

## APPENDIX TABLE OF CONTENTS

Memorandum Opinion of the United States Circuit Court for the Ninth Circuit (November 7, 2019) .....	1a
Judgment in a Criminal Case (April 27, 2018) .....	5a
Oral Colloquy and Bench Ruling Denying Motion to Terminate Retained Counsel (January 22, 2018) .....	17a
Order of the United States Circuit Court for the Ninth Circuit Denying Petition for Rehearing (November 26, 2019) .....	30a

**MEMORANDUM OPINION OF THE  
UNITED STATES CIRCUIT COURT  
FOR THE NINTH CIRCUIT\*  
(NOVEMBER 7, 2019)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
  
v.  
  
GERALD CLAUDE CARLSON,  
*Defendant-Appellant.*

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No. 18-30096

D.C. No. 3:17-cr-05188-RBL-1

Appeal from the United States District Court  
for the Western District of Washington,  
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted October 25, 2019  
Seattle, Washington

CLIFTON, IKUTA, and BENNETT, Circuit Judges.

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Defendant-Appellant Gerald Claude Carlson  
appeals from his jury trial conviction of one count of  
possession with intent to distribute methamphetamine,

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\* This disposition is not appropriate for publication and is not  
precedent except as provided by Ninth Circuit Rule 36-3.

in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (2). We affirm.

Carlson challenges the district court's denial of his request to replace his trial counsel. Under the Sixth Amendment, a defendant who hires his own attorney has a right "to be represented by the attorney of his choice," but this right is not absolute. *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010). A defendant "may have the counsel of his choice unless a contrary result is compelled by purposes inherent in the fair, efficient and orderly administration of justice." *United States v. Brown*, 785 F.3d 1337, 1344 (9th Cir. 2015) (quoting *Rivera-Corona*, 618 F.3d at 979). In assessing this question, a trial court has a "wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006).

Although the district court's description of its reasons for denying the request may not have been stated in the clearest and most comprehensive manner, it is apparent here that the denial was primarily based on the demands of its calendar. The issue did not arise until the Friday before the Monday that Carlson's trial was scheduled to begin. Though the attorney had been representing him for more than six months, it was on that Friday that Carlson told her that he wanted to replace her. The attorney notified the court clerk that day but the matter could not be presented to the court until the following Monday morning when trial was to begin. By that time, a jury pool had been gathered, and counsel and witnesses were pre-

pared to proceed with trial. Carlson did not want to represent himself, so he would need new counsel if the prior attorney was dismissed, but he had not obtained or even sought another attorney by the day trial was to begin, though he had not been in custody. In denying the request, the district court noted that its calendar was busy, that two continuances had already been granted in the case, and that granting the request would cause delay. The district court did not abuse its discretion in denying the request.

Carlson also appeals the district court's admission of expert testimony on the drug trade by a DEA agent. First, Carlson contends that the expert's testimony ran afoul of our rule barring expert testimony as to "the modus operandi of drug trafficking organizations . . . in cases where . . . the defendant is not charged with conspiracy to distribute drugs." *United States v. Pablo Varela-Rivera*, 279 F.3d 1174, 1179 (9th Cir. 2002). The testimony here, however, concerned the modus operandi or methods of individual drug sellers, not drug trafficking organizations. We have held that law enforcement experts "may testify as to the general practices of criminals to establish the defendants' modus operandi." *United States v. Anchrum*, 590 F.3d 795, 804 (9th Cir. 2009) (quoting *United States v. Freeman*, 498 F.3d 893, 906 (9th Cir. 2007)). The testimony here was of that nature.

Second, Carlson argues that the expert testimony constituted inadmissible [sic] character or criminal profile testimony in violation of Fed. R. Evid. 404. When such testimony makes "innocuous events indicate criminal activity," it may be inherently prejudicial to the defendant. *United States v. Lim*, 984 F.2d 331, 335 (9th Cir. 1993). Here, however, the expert testimony

concerned the common practices and methods of sellers of methamphetamine and not their character traits or the actions of users, so it did not present such a danger. The expert witness did not cite innocuous events as evidence of criminality. The district court did not abuse its discretion in admitting the testimony.

**AFFIRMED.**

**JUDGMENT IN A CRIMINAL CASE  
(APRIL 27, 2018)**

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UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON

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UNITED STATES OF AMERICA,

v.

GERALD CLAUDE CARLSON,

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Case Number: 3:17CR05188RBL-001

USM Number: 48380-086

Before: Ronald B. LEIGHTON, District Judge

Karen L. Unger, Defendant Attorney

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**JUDGMENT IN A CRIMINAL CASE**

**THE DEFENDANT:**

  X   was found guilty on count(s) 1 & 2 of the Indictment

Jury Verdict: 01/25/2018\_after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

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**Count 1**

Title & Section

21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),  
and 18 U.S.C. § 2

Nature of Offense

Possession of Methamphetamine with  
Intent to Distribute

Offense Ended

05/12/2016

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**Count 2**

Title & Section

18 U.S.C. §§ 924(c)(1)(A) and 2

Nature of Offense

Possession of a Firearm in Furtherance of a Drug  
Trafficking Crime

Offense Ended

05/12/2016

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The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution the defendant must notify

the court and United States Attorney of material changes in economic circumstances.

/s/ Gregory A. Gruber

Assistant United States Attorney

April 20, 2018

Date of Imposition of Judgment

/s/ Ronald B. Leighton

Signature of Judge

Ronald B. Leighton, United States  
District Judge

Name and Title of Judge

April 27, 2018

Date



### **IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

180 months

(i.e., 120 months on Count 1,  
and 60 months on Count 2, consecutive)

  X   The court makes the following recommendations to the Bureau of Prisons: FCI Sheridan

  X   The defendant is remanded to the custody of the United States

### **SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:

five (5) years.

### MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

\_\_\_ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. \_\_\_ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. X You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. \_\_\_ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached pages.

### **STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, *see Overview of Probation and Supervised Release Conditions*, available at [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	TOTALS
Assessment	\$ 200
JVTA_Assessment*:	\$ N/A
Fine:	\$ Waived
Restitution:	\$ None

\_\_\_ The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

\_\_\_ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	_____
Total Loss**	_____
Restitution Ordered	_____
Priority or Percentage	_____
TOTALS	<u>\$ 0.00 / \$ 0.00</u>

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

### **SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

  X   PAYMENT IS DUE IMMEDIATELY. Any unpaid amount shall be paid to Clerks Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.

  X   During the period of imprisonment, no less than 25% of their inmate gross monthly income or \$25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program..

  X   During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States Attorney's Office of any material change

in the defendant's financial circumstances that might affect the ability to pay restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.



\_\_\_ Restitution amount ordered pursuant to plea agreement \$

\_\_\_ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

\_\_\_ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

\_\_\_ the interest requirement is waived for the \_\_\_ fine

\_\_\_ restitution

\_\_\_ the interest requirement for the \_\_\_ fine

\_\_\_ restitution is modified as follows: X

\_\_\_ The court finds the defendant is financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived.

**ORAL COLLOQUY AND BENCH RULING  
DENYING MOTION TO TERMINATE  
RETAINED COUNSEL  
(JANUARY 22, 2018)**

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UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON

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UNITED STATES OF AMERICA,

v.

GERALD CLAUDE CARLSON,

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3:17CR05188RBL-001

Ronald B. Leighton, District Judge

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THE CLERK: U.S.A. versus Gerald Carlson, Cause No.  
CR17-5188RBL.

Counsel, please make an appearance.

MR. GRUBER: Good morning. Gregory Gruber appearing on behalf of the United states. Over here at the end of counsel table is Shaun Darby, Pierce County Sheriff's Department.'

MR. PENALVER: Andre Penalver.

THE COURT: Mr. Penalver.

MS. UNGER: Karen Unger with my client, Mr. Carlson.

THE COURT: Ms. Unger, Mr. Carlson, good morning. I was advised Friday afternoon, late afternoon. I

was advised there was an issue of counsel. Is that exigent now?

MS. UNGER: Yes.

THE COURT: I'll ask the Government to leave. We will deal with an ex parte issue.

MR. GRUBER: Yes.

THE COURT: Don't be far away. We'll have you back in a few minutes.

(The following proceedings were sealed, page 4,  
line 24 through page 10, line 14.)

THE COURT: Ms. Unger.

MS. UNGER: I met with Mr. Carlson on Friday. He came to my office hoping we could prepare for trial. I met with Mr. Carlson on several occasions. I met with him in his home in Graham a couple of months ago. He made it clear that he wanted to go to trial, The Government made several offers to resolve this. Mr. Carlson is looking at a long time in prison if he is convicted because of the mandatory minimums that these charges require.

I have contacted Mr. Carlson on numerous occasions via e-mail. We have spoken over the phone. Mr. Carlson was insistent on going to trial. I am preparing for trial. I filed the motions I felt were relevant. He came on Friday. After about an hour, he indicated to me that he didn't want me to represent him anymore, He wanted me not to represent him in the trial. He doesn't think I believe that he is not guilty. He doesn't apparently have any confidence in my ability to proceed as his counsel.

As soon as he made that clear to me, under the RPC contacted the clerk and let the clerk know my client didn't want me to represent him. I believe he wants to retain other counsel and go from there.

THE COURT: Mr. Carlson, what do you have to say?

THE DEFENDANT: That is pretty much it. Occasions we met, she went to my daughter's house. We didn't discuss about the case. Didn't have any discussion of the case at all or in our meetings.

THE COURT: What did you do?

THE DEFENDANT: She was offering up the plea bargain, saying kick it back to state court, at my daughter's house, When she got back, they said no, they wouldn't do that. Then a couple weeks ago I called her up, are you doing anything about the case? Are you preparing for it? She said she was. When I got up there, I didn't see anything she has done to prepare for my defense or anything.

THE COURT: What kind of evidence or what should she review? I have looked at all the evidence, trial memorandum. It is pretty straightforward. Pretty compelling.

THE DEFENDANT: No motions to suppress any of the statements by the detectives or anything because they are not truthful. Didn't make an attempt.

THE COURT: She almost succeeded on her motion to cut Jewell out.

THE DEFENDANT: I don't see a problem with the expert.

THE COURT: You have lost faith in her?

THE DEFENDANT: She basically told me she didn't think the same way I did, and she couldn't think the same way I did, and then just wasn't going to put on any defense.

THE COURT: Have you sought any other lawyer to see if he or she sees the world the same as you do?

THE DEFENDANT: Well, I haven't had time. We didn't have a meeting until 2:30 on Friday in Port Angeles.

THE COURT: You have waited way beyond the 11th hour, Looking at the evidence, it strikes me that that this is little more than an effort to delay the inevitable.

THE DEFENDANT: No. I seen the evidence, Mostly about my admittance or confessions to the detective.

THE COURT: You know, you throw that out, and you are still left with meth, guns, money, Pay O, scales. Is that a romper room for your grand kids?

THE DEFENDANT: Romper room, what is that?

THE COURT: What is a jury going to do with that evidence?

THE DEFENDANT: If they look at it and see what it is, it is not what they are stating it is.

THE COURT: What is it?

THE DEFENDANT: A little book with chicken scratch in it. Drug ledger? I don't know what that means.

None of it adds up to or verifies drug. dealing.  
All the guns were locked up in a safe. I was in  
my home.

THE COURT: Thousand dollar bundles in envelopes  
Marked "Chewy."

THE DEFENDANT: It was just a piece of paper with  
some numbers on it that said "Chewy." Not  
hundred dollar bills that said 'Chewy.'

THE COURT: You segregated the money into thou-  
sand dollar piles.

THE DEFENDANT: Yeah. I go on vacation. I don't  
have a credit card. I go in my safe, open it up,  
grab \$4,000 and head to Florida.

THE COURT: Would you like to represent yourself  
today?

THE DEFENDANT: No, I want a lawyer that will  
address their statements or whatever.

THE COURT: The public has an interest-in speedy  
trial just as you do. You continued it twice.

I looked at the docket this weekend. I have the  
docket right here where you are requesting contin-  
uances.

THE DEFENDANT: I never requested any.

UNIDENTIFIED SPEAKER: It was for her having a  
baby. Her daughter having a baby.

THE COURT: Are you prepared to go to trial?

MS. UNGER: I am prepared. I have been prepared to  
go to trial. To be quite frank, the case is not that  
complicated. Mr. Carlson had an attorney in state  
court, Apparently, they were in the same situation,

which is why the case was dismissed in Pierce County and refiled by the Government here because Mr. Carlson wouldn't take advantage of the plea offer that the State offered him.

THE DEFENDANT: They finally came up with one.

MS. UNGER: I don't know what to say, other than I disagree with Mr. Carlson in that I am prepared to go to trial, I believe we have had discussions. I have sent him many e-mails outlining what I thought the Government's case would be and why I thought he could be convicted. I never said I wouldn't represent him. I never said I wouldn't let him put on his case. He is very committed to tell the jury whatever it is he feels his perspective of the evidence and the case is. He said things to me on Friday about the legitimacy of the search warrant that I never heard before from him, which concerned me.

THE DEFENDANT: We never had a meeting before.

MS. UNGER: I feel like I have met with him enough. I have read some of the cases that the Government found over the weekend. It causes me some concern. I know the Government is concerned it could be sent back because Mr. Carlson --

THE COURT: I have read Judge Berzon's opinion on *Brown*. That is the one.

MS. UNGER: That is the one.

THE COURT: There are others. The Court is mindful of the public's right. The defendant has serious rights to be protected and guarded against abuse. The public has an equal -- a right to see justice

occur expeditiously, efficiently, and not allow people to make a mockery of the rule of law.

As an aside, if the detention order would have been different, I don't think Mr. Carlson would be making his argument today.

MS. UNGER: I honestly would have brought this to the Court's attention if I knew Mr. Carlson was feeling that way, The Court knows that.

THE COURT: As far as I am concerned, you pulled a rabbit out of the hat by getting him out of jail, the detention deal. With guns and meth, I would have detained him. I would have detained him awaiting trial. The magistrate judge thought differently. Anyway, the motion is denied. We are going to go to trial, We will start voir dire at 9:30.

The court is at recess. Tell Greg

(The proceedings recessed.)

(The proceedings resumed  
with all counsel present.)

THE COURT: Mr. Gruber, Mr. Penalver.

MR. GRUBER: Mr. Penalver, we just want to make sure, since we weren't in here to hear any of that, that certain things are on the record for, obviously, if it goes up on appeal.

MR. PENALVER: The cases we provided speak to one point. When the trial proceeds when the defendant has a retained counsel and wishes to change counsel on the eve of the trial, one of the most important things is there is a clear record as to the Court's decision.



THE COURT: I asked Mr. Carlson if he wanted to represent himself, for example. We did not discuss the issue, whether he had -- has the right to have appointed counsel. We didn't get that far. He had not retained another lawyer. My reasons are delay. He is just -- it is just a game. That is what I said.

MR. PENALVER: I imagine, with the court administration and a jury pool already assembled, that also --

THE COURT: The record will sufficiently portray that because we are going to pick a jury in ten minutes.

MR. GRUBER: The only other thing I guess I would just seek to clarify, which should be, I guess, somewhat clear, or at least can be inferred from an examination of the docket, but Ms. Unger has been retained since approximately a week after the defendant's detention hearing back in late April. If any of this had been brewing prior to Friday, he has had seven months to hire somebody else.

THE COURT: There have been two prior continuances. That is on the record.

MR. GRUBER: I think that is really all we wanted to address, Your Honor. Thank you.

THE COURT: It is not my first rodeo, but I have been bucked off a couple of times.

MR. GRUBER: I just got recently burned on an appeal where it was all about what happened when I wasn't in the room. That always makes me nervous.

Thank you, Your Honor.

THE COURT: We be at recess until

(The proceedings recessed.)

THE COURT: Are we ready for the jury?

MS. UNGER: Yes, Your Honor.

MR. GRUBER: Before we bring them in, there was the matter defense counsel and I raised with the Court a couple weeks ago. We wanted to see if the Court wanted to put anything on the record about that. We brought the issue to The Court's attention.

THE COURT: There are two people on the witness list who I know. Mr. Darby and Darrin -- where is the witness list. Darrin Rayner. I know those two gentlemen. Not very well. I do know them, I know a lot of prosecuting lawyers, a lot of defense lawyers, a lot of law enforcement people in the federal government and county government. I was the chairman of the Civil Service Commission for the sheriff's apartment for 16 years before I went on the bench, I know them. They would not expect any treatment in their favor. This is not a ease that would even invite suspicion of anyone in this case pulling punches or anything of the like. I addressed it as a non issue. I told counsel it was a non-issue.

MR. GRUBER: Thank you, I would note that while Detective Derby will be testifying, at this point we do not expect Detective Rayner to testify.

(Prospective jurors enter.)

THE COURT: Anything to take up with the Court at this time?

MR. GRUBER: I don't think so.

THE COURT: Let me, for the record, digress on the counsel issue before the jury came to put another factor on the record that was in my mind and was not expressed. I spend 600 hours on the bench last year, more than twice any of my colleagues. My trial schedule is packed going forward. That is just another reality that we are confronted with. I invite that. I like being in trial and giving people a chance to tell their story. That puts added pressure on the existing schedule, and to stay to it to the best of my ability.

Anything else?

MR. GRUBER: No.

MS. UNGER: I would like to just say something about my client's relationship with me. I don't know if I should say it in the presence of the Government.

THE COURT: Before I let them go, are there any subjects that you want me to ask before you folks -- I have taken the voir dire. Both sides have been here in cases such as this. You know the kinds of questions I am going to ask.

MR. GRUBER: Totally unrelated to the counsel issue, the only thing I guess my co-counsel here is a little bit nervous about is one thing. He recognized the gentleman. I forget his number. It might be 12. He is the attorney in the back row. Apparently, Mr. Penalver served on some board with him. I am not sure how long ago. Some time ago. Apparently, the juror doesn't really remember Mr. Penalver. I think that makes it a non-issue.

MR. PENALVER: Not unusual for people.

THE COURT: He is very forgettable.

MR. GRUBER: He wanted to note that.

THE COURT: Do you want me to ask him?

MR. PENALVER: The fact he didn't remember means it probably is not going to have any effect on his decision-making.

THE COURT: I will ask.

MR. GRUBER: Mr. Penalver will also be asking questions. He may recognize his voice, et cetera.

MS. UNGER: As far as general questions, does the Court intend to inquire about firearms, guns?

THE COURT: I have questions about drugs and guns, attitudes about guns, all that, Those questions get answered very quickly and succinctly, unless there is some problem. If you want a more cerebral discussion on the subject, we can --

MS. UNGER: No. I think the questions are simple enough to ask. You can eventually get some discussion from the juror, I figured you asked so --

THE COURT: No, that's exactly the kind of stuff I want.

MR. GRUBER: You want us to step out?

THE COURT: You guys out.

MR. GRUBER: 15 minutes?

THE COURT: Yes, about 11:20.

Ms. Unger, do you want me to clear the balcony or not?

MS. UNGER: I would imagine that is up to the Court.

THE COURT: Two law clerks.

MR. GRUBER: My assistant Lisa is up there. I can't see her. She should step out if she is.

THE COURT: You are a spectator?

UNIDENTIFIED SPEAKER: All externs.

THE COURT: They are court staff.

Sir?

UNIDENTIFIED SPEAKER: I was just going to relay a message to defense counsel. I will step out.

(The following proceedings were sealed,  
page lines 1-21.)

MS. UNGER: I want to make a record. My client does not have any confidence in me in this case. He doesn't believe I am going to do a good job for him. I know he is upset that he wasn't able to replace me, I want to make it clear that Mr. Carlson knows I have conveyed this to the Court.

I understand he doesn't have any confidence in me. I understand he doesn't seem to understand why I think what I think and how I reached the conclusions I reached, analyzing the evidence, looking at the materials. He and I do not agree on that at all.

THE COURT: I understand.

It is for Ms. Unger's edification more so than Mr. Carlson, I guess. Ms. Unger is one of the premier defense lawyers that comes in time and time again into my courtroom to represent her client. I have every confidence in Ms. Unger. If I were ever in trouble, I would always be in front of a

jury, not a judge, and Ms. Unger would be on my short list.

Court is at recess.

(The proceedings recessed.)

(The following proceedings resumed  
with all counsel present.)

THE COURT: Prepared for the jury?

MR. GRUBER: Yes, Your Honor.

ORDER OF THE UNITED STATES CIRCUIT  
COURT FOR THE NINTH CIRCUIT\*  
DENYING PETITION FOR REHEARING  
(NOVEMBER 26, 2019)

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

GERALD CLAUDE CARLSON,

*Defendant-Appellant.*

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No. 18-30096

D.C. No. 3:17-cr-05188-RBL-1

Western District of Washington, Tacoma

CLIFTON, IKUTA, and BENNETT, Circuit Judges.

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Appellant's Petition for Rehearing (DocketEntry  
No. 75) is DENIED.

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\* This disposition is not appropriate for publication and is not  
precedent except as provided by Ninth Circuit Rule 36-3.