now from this image it appears that the black line ends as
21 it approaches Mt. Cristo Rey. Can you explain why?

22 A The international boundary fence ends at that point right
23 there at that point.

24 Q And approximately how far were you from that end point?

25 A From where I was located at to the end of the fence it was

1 approximately half a mile.

2 Q Now on December 29th, around noon, did you see anyone?

3 A Yes, ma'am.

4 Q Can you remember more specifically when you saw someone?

5 A Yes. At approximately 12:05 I saw two individuals running
6 and walking towards me.

7 Q And can you show us on this map approximately where those
8 two people were when you saw them?

9 A Sure. **(Witness indicates)**

10 Q And just, again, for the record, can you circle
11 approximately where you were?

12 A **(Witness indicates)** Not a very nice circle, but --

13 **MS. HAMMOND:** For the record Agent Campos has circled
14 two points, both left of center in the bottom quadrant of the
15 screen. His location is to the far left of the screen and the
16 two individuals' location is closer to the center.

17 Q Now I'd like to show you a photograph -- I apologize.

18 I'm holding what has been previously marked as
19 Government Exhibit 4 for identification and opposing counsel
20 has been given a copy.

21 Agent Campos, do you recognize this photograph?

22 A Yes, that's a photograph of the metal fence.

23 **MS. HAMMOND:** The Government moves to admit Exhibit 4
24 into evidence.

25 **THE COURT:** Any objection?

1 **THE COURT:** Any objection?

2 **MS. WOLF:** No, your Honor.

3 **THE COURT:** It also is admitted.

4 **(Government's Exhibit Number 6 was received in evidence)**

5 **MS. HAMMOND:** Thank you, your Honor.

6 **BY MS. HAMMOND:**

7 Q Agent Campos, can you, again, point to roughly where you
8 were located and circle it on your screen?

9 A Okay. **(Witness indicates)**

10 **MS. HAMMOND:** Let the record reflect that Agent
11 Campos has placed a circle in the upper portion right of center
12 on this photograph along the border fencing.

13 Q And can you also circle where you first saw the two
14 individuals at approximately 12:05?

15 A Sure. **(Witness indicates)** That's the approximate
16 location.

17 Q Thank you, Agent Campos.

18 **MS. HAMMOND:** Let the record reflect that Agent
19 Campos has placed a similar, slightly southwest of his location
20 at that time.

21 Q And can you again reiterate the approximate distance
22 between you and these individuals at that time?

23 A The distance between them and I was about four-tenths of a
24 mile.

25 Q Thank you, Agent Campos.

1 Q And did anything else prior to you seeing them bring these
2 individuals to your attention? Radio notification, anything?

3 A No, there's no radio notifications of them being sighted,
4 no.

5 Q When you saw these two individuals did you move towards
6 them?

7 A No.

8 Q Did they move towards you?

9 A Yes.

10 Q And did they reach you?

11 A Yes.

12 Q And when they reached you what did they say, if anything?

13 A They didn't say anything, I identified myself to them.

14 Q You identified yourself as a Border Patrol agent?

15 A Yes.

16 Q And did you ask them any questions?

17 A I asked them for their country of citizenship.

18 Q And what did they tell you?

19 A The young female said that she's from El Salvador.

20 Q Did you ask them any other questions?

21 A I asked them if they had any immigration documents to be
22 in the United States legally.

23 A And what did they tell you?

24 A They said no.

25 Q What did you do after these two individuals approached

1 Q More than 20?

2 A I would say probably more than 20, yes.

3 Q Okay, so you've done a number of apprehensions in this end
4 of the wall area?

5 A In the pedestrian -- the international boundary
6 restraints, yes.

7 Q Right. And it's a pretty high wall in that area, correct?

8 A It's a tall fence, yes, ma'am.

9 Q About 20 feet?

10 A I haven't measured it, I don't know how tall it is.

11 Q Okay, but high enough to be difficult to climb, right?

12 A I think it would be difficult to climb, yes, ma'am.

13 Q Okay. And the fence just simply ends at Cristo Rey,
14 right?

15 A In Sunland Park it ends right there, yes.

16 Q Okay. And so there's nothing stopping somebody from
17 walking around the end of the fence in that area?

18 A No, they can walk across, yes.

19 Q Okay. So you're on line watch duty, you're looking for
20 somebody who might be crossing that boundary illegally and
21 there's a 20 foot tall wall, and then that wall just stops,
22 correct?

23 A Yes.

24 Q Okay. And your vehicle -- you were looking straight at
25 the end of the wall area, right, for a reason?

1 Q Okay. And they came directly to you?

2 A Yes.

3 Q And that meant that they were running west parallel to the
4 international boundary fence, is that correct?

5 A Yes, ma'am.

6 Q Okay. You never saw her run north, is that correct?

7 A No, ma'am, I never saw her run north

8 Q You never saw her run east away from you?

9 A No, ma'am.

10 Q Okay. Do you recall asking these two individuals whether
11 they knew who you were?

12 A I don't recall if I asked them. I did identify myself as
13 a United States Border Patrol agent.

14 Q Okay. So you said you've done a lot of line watch duty
15 and a lot of apprehensions. Do you have an independent
16 recollection of this conversation that you had with these two
17 people, aside from your notes?

18 A I remember asking them the immigration questions.

19 Q Okay, but do you recall whether you had any other
20 conversation with them?

21 A The only other thing I asked them if they were related.

22 Q Okay. You don't recall having a conversation with them at
23 the point where your vehicle was sitting about asylum?

24 A No, I don't recall any --

25 Q Okay, you're not an asylum officer, are you?

1 happened the next day?

2 A (Speaks Spanish)

3 Q Okay, (Speaks Spanish)

4 A The next day in the morning we waited for the lady to tell
5 us when it was time to leave. She said it is now the time.
6 She said I'm going to take you where Immigration catches you
7 then, and so she says this is where it is, where there's a wall
8 and I go around it. She took us.

9 Q Okay, and when you got to the place where the wall was
10 what, if anything, did you see before you crossed?

11 A Only that there were some houses there where we crossed.
12 We saw the houses and then she said "so you cross there and you
13 go around and over there is the car from Immigration. You go
14 there if you want to turn yourself in to surrender or else
15 somewhere else."

16 Q Okay. So could you see, when she said "You go over there,
17 there's the car from Immigration," could you actually see the
18 car?

19 A Yes, the vehicle was there. I crossed from there and then
20 she said that this is where we have to go to the other side.
21 It also had like when you go away from there it's like -- it's
22 for the train, and she said "You may run to that there or over
23 here," but I, I went directly to where the car is.

24 Q Okay.

25 MS. WOLF: May I approach the witness?

1 Q And you made it to the border of Mexico and the United
2 States, right?

3 A Yes.

4 Q And then you walked around the fence to get into the
5 United States?

6 A Yes.

7 Q Earlier Ms. Wolf showed you this exhibit, Defendant's
8 Exhibit 5, is that right?

9 A Yes.

10 Q Okay. And you pointed out where you walked around the
11 fence, is that right?

12 A Yes.

13 Q Can you also point out where you were dropped off?

14 A **(Witness indicates)**

15 Q And what was the lady who dropped you off driving?

16 A There was a car waiting for her at the entrance like
17 around here. **(Witness indicates)**

18 But how we were transported, she brought us on a bus
19 that dropped us off around here. Then this whole thing, it was
20 on foot that we went up to there where she dropped me off or
21 let me go at.

22 Q Thank you, Ms. Alvarado, for clarifying that.

23 So then you went by foot, right?

24 A Yes.

25 Q And you knew that it was illegal to enter the United

1 The Government's position is that that is simply
2 unworkable and that no other Circuit beyond the Ninth,
3 arguably, which has ruled on this issue, would look at the
4 facts of this case and find that the theory of official
5 restraint applies.

6 Unless your Honor has any questions the Government
7 has nothing further.

8 **THE COURT:** Okay, thanks.

9 All right, let me make some factual findings and
10 announce a decision.

11 I don't think anybody in the courtroom is especially
12 thrilled that this prosecution was brought, but it's brought
13 for a reason that I think we all understand and this is a
14 complicated case.

15 There's no dispute and it's not the Defendant's job
16 to dispute anything, but I certainly find beyond a reasonable
17 doubt that the Defendant is an alien; that is, she's not a
18 citizen or national of the United States.

19 And she certainly crossed at a place that the
20 Government proved beyond a reasonable doubt was not designated
21 by immigration officers as undisputed.

22 So the question in this case is only whether she
23 "entered" the United States as that term is understood in the
24 law.

25 I'm going to resolve the credibility dispute this way

1 and I'll explain why:

2 Agent Campos, I'll just point out, this is only 20
3 days ago so it's not as if we're asking him about something
4 that happened, as we often do in felony cases, a year or so
5 ago, so it's only 20 days ago. He is extremely familiar with
6 the part of America about which he was testifying. I dare say
7 that the agents who are assigned to line watch duties at the
8 Santa Teresa station know that ground really, really well.

9 It's also difficult for me to question his memory of
10 where he was performing line watch because he probably goes to
11 the same place every time to position himself so that he can
12 see what he needs to see in the area with the expanse of turf
13 that would be assigned to his portion of the line watch. And
14 so -- and I also believed him. I find him to be credible when
15 he says that he did not see them until they were approaching
16 him.

17 It's altogether possible, and I believe that he has a
18 zone of responsibility to visually monitor that has him looking
19 in multiple directions, so it's quite possible that
20 Ms. Alvarado and her fellow traveler saw him well before he saw
21 them, so I'm going to make a factual finding that the agent's
22 surveillance, awareness, visibility of the two people on foot
23 began after they had crossed into the United States.

24 There's something else that causes me to take the
25 agent's side of the credibility battle, and that is that he did

1 not act in a way that would be consistent with having seen them
2 enter the United States at the point of entry. I seriously
3 doubt that a Border Patrol agent that far away would simply do
4 nothing in response to seeing someone enter the border at the
5 port -- at the point that they enter the border, so that's how
6 I'm resolving that discovery dispute and there's any number of
7 reasons why the Court discounts Ms. Alvarado's testimony on
8 that point, not least because of her very healthy -- very heavy
9 self-interest in this particular case.

10 And I also can't credit her memory of where -- of
11 exactly where she says the agent was because that's the only
12 time in her life she's ever seen it. She was under incredible
13 stress at the time and she has never once been back. So that's
14 how I'm resolving the credibility dispute.

15 Ms. Wolf, you and I have a gentle person's
16 disagreement about whether Ms. Alvarado had a choice when she
17 came into the United States, but I am deciding and I am finding
18 that she had a range of choices, she could have gone in any
19 direction and for reasons that we all understand she chose to
20 turn in the direction of a Border Patrol vehicle, I'm assuming,
21 hoping that it was occupied and wasn't just a decoy, and she
22 ran toward it for the relief -- seeking the relief about which
23 she testified. So she was free to at least try to mill about
24 the country although that would have been contrary to her
25 purpose for coming here and so I understand why she did not try

1 to do so, but nonetheless I find that to be a volitional
2 choice.

3 All right, and I'll find that she also did not
4 subject herself to inspection by immigration authorities at a
5 place designated for the same, so I will find that her entry
6 governed only by general intent was completed at the time that
7 she crossed the border with the -- and her purpose for doing
8 so, although understandable, is not relevant.

9 So now let me express a conclusion about the law.

10 This issue is coming up and it's coming up
11 frequently. It's an area of the law that needs to be -- it
12 needs to be resolved because it is causing this kind of
13 litigation stress here in Las Cruces, but until the Tenth
14 Circuit or a District Court Judge in a case involving the
15 crossing at a place that's not a port-of-entry, that this
16 doctrine of constant surveillance applies. I'm not going
17 there.

18 When a defendant chooses to knowingly and voluntarily
19 cross the border at a place that she decides, and not one that
20 the immigration authorities decides, the general intent crime
21 of entry is completed, in my view, at the time she does it so
22 long as, this is important, so long as her action in crossing
23 the border was a volitional act. I mean, if she's doing it
24 because of duress as the law defines it, that's a different
25 thing. If she does it because she's a captive, that's another

1 thing, but if it is a volitional act the crime is complete, in
2 my view, upon entry.

3 The purpose or motive of the person committing the
4 unlawful entry is not relevant.

5 And I'll say this, that so far as I can tell our
6 immigration law does not allow one to, in effect, create her
7 own port-of-entry wherever it is convenient for her to cross
8 and then ask a Border Patrol agent for assistance. We
9 understand why someone might do that. We understand why they
10 may engage in that behavior, but the fact remains that, at
11 least in my view, they have committed a misdemeanor crime if
12 that's the route they chose.

13 So I will find the Defendant guilty.

14 Ms. Wolf, I encourage you to take this issue up. I
15 have been wrong before.

16 And so is the Defendant prepared to be sentenced?

17 **MS. WOLF:** Yes, your Honor.

18 Would you approach the lectern with Ms. Alvarado,
19 please?

20 Ms. Alvarado, I'm going to sentence you to the time
21 you have already spent in jail. I don't -- you don't have to
22 spend any more time in jail.

23 And does the United States move to remit the special
24 penalty assessment?

25 **MS. HAMMOND:** Yes, your Honor.

1 **THE COURT:** And I'm going to make sure you don't pay
2 any money as a result of your conviction.

3 Before I impose that sentence you have the right to
4 address the Court, if you wish. You are not required to, but
5 it is your right to do so. Do you have anything to say to the
6 Court before I impose sentence?

7 **THE DEFENDANT:** No.

8 **THE COURT:** All right. I'll sentence you to the time
9 you have already spent in jail and you're not going to pay the
10 \$10 special penalty assessment.

11 You have the right to appeal my decision, both the
12 conviction and the sentence. Ms. Wolf will explain to you what
13 you need to do to appeal and I encourage you to do that so that
14 you can get another answer from another higher level Judge if
15 you think I am wrong.

16 And let me just say this, Ms. Alvarado, I don't bear
17 you any ill will. I think you're a very nice person and I
18 understand why you wanted to leave El Salvador. I understand
19 why you don't want to stop in Guatemala or Mexico, and I
20 understand why you want to be in the United States. I hope for
21 your sake that someday the United States can make the decision
22 to allow you to stay here because I think you would add to our
23 country in a really positive way, so I don't want you leaving
24 here thinking that anybody in the courtroom thinks that you
25 are, in any way, a bad person, we think you are a good person

1 and I wish you the best and I wish you good luck.

2 Court is adjourned.

3 **MS. WOLF:** Your Honor, may I note for the record that
4 Ms. Alvarado-Diaz has a credible fear and wishes to be placed
5 in asylum proceedings. I think it's obvious.

6 **THE COURT:** All right, yeah, you may, and I'll say
7 that is very clearly stated for the record and I hope she gets
8 it.

9 **MS. WOLF:** Thank you.

10 **THE COURT:** Court is adjourned.

11 **THE CLERK:** All rise.

12 **(This proceeding was adjourned at 4:38 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



March 4, 2019

Signed

Dated

TONI HUDSON, TRANSCRIBER