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“The pursuit of justice is a team effort.”

Newsletter

Legal News Briefs for Law Libraries

NLPA SUCCESSFULLY ADDRESSES SENTENCING MISTAKES

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Thirteen years saved. It sounds like a lot of time, and it is. Recently, *National Legal Professional Associates* was able to make it happen. Through strong research, solid arguments, and clear writing, NLPA provided counsel of record the tools not to make the kind of sentencing mistakes that send defendants to prison for crazy periods of time. But can this type of assistance help you?

Recently, NLPA was contacted by a defendant in Otisville, New York. He thanked us for sending him materials about our successes in assisting counsel with sentence reductions but wondered how that information could help him *after* he had already been sentenced! In response, we reminded him of the second look that can be given to sentencing mistakes, both through direct appeals and post conviction motions. Just because sentencing counsel fails to raise important

issues at sentencing, or just because a court refused to recognize that it could grant downward departures does not mean the issue is forever gone. Through direct appeals or post conviction motions, many defendants have challenged NLPA was recently asked to assist in a case where the government sought to increase a sentence based on a prior criminal record under U.S.S.G. § 4B1.1, specifically the Career Offender provision.

A defendant is considered a Career Offender if (1) the instant offense is a crime of violence or a controlled substance offense, and (2) the defendant has at least two prior felony convictions for either a *crime of violence* or a *controlled substance offense*. U.S.S.G. §4B1.1. The Career Offender enhancement is extremely damaging to a defendant at sentencing because it boosts the criminal history score to the highest possible level, a Category VI, and also raises a defendant's offense level.

In the Northern District of Ohio case of *United States v. Griffin*, the government attempted to apply the Career Offender enhancement to Mr. Griffin at sentencing. Mr. Griffin's attorney, Paul Adamson, Esq., asked NLPA to prepare research on arguments to combat the enhancement at sentencing. A successful argument on this issue was critical because Mr. Griffin would be facing a sentence of up to 19 ½ years imprisonment if the enhancement was applied.

NLPA reviewed Mr. Griffin's PSI to determine whether arguments could be made at sentencing to

sentencing mistakes and have received a second chance at re-sentencing to lower their punishment and time in prison.

With that in mind, NLPA has been fortunate over the past many years to provide meritorious and combat this enhancement. Accordingly, NLPA provided research that, although Mr. Griffin had the necessary two prior *crimes of violence*, one of those crimes was too old to be counted in determining Mr. Griffin's criminal history score. Additionally, NLPA presented the argument that even if Mr. Griffin technically qualified for the §4B1.1 enhancement, the court should disregard the enhancement and depart downward at sentencing because the § 4B1.1 enhancement over-represented the seriousness of Mr. Griffin's criminal past.

Attorney Adamson relied substantially on NLPA's research and was ultimately successful with extraordinary results. Instead of Mr. Griffin receiving a sentence of 19 ½ years, Mr. Griffin received a sentence of 6 ½ years! ***Mr. Griffin saved 13 years in prison!***

Similarly, in the recent case of *United States v. Mancillas*, Case No. 02-CR-65, out of the Southern District of Texas, NLPA was requested to assist the defense team in reviewing and analyzing the defendant's presentence investigation report (PSI) with the objective of providing defense counsel with research and arguments in favor of a lesser sentence.

Mr. Mancillas was convicted in the Southern District of Texas of counterfeiting, in violation of 18

successful arguments to counsel of record for use at sentencing. Two new cases add to the list of victories claimed by attorneys who use our professional services.

U.S.C. §513(a). After his conviction, but prior to sentencing, a PSI was prepared outlining Mr. Mancillas' potential sentence. The calculations in the PSI indicated that Mr. Mancillas fell into a Criminal History Category VI and a guideline range of 30 to 37 months imprisonment. Further, even though Mr. Mancillas was in the highest Criminal History Category possible, the government was recommending that the court *depart above that guideline range* at sentencing. According to the government, Mr. Mancillas' prior criminal record was more serious than reflected in the PSI.

NLPA provided defense counsel, Jason Libby, Esq., with research and arguments to counter the government's request for an increased sentence. Additionally, NLPA provided research and analysis arguing that the calculations in the PSI were incorrect and that many of Mr. Mancillas' prior convictions were related offenses, and thus should not be counted separately. Based on NLPA's research, Mr. Mancillas' Criminal History should have been a Category V and his guideline range 21 to 27 months imprisonment.

Fortunately, NLPA's research proved to be beneficial. Not only did the Court agree not to depart upward, but the Court agreed with Mr. Libby that Mr. Mancillas'

Criminal History Category was V. As a result, the court sentenced Mr. Mancillas to 21 months imprisonment, *a decrease of at least 16 months* from the sentence suggested in the PSI.

Of course, results like this cannot be expected in every case. However, the combination of a diligent attorney and NLPA's research and writing assistance is one of the best ways minimize a

Q & A

[Despite today being April Fool's Day, these questions and answers are truly representative of the hundreds of letters NLPA receives each month.]

Dear NLPA:

I am a Federal inmate with the BOP. During a shakedown last week, a guard confiscated and destroyed some of my legal papers. Is there something I can do?

Dear Friend:

No one who is or has lived under the control of the Federal Bureau of Prisons is unaware of the problems associated with shakedowns. While the correctional officers of an institution have a responsibility to keep contraband out of the institution, the zeal and energy employed when they search inmates' living quarters is only equaled to their desire to complete the 4:00pm count on Super Bowl Sunday!

Several issues are raised by your letter. First of all, if you believe

defendant's sentence.

If similar issues should have been raised at a sentencing but were not, or if similar issues were raised but ignored by the court, we would hope you would consider asking NLPA's experienced team of attorneys to research your potential avenues to seek a second look at these or other mistakes.

THIS NEWSLETTER IS DESIGNED TO INTRODUCE

that materials properly maintained in your living quarters were improperly seized, the BOP provides an administrative remedy process to address such issues. NLPA stands ready, willing, and able to assist you in filling out the forms and seeking redress. If materials of value were seized and destroyed, you can also request a Federal Tort Claim Act form from the institution's paralegal for reimbursement. Finally, the entire issue of maintaining legal materials in your living quarters raises other important issues. Please double check your local institutional supplement to the program statement addressing the issue. Talk to your counselor and try to work matters out. If you still are at an impasse, contact us and we will work together to address the issue.

One last point though is the matter of maintaining your presentence investigation report. As you, and most federal inmates know by now, a new program statement directive defines PSI reports as contraband. Several lawsuits are currently pending to seek a reversal of this policy; nevertheless, the current policy is being enforced. If you are being denied access to your PSI, please

YOU TO NLPA. AS NLPA IS NOT A LAW FIRM, PROFESSIONAL SERVICES ARE ONLY PROVIDED TO LICENSED COUNSEL IN ALL AREAS THAT INVOLVE THE PRACTICE OF LAW. NLPA HAS CREATED THIS PUBLICATION TO PROVIDE YOU WITH AUTHORITATIVE AND ACCURATE INFORMATION CONCERNING THE SUBJECT MATTER COVERED. HOWEVER, THIS PUBLICATION WAS NOT NECESSARILY PREPARED BY PERSONS LICENSED TO PRACTICE LAW IN A PARTICULAR JURISDICTION.

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let us know.

Dear NLPA:

I am a state inmate and scheduled to go before the Parole Board this summer. Can your firm assist me?

Dear Friend:

Parole situations can be complex and frustrating if you are not aware of the operating rules, or if you do not have good communication with the Board and the outside. Many states allow the assistance of NLPA without the need for the involvement of counsel. In those circumstances, NLPA would review your entire file, contact the state parole authority, and outline the rules and policies applicable to your situation. (For example, some sex offenders have specific programming and related requirements unique to the process.)

Once we had completed our review and have discussed your situation with the state parole authority, we would then recommend to you and your family a plan of approach designed to address your current situation. This plan would no

doubt include a full parole memorandum prepared by our staff to assist the authority in their review of your file.

[Okay, we could not help it. In recognition of April Fool's Day, here is the most heart-wrenching letter of the month.]

Dear NLPA:

I am a first time offender. I have heard about all the good work you

As we mentioned in our February newsletter, the December 2002 change to the Bureau of Prisons Halfway House policy continues to generate litigation . . . most with favorable results to defendants. In the Washington, D.C. case of *Culter v. United States*, a Federal District Court held that the retroactive application of the policy violated the due process rights of the inmate. Similarly, in a handful of other cases for which NLPA provided detailed research, inmates have enjoyed the same results.

NLPA does not know what the ultimate result will be of this matter, but it is refreshing to read strong opinions from the judiciary on the capricious acts of the BOP such as the following opinion from U.S. District Judge Michael Ponsor in the 28 U.S.C. § 2255 case of *Iacoboni v. United States*, a District of Massachusetts case:

"It is no exaggeration to say that the December communications reflected a disregard for—indeed, almost an insult to—the courts. The affront was particularly grave to judges who had imposed sentences in reliance on the then-prevailing sentencing regime . . . The lack of respect

guys do with attorneys. It is great to know that there is a company out there that helps so many people!

I am in prison for drugs. I know I was wrong. It's just that I got caught. But I have been in here long enough. It has been four months already! Could you tell me how much it will cost to have me released immediately? I will speak to my family and get the money together.

for the proper role of the judiciary, the plain discourtesy in the brusque manner of notification, and particularly the subversion of the sentencing process by the insistence on a retroactive application of the new sentencing rules, all were highly offensive and gratuitous. Even if the BOP's about-face on community corrections could somehow be justified— and it cannot— it should never have been carried out in the cavalier manner it was."

NLPA has researched this new policy 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.

NLPA stands ready, willing, and able to assist inmates with any administrative remedies required to address this matter, and with

Thanks and God Bless.

What's New Around The Nation

HALFWAY HOUSE POLICY STILL UNDER ATTACK

their counsel for such litigation as may be needed to counter this new policy.

Around The Circuits

Second Circuit

United States v. Barresi, 316 F.3d 69 (2nd Cir. 2002)

Defendant appealed from the sentence imposed by the United States District Court for the Eastern District of New York, arguing that the district court, having determined that an upward departure was warranted, erred when it relied on his prior criminal record and lack of remorse in determining the extent of that departure (eight levels) was unreasonable.

The Defendant, in an apparent act of vengeance, called the Federal Bureau of Investigation (FBI) and identified his girlfriend's employer, a United States citizen of Pakistani descent, as a possible accomplice in the September 11 terrorist attacks. When later questioned by the FBI, he admitted he had no reason for implicating the employer. He pled guilty to

knowingly and willfully making a materially false statement in a matter within the jurisdiction of the executive branch of the government of the United States, in violation of 18 U.S.C. §1001(a)(2). The district court applied a base sentencing level of 6 under U.S. Sentencing Guidelines Manual §2B1.1, and then deducted two levels for acceptance of responsibility pursuant to U.S. Sentencing Guidelines Manual §3E1.1(a). The guideline sentence would have been zero to six months.

The district court exercised its discretion to depart upward and added eight levels, basing the Petitioner's motion to correct the judgment of the convicting court, which was construed as his first motion for collateral relief under 28 U.S.C. §2255, was denied. Petitioner then filed a petition for a writ of habeas corpus in the federal court that had jurisdiction over his place of confinement. The court construed the petition as a motion under §2255 and transferred the case back to the convicting court, which dismissed the motion. On appeal from the district court's dismissal of petitioner's 28 U.S.C. §2241 petition, the appellate court found that there was no evidence that the house petitioner bombed was actually rented. If it was not, then petitioner was correct in his claim that he was factually innocent of violation of the arson statute. Since it was clear to the court that the Petitioner was actually innocent, he satisfied the requirements of the 28 U.S.C. §2255 savings clause, and was entitled to a hearing under 28 U.S.C. §2241.

departure in part upon the defendant's lack of remorse and his prior record. The court of appeals remanded the case for resentencing, concluding that the district court erred in departing vertically based on those factors

Sixth Circuit

Martin v. Perez, 319 F.3d 799 (6th Cir. 2003)

Pro se petitioner appealed the dismissal of his petition for habeas corpus relief under 28 U.S.C. §2241. Without requiring the respondent, the federal warden to file a response, the United States District Court for the Eastern

District of Kentucky at Ashland dismissed the §2241 petition as a successive petition brought after successive claims under 28 U.S.C. §2255, which the circuit court for the sentencing court refused to allow.

The Petitioner appealed his conviction for obstruction of justice and violation of the federal bombing statute and argued that his conduct did not constitute a federal offense because there was not a sufficient nexus between his conduct and interstate commerce. Petitioner's appeal was rejected.

under 21 U.S.C. § 841(b)(1)(B) to a minimum of five years' imprisonment. But the only amount of marijuana introduced during the defendant's guilty plea colloquy was 17.59 kilograms, below the amount required to engage the sentencing provisions

Ninth Circuit

United States v. Velasco Heredia, 319 F.3d 1080 (9th Cir. 2003)

Defendant pleaded guilty of one count of conspiring to distribute an unspecified quantity of marijuana in violation of 21 U.S.C. §§841(a) and 846. The United States District Court for the Southern District of California sentenced the defendant to the statutory minimum sentence of 60 months in prison followed by four years of supervised release. The Defendant appealed.

At sentencing, the district court determined by a preponderance of the evidence that because defendant was responsible for more than 50 kilograms of marijuana, he had to be sentenced

of §841(b)(1)(B). Accordingly, because the defendant's sentencing range as fixed by the court's verdict was constitutionally restricted to zero to five years under 21 U.S.C. §841(b)(1)(D), his exposure to the imposition of a higher term (from 5 to 40 years) amounted to clear *Apprendi* error. The district court calculated that defendant's sentencing range was only 37 to 46 months, far less than the 60-month sentence imposed under 21 U.S.C. §841(b)(1)(B). Thus, the *Apprendi* error was not harmless; it was, in fact, demonstrably harmful to defendant. As a result, he was

ordered resentenced under 21
U.S.C. § 841(b)(1)(D).

And in Congress . . .

Legislation to require, federal

inmates to work a 50-hour work
week was recently introduced by
Senator Ensign and has been
referred to the Senate
Judiciary Committee. NLPA will
continue to monitor this

Legislation.

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About NLPA -

NLPA is a technical consulting firm, owned and staffed by attorneys, and dedicated to the professional mission of providing counsel, research, and related work product to members of the 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 by lawyers, for lawyers . . . and their clients. 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 need.

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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WE CARE,

WE LISTEN,

WE GET RESULTS

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