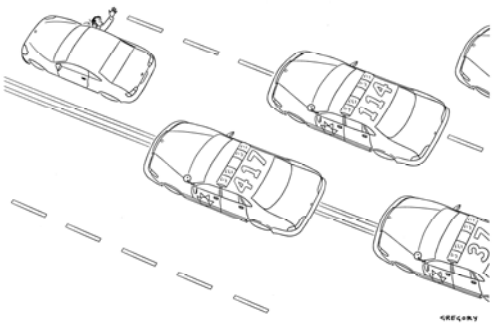
Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, September 5, 2016
Re: *United States v. Pablo Alvarez*, 2016 WL 4547362 (9th Cir. Sept. 1, 2016): ***Restitution:*** No *Paroline* or *Apprendi* error for restitution not in plea agreement.



"Mom – turn on the T.V!"
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Players: Decision by Judge Clifton, joined by Judges Callahan and Ikuta.

Facts: Alvarez and a co-D were caught illegally transporting aliens. *Id.* at *1. Alvarez was driving his own Chevy; the co-D drove a Ford that Alvarez had rented. *Id.* After a high-speed chase they hit spikes that the Border Patrol put across the road. The Ford was damaged. *Id.* Alvarez plead to a deal that promised a low-end recommendation. *Id.* The deal didn't (really) discuss restitution. The PSR did -- it recommended Alvarez pay for the damage for the rental Ford. *Id.* Over defense objection the court ordered $2,900 in restitution. *Id.*

Issue(s): "On appeal, Alvarez argues that the Supreme Court's decision in *Paroline . . .* established that restitution is a form of punishment. He contends, therefore, that restitution cannot be imposed as a condition of supervised release under the relevant statutes. For the same reason, he argues that restitution cannot be imposed based on facts not found by a jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000)." *Id.*

Held: "[R]estitution is not clearly a form of punishment and can be imposed as a condition of supervised release." *Id.* "Because *Paroline* did not establish that restitution is a punishment, Alvarez also cannot succeed on his argument that the district court violated *Apprendi* by imposing restitution based on facts not found by a jury. . . . [T]he Ninth Circuit "has categorically held that *Apprendi* and its progeny ... don't apply to restitution." . . . . *Paroline* is not "clearly irreconcilable" with that authority, and *Green* is still viable precedent.

Of Note: The district court didn't advise Alvarez that restitution was a potential consequence of the guilty plea – a clear Rule 11 error. *Id.* at *6 ("Where restitution is a possible penalty for a crime, Rule 11 of the Federal Rules of Criminal Procedure requires that a defendant be advised of the court's authority to impose restitution before the court can accept a guilty plea.") Why not reversed? Because, in the Ninth, that error is harmless if the defendant was told he was subject to a *fine* in excess of the restitution imposed (which happened here). *Id.* at *6. (Harmlessness also got a boost by the DJ's offer to let Alvarez withdraw his plea – which he rejected). *Id.*

How to Use: The Court also rejected Alvarez's claim that the government breached the plea by asking for restitution – even though that term was not laid out in the agreement. *Id.* at *5. Central to that analysis was the defendant's "reasonable expectation" as to whether restitution would be imposed. *Id.* at *6. Alvarez conceded at the first sentencing hearing that he knew he would have to pay for restitution: "I know that for a fact, and I have no problem doing that." *Id.* "The government did not breach the agreement by pursuing restitution subsequent to Alvarez's clear statement that he expected to have to pay it." *Id.* Alavarez later changed his view, and switched counsel – but his first disclaimer still killed the breach claim. "The reasonable expectations of the defendant can be ascertained through the objective proof on the record," explains Judge Clifton, *id.* at *5: beware of those prior hearing transcripts when mulling a breach argument.

For Further Reading: Are permanent residents entitled to bail hearings while awaiting deportation rulings? "Of course," held the Ninth. *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002) (affirming NorCal's own Judge Illston). "Wrong," the Supreme Court countered. *Demore v. Kim*, 123 S.Ct. 1708 (2003). DOJ got the Ninth reversed based on government statistics, after assuring the Supremes that removal hearings were quick, deportation appeals were rare, and immigration appeals were speedily resolved. The glitch? The Feds' stats were wrong. *See* http://blogs.findlaw.com/supreme_court/2016/08/did-the-department-of-justice-flat-out-lie-to-the-supreme-court.html?DCMP=NWL-pro_scotus The government's data had "several significant errors," now confesses the Acting Solicitor General. *See letter here:* http://lawprofessors.typepad.com/files/demore.pdf Turns out the Executive Office for Immigration Review's numbers were plagued with "serious errors in the query of its data it undertook at the time." *Id.* Is the government now urging reconsideration of *Kim*? No – though DOJ "greatly regret[s] the necessity for this letter." *Id.*