



NATIONAL LEGAL PROFESSIONAL ASSOCIATES

Margaret A. Robinson Professional Advocacy Center

11331 Grooms Road

Suite 1000

Cincinnati, Ohio 45242

Telephone Number: (513) 247-0082

Facsimile No. (513) 247-9580

Website: www.NLPA.com

E-mail: contactus@nlpacincinnati.com

“The pursuit of justice is a team effort.”

Newsletter

Legal News Briefs for Law Libraries

INSUFFICIENCY OF EVIDENCE + INEFFECTIVE ASSISTANCE = CONVICTION HOW TO BREAK THE FORMULA

National Legal Professional Associates is often contacted by defendants who feel that they did not receive effective assistance of counsel at trial and that they have been wrongfully convicted based upon insufficient evidence. The

case of Rodney Woodard is an excellent example of how a defendant can finally see justice prevail if given proper representation and a strong defense team.

crime. Mr. Woodard received consecutive sentences of 30 years for the conspiracy and life in prison for murder.

Mr. Woodard was convicted in 1992 in Wayne County, North Carolina, of murder and conspiracy to commit murder. The State alleged a murder-for-hire scheme, whereby Mr. Woodard hired two others to kill someone for revenge. At trial, one of Mr. Woodard’s alleged accomplices falsely testified that Mr. Woodard contacted him by telephone and ordered the killing. The accomplice’s testimony was the only evidence to directly implicate Mr. Woodard in the

After languishing in prison for ten years, Mr. Woodard retained the law firm of Robinson & Brandt who utilized NLPA in preparing Mr. Woodard’s post-conviction Motion for Appropriate Relief. The motion argued that Mr. Woodard was denied his constitutional right to the effective assistance of counsel, because trial counsel failed to interview and call witnesses critical to Mr. Woodard’s defense. First, there was a witness who would have testified that Mr. Woodard was with her the night of the killing, and that he made no phone calls to

CONTENTS:

INSUFFICIENCY OF EVIDENCE	1
Q & A	2
WHAT’S NEW AROUND THE NATION	3
AROUND THE CIRCUITS	4
ABOUT NLPA	5

anyone that night. Another witness was willing to testify that she was with Mr. Woodard's alleged accomplice that night, and that the accomplice also never received any phone call from Mr. Woodard that evening. These witnesses were present in the courtroom when the defense presented its case, and were ready and willing to testify. Counsel never called them to the stand.

Finally, ten years after he was convicted, the trial judge granted Mr. Woodard's motion and ordered a new trial. The court noted the importance of the testimony from the alleged accomplice that the instructions to kill came by telephone. Considering the totality of the circumstances in the case, the court determined that the failure of trial counsel to call at least two witnesses who would have raised the issue of alibi constituted ineffective assistance of counsel. Additionally, the court found ineffective assistance of appellate counsel for failing to raise this alibi issue in other post-conviction proceedings. In the best interest of justice, the court surmised, a new trial was warranted.

Through the team effort of counsel and NLPA, Mr. Woodard successfully challenged a life plus 30 year sentence and won, after already serving some ten years in prison. Furthermore, he won on, the often raised but seldom successful, claims that he was denied the effective assistance of counsel. With a thoroughly researched and well-presented motion and the evidence necessary to support that motion, sometimes the seemingly impossible become possible, and justice does prevail.

Q & A

Dear NLPA:

I am a state inmate in Virginia. I just heard that there is a new law that gives us an additional 15 days a month of good time credit. Is this true and when did it go into effect?

Dear Friend:

NLPA researched the issue, and even spoke to the VDOC. Unfortunately, the information you received is simply wrong, one of those all too frequent rumors that run through the prisons. Nothing has been passed or adopted that allows Virginia state inmates more than 4.5 days a month of "good time" credit. (Although, there are currently several bills in Virginia's General Assembly regarding good time. NLPA is keeping an eye on all of them!)

The current maximum is 4.5 days a month. However, most inmates tend not to get the maximum number of days each month. The average amount of good time credit, we are told, is running about 86% of the maximum, or only 3.87 days per month.

Dear NLPA:

I am currently incarcerated at FCI Manchester in Kentucky. I received my annual "Team" paperwork, and it looks like I am not getting my full 54 days of good time for each year in prison. What should I do?

Dear Friend:

The issue of good time credits with

the Bureau of Prisons has been an on-going matter for administrative complaints and litigation. We have contacted the offices of Senator Joe Biden, one of the cosponsors of the current legislation concerning the credits. His office informed us of the simple language to the statute that is each inmate can receive good time of up to 54 days for each year of imposed sentence, or approximately 15% of the sentence imposed. Clearly, the BOP has not been calculating the credit properly.

Litigation over this issue has started in many jurisdictions. If you wish to pursue administrative remedies in your case, and would like assistance, please feel free to contact us at NLPA. If your remedies would be fruitless due to time remaining on your sentence, and litigation is proper, then feel free to have your counsel contact NLPA for assistance. Our primary advice is that if you are due something from the Government, make sure you get it!

Dear NLPA:

I am a first time offender. I know this sounds like a simple question, but I have been hearing all this talk about a "2255" motion. What is it and can I use it to help my case?

Most first time offenders never hear about "2255s" until they are in prison and hanging out at the law library. It is not a secret key to release, but it is an important vehicle to use . . . if you can.

A "2255" is a motion to vacate, set aside, or correct a judgment. It is a post conviction motion, which means it is filed after you have been found guilty and sentenced. It allows a defendant to have a court

look again at a case if there were constitutional violations or other matters of illegality in connection with your conviction. One of the common grounds used in this kind of motion is an allegation of ineffective assistance of legal counsel in violation of the Sixth Amendment to the U.S. Constitution.

Many, if not most, defendants can use this type of motion to try and get back into court. Even defendants who signed plea agreements can sometimes benefit from it. Basically, there is not a single defendant now sitting in Federal custody that should not at least consider a "2255" and whether his situation might be better if one were filed.

One caveat to remember is that there are very strict time deadlines associated with filing a 2255 motion. If you are in anyway interested in considering such a motion, we urge you to contact your attorney, or any criminal defense attorney, as well as NLPA. Without having your defense team review the strengths and weaknesses of a post conviction motion, you may never know if you have exhausted all opportunities of potential relief.

What's New Around The Nation

BOP CHANGES HALFWAY HOUSE POLICY

As many of the Federal inmates are aware, a major policy shift occurred in the Bureau of Prisons in December regarding designations to halfway houses. This policy

change, mandated by a Deputy Attorney General in the Justice Department, will affect most if not all of the inmates currently incarcerated as well as those to be sentenced in the future.

Up until December 2002, the Bureau of Prisons maintained a policy under which offenders who received sentences in Zones C and D of the Sentencing Guidelines Table could qualify to serve all or part of their sentences in Community Corrections Centers, commonly known as halfway houses. Federal Bureau of Prisons' Program Statement 7310.04, which took effect on December 16, 1998, prescribed the placement criteria for designating and assigning inmates to halfway houses. This program statement states that the "Bureau is not restricted by § 3624(c) in designating a CCC [halfway house] for an inmate and may place an inmate in a CCC for more than the 'last ten percentum of the term,' or more than six months, if appropriate."

It was through this policy statement that the BOP was able to (a) directly commit some inmates to a halfway house based on either a judicial recommendation or the reality of a short sentence, or (b) transfer an inmate to a halfway house at an appropriate time in an inmate's sentence. This policy viewed halfway houses as simply another forum in which a defendant could serve his sentence.

For example, based on this policy the Bureau of Prisons has in the past transferred, prior to his 10% date, an inmate who was terminal with cancer and wanted to be closer to his family to receive treatment and care. It also allowed the BOP to

transfer a Jewish inmate to a halfway house in his home city three months prior to his 10% date in order to allow the system to address religious needs unmet at the Federal prison in which he had been assigned. (NLPA had assisted with both of these cases.) Under the new policy, none of these examples could occur.

Under the new policy, halfway house designation can only occur if an inmate receives a sentence in Zones A or B of the Sentencing Guidelines Table. Further, an inmate can only be transferred to such a community corrections center after his 10% date, or six months, whichever is less.

This policy change has touched off a storm of litigation. Temporary restraining orders have been issued by Federal judges throughout the circuits to stop the BOP from transferring inmates from halfway houses back to prisons. Independent complaints have been filed in Federal courts, as well as motions under 28 U.S.C. § 2255, all seeking judicial intervention into the matter.

NLPA has researched the issue extensively. We have been in touch with many of the advocacy groups around the nation who have expressed a collective concern on the Bureau of Prisons' improper construction of 18 U.S.C. § 3624(c) and U.S.S.G. § 5C1.1. At best, the new policy is improper as implemented for it violates the *ex post facto* prohibition in the United States Constitution. At worst, the new policy as a whole is patently erroneous.

As District Judge Ponsor of the United States District Court for the

District of Massachusetts stated recently in the case of *United States v. Iacoboni* in which he lamented the current state of affairs. "The abandonment, without prior warning, of the Bureau of Prisons long-standing policy of carefully considering judicial recommendations to community confinement has taken the court completely by surprise. Had the court known of the impending change in policy at the time of sentencing, it is quite likely that the court would have imposed a different sentence. At any rate, **the change in policy raises serious and substantial questions regarding the integrity of the sentencing process.**" (Emphasis added)

NLPA stands ready, willing, and able to assist inmates with any administrative remedies required to address this matter, and with their counsel for such litigation as may be needed to counter this new policy.

Around The Circuits

Second Circuit

Whitley v. Senkowski, 2003 U.S. App. LEXIS 660 (2d Cir. January 17, 2003)

The defendant, *pro se*, moved for a certificate of appealability and *in forma pauperis* status in his appeal from a district court judgment denying his 28 U.S.C. § 2254 petition as time-barred. The Court of Appeals vacated the district court judgment and remanded the case for consideration of four related issues surrounding the pursuit by a defendant of an actual innocence claim. The appellate

panel also ordered the district court to appoint counsel pursuant to the Criminal Justice Act.

The court reiterated that the constitutionality of the statute of limitation imposed by the Antiterrorism and Effective Death Penalty Act of 1996 if applied to a claim of actual innocence is an open question today. This being so, it is error for a district court, without further analysis, to dismiss, on statute of limitations grounds, a habeas corpus petition that claims actual innocence.

Eighth Circuit

United States v. Patterson, 2003 U.S. App. LEXIS 546 (8th Cir. January 15, 2003)

At sentencing, a defendant requested, and the District Court granted, a downward departure to a term of probation based on post-offense rehabilitation. That discretionary ruling was reversed on appeal because such a departure must be "atypical" and the record was devoid of facts to warrant a departure.

Tenth Circuit

Burger v. Scott, 2003 U.S. App. LEXIS 626 (10th Cir. January 15, 2003)

Equitable tolling should have been applied to a *pro se* 28 U.S.C. 2241 habeas petition, where the petitioner did not sleep on his federal rights, but believed his state petition was sufficient to begin the state's process of reviewing his claim, thus tolling the federal statute.

"[Equitable tolling] is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control."

Florida

Espindola v. State, 2003 Fla. App. LEXIS 270 (3rd DCA, Jan. 15, 2003)

The Third District Court of Appeals ruled this past month that the State of Florida's sexual predator act is unconstitutional because it lacks provisions allowing judges to determine a defendant's threat to the community.

The ruling arose from a case involving a man who admitted to sexually assaulting a woman whose cocktail had allegedly been drugged by another man, also a suspect in the attack.

By pleading guilty to sexual battery, Ferman Carlos Espindola, 23, was automatically required to register as a sexual predator, according to a circuit court ruling.

The appellate court overturned the decision on the grounds that the Florida Sexual Predator Act does not allow judges to hold a hearing to assess the degree of danger a sex offender poses.

"We find that in the absence of a provision allowing for a hearing to determine whether the defendant presents a danger to the public sufficient to require registration and public notification, the Florida Sexual Predators Act violates procedural due process," the court wrote in its unanimous decision.

Thou shalt not ration justice.

-Judge Learned Hand

About NLPA -

NLPA is a technical consulting firm, owned by attorneys, and dedicated to the professional mission of providing counsel, research, and related work product to members of the Bar. Although our fifteen-person attorney research department provides some consulting assistance to attorneys in the area of civil practice, most of NLPA's sixteen year history has been dedicated to working with the criminal defense bar. Our ownership structure includes attorneys licensed to practice before many local, state, and federal courts; however, NLPA is not a law firm and provides no "front line" legal services. On the other hand, we are far from being simply a paralegal service. Our sole purpose is to provide research and consulting assistance. With cutting-edge computer research capabilities, an experienced and top quality staff, and more than sixteen years' experience, NLPA is well-positioned to provide the types of assistance members of the bar oftentimes need.

Since 1986, NLPA has provided affordable, quality consulting to lawyers across the nation. Through our involvement in literally thousands of cases, coupled with our national professional staff, NLPA has developed a unique and unmatched expertise in pretrial, trial, sentencing, appellate, and post conviction matters. Whether your client is in the state or federal

systems, faced with local or international matters, NLPA is a team member worth engaging.

As a result of its affiliations, National Legal Professional Associates has increased its ability to service you as counsel. With NLPA's relationship with the law firm of Murray, Ratliff & Robinson, P.A., assistance is available in arranging for local counsel and co-counsel, if needed, throughout any judicial district in the United States. NLPA has offices in San Juan Capistrano, California and Tijuana, Mexico to augment its Cincinnati, Ohio operations center, and Naples, Florida administrative office.

Getting NLPA started on your team is not difficult nor time-consuming. Simply contact us at the numbers below and a member of our staff will review your case and needs, discuss financial arrangements and time constraints, and commence a program for meeting your needs.

You are important to us and we hope we can commence and maintain a long-term relationship with you. Please know that we are here to assist in all your needs.

If you would like to know more about the services we offer, please contact us at:

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Margaret A. Robinson
Professional Advocacy Center
11331 Grooms Road, Suite 1000
Cincinnati, OH 45242

Tel.: (513) 247-0082

Fax: (513) 247-9580

Other Office Locations:

Naples, Florida
San Juan Capistrano, California
Tijuana, Baja California, Mexico

E-Mail:

contactus@nlpacincinnati.com

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WE LISTEN,

WE GET RESULTS

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National Legal Professional Associates
11331 Grooms Road
Suite 1000
Cincinnati, OH 45242

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By Telephone at: 1-866-663-7440

By Mail at: Newsletter Editor
11331 Grooms Road
Cincinnati, Ohio 45242

