



## **Differing Interpretations: The Prohibition of Transporting Illegal Immigrants**

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The Immigration and Nationality Act (INA) prohibits individuals from transporting illegal immigrants in the United States. Under the law, it is an offense for any 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....” INA Section 274(a)(1)(A)(ii); 8 U.S.C.S. Section 1324(a)(1)(A)(ii)[hereinafter referred to as the “transporting provision].”

To establish a violation of the transporting provision, the government must prove the following: “(1) the transporting or moving of an alien within the United States, (2) that the alien was present in violation of the law, (3) that the defendant was aware of the alien’s status, and (4) that the alien acted willfully **in furtherance of** the immigrant’s violation of the law.” U.S. v. Barajas-Chavez, 162 F.3d 1285 (10<sup>th</sup> Cir. 1999) (citing U.S. v. Diaz, 936 F.2d 786, 788 (5<sup>th</sup> Cir. 1991) (emphasis added).

As noted above in bold, to be convicted of transporting unauthorized individuals in the U.S. the law requires that the accused act knowingly **in furtherance of** the immigrant’s illegal presence in the United States. Thus, the accused must intend by means of the transportation to advance or assist the individual’s violation of immigration laws. This element of **in furtherance of** has been interpreted differently by the Federal Courts of Appeals. Below is a summary of the differing interpretations.

### **Differing Interpretations/Approaches to the Transporting Provision**

#### U.S. Court of Appeals for the Ninth Circuit.

The U.S. Court of Appeals for the Ninth Circuit interpreted the language “in furtherance of” in a pre-IRCA case called U.S. v. Moreno, 561 F.2d 1321 (9<sup>th</sup> Cir. 1977). In this case, Mr. Moreno was a construction foreman who had transported construction workers, who he knew to be illegal immigrants, from one work site to another. He argued that his actions did not fall within the purview of the transporting provision because he did not transport the immigrants “in furtherance of” their violation of immigration laws. Instead, he was merely performing his job responsibilities by taking them to work sites in the course of their employment.



In its opinion, the U.S. Court of Appeals for the Ninth Circuit stated that for there to be a violation of the statute, there must be a *direct or substantial relationship* between the transportation and its furtherance of the immigrant’s violation of law. *Id.* at 1323(emphasis added). With this approach, the court focused on the *effect* the act of transportation had upon the two illegal immigrant’s ability to remain in the country unlawfully by looking at the time, place, and overall impact of the prohibited transportation.

Applying the *direct or substantial relationship* approach, the Ninth Circuit determined that Mr. Moreno’s transportation of the two workers was not “in furtherance of” their illegal presence in the U.S. *Id.* Instead, the court found that Mr. Moreno was transporting the illegal immigrants as part of the ordinary and required course of his employment as foreman. *Id.* at 1322. As such, the Ninth Circuit ruled, his transportation of the two individuals was only incidentally connected to the furtherance of the violation of the law, if at all. *Id.* Cf. United States v. Aguilar, 883 F.2d 662, 687 (9<sup>th</sup> Cir. 1989) (appellants various acts of transportation are hardly incidentally related to further the immigrants’ illegal status as they were driven from Phoenix to Santa Fe, a fourteen hour road trip, and the transportation was part of the appellants’ plan to shelter illegal immigrants from immigration authorities).

In its opinion, the Ninth Circuit noted that “[t]he mere transportation of a person known to be such an alien is not sufficient to constitute a violation” of the law. U.S. v. Moreno, 561 F.2d at 1322. The court also noted that “[b]ased upon purely humanitarian concern, the transportation of a known undocumented alien to a hospital following an injury or illness does not appear to come within the purview “of the law. *Id.* at FN 3. This notion of a possible hospital exception was recently challenged in a case where two volunteers from a humanitarian assistance group were indicted in the federal district court in Arizona for trying to drive three immigrants to a church clinic for medical care where the immigrants were barely conscious, vomiting and had blood in their stool. See U.S. v. Strauss and Sellez, CR 05-11499-TUC-Rcc, Order, 1-3 (District of Az. 2006). The district court did not review the issue of whether or not the protocol involving the transportation of illegal immigrants for medical care is or is not a violation of the law. Instead, the court dismissed the indictment on the grounds of entrapment by estoppel, as the Border Patrol had previously approved a protocol with the humanitarian group and it was reasonable for the defendants to have relied on the protocol as legal. *Id.*

#### U.S. Court of Appeals for the Eighth Circuit.

Following the lead of the Ninth Circuit, the U.S. Court of Appeals for the Eighth Circuit adopted the *direct or substantial relationship* test. See United States v. Velasquez-Cruz, 929 F. 2d 420, 424 (8<sup>th</sup> Cir. 1991) (defendant convicted of violating the transporting provision because she pooled her resources with others to purchase a car, was the primary driver of the car, and directed some of the immigrants to meet her at a safe house to begin the journey from Los Angeles to New York).



U.S. Court of Appeals for the Sixth Circuit.

In contrast, the U.S. Court of Appeals for the Sixth Circuit rejected the *direct or substantial relationship approach*. Instead, in the case of U.S. v. 1982 Ford Pick-Up, 873 F.2d 947, 954 (1989), the court adopted an *intent based* approach whereby the court looks to the *specific intent* or the *purpose* for the transportation. Under this approach, the fact finder is directed to consider all credible evidence concerning a defendant's intentions in transporting an illegal immigrant. Id.

In U.S. v. 1982 Ford Pick-Up, a pick-up truck owned by Juana and Luis Mendoza was used to transport illegal immigrants from Texas to Kentucky. The court ruled that the Mendozas did not violate the transporting provision because the government failed to prove that they willfully transported illegal immigrants with the *specific intent* of supporting the immigrants' illegal presence. Id. at 951-952 (emphasis added). According to the Sixth Circuit, the record showed that the Mendozas' actions were quite innocent. Id. at 952. For instance, they made no attempt to hide their passengers or conceal the fact that they were illegal immigrants. Id. The Mendozas received no financial gain for helping their passengers move to Kentucky. Id. According to the court, the illegal immigrants in this case were friends, relatives and former co-workers of the Mendozas who sought transportation to Kentucky in hopes of finding employment, not in order to escape prosecution or otherwise evade the law. Id.

U.S. Court of Appeal for the Fifth Circuit.

The U.S. Court of Appeal for the Fifth Circuit has adopted an approach that encompasses elements of both the *direct or substantial relationship* test and the *intent* based test. See United States v. Merkt, 764 F.2d 266, 271-72 (5<sup>th</sup> Cir. 1985). In discerning intent, the court noted that the fact finder should "consider all evidence it finds credible about the defendant's intentions, direct as well as circumstantial." Id. Thus, the court may look to see if the defendant was compensated for the transportation, what efforts were made to conceal the individuals, and whether the immigrants were friends, coworkers, companions or human cargo that was being shipped.

The Merkt case involved the conviction of Stacey Merkt, a refugee worker who was stopped by the border patrol while en route to the San Antonio immigration office with two illegal immigrants. The court noted that "willful transportation of illegal aliens is not, per se, a violation of the statute...." Id. at 272. It stated that the statute punishes only an intentional act and that it is the government's burden to establish the defendant's state of mind like every other element of the alleged crime, beyond a reasonable doubt. Thus, the court found, based upon the evidence that Ms. Merkt intended to take the illegal immigrants to an INS office to file their asylum papers and that she lacked the willful intent to transport them in furtherance of an immigration violation.



The U.S. Court of Appeal for the Seventh Circuit.

The U.S. Court of Appeal for the Seventh Circuit, while acknowledging both the *direct or substantial relationship test* and the *intent* based approach, has refused to adopt either method for purposes of determining a defendant's knowledge that his/her transportation activity furthers an immigrant's illegal presence in the U.S. See U.S. v. Parmelee, 42 F.3d 387 (7<sup>th</sup> Cir. 1994) (summary). Instead, the Seventh Circuit has adopted a general approach that allows the government to prove the "in furtherance of" element by *reference to the facts and circumstances surrounding each particular case*. Id. at 391. Relevant considerations bearing on this issue include: whether the defendant received compensation for his transportation activity, whether the defendant took precautionary efforts to conceal the illegal immigrants, and whether the illegal immigrants were the defendant's friends or co-workers or merely human cargo. Id.

The U.S. Court of Appeal for the Tenth Circuit.

The U.S. Court of Appeal for the Tenth Circuit also has rejected use of a particular test. It has adopted a general approach similar to the Fifth and Seventh Circuits. See United States v. Barajas-Chavez, 162 F.3d 1285 (10<sup>th</sup> Cir. 1999) (en banc). Under this approach, a fact finder may consider *any and all relevant evidence* bearing on the "in furtherance of" element. Id. Some of these factors include: time, place, distance, reason for trip, overall impact of trip, and defendant's role in organizing and/or carrying out the trip. Id.

Additionally, the Tenth Circuit in U.S. v. Barajas-Chavez, affirmed that the "in furtherance of" element, does not encompass persons "who come into daily contact with undocumented aliens and who, with no evil of criminal intent, intermingle with [illegal aliens] socially or others." Id. However, the court concluded that the element is sufficiently broad to encompass any person who acts, regardless of profit motive or close relationship, with knowledge or with reckless disregard of the fact that the person transported is an illegal alien and that transportation or movement of the alien will help, advance, or promote the alien's illegal entry or continued illegal presence in the United States." Id.

The Tenth Circuit concluded, by looking at the evidence in the light most favorable to the government, that Mr. Barajas-Chavez planned, organized and attempted to carry out a trip from Prescott, Arizona to Denver, Colorado. The court also concluded that the defendant's transportation of the illegal immigrants would have advanced or promoted their continued illegal presence in the U.S. The Tenth Circuit noted that: Mr. Barajas-Chavez utilized a vehicle that is commonly associated with illegal transportation (a pickup with a camper shell with darkened windows); the undocumented immigrants rode inside the camper shell and that Mr. Barajas-Chavez was the sole driver of the vehicle; Mr. Barajas-Chavez drove through the night and was stopped at the checkpoint during the morning hours; and, both immigrants paid him to take them to Denver. In addition, the Tenth Circuit pointed out that the transportation would have assisted the immigrants in evading immigration authorities by relocating them to a city much farther from the



border. The court also stated that the transportation was intended to assist them in finding employment and if their efforts had been successful the benefits from finding employment would have assisted them in remaining in the U.S.

#### Summary/Conclusion

Given the different approaches in the various U.S. Courts of Appeals, it is difficult, if not impossible, to set forth guidance that would be relevant in all circumstances. That said, there are a few lessons that can be gleaned from reading and analyzing these cases.

First, acts of transportation that are incidentally related to further the immigrant's illegal status most likely do not come within the purview of the transporting provision. Unfortunately, it is difficult to determine what actions a court would deem "incidental."

Second, the approach that a court will take to interpret "in furtherance of" depends upon where the court sits. For instance, in the Ninth and Eighth Circuits, the courts will look at whether there is a *direct or substantial relationship* between the transportation and "the furtherance of" the immigrant's illegal presence in the U.S. Courts in the Sixth Circuit will look at the *intent or purpose* of the transportation. And, the Fifth, Seventh and Tenth Circuits generally will look at *any and all evidence* that will bear upon the element of "in furtherance of."

Third, it is unclear whether transporting an illegal immigrant to a hospital for an injury or an illness violates the law. While humanitarian groups continue to point to U.S. v. Moreno, *supra*, for support, many groups, like No More Deaths in Tucson, try to work out a protocol for the transportation of illegal immigrants that they find ill and sick in the desert.

If you have questions about the transporting provision, please do not hesitate to contact Karen Herrling at [kherrling@cliniclegal.org](mailto:kherrling@cliniclegal.org).

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