

Monthly Review

The Federal Public Defender for the
District of Puerto Rico's Newsletter

May-June 2011

I. In The Supreme Court



Kentucky v. King, 131 S. Ct. 1849
(May 16, 2011)

Justice Alito, delivered the opinion of the Court, in which Roberts, Chief Justice, and Scalia, Kennedy, Thomas, Breyer, Sotomayor and Kagan, JJ., joined. Ginsburg, J. filed a dissenting opinion

Police were conducting a buy-bust operation with a CI. Officers entered an apartment building in hot pursuit of a person who sold crack cocaine to the informant. They heard a door slam, but were not certain into which of two apartments the dealer fled. A strong odor of marijuana emanated from one of the doors, which prompted the officers to believe the dealer had fled into that apartment. The

officers knocked on the door. They then heard noises which indicated that physical evidence was being destroyed. The officers entered the apartment and found large quantities of drugs. It was the wrong apartment; instead of finding a crack-selling drug dealer, they found a few pot-smokers sitting on the couch. The Kentucky Supreme Court held that this evidence should have been suppressed, ruling that (1) the exigent circumstances exception to the warrant requirement did not apply because the officers created the exigency by knocking on the door, and (2) the hot pursuit exception to the warrant requirement did not apply because the suspect was not aware he was being pursued. The Supreme Court reversed, 8-1, in a decision authored by Justice Alito.

The Court held that the exigent circumstances exception to the Fourth Amendment warrant requirement applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. In ruling, the Court clarified the proper test for determining police-created exigent circumstances, overruling the test applied by Kentucky and various other tests applied in the federal circuits. A warrantless entry based on exigent circumstances, the Court held, is reasonable when the police did not create

the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. This rule follows the principle that warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. The Court remanded to the Kentucky Supreme Court to determine whether an exigency existed under this test. Assuming an exigency did exist, the officers' conduct – banging on the door and announcing their presence – was entirely consistent with the Fourth Amendment. Justice Ginsburg was the sole dissenter, warning, “The Court today arms the police with a way routinely to dishonor the Fourth Amendment’s warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant.”

Fowler v. United States, 131 S. Ct. 2045
(May 26, 2011)

Breyer, J. Delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Thomas, Sotomayor, and Kagan, JJ. joined. Scalia, J. Filed an opinion concurring in the judgment. Alito, J. filed a dissenting opinion in which Ginsburg, J. joined.

Fowler was convicted of murdering a Haines City Police officer with intent to prevent him from communicating information about a federal offense to a

federal law enforcement officer or judge of the United States, in violation of 18 U.S.C. § 1512(a)(1)(C). Fowler and others, including Gamble, had robbed a Holiday Inn and planned to rob a Nations Bank the next day. They gathered in a vehicle at a cemetery, dressed in black. The vehicle contained masks, guns, and gloves. The police officer stumbled upon their vehicle and called in to his dispatcher that he was going to investigate a suspicious vehicle. He ordered the occupants from to step away from it, and he seemed to recognize one of the occupants. They eventually disarmed him and the officer was eventually found dead. Gamble cooperated and implicated Fowler in the killing. Fowler questions whether a defendant may be convicted of murder under §1512(a)(1)(C) without proof that information regarding a possible federal crime would have been transferred from the victim to federal law enforcement officers or judges. The Eleventh Circuit affirmed Fowler’s conviction even though there was no evidence that information allegedly obtained by the deceased officer on the date of his death would have been transferred to a federal law enforcement officer or judge. In the Eleventh Circuit’s opinion, the “possible or potential communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C). Here, the federal nexus requirement was clearly satisfiedThese [the offenses which Fowler, Gamble, and others allegedly were perpetrating on the morning of the officer’s killing] were all federal crimes and could

have led to a federal investigation and prosecution. These facts adequately support Fowler's conviction for violating §1512(a)(1)(C)." The Supreme Court reverses, rejecting the 11th Circuit's "possible or potential communication"- "possible crime" formulation. In an opinion by Justice Breyer (joined by Roberts, C. J., and Kennedy, Thomas, Sotomayor, and Kagan, JJ), the Court held that, in such circumstances, the government must show that there was a "reasonable likelihood" that a relevant communication would have been made to a federal officer. Justice Scalia concurred in the judgment, but argued forcefully that proof needed to be beyond a reasonable doubt, not the lower "reasonable likelihood" standard. Justices Alito and Ginsburg dissented. The case was remanded for a determination of whether there has been plain error here, since the defendant admits he failed to preserve the issue in the lower courts.

United States v. Tinklenberg, 131 S. Ct. 2007, (May 26, 2011)

Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Alito, and Sotomayor, JJ., joined, and in which Roberts, C.J., and Scalia and Thomas, JJ., joined as to Parts I and III. Scalia, J., filed an opinion concurring in part and concurring in the judgment, in which

Roberts, C.J., and Thomas, J., joined. Kagan, J., took no part in the consideration or decision of the case.

In *Tinklenberg* the Court addressed whether certain pretrial motions stop the 70-day Speedy Trial Act clock. Below, the Sixth Circuit concluded the Act had been violated because some pretrial motions did not cause delay or an expectation of delay in the trial, and thus the days when those motions were pending should not have been excluded from the 70-day calculation. The Supreme Court rejected the Sixth Circuit's "motion-by-motion causation test" and held that the exclusion for pretrial motions applies "irrespective of whether [the motion] actually causes, or is expected to cause, delay in starting a trial." But the Court nonetheless ruled in Mr. Tinklenberg's favor on an alternative basis, holding that the Act was violated when the district court improperly excluded holidays and weekends during the 20 days spent on transportation related to a competency evaluation. By statute, transportation in excess of 10 days is presumptively unreasonable. In calculating the number of presumptively unreasonable days, the district court exempted holiday and weekend days, so that only 2 days, instead of 10, were considered excessive, during which the Speedy Trial clock continued to tick. Looking to the common law and other federal statutes, the Supreme Court concluded holiday and weekend days should not be excluded from the 70-day time period.

Flores-Villar v. United States, 131 S. Ct. 2312 (June 13, 2011)

An equally divided Court issued a *per curiam* decision affirming, without opinion, the judgement below in *Flores-Villar v. United States* (No. 09-5801). The Ninth Circuit had rejected Ruben Flores-Villar's equal protection challenge on the basis of age and gender to two former sections of the Immigration and Nationality Act, 8 U.S.C. §§ 1401(a)(7) and 1409 (1974), which impose a five-year residence requirement, after the age of fourteen, on United States citizen fathers -- but not on United States citizen mothers -- before they may transmit citizenship to a child born out of wedlock abroad to a non-citizen.

DePierre v. United States, 131 S. Ct. 2225, (June 9, 2011)

Sotomayor, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ., joined, and in which Scalia, J., joined except for Part III-A. Scalia, J., filed an opinion concurring in part and concurring in the judgment.

Title 21 U.S.C. § 841(b)(1)(A) requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug-related offense involving either (a) five kilograms or more of "coca leaves" or "cocaine," or (b) fifty grams (.05 kilograms) or more of those substances, or of a mixture of those substances, "which contain[] cocaine base." Is the term "cocaine base" limited only to

"crack" or does it encompass every form of cocaine that is classified chemically as a base—which would mean that the ten-year mandatory minimum applies not only to "crack", but also to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves. The Supreme Court held, unanimously, the term "cocaine base" includes all cocaine in its chemically basic form, not just crack cocaine. Its holding abrogates contrary decisions in the Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits that had interpreted "cocaine base" to mean only crack, and, perhaps, other smokeable types of cocaine base.

Freeman v. United States, 131 S. Ct. 2685 (June 21, 2011)

Kennedy, J., announced the judgment of the Court and delivered an opinion, in which Ginsburg, Breyer, and Kagan, JJ., joined. Sotomayor, J., filed an opinion concurring in the judgment. Roberts, C.J., filed a dissenting opinion, in which Scalia, Thomas, and Alito, JJ., joined.

Freeman and another defendant, Goins, entered guilty pleas in a crack case with a binding plea agreement approved under Fed. R. Crim. P. 11(c)(1)(C). Following the 2007 amendment to the crack guidelines, they sought the retroactive benefit of that change under the authority of 18 U.S.C. § 3582(c)(2). The Sixth Circuit held that § 3582(c) relief is inapplicable here, following its binding precedent in *United States v. Peveler*, 359

F.3d 369 (6th Cir. 2004). The defendants, it held, were not entitled to relief under § 3582(c)(2) because the original sentence was imposed pursuant to a binding plea agreement under Rule 11(c)(1)(C) and resentencing was not necessary to “prevent a miscarriage of justice.” The Supreme Court, in a plurality decision, reversed holding that a sentencing judge is required to consider the Guidelines when deciding whether to accept and impose the specific sentence agreed upon by the parties in an 11(c)(1)(C) plea, even in cases where the original sentence imposed varies from the Guideline range.

The plurality reasoned that even an 11(c)(1)(C) sentence is “based on” the Guidelines. Because § 3582(c)(2) applies in cases when a sentence was “based on” a subsequently amended Guideline range, an 11(c)(1)(C) defendant is therefore eligible for § 3582(c)(2) relief.

Justice Sotomayor issued a concurring opinion setting forth a different ground for reversal. That opinion, like the dissent, would hold that sentences following 11(c)(1)(C) agreements are typically based on the agreement rather than the Guidelines, and therefore that § 3582(c)(2) relief is not available in the typical case. But unlike the dissent, Justice Sotomayor would permit Freeman to seek a sentence reduction because *his* plea agreement in express terms tied the recommended sentence to the Guidelines sentencing range. Justice Sotomayor’s opinion is the controlling one, and provides

a much narrower path to reduction for defendants sentenced under 11(c)(1)(C) agreements.

Tapia v. United States, 131 S. Ct. 2382
(June 16, 2011)

Kagan, J., delivered the opinion for a unanimous Court. Sotomayor, J., filed a concurring opinion, in which Alito, J., joined.

Tapia was sentenced to 51 months imprisonment following her jury-trial conviction for bringing in an illegal alien for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii), bringing in an illegal alien without presentation, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii), aiding and abetting, in violation of 18 U.S.C. § 2, and bail jumping, in violation of 18 U.S.C. § 3146. In sentencing her, the district court stated that it was imposing a 51-month sentence, instead of the mandatory minimum 3 year sentence, to ensure Tapia would get the benefit of BOP’s 500 Hour Drug Program. Tapia appealed, contending that the district court committed plain error by basing her 51month sentence on speculation about whether and when Tapia could enter and complete the Bureau of Prison’s 500-hour drug abuse treatment program. She relied upon the plain language of 18 U.S.C. § 3582(a), which provides: “The court in determining whether to impose a term of imprisonment . . . shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment is not an appropriate means of promoting correction and rehabilitation.*” The Ninth

Circuit rejected her argument and affirmed, even though there is a circuit split on this question. *Compare United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007); *In re: Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009), with *United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994); *United States v. Hawk Wing*, 433 F.3d 622, 629-30 (8th Cir. 2006); *United States v. Jimenez*, 605 F.3d 415, 424 (6th Cir. 2010). The Solicitor General agreed with Tapia's interpretation. The Supreme Court reversed, holding that 18 U.S.C. § 3582(a) does not permit a sentencing court to impose or lengthen a prison term in order to foster a defendant's rehabilitation. The Court relied on the plain language of the statute, and the fact that sentencing courts when imposing terms of incarceration are not authorized by statute to ensure that offenders participate in prison rehabilitation programs, but are authorized to consider rehabilitation when imposing probation or supervised release terms.

J.D. B. V. North Carolina, 131 S. Ct. 2394 (June 16, 2011)

Sotomayor, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C.J., and Scalia and Thomas, JJ., joined.

In *J.D.B. v. North Carolina* the Court held that a child's age is a relevant factor to consider in determining whether the child is in custody for the purposes of *Miranda v. Arizona*. A uniformed police officer had

questioned J.D.B. when he was 13-years-old behind closed doors at school, under the scrutiny of the school principal. J.D.B. confessed after the officer threatened him with juvenile detention. The Court remanded to the state to decide whether, in light of the circumstances, including the boy's age at the time, he would have felt free to leave the room.

Bullcoming v. New Mexico, 131 S. Ct. 2705, (June 23, 2011)

Justice Ginsburg delivered the opinion of the Court

The Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The Court noted that the representations in a forensic report – for example, the indication that no circumstance affected the analysis' validity – were the type of topic that is subject to cross-examination. They therefore fell within the Confrontation Clause's protection. The Court noted that substitute expert witness testimony did not satisfy the Confrontation Clause, as surrogate testimony would not convey what the person who prepared and certified the report knew, did, or observed.

United States Sentencing Commission

Latest News:

On October 15, 2010, the United States Sentencing Commission promulgated a temporary, emergency amendment that implemented the emergency directive in section 8 of the Fair Sentencing Act of 2010. On April 6, 2011, the Commission re-promulgated the temporary amendment as a permanent amendment, which will become effective, absent congressional action, on November 1, 2011.

On June 30, 2011 the U.S. Sentencing Commission voted to give retroactive effect to its proposed permanent amendment to the federal sentencing guidelines that implements the Fair Sentencing Act of 2010. Retroactivity of the amendment will become effective on November 1, 2011, the same day that the new proposed permanent amendment would take effect, absent Congressional disapproval.

On July 15, 2010, in a sudden change of position, Attorney General Eric Holder issued a two-page memorandum acknowledging that Congress intended all individuals sentenced after August 3, 2010, to benefit from the change of triggering quantities set forth in the Fair Sentencing Act. The memorandum also makes clear that all individuals sentenced after August 3, 2010, who did not benefit from the FSA will have to be resentenced.

* * *

Upcoming Petitions To Watch For:

United States v. Jones, 131 S. Ct. ___ (cert granted June 27, 2011); (No. 10-1259); decision below at 615 F.3d 544 (D.C. Cir. 2010).

Law enforcement made warrantless use of a global positioning system ("GPS") device to track the public movements of appellant Antoine Jones's vehicle for approximately four weeks. The court of Appeals found this unreasonable under the Fourth Amendment. The government petitioned for cert raising only this question: Whether the warrantless use of a tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment. The Supreme Court added a second question, one that was not decided below: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent."

Setser v. United States, 131 S. Ct. ___ (cert granted June 13, 2011) (No-7387); decision below at 607 F. 3d 128 (5th Cir. 2010).

Question presented: Whether a district court has the authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence. Following longstanding precedent, the Fifth Circuit held that 18 U.S.C. § 3584 authorizes district courts to order a federal sentence to run

consecutively to an undischarged state sentence. In the process, the court acknowledged a split in the circuits and the recent recommendation by two judges that the court reconsider the issue. (The Fifth Circuit is joined by the Eighth, Tenth, and Eleventh Circuits, while the Second, Fourth, Sixth, and Ninth Circuits have held that § 3584 does not authorize a district court to impose a federal sentence to be served consecutively to an undischarged state sentence.) The Solicitor General conceded error in responding to the cert petition, stating that “[t]he government agrees with petitioner” that 3584(a) does not authorize district courts to order a federal sentence to run consecutively to a not-yet-imposed state sentence. But the government argued (as it has argued in a number of similar cases), that review was not warranted because the error has “scant practical effect” because the state court and BOP can decide for themselves whether to take the other sovereign's sentence into account. The Supreme Court nevertheless granted plenary review.

Perry v. New Hampshire, 131 S. Ct. ____ (cert. granted May 31, 2011) No. 10-8974; decision below at NHSC 2009-0590 App1.

When a witness in a criminal case identifies a suspect out-of-court, under suggestive circumstances which give rise to a substantial likelihood of later misidentification, Due Process requires the trial judge to determine whether the out-of-court identification and any subsequent in-court identification are

reliable before either may be admitted into evidence. Question presented: Do the Due Process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, as held by the First Circuit Court of Appeals and other federal courts of appeals, or only when the suggestive circumstances were orchestrated by the police, as held by the New Hampshire Supreme Court and other courts?

II. First Circuit - Opinion Summaries



United States v. Mieses, 2011 WL 1817855 (1st Cir. May 13, 2011) (Appeal from the United States District Court for the District of Puerto Rico)

Before Lipez, Leval and Thompson, Circuit Judges.

Lipez, Circuit Judge.

Appellants Mieses and Reyes-Guerrero were arrested in a reverse sting operation after they drove to a sham drug

deal in a vehicle containing \$106,000 in cash. A jury found both appellants guilty of a single drug conspiracy count. On appeal, they both claimed that their convictions must be vacated because of three errors at trial: (1) the government's use of improper overview testimony from the lead law enforcement agent in the case, (2) the indirect admission of the third co-defendant's out-of-court statement implicating appellants, and (3) the district court's refusal to allow the jury to hear an audiotape recorded on the day of their arrests.

Roberto Cruz, a member of a federal drug task force worked undercover in an investigation targeting an alleged trafficker, Toribio-Custodio, who worked out of the Dominican Republic and Puerto Rico. Also participating was Marco Antonio Torres, a paid government informant. Cruz instructed Torres to solicit Custodio for a cocaine deal in Puerto Rico by way of recorded phone calls. Although Custodio originally said he would travel to P.R., instead he sent his partner Rubis to carry out the deal. After some wrangling (the buyers wanted to defer payment until after receipt of the drugs) Cruz had Torres arrange a meeting with Rubis at a shopping center in order to show him sham kilograms of cocaine packages. The meeting was videotaped and Cruz was part of the surveillance team.

The following day, DEA task Force members, including Cruz, set up surveillance at the shopping center. Rubis

arrived alone in a car belonging to Reyes-Guerrero. He left and returned shortly thereafter with Mieses and Reyes-Guerrero in a minivan. Mieses, who was driving, dropped off Rubis near where Torres, wired for sound, was waiting, and drove on a short distance before parking. In response to Torres' questions as to why he was late he responded he needed to wait for the owners of the money to come as they did not trust him. Rubis then escorted Torres to the minivan. Reyes-Guerrero rolled down the window in the passenger side of the van and asked them to get in. Torres refused. He then asked them if they were ready; Mieses said "yes" and Reyes-Guerrero nodded. Torres asked to see the money and Mieses reached behind his seat and pulled out a shoe box full of money. Mieses said there was \$100,000. He asked Torres how the exchange was going to occur and Torres told them the drugs were in his car; he was going to drive off and they should follow him. Although Torres was wearing a recording device the conversation between Torres and the men in the van could not be heard on the tape.

Torres gave Cruz a signal to let him know that the deal was underway and Reyes-Guerrero, Mieses and Rubis were arrested. Rubis began to cooperate upon his arrest. Rubis, Reyes-Guerrero and Mieses were all charged with a single count of conspiracy to possess five or more kilograms of cocaine with intent to distribute.

After a jury found Miseses and Reyes-Guerrero guilty (Rubis absconded and was not tried) both appealed alleging several evidentiary errors. First, they alleged that the district court erred when it allowed Cruz to give overview testimony identifying the appellants as the buyer in the drug deal.

The Court of Appeals examined Cruz's testimony in light of *United States v. Flores-de-Jesus*, 569 F.3d 8 (1st Cir. 2009) and found that the agent's testimony about appellants' roles in the drug transaction was not based on direct personal knowledge but was, rather, based on inferences drawn from circumstantial evidence. Cruz did not hear or see the only explicit inculpatory conduct attributed to the appellants—the interaction of Miseses and Reyes-Guerrero with Rubis and Torres at the minivan. The Court found that allowing Cruz to testify usurped the jury's fact-finding function and improperly endorsed the government's theory of the case and thus was wrongly admitted

As to the admission of the Rubis' post-arrest statements made to Cruz implicitly identifying Guerrero-Reyes and Miseses as co-conspirators, the Court of Appeals found that such an admission violated the defendant's Confrontation Clause rights. To allow such a statement would permit the government to evade the limitations of the Sixth Amendment by weaving an unavailable declarant's statement into another witnesses testimony by implication.

Although the Court found that the overview and Sixth Amendment errors warranted vacating the appellant's convictions, it went on to consider the claim that the district court erred in excluding the audio recording. Miseses argued that the jurors needed to hear the recording so they could decide whether the audio was faulty or whether Torres had fabricated the exchange in the minivan. The Court found that the explanation for the absence of the defendant's voices on the recording was a question that should have been put to the jury and the recording should have been admitted.

United States v. Douglas, 644 F. 3d 39 (1st Cir. May 31, 2011) (Appeal from the District Court for District of Maine, D. Brock Hornby, J.)

Before Boudin, Stahl and Howard, Circuit Judges.

Boudin, Circuit Judge

In 2009, defendant engaged in sales of cocaine base to an undercover agent in Maine. In January 2010 he entered a plea of guilty to conspiracy to distribute and to possession with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. 841(a), 841(b), and 846.

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, effective August 2010, reduced the drug quantity thresholds required to trigger specific mandatory minimum sentences. On November 1, 2010, the sentencing

guidelines were amended. On November 8, the district court imposed a sentence of 56 months, rather than the 10-year mandatory minimum set by the pre-FSA drug statute. The First Circuit affirmed. Although the defendant's wrongful conduct and guilty plea occurred before the FSA and the amended Sentencing Guidelines went into effect, the Court held that the FSA was correctly applied at the defendant's sentencing, because the sentencing occurred after November 1, 2010 when the corresponding amendments to the Sentencing Guidelines were in effect. The Court concluded that Congress intended to apply the FSA to the same sentences to which the new Sentencing Guidelines applied, i.e. sentences imposed after November 1, 2010, despite the fact that the wrongful conduct may have occurred before August 3, 2010.

United States v. Rios-Hernandez, No. 09-2545 (1st Cir. June 2, 2011) (Appeal from the District Court for the District of Puerto Rico, Hon. Jose A. Fuste, J.)

Before Souter, Associate Justice, Torruella and Boudin, Circuit Judges.

Torruella, Circuit Judge.

The defendant entered a plea of guilty to charges of taking a motor vehicle, by force and with intent to cause death or serious bodily harm, (18 U.S.C. 2119) in exchange for an agreement that the prosecutor recommend sentencing at the lower end of the guidelines range. The

agreement did not stipulate to a criminal history category, but did outline sentencing exposure and provided estimated ranges for criminal categories one through six. The presentence investigation report classified defendant as a career criminal, based on two prior violent felonies. The court imposed a sentence of 120 months incarceration and five years of supervision. The First Circuit affirmed. Although the defendant waived appeal, the court considered the case because the district court failed to sentence him according to the agreed upon recommendation. Defendant's argument that the career offender classification was not meant to be triggered by convictions involving consensual mutual combat between individuals who chose this as their lifestyle amounted to acquiescence in the court's classification of the convictions and reliance on the sentencing report.

United States v. Crespo-Rios, 2011 WL 2206907 (1st Cir. June 8, 2011) (Appeal from the United States District Court for the District of Puerto Rico, Garcia-Gregory, Jay, J.)

Before Lynch, Chief Judge, Torruella and Stahl, Circuit Judges.

Torruella, Circuit Judge.

The defendant had sexually explicit online conversations with an officer posing as a 12-year old girl. Agents obtained a warrant to search his residence for evidence of violation of 18 U.S.C. 1470 (transfer of obscene material to a minor)

and 18 U.S.C. 2422(b) (coercion or enticement of a minor), seized a computer system and cds, and found child pornography. Defendant was charged with transferring obscene material to a minor under age 16 (18 U.S.C. 1470) and possession of child pornography (18 U.S.C. 2252(a)(4)(B)). The district court granted a motion to suppress, holding that the agents lacked probable cause to search for child pornography. The government appealed and the First Circuit reversed, based on the inevitable discovery doctrine. The agents had probable cause to search the digital media and, in searching for evidence of interaction with minors, had to thoroughly search the electronic files.

United States v. Bryant, 2011 WL 2041837 (1st Cir. May 26, 2011) (Appeal from the United States District Court for the District of Massachusetts, Nathaniel M. Gorton, J.)

Before Boudin, Circuit Judge, Souter, Associate Justice, and Selya, Circuit Judge.

Boudin, Circuit Judge

Defendant was charged with sales of crack cocaine in 2006. The pre-sentence report classified him as a career offender and he was sentenced to 90 months incarceration. The First Circuit held that a 1997 Massachusetts conviction for conspiracy to violate state drug laws did not qualify as a predicate offense. On remand, the court admitted three new documents to establish a New York conviction, held that the defendant's

presence was not required at the hearing, and reaffirmed the career offender designation and 90-month sentence. The First Circuit vacated and remanded, noting the various options available to the court. The defendant should be permitted to allocute and to raise the issue of post-sentencing rehabilitation.

United States v. McGregor, 2011 WL 2090026 (1st Cir. May 27, 2011) (Appeal from the United States District Court for the District of Massachusetts, Nathaniel M. Gorton, J.)

Before Lynch, Chief Judge, Boudin and Thompson, Circuit Judges.

Thompson, Circuit Judge.

After gang-member shooting victims were taken to the hospital, police officers watching the emergency room entrance, observed the defendant and another known gang member leaving. They followed and pulled over the speeding car. Believing the occupants to be acting "nervous" and to have a gun, the officers conducted a thorough search of the car and found a gun and crack cocaine hidden in an access panel. A second search, by an expert familiar with "hides," revealed ammunition. Defendant entered a conditional plea of guilty as a felon in possession (18 U.S.C. 922(g)). The district court denied a motion to suppress and sentenced defendant to 188 months incarceration. The First Circuit affirmed. The officers had reasonable suspicion, the

five-minute duration of the search before the gun was found was reasonable, and the scope of the search, including the easily accessible hidden compartment, was reasonable.

United States v. Witham, 2011 WL 2206934 (1st Cir. June 8, 2011) (Appeal from the United States District Court of New Hampshire, Steven J. McAuliffe, J.)

Before Lynch, Chief Judge, Boudin and Thompson, Circuit Judges.

Lynch, Chief Judge.

The defendant, part of a conspiracy that stole and re-sold computer parts and memory, pled guilty and was sentenced to 33 months in prison plus 36 months of supervised release and ordered to pay to the victim, jointly and severally with a co-conspirator, restitution of \$800,000 plus interest. After he fell behind on the payments, the government obtained a writ of garnishment. The district court held that the government cannot meet its obligation to enforce an order of restitution to a private-party crime victim by using the garnishment procedure of the Federal Debt Collection Procedure Act, 28 U.S.C. 3205. The First Circuit reversed, noting statutory changes that make compensation of private victims a high priority. The Mandatory Victim Restitution Act of 1996 (18 U.S.C. 3613) specifically authorizes use of the FDCA to enforce private-victim restitution orders.

United States v. Fernandez-Hernandez, 2011 WL 2567893 (1st Cir. June 30, 2011) (Appeal from the United States District Court for the District of Puerto Rico, Jay A. Garcia-Gregory, J.)

Before Lynch, Chief Judge, Torruella and Stahl, Circuit Judges.

Torruella, Circuit Judge.

Three defendants were convicted of conspiracy and drug charges (21 U.S.C. 841(a)(1), 846, 860) stemming from a drug distribution operation in a public housing project and two were convicted of gun charges (21 U.S.C. 841(a)(1), 846, 860) because of the killing of three unintended victims in a botched attempt to kill a rival gang member. Two received sentences of life in prison; the third was sentenced to 151 months. The First Circuit affirmed in part, but remanded for resentencing of the defendant not involved in the attempted assassination. The defendants were not prejudiced by the court's error in responding to notes received from the jury during deliberations without alerting counsel. The court's questioning of prospective jurors outside the presence of the defendants was justified. The court also rejected challenges concerning the composition of the jury and Spanish translations. There was sufficient evidence to support the convictions, except with respect to the quantities of drugs attributed to the defendant not involved in the killings.

United States v. Melendez-Santiago, 2011 WL 2567789 (1st Cir. June 30, 2011) (Appeal from the United States District Court for the District of Puerto Rico, Hon. Daniel R. Dominguez)

Before Lynch, Chief Judge, Torruella and Lipez, Circuit Judges.

Lynch, Chief Judge.

Defendant, an addict with no prior criminal history, was one of 12 indicted co-conspirators convicted of conspiracy to import five or more kilograms of cocaine and one or more kilograms of heroin, as well as actual importation of five or more kilograms of cocaine, and was sentenced to 360 months' imprisonment. The First Circuit affirmed. Affidavits supported the decision to authorize wiretaps under 18 U.S.C. 2518(1)(c) and speculation that a confidential source must already have known and shared with the investigators the details of the conspiracy's inner workings before the wiretap application was illogical and unsupported. The district court decision that defendant knowingly and voluntarily decided to cooperate, without counsel, waiving his Fifth and Sixth Amendment rights, was not an error.

III. In the District Court

A. Training

The Federal Public Defender for the District of Puerto Rico, the Puerto Rico Association of Criminal Defense Lawyers, the American Immigration Lawyers, P.R.

Chapter and the Colegio de Abogados de Puerto Rico will be offering a seminar regarding **Immigration Consequences of a Criminal Conviction** on September 16, 2011. Speakers will be the Hon. Irma Lopez Defilo, and Mary Kramer, author of *Immigration Consequences of Criminal Convictions Sentence*.

The seminar will be offered at the Colegio de Abogados de Puerto Rico at a cost of \$95.00 for members of the Puerto Rico Bar Association and \$150.00 for non-members. It will be free of charge for FPD attorneys, and members of the PRACDL and AILA-PR. For further information regarding registration you may contact coral_rodriguez@fd.org

Note of the Editor:

I must acknowledge the work of AFD Patrica Garrity in making possible this new issue of our newsletter. Thanks Pat!

Also, I want the criminal defense bar to be aware that this issue of the newsletter as well as past issues are posted in the new and improved website of the Federal Public Defender District of Puerto Rico. The website has useful information and links. It will soon contain a motions bank for the benefit of the defense bar and the public in general. The web page will also provide notice of upcoming CLE seminars and how to register for them. Visit us at www.fpdpr.com.

Hector L. Ramos-Vega, SAFPD