



LEGAL DEFENSE TRUST TRAINING BULLETIN

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OFF-DUTY CALIFORNIA PEACE OFFICERS AT THE U.S. BORDER

DON'T TRY TO OUT-SMART FEDERAL OFFICERS AT SAN YSIDRO

Over the years, we have handled some unfortunate cases where off-duty peace officers, while on vacation or a holiday, have been detained and arrested coming across the United States border from Mexico. Their crime? "*Alien smuggling*". The frequency of these arrests is certainly not great; fortunately, they are somewhat rare.

However, when off-duty cops are caught in this predicament, they uniformly express shock and disbelief: "Smuggling? They've got to be kidding!" *No, they are not kidding. This is serious...the Government has charged you with a felony...*

Here, we are not concerned with off-duty officers who have become involved in calculated criminal enterprise and conspiracy, leading to attempts to smuggle contraband drugs or undocumented persons across the border for financial gain (*see*: Title 8 *United States Code* §1324 (a)(1)(B) which calls for 10 years' imprisonment). Any officer who gets caught up in such a criminal enterprise cannot complain when the Government and U.S. Attorney prosecute him or her to the fullest extent of the law. In fact, you would probably

say, "They deserve whatever they get." Certainly, they will not be peace officers any longer.

Rather, this article concerns less-spectacular, ill-conceived attempts to bring undocumented persons to the border because of friend or family relationships, or "Good Samaritan" intentions, or just to "party" on the U.S. side.

By way of example using a hypothetical case, an off-duty officer agrees to help an intimate friend or family member bring a non-citizen friend or family member to the border, hopefully to pass under the U.S. Immigration radar, since all of the persons in the car are U.S. citizens, except for one. Usually, there is a "story" agreed upon in advance, to answer questions at the Port of Entry if they are asked, about why the one person has no papers with him or her, or U.S. identification. They don't expect to be stopped and questioned; but if they are, they hope a concocted explanation will carry it off. If that becomes a problem, "hey, well they'll find out I'm a cop, and it'll be okay." Rarely do they calculate the possibility that they will be arrested for alien smuggling. They don't realize the crime is

completed by bringing an alien *to the Port of Entry*. They assume that if they are challenged there, and the alien's status is discovered, the alien will be turned back, and the U.S. citizens will pass on through.

In another variant, an off-duty officer, accompanied by his friends, travels to Tijuana or Ensenada for a weekend or on a holiday. They check in to a motel on the U.S. side, and head across the Mexico border for some nightlife and fun. They meet young women in Mexico, and after hours of drinking and dancing, hatch a plan to bring the women back across the border "to have breakfast at Denny's" (?) Hmmmm. Again, there might be an agreement that the women should not say anything – let the men (the U.S. citizens) do the talking if necessary. "It'll be okay because 'we're just taking them to breakfast, and we'll take them back afterward.'"

Typically, the men claim they *believed* the women are also U.S. citizens, or that they are students at some college in California. But once they are waved into secondary inspection, they are separated, and the story disintegrates. The U.S. citizens are arrested, booked and locked up. The non-citizens are detained, to be deported *after* they are deposed on videotape (examined under oath) so their statements can later be used against the citizen-defendants. In most cases, these non-citizens agree to cooperate with the Government, and willingly testify that the off-duty officer and his friends were aware that the women had no permission or authorization to be in the U.S. and willingly relate all of the discussions that were had among them as they discussed what to say if they got stopped at the border. The women may portray themselves at the time as intoxicated and passive-innocent passengers who were being taken somewhere for breakfast; it was the men's idea to cross into the U.S. Under Title 8 *United States Code* §1324 (a)(1)(A)(iv)

it is a felony to "encourage or induce an alien to come to" or enter the U.S., which may draw up to 5 years' prison.

By this time, the off-duty officer and his friends have already made various statements attempting to extricate themselves from criminal responsibility and "knowledge" of the women's true residency. But the explanations are not convincing or even persuasive, compared to the circumstances and the testimony of the women. There is the additional problem of false statements to a U.S. officer, a federal crime as well.

The detained off-duty officer of course, has an obligation under most agency rules to notify his employer. But, even if he doesn't, the federal officers will anyway. Usually, the agency will send its own investigator to the location to gather information for the administrative investigation. By now, the off-duty officer realizes he is in a desperate situation. He must locate and hire a criminal lawyer with expertise in immigration and smuggling laws. He has to arrange for bail. He is facing a felony charge. Nobody in the Government seems to recognize that he is *also a peace officer*, or seems to care. He is treated like every other "criminal" caught at the border with drugs or non-citizens.

"Maybe there will be a plea-bargain; I can get a misdemeanor or even better, a deferral of judgment, and at least I won't lose my job!" The problem with this thinking is that his employer will look at the case in the following way: (1) does the evidence suggest that the officer "knew or should have known" that the person(s) he brought to the border were non-citizens and not otherwise authorized? (2) did the officer plan or conspire to attempt to fool U.S. officers into believing the person(s) were "legal" to cross? (3) did the officer make any false representations or statements to U.S.

officers? (4) did the officer, when he was first asked questions by a U.S. officer, tell the *truth*? (5) has the incident brought discredit to the officer and the agency? In the typical case, the officer is in trouble on each of the five issues. The result is usually removal from the job, regardless of the officer's "good package". Even "coming clean" with his agency's investigators and accepting responsibility won't help. The job is gone.

But, he's not done, yet. There is still the criminal indictment to deal with. The cases are usually not defensible, at least not enough to warrant going to trial on a felony. True, maybe the Government will agree to a misdemeanor plea, and not insist on time in prison. But, keep in mind, there are Federal Sentencing Guidelines that have to be reckoned with.

A recent case disposition is indicative of the likely outcome in a "typical case". In return for the Government's agreement to forego the felony charge in the Indictment, and to file a Superseding Information, the defendant agrees to plead "guilty" to a violation of Title 8, *United States Code*, §1324 (a)(2)(A):

On or about (date), within the Southern District of California, (defendant), with the intent to violate the immigration laws of the United States, knowing and in reckless disregard of the fact that an alien, namely, (name), had not received prior official authorization to come to, enter, and reside in the United States, did bring to the United States said alien.

The Government agrees to move to dismiss the

Indictment when the officer is sentenced. But there is a lot more. The officer must stipulate to the "factual basis" for the plea - - usually a comprehensive statement of facts showing knowledge and intention combined with the act of bringing the "alien" to the Port of Entry, with the intent to violate immigration laws. He must agree not to attempt to withdraw the plea. He must acknowledge that sentencing is up to the judge, after a presentence report by the U.S. Probation Office. There are no guarantees. He must *declare under penalty of perjury* that the facts stated in the factual basis are true. Finally, he must **AGREE TO RESIGN FROM THE DEPARTMENT AND PROVIDE THE GOVERNMENT WITH PROOF OF HIS TERMINATION BEFORE SENTENCING.**

The "resignation" requirement is not always imposed by the Government in every case; that is plea agreements usually do not require the officer to resign. But our associate in San Diego, criminal law specialist Jeremy Warren, Esq. says that misdemeanor dispositions in these cases are increasingly difficult to obtain. So, the resignation agreement may be the only way to obtain a misdemeanor disposition. But with the factual stipulation, holding on to the peace officer's job would be highly doubtful anyway.

Under §1324 (b)(1), any vehicle or conveyance used to commit any of these offenses "shall be seized and subject to forfeiture".

The rules that emerge are these: (1) make sure when you come back to the United States from Mexico, you strictly comply with all laws for persons *coming to the Port of Entry*; (2) if you are questioned by federal officers, do not try to mislead or deceive them in any way; (3) don't think that your position as a peace officer will entitle you to any special consideration,

sympathy or concessions –it will not; (4) if the violation is present, almost no explanation will avoid arrest and prosecution – almost always fatal to your career.

Stay Safe!