



## ORIENTATION READING ASSIGNMENT

Welcome to Santa Clara Law! This packet of materials introduces you to some of the basic ideas behind legal education and includes your assignments for the classes that will meet during Orientation. Our goal for Orientation is to help you get your bearings so that the first few weeks of the semester are a bit less overwhelming. Law school is an incredibly challenging undertaking that will require you to work harder and think more deeply than you probably ever have before. We hope to ease your transition into this new academic environment, and look forward to supporting and advising you along the way.

### **The Legal System and Lawyers**

If you went to high school and/or college<sup>1</sup> in the United States, you probably have some background knowledge of the structure of our government, how our laws are made, and what the court system does. These are foundational concepts to the study of law, so we provide here links to some general articles that introduce (or reintroduce) this material. Please review each of the assigned portions below before Orientation.

- *U.S. Federal Government*  
<http://www.usa.gov/Agencies/federal.shtml>  
Read *How the U.S. Government Is Organized*.
- *Introduction to the American Legal System*  
<http://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page>  
Read sections A, B, and D.

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<sup>1</sup> If you weren't educated in the United States, it may be helpful to do some additional reading in this area. A book we recommend is *Constitutional Law: Principles and Practice* by Joanne Banker Hames and Yvonne Ekern. Professors Hames and Ekern are on the Santa Clara Law faculty.

As Santa Clara is located in California and most of our graduates go on to practice in this state, some portion of our curriculum focuses on the specifics of California law and legal practice.

- *Fact Sheet: California Judicial Branch*  
[http://www.courts.ca.gov/documents/Calif\\_Judicial\\_Branch.pdf](http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf)  
Read in full.
- *Summary of Requirements for Admission to Practice Law in California*  
<http://admissions.calbar.ca.gov/Portals/4/documents/Admit-Summary-Requirements.pdf>  
Read in full.

Finally, you are entering into one of the world's most respected professions. Lawyers serve a unique role in our society, and have important professional obligations that come along with that position. Lawyers are "officers of the court," serving not only the interests of our clients, but also those of the entire legal-judicial system. As law students, beginning to understand and develop that professional identity is essential.

- *California Attorney Guidelines of Civility and Professionalism*  
[http://nevadacountycourts.com/documents/public/CalBar Guidelines of Civility.pdf](http://nevadacountycourts.com/documents/public/CalBar%20Guidelines%20of%20Civility.pdf)  
Read the Introduction, and Sections 1 through 5, 14, 16, 17, 19, and 20.
  - *A Primer to Law School Etiquette*  
<http://tippingthescales.com/2013/11/a-primer-to-law-school-etiquette/>  
Read in full.
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## LEARNING IN THE LAW SCHOOL CLASSROOM PROFESSOR MARINA HSIEH<sup>2</sup>

Not only do different professors choose different reading materials and cases for their classes, but they all teach a bit differently based on their own background and goals for your learning. Some professors lecture, some engage you in discussion, many ask you to resolve specific hypothetical problems, and others utilize simulations and role-play. This diversity of approaches mirrors the legal profession into which you will graduate.

Probably the most widely known law school teaching approach is the Socratic method, which will be used in some form or another in most of your first-year classes. Traditional Socratic method begins with your professor assigning you a group of cases. Before coming to class, your task is to read and make sense of those cases individually and as a whole by briefing them. You'll bring your briefs and casebook to class and your professor will begin asking questions. She may ask for some basic information, such as a summary of the facts or the procedural history. She will likely ask a student to explain the legal reasoning the court applied (what law the court decided to use and why, and how it was applied to the facts.) And sometimes, she will ask how that law would apply to a different, hypothetical situation. This approach not only helps you make sense of the law; it is the way that courts, judges, and lawyers do their jobs every day.

Sometimes students are nervous about being called-on by their professors and worry about being able to think on their feet. This is a perfectly normal reaction. The best way to manage your nerves and to get the most out of the experience is to be fully prepared for class. Preparation for class, homework assignments, and exam study in law school is very different from undergraduate education, so the tactics and approaches you used in college will have to be adapted once you reach law school. From the sessions during Orientation week, we hope you're already thinking about how you'll need to adapt to this new environment. If you're not sure, make an appointment to see a faculty advisor in the Office of Academic & Bar Success.

For this session, Professor Marina Hsieh will lead you through a traditional classroom discussion of the case below. She will assume that you have attempted to read and understand the various parts of the case,

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<sup>2</sup> Professor Hsieh teaches Civil Procedure and Constitutional Law.

and will dive right into a blended lecture/discussion/Socratic conversation. Before this class, please read and make notes about the case below so that you are prepared to participate.

**Joanne KILLION, parent and natural guardian of  
Zachariah Paul, a minor, Plaintiff, v.  
FRANKLIN REGIONAL SCHOOL DISTRICT, Defendant**  
U.S. District Court for the Western District of Pennsylvania  
136 F. Supp.2d 446 (W. D. Penn. 2001)

ZIEGER, District Judge.

...Plaintiff, Zachariah Paul ("Paul"), was a student at Franklin Regional High School during the 1998-1999 school year. During March of 1999, Paul, apparently angered by a denial of a student parking permit and the imposition of various rules and regulations for members of the track team (Paul was a member), compiled a "Top Ten" list about the athletic director, Robert Bozzuto. The Bozzuto list contained[] statements regarding Bozzuto's appearance, including the size of his genitals. After consulting with friends, Paul composed and assembled the list while at home after school hours. Thereafter, in late March or early April, Paul e-mailed the list to friends from his home computer. However, Paul did not print or copy the list to bring it on school premises because, after copying and distributing similar lists in the past, he had been warned that he would be punished if he brought another list to school.

Several weeks later, several individuals found copies of the Bozzuto Top Ten list in the Franklin Regional High School teachers' lounge and the Franklin Regional Middle School. An undisclosed student had reformatted Paul's original e-mail and distributed the document on school grounds.

On or about May 3, 1999, Paul was called to a meeting with Richard Plutto (principal), Thomas Graham (assistant principal), and Robert Bozzuto (athletic director). Upon questioning, Paul admitted that he had created the contents of the Top Ten list, and that he had e-mailed it to the home computers of several friends from his home computer; however, Paul steadfastly denied bringing the list on school grounds. Plutto or Graham instructed Paul to bring a copy of the original e-mail message the next day....

The next day, shortly before Paul was scheduled to leave for a track meet, Plutto called Paul to his office. Paul, apparently anticipating that he might be disciplined, called his mother, who arrived shortly thereafter. Paul and Mrs. Killion went to the administrative offices where they met with Graham and Bozzuto. Graham and Bozzuto showed Mrs. Killion the Top Ten list, asked if she had seen it, and informed her that Paul was being suspended for ten days because the list contained offensive remarks about a school official, was found on school grounds, and that Paul admitted creating the list. Graham further informed Mrs. Killion that Paul could not participate in any school-related activities, including track and field events during the ten-day suspension....

[P]laintiffs commenced an action in the Westmoreland County Court of Common Pleas, Pennsylvania, against the School District seeking immediate reinstatement. The parties subsequently entered a settlement agreement wherein plaintiffs agreed to withdraw the complaint in exchange for the School District's agreement to provide Paul with the due process outlined in the Pennsylvania School Code....

On May 12, plaintiffs, Plutto and Graham met for the suspension hearing, which resulted in a ten day suspension. The same day, plaintiffs commenced a civil action in this court seeking a preliminary injunction for First and Fourteenth Amendment violations, and requesting that Paul be allowed to return to school immediately....

\* \* \*

Plaintiffs seek summary judgment contending that defendants violated Paul's First Amendment right of free expression by suspending Paul for speech that was made off school grounds and in the privacy of his home.

\* \* \*

## **B. First Amendment**

### **1. Freedom of Speech**

\* \* \*

Although there is limited case law on the issue, courts considering speech that occurs off school grounds have concluded (relying on Supreme Court decisions) that school officials' authority over off-campus expression is much more limited than expression on school grounds.

\* \* \*

[W]e find that Paul's suspension violates the First Amendment because defendants failed to satisfy *Tinker's* substantial disruption test. [*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).] First, defendants failed to adduce any evidence of actual disruption.... There is no evidence that teachers were incapable of teaching or controlling their classes because of the Bozzuto Top Ten list. Indeed, the list was on school grounds for several days before the administration became aware of its existence, and at least one week passed before defendants took any action....

Further, we note that the speech at issue was not threatening, and, although upsetting to Bozzuto, did not cause any faculty member to take a leave of absence... Although the intended audience was undoubtedly connected to Franklin Regional High School, the absence of threats or actual disruption lead us to conclude that Paul's suspension was improper....

Admittedly, Bozzutto, Graham, Plutto and others found the list to be rude, abusive and demeaning.... However, [d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*[.] Indeed, [t]he mere desire to avoid 'discomfort' or 'unpleasantness' is not enough to justify restricting student speech under *Tinker*. However, if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.[.]

Defendants attempt to support an expectation of disruption defense by arguing that Paul had created similar lists in the past, and had been warned that he would be punished for distributing similar lists in the future. However, defendants have not presented any evidence that Paul's earlier lists had caused disruption which would have supported a belief that substantial disruption would follow from the Bozzuto list....

\* \* \*

...[D]efendants apparently argue that the Bozzuto list could "impair the administration's ability to appropriately discipline students."... We cannot accept, without more, that the childish and boorish antics of a minor could impair the administration's abilities to discipline students and maintain control.

\* \* \*

Defendants also argue that the suspension was appropriate because Paul's speech was lewd and obscene and therefore punishable under [*Bethel School District v. Fraser*, 478 U.S. 675 (1986).] Plaintiffs rejoin that, "[i]f the Bozzuto list could in fact be considered contraband, sanctionable under *Bethel*, the defendants['] recourse would be to punish those students who actually brought the offending material to school. But to punish the author for work created outside of school is certainly beyond the First Amendment pale."...

\* \* \*

Here, defendants argue that Paul's top ten list contained several lewd and vulgar statements... Although we agree that several passages from the list are lewd, abusive, and derogatory, we cannot ignore the fact that the relevant speech... occurred within the confines of Paul's home, far removed from any school premises or facilities. Further, Paul was not engaged in any school activity or associated in any way with his role as a student when he compiled the Bozzuto Top Ten list.

\* \* \*

Given the out of school creation of the list, absent evidence that Paul was responsible for bringing the list on school grounds, and absent disruption,... we hold... that defendants could not, without violating the First Amendment, suspend Paul for the mere creation of the Bozzuto Top Ten list. Plaintiffs' motion for summary judgment must be granted.

\* \* \*

IT IS ORDERED that the motion (doc. no. 27) of plaintiffs, Joanne Killion and Zachariah Paul, shall be and hereby is granted.

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## TOOLS FOR ACADEMIC SUCCESS PROFESSOR DEVIN KINYON<sup>3</sup>

As you saw in Professor Hsieh's presentation, understanding and studying cases can be very challenging. One very important idea that we hope you took away from that session is that you need to develop a new approach to learning in law school if you hope to be successful. Simply put, law school isn't like anything else you've experienced, so the strategies you've used in the past for college will have to change for you to succeed.

Professor Devin Kinyon will begin your exposure to the various tools, techniques, and strategies that successful law students employ at your next academic session. Our goal is to show you a variety of ideas, and empower you to do those things that align with your learning preferences, background, and needs.

In preparation for Professor Kinyon's session, please complete the following learning styles assessment:

- *VARK: A Guide to Learning Styles*  
<http://www.vark-learn.com/english/page.asp?p=questionnaire>  
Note your learning style for discussion at Professor Kinyon's session.

We also will be discussing a concept called Self-Regulated Learning, an idea employed by the very best students in all disciplines to get the most out of their learning experience. Please watch the following video presentation in preparation for our discussion:

- *Expert Learning for Law Students: Part III*  
[http://lawschoolasp.org/eLearning/expert\\_learning\\_part3/viewer.swf](http://lawschoolasp.org/eLearning/expert_learning_part3/viewer.swf)  
There are two additional presentation (parts I and II), that are not required for our discussion, but may be useful to view. They are available at: [http://lawschoolasp.org/students/learning\\_opps.php](http://lawschoolasp.org/students/learning_opps.php)

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<sup>3</sup> Professor Kinyon teaches Legal Analysis, and as a part of the faculty in the Office of Academic & Bar Success, oversees the first-year Academic Success Program and the upper-division Directed Study Program.

## **READING AND BRIEFING CASES LARAW<sup>4</sup> ORIENTATION CLASSES**

Reading cases will make up the bulk of your assignments in your first-year law school classes. Creating briefs for those cases is the process by which you make sense of that reading material, prepare for class, and, ultimately, study for your exams. In your LARAW class meetings during Orientation, you will begin practicing that skill. This section provides some background information that you should review before your first LARAW meeting.

### **The Basic Structure of a Case**

Cases contain two main parts: the heading and the opinion. The heading precedes the opinion, and normally consists of:

- The title of the case;
- The name of the court issuing the opinion;
- The date of the opinion;
- The case citation.

After the heading is the main opinion, the part of the case written by the court. It usually contains the following parts:

- The name of the judge writing the opinion;
- The facts of the case;
- The procedural history of the case;
- The issue(s) presented to the current court;
- The holding(s) that resolve those issues;
- The court's rationale, or reasons, for the holding(s);
- The court's order or judgment.

Sometimes, court opinions or the edited versions of them in your casebooks omit some of these components, or the components must be inferred from other parts of the opinion. Read opinions to glean information pertinent to each component, but do not be discouraged if an opinion is written so cryptically that you can't determine all of these parts. Analyze the opinion as best you can and discuss it with others (such as your study group members), as you will find that different readers often have different understandings of what an opinion means. Lawyers confer

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<sup>4</sup> LARAW (pronounced "law-law") stands for Legal Analysis, Research, and Writing. For more information on the LARAW program, visit: <http://law.scu.edu/laraw/>.

with each other often about the meanings of cases; as law students, you should start that practice through your study groups, ASP sessions, and class discussions.

### **First Steps to Reading a Case: Recognizing the Context**

In your undergraduate college, you might have just jumped right into your reading. In law school, however, you'll want to understand the context of your assignment so that you can fit it into the larger framework of your course. For example, in your Criminal Law course, you will cover the topic of homicide not all in one day, but instead over the span of many class sessions. Your reading assignment for a particular class session might address one specific aspect of homicide, such as the mental state required for a first-degree murder. Thus, in reading a case, be aware both of how the case helps define the discrete topic covered – mental state for first-degree murder – and also of how it fits into the larger analytical framework for homicide crimes and into the larger topic of criminal law.

To figure out that context, you'll want to review the topics assigned on your course syllabus and the table of contents in your textbook. Consider your professor's focus for that class session, so that you can understand why this case is being assigned. This is important because most cases will address multiple issues and legal rules. Typically, your professor assigns a case because it addresses one specific legal topic very well. Because you've identified the focus area for that date's class, you'll be able to zero in on that topic in the case and pay special attention to it. That topic should make up the bulk of your case brief so that you're ready for the discussion in class and, ultimately, can use that case material in preparing for exams.

### **The Case Heading**

As outlined above, the first part of the case that you'll see is the heading. The heading helps you understand some very basic aspects of the case.

*The title* typically contains the names of at least two parties to the lawsuit. There may be other parties, but for brevity's sake, the title generally includes only one party on each side of the lawsuit. In a trial court, the parties are referred to as plaintiff and defendant. In appellate courts, the parties are typically renamed as the appellant or petitioner (the losing party at trial, now asking the appellate court to review the decision), and the appellee or respondent (the party who was successful at the trial level).

*The name of the Court issuing the opinion*, such as the U.S. Supreme Court, a Missouri appellate court, or the U.S. District Court for the Northern District of California. Knowing which court issued the opinion helps you assess the opinion's relative weight.

*The year of the opinion* is also critical because it tells you when the opinion was decided relative to other cases that involve the same issues. Many older cases are still relevant, but a current court may decide that an earlier decision was wrong or that circumstances have changed so dramatically since the issuance of an older opinion that a new rule or rationale should be used instead.

*The case citation.* Lawyers and judges must be able to access decisions quickly and accurately. For this reason, each case has a citation, including the name, volume, and page number of the books, called "reporters," where the decision is published. We will cover the rules for formulating citations in legal documents in your LARAW course.

Depending on the course and your professor's preference, it is useful when creating your case brief to note some of the information from the heading. For some classes, it is enough to note simply the case's title and year and which party is which. Other professors and classes focus more on the procedural and precedential aspects of the cases, so having more detail about the court and timeline of the case is important.

### **Some Tips for Reading a Court Opinion**

The opinion is the main text of the case, explaining the fact situation, the relevant law, and how the court applied that law to the facts. If you are a "big picture" person, it may be helpful to skim the case for a basic understanding of what occurs before beginning your in-depth reading. Others may wish to highlight text and make margin notes on an early read-through so you can go back and retrieve parts for your brief. This can be especially helpful for kinesthetically-oriented people, who tend to learn best when moving or "doing."

As you read cases, try to identify each of the components of the opinion listed below. This will help you understand what the court is doing at each stage of the opinion. The court may not address the components in the listed order, and the casebook editor may have omitted some components, but you should be able to identify one or more of the components in each of the paragraphs of the decision. When you brief the

case, you will be using these same components as the headings for the sections in your brief.

As a new student of law, the terminology used by judges and lawyers may be unfamiliar to you. When you read cases, have a legal dictionary at hand so that you can look up any term that you don't know. Don't just assume you understand the gist of a word or that its conversational English definition applies. The preferred resource, used by most law students, is *Black's Law Dictionary*.

### **Components of a Court Opinion**

*The name of the judge writing the opinion* is found at the beginning of the body of the opinion. Trial courts typically have only one judge presiding. Appellate courts consist of multiple judges, and the judge whose name appears at the beginning of the opinion is generally writing on behalf of the entire court or a majority of the court. If the court's decision is not unanimous, then other judges on the panel may publish concurring or dissenting opinions, which are printed at the end of the majority opinion.

*The procedural history* of the case, sometimes called procedural facts, is usually found towards the beginning of the court's decision. It explains how the case worked its way to this court from the time it was filed with the initial court. Procedural history is particularly important in your Civil Procedure class, but may also be of interest to your other professors. When briefing a case, it can be helpful to write a timeline of the procedural history.

*The facts* about the parties' conduct that gave rise to the case are typically stated at the beginning of the opinion in narrative form. By the facts, we refer to the events that led to the judicial proceeding. In effect, the facts are the story of the people or institutions that become the parties to the judicial proceeding.

*Issues* are the legal questions posed by the specific case. Issues generally fall into one of three categories. These are (1) *issues of law*, in which the court must interpret the meaning of a particular statutory term or otherwise determine what legal rule should apply; (2) *issues of fact*, in which a court must determine what the true facts of the case are (especially where the evidence is conflicting); and (3) *mixed questions of law and fact*, where the court determines the outcome of a dispute by applying the relevant legal rules to the specific facts before it.

Sometimes, though not always, the court makes it simple to identify the issues by stating them as questions. At other times, the issues just appear as headings or introductory sentences. There may be more than one issue in a case, and there may be more than one type of issue in a case

In *the rationale or analysis section*, usually the lengthiest part of the decision, the court explains the reasoning that led to its holding(s).

The court will use different types of reasoning depending on whether it is deciding a question of law or a mixed question of law and fact. For both types of issues, the court will begin by summarizing the applicable pre-existing *rules of law*. Rules of law originate in primary sources of law, including federal and state constitutions, statutes, regulations, and, under the doctrine of *stare decisis*, the holdings of courts superior to the deciding court and of earlier decisions by the deciding court.

Where the case addresses a new issue of law, the court's reasoning will include statutory interpretation, existing rules in related areas of law, and public policy, among other bases. The court's holding, or answer, to a question of law will be a new rule.

Where the court addresses a mixed question of law and fact, the court's reasoning will include its *application of the rules of law to the facts of the case* before it. By application, we mean the court's examination of whether the facts in the case meet the requirements of the applicable rules of law, and why or why not.

The analysis of each issue usually ends with a *conclusion or holding*. The content of the holding depends on the type of issue the court is deciding. If the court is deciding a question of law, its holding will be a new rule of law. If the court is deciding a mixed question of law and fact, the court's holding will be the conclusion it reaches after applying existing and any new rules of law to the facts of the case before it. There will generally be one holding for each issue in the case. For example, the court may first decide a question of law and then apply its holding on that question (which will be a new rule of law) to the facts of the case before it.

Typically, the holding(s) will be followed by *the court's order*. The order describes the procedural steps needed to effect the court's decision, such as affirming or reversing the lower court's decision or remanding (sending back) the case to a lower court for further action.

*Concurring* and *dissenting opinions* may be included with a case, as judges on an appellate panel may not agree with each other as to the outcome of the case or may agree as to the outcome but not as to the reasoning the majority opinion used to get there. A *concurring opinion* agrees with the judgment rendered by the majority, but either disagrees with the issue to be decided or the method of deciding it or sets out additional reasoning. A *dissenting opinion* disagrees with the majority's holding. These opinions are often retained in the casebook to demonstrate the varying viewpoints within the court and to aid you in understanding the scope and reasoning of the case.

### **Writing a Case Brief**

A case brief is a written summary of a court's opinion. It serves several critical purposes. Its preparation forces deeper reading so that the student or lawyer understands how the opinion advances and applies the law. It also boils down the content of an opinion and organizes it in a useful format for later reference in class discussions and preparing for exams.

Because the process of creating briefs advances the law student's legal analysis and writing skills, the use of commercially-published briefs is counterproductive, as it preempts the activity of studying opinions and distilling their content. This is a skill mastered only through practice. (Commercial briefs may also be misleading, because they may focus on aspects of the case other than those your professor prioritizes.) Similarly, "book briefing," i.e., merely highlighting the text and writing notes in the margin of the casebook without creating a separate brief, is inadequate. It skips the important exercise of distilling the legal reasoning into your own words, which is a proven step to truly making sense of and learning the law.

A brief should be just that. More than a page or so defeats the usefulness of the tool. Early in the semester, you will probably write longer briefs. Edit them for focus after class discussion to make them more useful and to improve your briefing skills for the next case. Do not be discouraged that brief-writing is difficult at first; it is a sophisticated activity that takes time. You will improve with practice.

Another important reminder as you begin briefing: your briefs for each subject will be slightly different based on the types of questions your professor asks in class and the overall course subject. We have already noted that the procedural aspects of a case tend to be very important in a Civil Procedure course, but may not be in your Torts class. These kinds of

differences will become clear after a few weeks of paying careful attention to your different professors. Adapt your briefs as you go.

One final but critical note: it is very difficult to identify the elements of a brief by simply reading an opinion from beginning to end. Several readings of the opinion are usually necessary to ferret out the parts. One usually must dissect the rationale to find the rules and facts the court relied upon; those key facts and formulation of the rule are then necessary to construct the issue statement and the corresponding holding. Do not expect to find the items in order, nor on your first reading of the case. Be ready to draft your brief “out of order” and to adjust the contents of your brief as you compose it.

### **Components of a Brief**

1. *Heading:* Start your brief by listing:
  - a. Title of the case;
  - b. Name of the court writing the opinion;
  - c. Year of the opinion;
  - d. Casebook page number;
  - e. Topic area from your syllabus or table of contents.
  
2. *Facts:* Summarize the relevant facts of the dispute before the court. Remember the context in which your professor assigned the case and focus on the facts that address that specific issue area. The court may provide the facts in a separate facts section, and will also refer to them when applying the rules to the facts. In referring to the parties, use a description (for example, owner, seller, parent) rather than the parties’ positions in the lawsuit, which can be confusing to follow in a brief.
  
3. *Procedural History:* A summary of the relevant procedural details. Include who originally sued whom and the cause of action (the claim for relief). In addition, include the trial court’s judgment, who appealed the judgment, and how any appellate court(s) have ruled so far.
  
4. *Issue(s):* A statement of the pertinent legal question(s) before the court. Sometimes courts explicitly state the issues presented in the case with language such as “the issue presented is whether...,” or “the question in this case is whether...” If the issues are not expressly stated, you must identify them from the

court's summary of earlier proceedings or the arguments advanced by counsel.

You will formulate your issue statements a little differently, depending on whether the issue is one of law or one of mixed law and fact. (You will rarely see the third type of issue – questions of fact – in the appellate decisions you read for class). An issue of law arises when there is an unanswered question as to what the law should be on a given point. The resulting rule does not depend on the facts in the case before the court, so a question of law does not need to include the facts of the specific case, although it may include generic facts. On the other hand, a mixed question of law and fact is resolved by applying the existing applicable law to the facts of the specific case, so it must contain both a reference to the applicable law and the facts from the case that are most determinative in satisfying (or not satisfying) the requirements of the applicable law.

Here is an example of an issue statement for a pure question of law, taken from the attached sample brief: *Under California law, does an implicit threat of arrest satisfy the force or fear element of a simple kidnapping?* You can see that the question does not include the facts of a specific case, because the answer to the question will be a rule that applies in any false imprisonment case, regardless of the facts in that specific case. The question does include the generic facts of “implicit threat of arrest,” however.

In contrast, a good issue statement for a mixed question of law and fact incorporates both a brief statement of the applicable rule and a brief statement of the facts that determine whether or not that rule is met in the specific case (sometimes called “the determinative facts”). Here's an example, also taken from the attached sample brief:

*Was the force or fear element of kidnapping met where the defendant identified himself as a security guard, took the victim's backpack, and told the victim that she was a suspect in a theft and must accompany him, where the victim testified that she thought she would be arrested if she did not comply, and where the defendant did not display any weapons or threaten or touch the victim?*

In this example, the issue statement refers to the applicable legal rule (a required element of kidnapping). Then it summarizes the relevant facts.

5. *Holding/Conclusion:* Just as a court's opinion sometimes contains an explicit statement of the issue, it may also include an explicit statement of the holding. You should look for phrases like "the holding is..." or "we hold..." or sometimes "we conclude..." or "we find... ."

Your holding should be a mirror-image response to the issue statement. Its format will vary depending on whether it answers a question of law or a mixed question of law and fact. You can see examples of a holding on a question of law and a holding on a mixed question of law and fact in the sample brief in these materials.

One thing to note: articulating the holding of a case is not always simple. In many cases, the readers of an opinion (lawyers, judges, law professors, and law students) disagree about the precise holding of a case. Some may reasonably argue that a holding is very narrow, applicable to only a very small range of future situations. Others may reasonably argue that a holding is very broad, applicable to a wide variety of future cases. There is not always one correct way to articulate the holding of a case; only time and later cases will tell.

6. *The Court's rationale:* Here, you should identify the court's reasons for its holding or conclusion. It is helpful to summarize the rationale by the issue. In other words, if the court has decided two issues, you will divide your summary of the rationale in your case brief according to the issues.

The court's reasons for its holdings on both questions of law and mixed questions of law and fact will start with the relevant pre-existing rules. The court's further reasoning, however, will differ depending on whether it is deciding a question of law or a mixed question of law and fact. For the former, the court will use statutory interpretation, references to related rules, and public policy, among other bases, in making its decision. For the latter, the court will apply the pre-existing rules and any new rule resulting from its holding on a question of law to the

facts before it. The court's rationale on a mixed question of law and fact may also include public policy reasons.

*Rules:* Phrasing of the rule statement is important, as using a precise rule on an exam is a hallmark of solid legal analysis. When you begin briefing, extracting the rule statement verbatim from the casebook tends to be the best approach. Over time you will see how your professor rephrases or polishes rule statements, and you'll want to mirror that approach in your briefs and ultimately on your exam.

*Application:* By "application," we mean the court's examination of whether the facts in a specific case establish or do not establish the requirements ("elements") of the relevant rules. Recognizing how a court has applied the rule to the facts and developing the ability to apply rules to facts yourself are critical skills that you will need in reading and briefing cases, in answering questions in class, on exams, and in the practice of law.

One thing to note: sometimes the casebook editors will have edited the case to take out some of the court's rationale. For example, if the point of including the case was to demonstrate how a court arrived at a particular new rule of law, the casebook might not include the court's application of the rule to the facts.

7. *Concurring and Dissenting Opinions:* Your brief may include a short summary of a concurring and/or dissenting judge's opinion. You will find that persuasive dissenting opinions sometimes become the majority opinions of tomorrow.

Finally, leave space to amend your brief based on class discussion. What did the professor emphasize? Ignore? You will find it far easier to make these notes during or immediately after class rather than many days and thousands of pages later. What are the two or three takeaways that this case adds to your understanding of this area of law? Is it the major statement of the rule moving forward? A source of a new exception or element of the rule? A particularly good example of the application of a familiar rule to interesting facts? Was it used with a hypothetical in class? As you approach the end of each topic area of your course, be sure to consider how each case relates to others in that section.

## IRAC

You will most likely have heard the term “IRAC” and, if you have not, you will hear it frequently in law school! IRAC (issue, rule, application, conclusion) is simply a short term for the tasks of identifying an issue, identifying the applicable rules, applying those rules to the facts of a new case, and reaching a conclusion on the outcome of a mixed question of law and fact. These tasks are the essential skills that you’ll apply (with some variation) in all of your coursework, on law school exams, on the Bar Exam, and in legal practice. For those of you with a philosophy or logic background, IRAC is a form of syllogistic, or deductive, reasoning. You’ll begin seeing more and more IRACs as you read cases and other legal writing.

### Sample Case Brief

In providing this template, our goal is to give you a starting point for your briefing. As you gain experience preparing for class and checking your preparation against your class participation, you will develop your own style of brief writing. Below, we’ve provided a sample brief written by Professor Evangeline Abriel<sup>5</sup> to give you an idea of what a case brief might look like. Remember that a case brief is a tool for your own use and that you will develop your own briefing process and format based on your preferences and professors.

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<sup>5</sup> Professor Abriel teaches LARAW, Advocacy, Immigration Appellate Practice, and Advanced Legal Writing: The Bar Exam.

## **SAMPLE BRIEF**

People v. Majors  
Supreme Court of California 2004  
14 Cal. Rptr. 3d 870

Facts: As 18 year old victim (V) was riding home on bike from a shopping mall, defendant (D), standing in street next to white van, flashed a badge and asked her to stop, said he was security guard at mall and there was suspicion that someone on bicycle had stolen something from store V had been in. D. told V she must return with him to store to resolve matter. V testified she feared arrest if she did not get into the van. D tried to put V's bike in van; when would not fit, took her backpack and told her to lock bike at nearby school. Would not let V call her parents. Made cell phone call apparently to office. V had no prior dealings with police. D drove to isolated area of mall, where attacked V. V fought back; D let her go.

Procedural history: D charged criminally, found guilty of several counts of kidnapping; D appealed to appellate court, which reversed the judgment on simple kidnapping for insufficient evidence on the element of force or fear. The Cal. Supreme Court granted Attorney General's petition for review.

*Preliminary note to students: This brief is an example of the basic components of a brief and how one person prepared it. Remember that a case brief is a tool for your own use, so adapt the format and contents to fit your needs and the particular case you are briefing!*

*Heading: case name, deciding court, citation. For cases you read for class, it's also helpful to note where the case fits in the course syllabus or textbook table of contents.*

*Include only relevant facts; facts that make a difference in the outcome of the case or that are necessary to allow reader to understand context or sequence of events. Summarize and abbreviate in the way that works best for you.*

*The procedural history explains how the case arrived before this Court.*

Issues:

1. Under California law, does an implicit threat of arrest satisfy the force or fear element of a simple kidnapping?
2. If so, was the force or fear element met where the defendant identified himself as a security guard, took the victim's backpack, and told the victim that she was suspected of theft and must accompany him, where the victim testified that she feared arrest if she did not comply, and where the defendant did not display any weapons or threaten or touch the victim?

Holdings:

1. Yes. An implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so and if the victim's belief is objectively reasonable.
2. Yes. Here, there was substantial evidence that defendant's conduct and statements caused V to fear she would be arrested if she did not comply. There was also substantial evidence that her fear was objectively reasonable.

*Note that there are two issues here. A CLUE that there are two issues – the Court's last paragraph, page 4, first column: "We conclude that..... We further conclude...."*

*The first issue is an issue of law, which the Court determines without reference to the particular facts of this case.*

*The second issue is a mixed question of law and fact, in which the Court will apply the new rule that it has just announced (that implicit fear of arrest can satisfy the force or fear element of kidnapping) to the facts of this case. An issue statement on a mixed question of law and fact contains the legal question plus the determinative facts of the case (the facts that make a difference in the outcome). And yes, you're right – this question is too long – we would have to decide to take out some of the determinative facts.*

*Two holdings: one for each issue.*

*The first holding, responding to an issue of law, sets out the new, or "processed," legal rule the Court has fashioned.*

*The second holding, responding to a mixed question of law and fact, explains in summary fashion how the elements of the new rule are met by the facts of this case. In other words, the holding very briefly applies the legal rules to the facts of this case.*

Rationale (analysis):

Pre-existing rules:

- A person is guilty of kidnapping if he or she takes or holds the V forcibly or by any other means of instilling fear and moves V elsewhere.
- Movement is forcible if accomplished through orders that victim feels compelled to obey because victim fears harm from accused and fear not unreasonable under circumstances.
- Force need not be physical or involve express threats.
- Threat of force satisfies force element for kidnapping.
- Kidnapping may be accomplished by fraud and force or by fear. But if movement is by fraud alone, and not force or fear, victim has exercised free will in accompanying perpetrator, and it is not kidnapping.
- Determining characteristic of kidnapping as opposed to fraud is that kidnapping must be against victim's will, i.e., without victim's consent.

Rationale for holding 1:

1. Earlier cases distinguished between situations where victim went with kidnapper through fraud and where victim forced to go with kidnapper. Court says concepts of consent and force or fear are inextricably intertwined and are not

*The Court's rationale or reasoning is its explanation of how it arrived at its holdings on the issues presented.*

*For both of issues of law and mixed questions of law and fact, the Court's rationale will include pre-existing rules.*

*Summarize the preexisting rules that the Court sets out. You will want to start at the logical beginning, which may be somewhere before the specific rule or rules involved in the case. Include any rules from constitutions, statutes, and regs as well as rules from cases. Rules from constitutions or statutes should go first, as the preeminent source of rules.*

*Set the rules out in a logical order.*

*The Court's reasons for its holding on the issue of law include reasoning based on the preexisting rules, statutory interpretation, legislative history, policy, and justice, among other types of reasons.*

mutually exclusive. The use of force is implicit when arrest is threatened. Threat of arrest is quantitatively different from examples of pure fraud in earlier cases, where kidnapper asked victim to help find puppy or offered a ride.

Rationale for issue 2:

2. Substantial evidence that Defendant's conduct caused victim to fear arrest if she did not comply consisted of victim's testimony that was afraid she would be arrested, believed defendant had authority to arrest her, and had not dealt with police before. Substantial evidence that victim's fear was reasonable consisted of testimony that Defendant showed realistic badge, identified himself as security guard, said he stopped victim for law enforcement purpose. Also by Defendant's exerting control over victim's belongings, trying to put bike in van and putting backpack in van, continuing ruse after victim entered van.

Court's order: The Supreme Court reversed the decision of the Court of Appeal and remanded to that court for further proceedings.

*The court's rationale or reasons for its holding on a mixed question of law and fact will be the court's application of the law to the facts, its consideration of analogous cases, and public policy, fairness, and justice, among other reasons.*

*The Court's order states the practical steps to be taken to effect the holding(s).*

## Practicing Reading and Briefing

You will work with briefing cases in your LARAW class meetings during Orientation. The LARAW faculty has identified the two cases that follow for briefing practice. Prior to your first LARAW class meeting, please read the cases thoroughly and prepare any notes that you believe will be useful in briefing them. You do not need to create briefs in advance.

[Note: Your typical law school casebook will have edited court opinions connected by explanatory text written by the casebook authors. Assume these two cases appear in a chapter on “The Right to Have Appointed Counsel.” Some sample introductory and “note” materials precede and follow the *Gideon* case in this first example, so that you can see a case in context.]

### ***THE RIGHT TO HAVE APPOINTED COUNSEL***

#### **A. An Introduction to the Substantive Law**

The first case in which the Court required a state to provide counsel for indigent criminal defendants was *Powell v. Alabama*, 287 U.S. 45 (1932), holding that “in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.” The question after *Powell* was whether its counsel rule would be limited to the narrow set of circumstances set out in the holding, or expanded to include most or all indigent defendants.

In *Betts v. Brady*, 316 U.S. 455 (1942), the Court stated a test for the due process right to appointed counsel at state expense: whether the failure to appoint counsel would be so “offensive to the common and fundamental ideas of fairness” as to amount to a denial of due process. Using that test, the Court held that *Betts*, charged with robbery, did not have a right to appointed counsel. He was forced to try his own case before a jury, while the state was represented by a law-trained prosecutor. Almost twenty years after *Betts*, the Court defined fairness by a more expansive view of the right to counsel.

**GIDEON, Petitioner v.**  
**WAINWRIGHT, Director, Division of Corrections**  
Supreme Court of the United States  
372 U.S. 335 (1963)

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

“The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

“The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.”

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State’s witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument “emphasizing his innocence to the charge contained in the Information filed in this case.” The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this *habeas corpus* petition attacking his conviction and sentence on the ground that the trial court’s refusal to appoint counsel for him denied him rights “guaranteed by the Constitution and the Bill of Rights by the United States Government.” ...[W]e granted certiorari. Since Gideon was proceeding *in forma pauperis*, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: “Should this Court’s holding in *Betts v. Brady*, 316 U.S. 455, (1942), be reconsidered?”

We accept *Betts v. Brady*’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel [in criminal

cases] is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that “the right to the aid of counsel is of this fundamental character.” *Powell v. Alabama*, 287 U.S. 45, 68, (1932). While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable....

...The fact is that in deciding as it did – that “appointment of counsel is not a fundamental right, essential to a fair trial” – the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.

Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him....

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was “an anachronism when handed down” and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

[The concurring opinion of Mr. Justice DOUGLAS has been omitted.]

Mr. Justice CLARK, concurring in the result.

[T]he Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprivation of 'liberty' just as for deprivation of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life - a value judgment not universally accepted - or that only the latter deprivation is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

Mr. Justice HARLAN, concurring.

I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented 'an abrupt break with its own well-considered precedents.' [In *Powell*] this Court declared that under the particular facts there presented - "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility...and above all that they stood in deadly peril of their lives" - the state court had a duty to assign counsel for the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an after-thought; they were repeatedly emphasized, and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell v. Alabama*, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in *Powell* and in *Betts*, however, have had a troubled journey throughout the years that have followed. Even by the time of the *Betts* decision, *dictum* in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases....

In noncapital cases, the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded. The Court has come to recognize that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality. This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

I join in the judgment of the Court.

### NOTES AND QUESTIONS

1. Perhaps signaling that the Supreme Court was ready to change its mind about the rule of *Betts v. Brady*, the Court appointed Abe Fortas to represent Gideon. Fortas, who later went on to become a justice on the Supreme Court, was in 1962 "a high-powered example of that high-powered species, the Washington lawyer."

During oral argument Fortas ingeniously made the federalism argument work for rather than against Gideon. In response to Justice Harlan's argumentative question about federalism Fortas reassured that it was "a fundamental principle for which I personally have the highest regard and concern," then made the argument work for him: "*Betts against Brady* does not incorporate a proper regard for federalism. It requires a case-by-case supervision by this Court of state criminal proceedings, and that cannot be wholesome. Intervention should be the least abrasive, the least corrosive way possible." For Fortas, the "least abrasive"

intervention was a bright-line rule that state judges could apply without having federal judges looking over their shoulder.

2. Following a retrial at which he was represented by appointed counsel, Gideon was acquitted. See Anthony Lewis, *Gideon's Trumpet* 223-38 (1964).
3. *Gideon's* legacy. How has *Gideon* been applied? There are basically three forms of publicly-financed representation of criminal defendants, listed here from the least to the most common systems used by the states:
  - A contract-attorney program is one in which a jurisdiction enters into an agreement with private attorneys, law firms, or bar associations to represent indigent defendants in the community. About one-tenth of the counties use such a program. Attorneys in this system maintain a substantial private practice and agree to accept an undetermined number of cases for a determined flat fee or on a fixed-fee-per-case basis. Frequently the fees are so low that quality representation particularly in capital cases, is difficult to obtain.
  - A public-defender system is an organization of lawyers designated by a jurisdiction to provide representation to indigents in criminal cases. Over a third of the nation's counties have such defender programs.
  - In the remainder of counties (slightly more than half), an assigned-counsel program exists. Here, many lawyers, often inexperienced private practitioners, are placed on a list to provide representation to poor defendants on a case-by-case basis. They are paid by the hour – usually well below ordinary local rates – or a flat fee per case.

The National Legal Aid & Defender Association estimated in 2003 that the annual number of indigent defense cases nationwide is “as many as 10 million.”

4. In *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970), the Court recognized that “the right to counsel is the right to the *effective* assistance of counsel.” In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established standards for deciding whether a

defendant has been deprived of effective assistance of counsel. The defendant must show: (i) that his attorney's performance was deficient when measured against an objective standard of reasonableness; and (ii) that the defendant was prejudiced in the sense that there was a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. For the suggestion that *Strickland's* two prong test is reminiscent of *Betts v. Brady's* "facts and circumstances" test, see Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths-A Dead End?*, 86 Colum. L. Rev. 9, 99 (1986).

\* \* \*

## **B. The Scope of the Right**

**UNITED STATES OF AMERICA, Plaintiff, v.  
FORFEITURE, PROPERTY, ALL APPURTENANCES  
AND IMPROVEMENTS, Located at  
1604 Oceola, Wichita Falls, Texas, Defendant**  
U.S. District Court for the Northern District of Texas  
803 F. Supp. 1194 (N. D. Texas 1992)

BELEW, District Judge.

Before the Court is the motion of claimant John Amescua Garcia styled Introduction of Claimant, Petition for Counsel and Additional Time. Upon consideration of all pleadings, motions and applicable law, the Court is of the opinion that the motion is of merit and should be GRANTED in part. The motion is otherwise DENIED without prejudice to refiling at a later date if the conditions of representation are met.

This is an *in rem* forfeiture action against the property of John Amescua Garcia and Mary Lou Garcia. The property in this instance is the home of the Garcias. The government, plaintiff in this suit, seized the property upon authority of an ex-parte seizure warrant issued pursuant to 18 U.S.C. 881 and Rule 41 of the Federal Rules of Criminal Procedure. Based upon the motions and affidavits as presented to the Court for that seizure warrant, the Court determined that probable cause existed to seize the respondent property. Both Garcias are currently incarcerated in federal institutions upon crimes which the Court presumes to be related to this forfeiture proceeding.

\* \* \*

A court's authority to appoint counsel in a forfeiture proceeding stems from three possible sources. A court may do so under the statute authorizing *in forma pauperis* proceedings, 28 U.S.C. 1915, which also allows a court to request an attorney to represent a party in any case. Under 18 U.S.C. § 3006A a court may appoint and compensate counsel for representation of a defendant in criminal proceedings and proceedings ancillary thereto. Finally, the Due Process Clause of the United States Constitution requires a court, in some circumstances, to appoint counsel on behalf of a party. Upon review of these possibilities, the Court finds that the appointment of counsel to represent the Garcias is not appropriate at this time.

When the action of a court clearly implicates the substantial interests of a party, the Due Process Clause of the Constitution may require a court to appoint an attorney to insure the adequate representation of that party's interests. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2159, 68 L.Ed.2d 640 (1981). Historically, due process required the appointment of counsel only in cases threatening the physical liberty of criminal defendants. *Lassiter*, 452 U.S. at 25, 101 S. Ct. at 2158. In *Lassiter*, the Supreme Court found this historical interpretation merely "to be a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 26-27, 101 S. Ct. at 2159. If a citizen is not automatically entitled to representation simply because of the character of the proceeding or the nature of the possible deprivation, due process may still require the appointment of counsel in a particular case. *Id.* The *Lassiter* Court held that the presumption against appointed representation must be balanced against the tripartite due process equation enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). *Lassiter*, 452 U.S. at 26-27, 101 S. Ct. at 2159. In *Eldridge*, the Supreme Court listed three factors a court must evaluate when determining whether Due Process requires an additional procedural safeguard, (such as the appointment of counsel), in an official action by the government. *Eldridge*, 424 U.S. at 335, 96 S. Ct. at 903. Those factors are: 1) the private interest that will [ 803 F. Supp. 1197 ] be affected by the action of the government; 2) the risk of an erroneous deprivation of that interest and the probable value of an additional procedural safeguard; and 3) the government's interest involved, including the burdens entailed by the additional procedural safeguard. *Id.* This is a case-by-case determination to be made by the district court. *Lassiter*, 452 U.S. at 31, 101 S. Ct. at 2161.

In the case at bar, the private interest affected is the Garcia's possession of their family home. They have been paying a mortgage upon the house for nearly twenty-five years and currently owe only about \$2,300. Clearly, this interest is substantial and important.

The government interests involved are less compelling. The forfeiture seems to be primarily sought to further the punitive and exemplary interests of the government. There is no evidence that the home is a present danger to society, that it is enabling the continued trafficking of narcotics, or that it will pose a danger to society in the future or enable the Garcias to do so. The government is seeking to impose an additional penalty upon the Garcias, (who are already incarcerated), and to set an example of the costs involved in dealing drugs. While the government's interests in deterrence can be important, forfeiture of the Garcia's home would not significantly further those interests beyond the penalties already imposed. Any remedial interest the government has in seeking forfeiture to reimburse itself for the investigation and prosecution of Garcias is equalled by the Garcias['] monetary interest in maintaining their home. The government's interests in seeking forfeiture are important, but not compelling. Further, there is no showing that the government's interests will be substantially affected by the appointment of counsel for the Garcia.

The additional burdens imposed upon the government by appointment of counsel in this case would not be overwhelming. The mechanism to appoint counsel already exists, and though a question might arise of where funds for such an appointment might be found, no substantial procedural or administrative burdens would be created by a decision in the claimant's favor. Perhaps the most substantial imposition upon the government would be requiring the Plaintiff to oppose an attorney in a complicated and abstruse field where the Plaintiff normally expects to meet only pro-se litigants struggling through the claimant process. This imposition is not sufficient to deny the appointment of counsel.

The remaining *Eldridge* factor requires an examination of the likelihood of an erroneous deprivation and the probable value of an additional procedural safeguard. *Eldridge*, 424 U.S. at 335, 96 S. Ct. at 903. It is quite likely that in most, if not all forfeiture cases, the appointment of counsel would substantially aid a claimant in negotiating the arcane forfeiture procedures. It is also quite likely that in forfeiture cases where the claimant has a chance of success, the risk of an erroneous deprivation of property rights is substantially higher if the claimant must proceed pro-se.

Unfortunately for the Garcias, there is little chance a deprivation of their property through this particular proceeding would, in fact, be erroneous. Based upon evidence submitted by the government, the Court previously found sufficient probable cause existed to issue seizure warrants under Fed. Rule Crim. Pro. 41(c). The Garcias pled guilty to narcotics charges stemming from transactions involving their home. Examining the affidavits of the plaintiff, submitted for the purposes of the seizure warrant, and the guilty pleas of the claimants, there is ample evidence in the record to support a finding of forfeiture. Without deciding whether this evidence would eventually result in a forfeiture, the Court merely decides that an erroneous deprivation of property is unlikely in this case.<sup>[6]</sup> Therefore, when balancing the *Lassiter* presumption against required appointment of counsel and the ambivalent *Eldridge* factors in the case at bar, the Court finds that due process does not require the appointment [ 803 F. Supp. 1198 ] of an attorney to represent the Garcias. [Discussion of Criminal Justice Act omitted]

IT IS SO ORDERED.

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<sup>[6]</sup> While the Court is not unmindful that those with the least chance of success are often those most in need of counsel, that is not the appropriate due process inquiry under *Eldridge*.