

Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, Aug. 15, 2016
Re: *United States v. Herrera-Rivera*, No. 15-50141 (9th Cir. Aug. 12, 2016): **Obstruction:** Good decision finds plain error with obstruction enhancement (albeit, with some grumbling)

Players: Decision by Judge Silverman, joined by Judge Tashima.
Concurrence and partial dissent by Judge Graber.

Facts: Herrera-Rivera was on a bus stopped by the border patrol. *Slip Op.* at 4. Agents found an unclaimed backpack a few rows up from the back of the bus. *Id.* at 5. Inside was a kilo of meth, wrapped with electrical tape. *Id.* Herrera-Rivera, who had crossed the border that morning, was sitting a few rows behind the bag. *Id.* A consent search of Herrera-Rivera by the agents revealed “black marks on his stomach that they believed were residue from electrical tape.” *Id.* A search of cell phones on Herrera-Rivera produced texts that appeared to arrange a rendezvous and payment for his return trip. *Id.* Herrera-Rivera explained to the agents that a friend had given him the cell phone and \$60, and told him to get on a bus to Calexico. *Id.* He said he thought there were drugs on the bus because his friend was involved in trafficking. *Id.* At trial, Herrera-Rivera testified he left Mexico because of marital problems, and was heading to Vegas to see his sister. *Id.* at 8. He explained that he was strip searched at the border (which agents later denied). *Id.* He testified that he did not know anything about the bag, and denied making incriminating statements to the agents. *Id.* He also testified the black marks on his stomach were from painting a fence the day he left home. *Id.* He was convicted. At sentencing the government moved for the guideline obstruction of justice enhancement under USSG § 3C1.1. *Id.* at 9-10. The district court mused, “I remember when he was testifying, thinking to myself that it was – to put it kindly, tenuous at best.” *Id.* at 10. The court applied the obstruction enhancement and imposed a sentence of ten years (about half of the (enhanced) guideline range). *Id.* at 10.



“I know I’m perjuring myself, but I’m trying to make a point!”
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Issue(s): “Because Herrera-Rivera did not object to the district court’s findings on the obstruction of justice enhancement, we review these findings for plain error.” *Id.* at 10-11.

Held: “[W]e agree with Herrera-Rivera that the district court plainly erred by applying an obstruction of justice enhancement to his sentence without making the express findings required by *United States v. Castro-Ponce*, 770 F.3d 819 (9th Cir. 2014).” *Id.* at 4.

Of Note: This is a good defense win, because (as dissenting Judge Graber argues), this case was a little – well, sketchy -- for us on the obstruction enhancement. Herrera-Rivera’s testimony was impeached on several fronts. It was pretty clear that his testimony was on facts that were material. And with no objection in the district court, the sentence was being reviewed for plain error. The reversal thus boils down to the lack of specificity of the findings. As Judge Graber complains, “the practical effect of [the majority’s] holding is to require a remand in *every* case in which a district court applies the obstruction of justice enhancement but makes incomplete findings.” *Id.* at 22 (Graber, J., dissenting). Our client’s right to testify is an invaluable, but fragile, thing: *Herrera-Rivera* continues the Ninth’s strict protections against casual bumps for invoking that right.

How to Use: Begrudging *Johnson* Section 2255 remands, the government has bickered over prejudice when our clients originally received below-guideline sentences. *Herrera-Rivera* (again) eviscerates that argument. In *Herrera-Rivera*, the client got a *full decade* below the enhanced guideline range: a fifty percent break. The government argued that the obstruction error didn’t affect Herrera-Rivera’s substantial rights. “[W]e reject this contention,” rebuffs the Ninth. *Id.* at 17. Add *Herrera-Rivera* to *Molina-Martinez* in our *Johnson* briefing: a sentence imposed under the wrong guidelines is, plainly put, wrong – remand and resentencing is the remedy.

For Further Reading: Bet you’ve been hitting Nate Silver’s blog for other reasons, lately. Next time you’re there, take a look at an interesting (terrifying) article on predictive sentencing based on odds of recidivism. See fivethirtyeight.com/features/prison-reform-risk-assessment/) *Minority Report*, coming to a court near you.