Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, January 14, 2019
Re: *United States v. Valencia-Mendoza*, 2019 WL 149827 (9th Cir. Jan. 10, 2019): ***Sentencing****:* Seminal decision limits state priors that increase federal sentencing exposure

"It's not the 'Bird Box' challenge. I just can't stand seeing the news anymore."

Players: Decision by Judge Graber, joined by Judges McKeown and Christen. Huge win for AFD William Miles Pope, Fed. Defenders of E. Wa. & Idaho.

Facts: Valencia-Medonza pleaded guilty to illegal reentry. *Id.* at *1. He received a +4 OL increase under USSG § 2L1.2, because of a prior Washington "felony" conviction. *Id.* Commentary to § 2L1.2 defines a felony as an offense "punishable by imprisonment for a term exceeding one year." *Id.* The stat max for this Washington prior was *five* years. Based on Ninth precedent, the D.J. imposed the bump. *Id.* Under Washington's mandatory sentencing range, however, the *actual* max that Valencia-Mendoza could have received was *six months*. *Id.*

Issue(s): "We must decide whether Defendant's state conviction was a 'felony' for purposes of the federal Sentencing Guideline. According to the government, the statutory maximum punishment for Defendant's state offense was five years, so he was convicted of an 'offense punishable by imprisonment for a term exceeding one year.' U.S.S.G. § 2L1.2 cmt. n.2. Defendant acknowledges the statutory maximum but argues that, because the maximum sentence that he actually could have received was only six months, he was not convicted of an 'offense punishable by imprisonment for a term exceeding one year.'" *Id.* at *3.

Held: "Our precedent required the district court to disregard the maximum term that Defendant actually could have received under state law, in favor of the maximum term that Defendant theoretically could have received if different factual circumstances were present. Reviewing de novo the interpretation of the Sentencing Guidelines . . . we conclude that later Supreme Court decisions are clearly irreconcilable with our precedent on this point. Accordingly, we vacate the sentence and remand for resentencing." *Id.* at *1. (citation omitted). "In sum, the Supreme Court has held that courts must consider both a crime's statutory elements and sentencing factors when determining whether an offense is 'punishable' by a certain term of imprisonment." *Id.* at *9.

Of Note: Judge Graber's terrific decision parts ways with the Ninth's precedent in *Rios-Beltran*, 361 F.3d 1204, 1208 (9th Cir. 2004). *See id.* at *4. The Ninth has historically looked at the *stat max* when evaluating the viability of state priors for federal sentencing. *Id.* With a nice *Miller v. Gammie* whammy, the Ninth now comes in line with SCOTUS (and the Fourth, Eighth and Tenth Circuits). *Id.* at *8. The decision is also consistent with *the government's* position in the Fifth! *See id.* at *8 & n.4 (a particularly enjoyable footnote). *Valencia-Mendoza* is a well-reasoned decision by a jurist who is, one might say, frequently sympathetic to the government's views. The opinion brings the Ninth squarely in line with a solid phalanx of out-of-circuit authority, and the Supreme Court. The government's e.b. efforts (if it even bothers) should (we hope) die quickly on the vine.

How to Use: California famously used to have determinate sentencing below the "stat max" – a scheme that got sideways with SCOTUS. *See Cunningham*, 549 U.S. 270 (2007). The State then scrambled for a fix – S.B. 40 and the later Realignment Act re-jiggered the sentencing schemes. *See generally* http://www.courts.ca.gov/documents/SPR17-09.pdf at 1-2. Do Cali's current "sentencing triads" trigger the same limitations as the Washington system in *Valencia-Mendoza*? *See generally* https://lao.ca.gov/handouts/crimjust/2017/Overview-of-Felony-Sentencing-in-California-022717.pdf Yup! (We think). Like Sriracha, Valencia-Mendoza's spicy bite tastes good on everything. Glop the analysis onto state priors the government tries to assert in USSG § 2L1.2, USSG § 2K2.1, Career Offender, § 922(g) charges, § 924(e)(2)(A) and § 3559(c)(2)(F)(ii) (First Step Act revised) cases, § 851 allegations, ACCA sentences – yum!

For Further Reading: Last Friday, AO Director Duff informed the Judiciary that we are almost out of dough. Furloughs and "work without pay" loom for federal court staff – and for Federal Public Defenders – on the 19th, if the shutdown isn't resolved next week. *See generally* https://www.thegazette.com/subject/news/government/public-wont-notice-impact-of-government-shutdown-in-iowa-federal-court-but-employees-will-courthouses-20190110