

# Case o' the Week

*A little memo on a big case.*

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD      Date: Monday, October 14, 2019  
Re: *United States v. Valle*, 2019 WL 5058604 (9th Cir. Oct. 9, 2019): **Section 1326**: Great decision on standard of proof at sentencing, big reentry win

**Players:** Decision by Judge Friedland, joined by Judge M. Smith and DJ Bastian. Very nice victory for Deputy Federal Public Defender Brianna Mircheff, C.D. Ca. FPD.

**Facts:** In '98 and 2000, Valle was convicted of drug felonies and removed from the U.S. *Id.* In 2004, Valle was arrested for a DUI in California, but was not convicted or removed. *Id.* at \*2. In 2017, Valle was arrested by police in California, charged with illegal reentry, and plead guilty. *Id.* The guidelines carried additional enhancements *if* his drug priors were within ten and fifteen years “of the start of his illegal reentry offense.” *Id.* Over defense objection, the PSR started the clock at the 2004 DUI arrest, despite the fact that there was no evidence about how many times Valle had departed and reentered the U.S. since that date. *Id.* This “start date” issue made a 30+ month difference in the guideline range, from 1-7 months to over three years. *Id.* The government argued Valle’s previous use of California addresses and his family ties created a sufficient inference to conclude that he had continuously been in the US since 2004. *Id.* at \*3. The district court agreed. *Id.* The court held as a matter of law that Valle’s continuous presence in the U.S. was not required [a legal error], *and* found that under a “preponderance of evidence” standard Valle had continuously been here since ‘04. *Id.* at \*3 and \*6. Valle was sentenced to 37 months.



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**Issue(s):** “This appeal requires us to evaluate the Government’s burden of proof in demonstrating the applicability of sentencing enhancements for an illegal reentry crime. Specifically, we consider whether the Government can establish by clear and convincing evidence a non-citizen’s continuous presence in the United States since the alleged time of reentry without submitting any direct evidence of where the non-citizen was for more than a decade.” *Id.* at \*1.

**Held:** “We hold that it cannot. We give some weight to the inference that a non-citizen who had previously returned after being removed and who had family in the United States would have made efforts to stay in the country. But that inference is not enough to carry the Government’s burden here to prove the thirteen years of continuous presence in the United States necessary to support the enhancements applied to . . . Valle’s sentence. We . . . vacate and remand to the district court for resentencing.” *Id.* “[I]t was the Government’s significant burden to prove that Valle was continuously present, and it produced no evidence whatsoever about where he was for over a decade, the district court clearly erred in concluding that the Government had sufficiently proven that he remained in the United States.” *Id.* at \*8.

**Of Note:** Valle won for now, the Ninth pointed to lower guidelines, but so what? Won’t the government just scrape together evidence of “continuous presence,” for re-sentencing? Nope! Judge Friedland concludes that because the government “failed to carry its burden despite an extensive factual inquiry below, it is not entitled to “a second bite at the apple.” *Id.* at \*8. (internal citations and quotations omitted). *Valle* “second bite” holding is an interesting arrow for our appellate quivers.

**How to Use:** The key to this victory is the Ninth’s holding that the government’s sentencing burden of proof was *not* by a preponderance, but by the higher “clear and convincing” standard. *See id.* at \*4 - \*5. Judge Friedland carefully distinguishes other “preponderance” decisions. *Id.* at \*5. Her analysis is invaluable for our future “clear and convincing” efforts -- turn to *Valle* when hunting for a heightened sentencing standard.

**For Further Reading:** *One out of three* defendants sentenced last year was convicted of an immigration offense. So reports the Sentencing Commission. For an accessible summary of the Feds’ new focus, *see* <https://www.washingtonexaminer.com/washington-secrets/feds-immigration-top-us-crime-one-third-of-all-sentencings>