

Monthly Review

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

September 2010

Beginning this month, the office will have a newsletter in which the most pertinent criminal cases decided by the Supreme Court of the United States and by the United States Court of Appeals for the First Circuit will be summarized. The newsletter will compile decisions published the preceding month with a synopsis of the relevant facts, the Court's reasoning and holdings for the benefit of all attorneys in an effort to keep current with Supreme Court and First Circuit's jurisprudence. We will try to also include interesting and pertinent articles and new developments in the law. We hope you enjoy it and find it helpful.

Héctor L. Ramos-Vega, AFPD

I. In the Supreme Court:



The Supreme Court did not decide any cases during the month of September. As you all know, the Court officially begins its term the first week of October. Opinions begin to be issued later during the term after oral arguments are conducted. The Court has granted cert, however, on several cases that may be of interest for us. We will try to keep you updated in upcoming newsletters on the different petitions of certiorari that are granted that may be relevant to our practice. Here are the most recent.

DePierre v. United States, No. 09-1533:

Issue: Whether the term “cocaine base” encompasses every form of cocaine that is classified chemically as a base, or whether the term “cocaine base” is limited to “crack” cocaine.

Opinion below: United States v. DePierre, 599 F.3d 25 (1st Cir. 2010).

The question presented does not convey that the case implicates Apprendi and mandatory minimums under the drug statute. DePierre was sentenced to a ten-year mandatory minimum for distributing 50 or more grams of “cocaine base.” He argued that the statutory term “cocaine base” should be “judicially restricted to only the specific form of cocaine base known as crack.” The argument is premised on the fact that Congress’s main focus for the enhanced penalties was specifically crack cocaine, and that it would be absurd for the enhanced penalties to apply to such things as coca leaves. Several circuits have held that the phrase “cocaine base” in § 841 means “crack cocaine,” and that, under Apprendi, before the enhanced penalties of § 841 can apply, the indictment must charge and the jury must find beyond a reasonable doubt that the defendant

committed a crime involving crack cocaine. See, e.g., United States v. Higgins, 557 F.3d 381, 396 (6th Cir. 2009).

Although it is not clear from the First Circuit's opinion, the jury did not specifically find that DePierre distributed "crack." However, there is a circuit split, and the First Circuit decided to remain on the other side, holding that "cocaine base" refers to "all forms of cocaine base, including but not limited to crack cocaine."

Bond v. United States, No. 09-1227:

Issue(s): Whether a criminal defendant convicted under a federal statute [in this case, 18 U.S.C. § 229 for possessing and using chemical weapons] has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

Before the Third Circuit, Bond contended that the crime was at most a local one, growing out of a domestic dispute, having nothing to do with the spread of chemical weapons among nations.

Opinion below: United States v. Bond, 581 F.3d 128, 137 (3d Cir. 2009).

The next two cases were consolidated to address the question whether the Constitution puts limits on the authority to interview children at school about claims of sexual assault:

Camreta v. Greene, No. 09-1454:

Issues: (1) Whether the traditional warrant/warrant exception requirements that apply to seizures of suspected criminals should apply to an interview of the child in light of reports of child abuse, or whether instead a balancing standard should apply; and (2) whether the Ninth Circuit's constitutional

ruling is reviewable, notwithstanding that it ruled in the petitioner's favor on qualified immunity grounds.

Alford v. Greene, No. 09-1478:

Issue: Whether the Fourth Amendment requires a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused.

The specific issue is whether police and social workers must obtain a warrant before conducting such interviews. The petitioners argue that, because the details of child sex abuse are known only to the victim and the perpetrator, police may not have sufficient evidence to support a warrant, so they need the authority to interview an alleged victim without the parents' presence — often, at school. The Ninth Circuit Court required a warrant, if parents' consent is not obtained or there are no other "exigent circumstances." Supreme Court review of the warrant issue was supported by 27 states.

Note: Also keep in mind that on October 4, 2010, oral arguments were heard by the Court in the consolidated cases of Abbott v. United States and Gould v. United States. These are the cases where the Court is called upon to interpret the "any other provision of law" language in 18 U.S.C. § 924(c) to decide whether the mandatory minimum of that section applies even when there are other counts of conviction that carry a higher mandatory minimum sentence.

II. In the First Circuit:



United States v. Nguyen, No. 09-2410, slip op. (1st Cir. Sept. 1, 2010)

Defendant Nguyen plead guilty pursuant to a plea agreement to charges of conspiracy to possess with intent to manufacture a significant amount of marijuana plants. Her plea agreement contained a waiver of appeals clause. Defendant was sentenced to 83 months of imprisonment and she appealed raising two main issues: (1) whether the district court complied with Fed. R. Crim. P. 32 by verifying that the defendant and her attorney had read and discussed the presentence report prior to sentencing where the PSR was not translated into Vietnamese, her native language; and (2) whether the district court erred in imposing a drug testing condition of supervised release on her where the record show that she had no history of drug use.

The appellate court found that both claims of error were foreclosed by the waiver of appeal provision. Appellant admitted that the waiver was clear and that she had entered into it knowingly and voluntarily. However, she argued that to enforce it would work a miscarriage of justice. The Court of Appeals disagreed. As to the first issue, the record showed that the judge went the extra mile in making sure that defendant understood everything

and in having an interpreter available for her. The district court relied on statements by both the defendant and her counsel to the effect that she understood English very well and that the interpreter was not needed. Therefore, no miscarriage of justice could be found under those circumstances.

As to the drug-testing condition of supervised release, the argument was also rejected. The condition is a standard one and while a district judge may waive it if there is no history of drug use, the refusal to do so cannot be said to be error, let alone one justifying a finding of miscarriage of justice to overcome a knowing a voluntary waiver of appeal. The appeal was dismissed.

United States v. Ellis, No. 09-1485, slip op. (1st Cir. Sept. 2, 2010)

The First Circuit summarily affirmed the district court's order refusing to alter the defendant's sentence. Ellis was originally sentenced as an Armed Career Criminal. One of the prior offenses taken into account to give that status to the defendant was a Massachusetts juvenile adjudication for assault and battery with a dangerous weapon. Ellis had appealed his original sentence and the same had been reversed and remanded for re-sentencing under Booker. On re-sentencing, Ellis attempted to argue that the Mass. juvenile adjudication could not be treated as a predicate violent felony under the ACCA because by statute, such adjudication was automatically set aside once he reached adulthood. The district court refused to alter the sentence citing the "mandate rule." Such rule establishes that a district court cannot consider arguments not encompassed in a mandate from the Court of Appeals. In other words, defendant did not raise the argument on appeal and therefore, the remand was limited to the Booker issue, not the ACCA issue argued for the first time on remand. Except for a blatant error that if left uncorrected a serious injustice will occur, a district court cannot consider these kinds of arguments not contemplated in the remand order and mandate.

The First Circuit held that the district court properly applied the mandate rule and that there was no blatant error in the ACCA analysis requiring that the exception be applied. The Court of Appeals refused to decide whether the juvenile adjudication would in fact qualify as a violent felony under the automatic set-aside provision of the statute. It just ruled that there had been no blatant error.

The lesson to be learned from this case is that we need to raise all possible issues on appeal. On re-sentencing, we could be precluded from making an argument that had it been presented originally, it could have succeeded. Don't count on the blatant error exception to the mandate rule saving the day.

United States v. Salas, No. 08-2015, slip op. (1st Cir. Sept. 10, 2010)

Defendant Salas pled guilty for his participation in an armed robbery of a Loomis Fargo bank truck. He did not appeal the sentence imposed; rather, he challenged the district court's restitution order on three grounds, all of which were rejected by the appellate court. First, he claims that the district court did not explain sufficiently his rationale for imposing restitution. Second, appellant argued that the restitution amount should have been apportioned based on the roles and relative culpability of all defendants. Finally, he argues that the district court erred in ordering payment of the restitution amount "forthwith." The government argued that these arguments were precluded by the waiver of appeal clause in the plea agreement. The First Circuit assumed without deciding that the waiver of appeals did not apply because the plea agreement did not specify any restitution amount. (Judge Selya noted that there was a circuit split with a clear majority of appellate courts holding that the waiver under such circumstances does not preclude an appeal of a restitution order.)

On the merits, however, the Court held that there was no plain error. (This was the applicable

standard of review since the argument was raised for the first time on appeal and there was no contemporaneous objection in the lower court). A district court does not have to explain a restitution order. As long as the offense is one for which restitution is mandatory and there is a rational basis for the amount, that is all that is needed. Additionally, while a district court may consider the culpability and roles of all defendants, the general rule is that all defendants are liable for the full amount of the loss jointly and severally. So there was no plain error in apportioning restitution equally between all defendants. Finally, there was no plain error in ordering the restitution to be paid forthwith. The order of restitution was affirmed.

United States v. Santana-Perez, No. 09-1101, slip op. (1st Cir. Sept. 8, 2010)

Note: This appeal was briefed and argued by yours truly. I second chaired the trial with Coral.

Mr. Santana appealed his conviction for failure to heave under 18 U.S.C. § 2237(a)(1). Several issues were presented: (1) the sufficiency of the evidence; (2) the district court's erroneous ruling permitting a prior foreign conviction to be used to impeach Mr. Santana if he took the stand; (3) improper vouching by the government during closing arguments; (4) refusal to give a missing evidence instruction; and (5) improper questioning by the district court of the co-defendant.

As to sufficiency of the evidence, the court of appeals rejected the argument (correctly in my opinion). There really was a credibility issue that was for the jury to decide on the question of whether the defendant really knew that it was the Coast Guard who was following them and whether they really heard and understood the order to stop.

With respect to the second issue, Mr. Santana had moved *in limine* to preclude the government from using his prior drug conviction from Aruba to impeach him if he testified. The district court ruled that the foreign conviction was fair game if Mr. Santana testified. We then decided not to put Mr. Santana on the stand for

strategic reasons. That decision unfortunately prevented the issue from being resolved on appeal. In Luce v. United States, 469 U.S. 38 (1984), the Supreme Court held that a defendant who chooses not to testify loses his right to appeal the district court's *in limine* ruling allowing a prior conviction for impeachment purposes. The issue was raised to preserve it for Supreme Court review.

Moreover, the First Circuit rejected the argument that there was improper vouching on the part of the government. The prosecutor simply set out for the jury, according to the appellate court, the credibility issues to be decided by the trier of fact. He then rhetorically asked, who are you going to believe the Coast Guard officers or the defendants? This, the Court of Appeal found, was nothing more than asking the jury to accept the government's version as true, not vouching for the credibility of the officer just because they were officers of the United States. The Court of Appeals pointed out, as argued by the defense, that depending on tone and inflection the statement could be "troubling." Nevertheless, it deferred to the district court's on-the-spot assessment of that issue.

The appellate court similarly rejected the claim that the lower court erred in not giving a missing evidence instruction. At trial, the Coast Guard officers testified that there had been a 12-minute "chase" of the defendants and that such chase had been recorded by the CG ship's MFLAIR equipment. Defendants denied that there was such a chase. The only video produced at trial showed the defendants stopping seconds after being intercepted by the CG's smaller inflatable boat. The video of the alleged chase could not be played due to malfunction. The defense asked the judge to instruct the jury that since such evidence was not available, the jury could infer that it was favorable to the defendants and adverse to the government. The First Circuit ruled that the government had given a satisfactory explanation for the unavailability of the video, therefore, there was no basis for an adverse inference since the

defense put nothing on the record to demonstrate that the explanation was untrue.

Finally, the court of appeals held that the district judge came dangerously close to the line that judges should not cross in questioning witnesses. In other words, judges should only intervene to clarify matters and should not show the appearance of favoring one side over the other. The problem was that the error, if any, was not plain (there was no objection to the judge's questioning of the co-defendant) according to the Court of Appeals. The Court held that "[despite the tenor of the questions, they appear to have been aimed at clarifying]" the co-defendant's testimony. Affirmed in all respects.

Two lessons from this one: don't be afraid as I to object to the judge. Not sure if objecting may have made a difference in the analysis, but you never know. Second, remember that if you move in limine to exclude prior convictions of your client and the judge denies the motion, your client needs to take the stand in order to appeal the issue. This is a lousy situation to be in. You either put your client on the stand and let the government impeach the heck out him with a conviction that should not be used so that you can later appeal (in the meantime diminishing all chances before the jury), or you decide not to put him on thereby insulating the district court's ruling from review no matter how erroneous.

United States v. DiTomaso, No. 08-2567, slip op. (1st Cir. Sept. 22, 2010)

The Court of Appeals affirmed a defendant's conviction, ruling that registration requirements under the Sex Offender Registration and Notification Act (SORNA) took effect when the bill was signed, rather than when the U.S. attorney general issued an interim rule. This decision has deepened a circuit split on the law's effective date. The 4th, 7th, 6th and 11th circuits have ruled that SORNA's registration requirements

didn't apply to people convicted of sex offenses until the attorney generals interim regulation set up rules for that group of offenders. The 3rd, 8th and 10th circuits -- like the 1st Circuit -- have ruled that SORNA's registration requirements applied to prior offenders as soon as SORNA was enacted.

SORNA was signed into law on July 27, 2006, and the U.S. attorney general issued the interim rule on Feb. 28, 2007. Michael DiTomasso was convicted of sex offenses in Massachusetts in 1995 and last registered in that state in 2006. He traveled to Rhode Island before the attorney general issued the February 2007 interim rule. In October 2007, he was charged with failing to register as a sex offender. He pleaded guilty in June 2008, but reserved his right to appeal the denial of his dismissal motion. He was sentenced to 30 months in prison in December 2008.

Judge Selya wrote that without clear congressional direction stating otherwise, "a law takes effect on the date of its enactment." "...the general rules requiring updates to sex offender registration took effect when SORNA was signed into law. Those requirements were thus in full force when, in February of 2007, the defendant traveled to a new state. When he failed to register there, he violated federal law."

The opinion also rejected DiTomasso's two other claims. DiTomasso argued that Congress lacked the authority under the commerce clause, which prohibits states from placing unnecessary burdens on interstate commerce, to enact sex offender registration requirements. Selya wrote that "SORNA, as applied here, explicitly regulates the use of the channels of, and persons in, interstate commerce. Interstate travel is, after all, an express element of the SORNA violation with which the defendant was charged and of which he stands convicted."

DiTomasso further claimed that the conviction violated his due process rights because Rhode Island had yet to implement SORNA when he traveled interstate. Selya wrote that SORNA's

registration requirements "are neither conditioned on nor harnessed to state implementation of SORNA's state-directed mandates."

Judge Boudin wrote in a concurring opinion that he wanted to underscore two additional points. He wrote, "the statute's design leans against the narrow reading adopted by several other circuits and ... Congress' purpose supports the broader one that we adopt today." "What is important to the case before us is that Congress intended the enforcement provisions to apply of their own force to those who had previously been convicted and not just to newly convicted offenders," Boudin wrote.

Note: It seems clear that this is a question that the Supreme Court should resolve. Hopefully our colleagues from the Rhode Island Federal Public Defender's Office are already thinking of filing a petition for cert.

United States v. Gagnon, No. 09-1047, slip op. (1st Cir. Sept. 28, 2010)

This opinion is sort of the companion of DiTomasso in that it presented sort of the same issues. Bruce Gagnon was convicted on a sexual assault charge in New Hampshire in 2000. He registered as a sex offender in New Hampshire from 2000 through 2005 and moved to Maine in December 2006. He was charged in February 2007 with failure to register as a sex offender. His September 2008 guilty plea was conditioned on reserving the right to appeal the judge's denial of his motion to dismiss. He was sentenced to 12 months and one day in prison, plus three years of supervised release in January 2009.

On appeal, he challenged his conviction, as did DiTomasso, on grounds that it was committed in the "gap" between Congress' passage of SORNA and the AG's issuance of the implementing rule. Of course, this argument was disposed of by the DiTomasso opinion issued six

days earlier. Nevertheless, Gagnon raised two separate issues: that the rule of lenity requires a construction of the statute that would invalidate his conviction; and (2) that due process was infringed because he had no fair warning of his duty to register.

With respect to the first issue, the First Circuit held that the rule of lenity requires resolving issues of uncertainty in statutory language. As it explained in *DiTomasso*, the First Circuit did not find the language of the statute ambiguous. It clearly sets out the requirement to register upon moving to another state. As to the second contention, the appellate court rejected it finding that the facts of the case did not support the application of the exception to the axiom "ignorance of the law is no excuse." Gagnon knew that he had to register as a sex offender under state law. He may claim that he did not know such failure would also be a violation of SORNA. But such a contention would not take him very far because he was on clear notice that a failure to register "would place him on the other side of the law."

III. In the District Court:

In this section, we will try to highlight decisions, orders and any other pertinent events and information from our District Court. Your collaboration in this matter is appreciated. If you know of any relevant events, information or rulings from our court or judges in our cases, or in any case, please let the undersigned know so that the information can be included in this section.

A. FYI

Be on the lookout. I had a situation recently in a § 1325 illegal entry misdemeanor where the charges were time-barred. Had I not been paying attention at the bail hearing and had the prosecutor not realized it, I would have pled the client out very fast on charges that were time-barred. Section 1325 (a)

of title 18 does not have "being found in" language. It only has language related to entering or attempting to enter at a place other than a designated port of entry. My client told the agents in his statement when he was arrested that he had entered in the year 2003. That's all the evidence they had of his entry.

Accordingly, the five-year statute of limitations as set forth in 18 U.S.C. § 3282 had expired. This is something to keep in mind. Sometimes we see that it is a misdemeanor, that the client wants to plead guilty as soon as possible and get deported, and we forget to take a closer look at all of the possible issues.

B. Training Opportunities: Remember we have two seminars in November.

1. The First Circuit's Appellate Seminar on November 5, 2010 at the San Juan Marriott.

2. The Sentencing Advocacy Workshop November 17 and 18, 2010 at the Colegio de Ingenieros. Remember that for this one there are things to do ahead of time to prepare. You have to read a fact pattern and write a two-paragraph sentencing decision. You also need to take one of your cases and have a summary of the facts for the small group brainstorming sessions. Go to: http://fd.org/odstb_sentencingresourcematerials.htm for more information.

C. An Interesting Article: about the never shy to speak her mind Judge from the District of Massachusetts and friend of this office Nancy Gertner.

Judge says judiciary shrinking from duty

By Lee Hammel TELEGRAM & GAZZETTE STAF

WORCESTER — The judiciary is shrinking from its duty to judge, under attack from critics brandishing the A word — "activist" — over

judges who dare interpret the law differently from the way their critics would like, a federal judge told other judges and lawyers in Worcester last week.



U.S. District Judge Nancy Gertner also told those gathered for the first Hon. Daniel F. Toomey Memorial Lecture in the city's state courthouse that she disagrees with the philosophy of Supreme Court Justices Antonin Scalia and her fellow Yale Law School graduate Clarence Thomas.

Judge Gertner began her legal career fighting for the rights of women and for civil rights and has made rulings in federal district court in Boston that have upset some law enforcement professionals. But she said Thursday that real judicial activism is found not in her courtroom but in the U.S. Supreme Court.

"If activism is measured by how many state and federal laws are overturned, precedents reversed or narrowed to oblivion, we have the most activist Supreme Court in memory," she said. "After decades of the Warren court and the Burger court, with which one may disagree, and a plethora of civil rights legislation, in fact it's the decisions upholding civil rights that are consistent with precedent and the will of the people."

Justices Scalia and Thomas and the late Chief Justice William Rehnquist are associated with the judicial philosophy of originalism, which holds that the Constitution is frozen in time, and the answers to even the most modern challenges are found in its original words and meaning. Judge Gertner said that involves undoing the consensus about federal power that has been in place since the administration of Franklin Delano Roosevelt, and leaping over centuries of interpretation to go back to the compromises of the founding fathers, who disagreed among themselves

The impending publication of her book 'In Defense of Women: Memoirs of an Unrepentant Advocate,' has generated buzz in the legal community, and Judge Gertner noted a Boston Globe headline that spoke of raised eyebrows.

"There would have been no article had the book been entitled 'Unrepentant Crime Fighter.' It was only because of what the title was, and the side that I had been on, that this was an issue." Similarly, a conservative columnist in the same newspaper predicted when she was nominated to the bench in 1994 by President Clinton that she would do to the law what Lorena Bobbitt had recently done to her husband's manhood. Judge Gertner said this opinion presumes that she could never be neutral, while a law enforcement official can be.

"This has been a theme that has driven me crazy over the past few years," she said.

"As a lawyer, I knew well the difference between my personal point of view and what the law required. I am acutely aware of the difference between my personal positions and what the law requires."

She added, "That doesn't mean my background is irrelevant. No one's background is."

And that brought up another difference between her and some members of the conservative majority on the Supreme Court. Justice Thomas

“said in his confirmation hearing that he wanted to be stripped down, like a runner with no entanglements, as a judge.

“What he said made no sense to me. We all live with our experiences. He came to the bench with his experiences, his context, his world view. We can't walk away from the world we live in.”

She said, “We pick judges in their 50s, after they have lived. Everyone comes to the table with their lives.

“The question is whether or not you are aware of it. Whether you struggle with it, whether you acknowledge it. Or whether you pretend that the moment you took the oath you are no longer a mother, a citizen, a man, of a community within a country. In my judgment, neutrality is about struggling with who you are, constantly.”

Judge Gertner said there is a tendency for judges, especially federal judges, to avoid judging entirely, “because I think that the specter of being labeled an activist helps to create a culture of avoidance. A culture of ducking. Of doing what one can to not make a decision.”

Judges avoid delivering justice “when we dismiss cases when we do not have to, when we enforce the statute of limitations with a rigor that the law doesn't really require.”

She said, “We won't be criticized. There will be no demonstrations. But we won't be fair.”

When she underwent training given to all new federal judges, she recalled, the trainer said of civil rights cases, “OK, ladies and gentlemen, here's how you get ahead of these cases. He proceeded to describe all the technical rules that would accomplish the task.

“If you paid attention, the outcome was foreordained. You would be deaf to the plaintiff's narrative of discrimination.

“You'd be far too preoccupied . . . with the name of technical rules and exclusions. The case could be closed. Nothing to march about.”

With all of the technicalities available to defendants in federal civil cases, “Small wonder that federal filings are dramatically down, that plaintiffs of all cases would rather bring their cases here, in state court, where they get trials.”

The late Judge Toomey, who died in 2002, worked for the Massachusetts Defenders Committee, was an assistant district attorney, and was a judge in the district court and the superior court.

THE END