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“The pursuit of justice is a team effort.”

Newsletter

Legal News Briefs for Law Libraries & Defense Attorneys

SIXTH CIRCUIT COURT OF APPEALS ANNOUNCES IMPORTANT DECISION CONCERNING INEFFECTIVE ASSISTANCE OF COUNSEL AND RETROACTIVE POTENTIAL OF BOOKER

In a decision announced on August 16, 2007, the Court of Appeals for the Sixth Circuit issued an opinion that NLPA believes may have a significant potential benefit to defendants who have been waiting for retroactive application of the

Booker/FanFan line of cases to assist them with their post-conviction efforts.

In the Nichols case (No. 05-6452, 6th Circuit August 16, 2007) the Court of Appeals stated:

“Petitioner-Appellant Thomas Alberto Nichols (“Nichols”) appeals from the district court’s judgement denying his motion to vacate his sentence pursuant to 28 U.S.C. §2255. Nicholas argues that his counsel was constitutionally ineffective for failing to challenge enhancements to his Guidelines range. Nichols argues that, based on Apprendi v. New Jersey, 530

U.S. 466 (2000), his counsel should have raised a Sixth Amendment challenge to the sentencing enhancements, even though Nichols was sentenced in 2002, more than two years before the Supreme Court’s decision in the United States v. Booker, 543 U.S. 220 (2005). Because Apprendi cast the constitutionality of the Federal Sentencing Guidelines into considerable doubt and because the enhancements to Nichols’s

Guidelines range directly presented circumstances that were called into question by Apprendi, we conclude that Nichols’s counsel was constitutionally ineffective for failing to preserve a Sixth Amendment challenge to his

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sentence, and we therefore, REVERSE the judgement of the District Court, VACATE Nichols's sentence and, REMAND the case for resentencing..."

"...We recognize that, under our decision today, the performance of many attorneys who represented criminal defendants after Apprendi but before Blakely will be deemed constitutionally deficient. The question before us, however, is not what some or most attorneys actually did, but whether the performance of Nichols's counsel "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Although we recognize that common practices may provide evidence of the objective standard by which we should measure the performance of individual attorneys, common practices can never be determinative lest we freeze our expectations of counsel at one moment in time, never to improve or change in response to developments in, for example, education, technology, or the law itself. In this case, we conclude that the performance of Nichols's counsel was constitutionally deficient for failing to take into account and respond to the significant changes in the law effected by Apprendi."

If you have a client who you feel may benefit from the retroactive application of Booker/FanFan and would like assistance in preparing research for your client's post-conviction motion, contact NLPA.

CHANGE IN THE BOP POLICY FOR RESPONSES TO SENTENCING RECOMMENDATIONS

On June 4, 2007 the Director of the BOP, Harley Lappin, wrote to Judge Cassell, Chair of the Criminal Law Committee of the Judicial Conference to notify the courts of an approaching change in the Bureau's policy for responding to judicial sentencing recommendations. In the past the BOP's practice has provided a written explanation to the judge responsible for sentencing whenever the BOP is unable to comply with the court's sentencing recommendations. Beginning July 2, 2007 the BOP will only supply this type of explanation to the sentencing court upon request. The change in this policy comes as a response to the BOP's efforts of controlling costs by reducing or altogether eliminating certain practices. The Bureau of Prisons will continue to keep statistics on the rate of compliance with judicial recommendations. That rate is currently at 72%.

INTERESTING USSC DATA ON MANDATORY MINIMUMS

From Professor Berman: Now available online from the US Sentencing Commission is the prepared statement of Ricardo Hinojosa, USSC Chair, for the house hearing on mandatory minimum sentencing. This state is full of very interesting data on the application of mandatory minimum sentences during the

fiscal year 2006. Here is a sample of the statement's many interesting snippets of data:

Of these 69,627 cases (with complete information from fiscal year 2006), offenders in 20,737 cases (29.8%) were convicted of a statute carrying a mandatory minimum penalty. Of these 20,737 offenders, 2,716 (13.1%) received a statutory mandatory minimum sentence that was required to be consecutive to any other sentence imposed...

Black offenders are the only racial/ethnic group that comprised a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty (32.9%) than their percentage in the overall fiscal year 2006 offender population (23.8%)...

Excluding immigration cases, both Hispanic offenders and black offenders comprised a greater percentage of non-immigration offenders convicted of a statute carrying a mandatory minimum penalty than their percentage in the overall fiscal year 2006 offender population.

CASES YOU CAN USE

Zakrzewski v. McDonough, No. 06-12804. Denial of motion seeking post-judgment relief under rule 60(b), Federal Criminal Rules of Civil Procedure where motion was made on the ground that former habeas counsel perpetrated a fraud on the court, is vacated as petitioner's Rule 60(b) motion was not a second or successive habeas petition as construed by the district court.

U.S. v. Poindexter, No. 05-7635, 05-7636. Denial of motion to vacate sentence under 28 U.S.C. §2255 is vacated and remanded as an attorney renders constitutionally ineffective assistance of counsel if he fails to follow his client's unequivocal instruction to file a timely notice of appeal, even though the defendant may have waived his right to challenge his conviction and sentence in the plea agreement.

U.S. v. Tapp, No. 05-30222. The rule of Flores v. Ortega, 528 U.S. 470 (2000) which held that the failure to file a requested notice of appeal is per se ineffective assistance of counsel, applies even where a defendant has waived his right to direct appeal and collateral review. In such circumstances, if the petitioner is able to demonstrate by a preponderance of the evidence that he requested an appeal, prejudice will be presumed and the petitioner will be entitled to file an out-of-time appeal, regardless of whether he is able to identify any arguably meritorious grounds for appeal that would not be precluded by the terms of his appeal waiver.

U.S. v. Stephens, No. 04-30185, 05-30668. Defendant's convictions and sentence for various charges arising out of a string of armed bank robberies in Louisiana are reversed and vacated, respectively, where neither a co-defendant's guilty plea nor defendant's own severance motion rendered a particular 7 week period excludable from the speedy trial clock, and thus, the Speedy Trial Act was violated.

U.S. v. Voelker, No 05-2858. Special conditions, which a district court imposed on a defendant's

lifetime term of supervised release after he pled guilty to possessing child pornography, are vacated and remanded where: 1) an absolute lifetime ban on using computers and computer equipment as well as accessing the internet, with no exception for employment or education, involved a greater deprivation of liberty than was reasonably necessary, and was not reasonably related to the applicable statutory factors; 2) a lifetime ban on possessing "sexually explicit materials" was overly broad and unsupported by the district court's analysis; and 3) although a restriction on defendant's associating with children, including his own, may have been supported, the district court improperly delegated absolute authority to a probation office over such restrictions.

U.S. v. Baker, No 06-3115. Sentence based on guilty plea to fraud and related offenses is vacated where the court impermissibly and prejudicially participated in plea negotiations with defendant.

U.S. v. Paul, No. 06-30506 (9th Circuit). A full 31 months and 5 days since Booker, today has brought what is believed to constitute the very first appellate reversal of a within-guideline sentence as substantively unreasonable. Strangely and disappointingly this groundbreaking ruling appears as the final paragraph of an unpublished per curiam ruling in U.S. v. Paul (9th Circuit, August 17, 2007) reading:

Paul's 16-month sentence is unreasonable. Several factors that are absent from the district court's

sentencing analysis demonstrate that this case does not fall within the "heartland" of cases to which the guidelines are most applicable, as described by the Supreme Court in Rita v. United States, 127 S. Ct. 2459, 2465 (2007). All of the following facts demonstrate that a 16-month sentence was unreasonably high: Paul was a first-time offender with absolutely no criminal records whatsoever; she promptly returned all of the funds to the school district; she displayed remorse in two statements given to the Department of Labor prior to the filing of criminal charges; and the misappropriated funds represented compensation for work that she had performed for the district. The district court did not adequately consider this strong mitigating evidence in sentencing Paul to the very top of the guidelines range. Accordingly, we vacate Paul's 16 month sentence and remand with instructions for the district court to resentence Paul after giving appropriate consideration to the above-mentioned factors.

While it's great the court has issued this decision, we find it perplexing as to why they have elected not to publish this disposition and explain further the reasons the sentence imposed did not comply with 3553(a).

Brendlin v. California, No. 06-8120. When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.

NLPA CONTINUES A TREND OF EXCELLENCE - OUR SECOND QUARTER SUCCESSFUL CASES

NLPA is proud to spotlight our successful cases for the third quarter of 2007. For more information on our track record please contact NLPA for a complete victory listing.

L. Gary - (USDC MD FL Case No. 2:06-cr-00125) NLPA assisted at sentencing in fighting a 135-168 month recommendation in the PSI. At sentencing Mr. Gary received 121 months - saving him more than a year in prison.

J. Smith - (USDC ED VA Case No. 1:06-CR-502). NLPA assisted at sentencing for Mr. Smith. His PSI recommended 262-327 months. He received 15-21 months with a 60 month mandatory for a firearm. This saved him a more than 200 months in prison!

R. Patrick, Jr. - (USDC SD TX Case No. 2:06cr00228-6). NLPA was hired to assist with the sentencing stage of Mr. Patrick's case. His PSI recommended 188-235 months. At sentencing he received 151 months - saving him more than 3 years in prison.

K. Tyler - USDC SC Case No. 5:04-cr-00964-MBS-1). NLPA assisted counsel for Mr. Tyler with arguing against his PSI which recommended 360 months to **LIFE**. At his sentencing he only received 168 months - saving him a lifetime in jail!

P. Nieto-Garcia - NLPA assisted counsel for Mr. Nieto-Garcia with his sentencing case out of the ND of TX (Case No. 3:05-CR-00313-3). His PSI recommended a guideline range of 262-327 months. At his sentencing he received 108 months - saving him more than 13 years in prison!

R. Whittington - NLPA assisted counsel for Mr. Whittington with sentencing research for his case out of the ED of LA (Case No. 2:05-CR-00243-9). We were only able to complete partial research based on financial difficulties of the family. However, his PSI recommended that he receive between 121-151 months. At his sentencing he received 87 months - saving him more than three years in prison.

K. Thompson - NLPA assisted counsel in this case to prepare sentencing arguments to be filed in the ED of VA (Case No. 3:05-CR-00164-1). After a long process of arguing his PSI contents which recommended 87 - 108 months PLUS 120 months, the court adopted the new PSI received by the probation department and imposed 87 months keeping Mr. Thompson at the bottom of his guideline range.

D. Hawkins - NLPA assisted at sentencing for Mr. Hawkins' counsel. His case was out of the ND of OH (case no. 5:06-cr-00505-PAG-1). He received a PSI recommendation of 360 to **life**. At his sentencing, he received 240 months - saving him many years in prison.

D. Shifflett - NLPA is currently assisting counsel with the preparation of a 2255 motion in the

federal court out of the WD of VA (Case No. 7:06cv00497). As part of its research, NLPA prepared for counsel a motion for discovery to be produced. Although it doesn't usually happen, the court has granted this motion and scheduled oral argument to take place to hear the case. We are hopeful that the court will also agree with our arguments on the motion itself and remand the case and this victory definitely gives a good feeling.

INTERESTED IN HIRING NLPA?

If you're considering hiring someone to assist with your criminal proceedings, NLPA offers realistic fees that may suit you in your pursuit of finding top-notch yet affordable legal research & consulting assistance. We believe you will find our fees to be extremely competitive compared to other legal research firms in the country. We also have several alternative options for paying our fees.

- NLPA can accept payment via cashier's check or money order through the mail.
- We also can accept credit/debit card payments over the telephone as well as electronic check (check by phone) payments over the telephone.
- For most services provided NLPA also offers payment plans as well. With a minimum down payment you could soon be financing your legal fees.

Therefore, if you are interested in discussing the financing options available to you for your specific matter, please contact us.

NLPA assists in virtually every stage of criminal proceedings from pretrial to post-conviction and also assists in immigration matters. For additional information on the

services offered by National Legal Professional Associates please contact our offices.

This newsletter is designed to introduce 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. This publication is not meant to be a substitute for legal or other professional advice, which NLPA is not rendering herein.

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About NLPA

NLPA is a research and 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 much more than your typical paralegal service as our work is prepared by attorneys. 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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NLPA: WE LISTEN, WE CARE, WE GET RESULTS !

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