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“The pursuit of justice is a team effort.”

Newsletter

Legal News Briefs for Law Libraries

NLPA HELPS GET NEW TRIAL FOR DEFENDANT SERVING LIFE WITHOUT PAROLE!

Many defendants feel that they did not receive proper representation from their attorney during the course of their case. The case of Jesus Rios is an excellent illustration of how a defendant can obtain a new trial if he did not receive effective assistance of counsel during his case.

With NLPA's research assistance, Attorney Charles A. Murray of Naples, Florida was able to obtain a new trial for a client serving a life sentence with no possibility of parole. NLPA provided Attorney Murray with research and arguments to convince the Seventh Circuit Court of Putnam County Florida that his client, Jesus Modesto Rios, received ineffective assistance of trial counsel in violation of his Sixth Amendment rights. Following an evidentiary hearing, the court agreed that Mr. Rios had been denied the right to effective counsel at his 1999 jury trial. The court then ordered a new trial for Mr. Rios.

Mr. Rios's case shows exactly why hope for relief and the fight for justice should never be given up. He appealed his case in 2001 to no avail, but never quit. Instead, he contacted NLPA about the possibility of assisting counsel with research services. NLPA put Mr. Rios in touch with Attorney Charles Murray, an experienced criminal defense attorney in Naples, who was willing to take Mr. Rios's case, and fight for justice with NLPA's assistance. The rest is history. Thanks to the tireless efforts of Charles A. Murray and NLPA, Mr. Rios will once again have the chance to prove his innocence in a court of law.

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NLPA continues to be at the forefront of developing criminal law, assisting attorneys in all 50 states and every federal jurisdiction. If you or your clients need assistance with pretrial work, a sentencing hearing, an appeal, state or federal post-conviction motion, deportation proceedings, or any other area of developing law, NLPA's resources and experience can provide you with the most up to the minute research and arguments available. (*More Recent Victories page 6*)

What's New Around the Nation

Interstate Commerce Element and Actual Innocence, Sixth Circuit Vacates RICO Conviction: *Waucaush v. United States*, 03-1072 (6th Cir. 2004)

In *Waucaush v. United States*, 03-1072 (6th Cir. 2004) the Sixth Circuit had to decide whether a defendant was actually innocent of violating RICO when there was a lack of evidence indicating that his activities substantially affected interstate commerce within the meaning of RICO. The court addressed this issue despite the fact that Waucaush admitted as part of his plea that his activities "affected interstate commerce."

Waucaush argued that the activities he was charged with did not substantially affect interstate commerce. Therefore, he was actually innocent of the crime to which he pleaded guilty and his plea was unknowingly and involuntarily entered.

The court held that where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not satisfy the interstate commerce element of RICO. The government must show that the effect on commerce was substantial. "Indeed, most individuals and organizations cannot help but buy products that traveled in interstate commerce, or occasionally talk to colleagues in, or travel to, other states for some reason or another. If we were to label these occasional acts of interstate commerce as "substantial," federal authority under the Commerce Clause would be virtually limitless. Allowing the government to meet the interstate commerce requirement [in a federal criminal prosecution] through only a nominal showing of a connection to interstate commerce would do as much to 'completely obliterate' the distinction between national and local authority as if no jurisdictional requirement existed at all."

The court determined that the activity in question was intrastate, non economic, and without substantial effects on interstate commerce. Therefore, the Court held that "a reasonable jury could not conclude that Waucaush's enterprise affected interstate commerce and Waucaush was actually innocent of violating RICO. His actual innocence excuses his failure to challenge his plea on direct appeal, such that we may consider the challenge now. "

Further, the fact that he admitted in his guilty plea that his organization affected interstate commerce was not enough. When he pleaded guilty, Waucaush believed, and in fact was told by the district court, that a

purely intrastate act of violence that had only minimal, indirect effects on interstate commerce could nonetheless satisfy — as a matter of law — the "affect[ed] interstate commerce" element of RICO.

But this understanding of the statute was legally erroneous. And because he had an incorrect understanding of the reach of RICO's requirement that the enterprise "affect interstate commerce," Waucaush pled guilty to conduct which was simply not a federal crime.

"This type of misunderstanding — a misconception about the statute's legal scope that results in the defendant pleading guilty to conduct which was not a crime — typifies an unintelligent guilty plea. Because Waucaush's misunderstanding of the law led him to plead guilty to conduct which the law had not made a crime, his plea was unintelligent and his conviction cannot stand."

Second Circuit Reverses Defendant's Conviction For Illegal Re-Entry: *United States v. Sosa* (2nd Cir., 10/21/04 - No. 03-1530)

Prior to 1996, § 212(c) gave the Attorney General "broad discretion to cancel deportation orders for aliens who met certain residence requirements and had not served five years in prison for an aggravated felony." *United States v. Copeland*, 376 F.3d 61, 64 (2nd Cir. 2004) (citing 8 U.S.C. § 1182(c)). In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") made aliens convicted of aggravated felonies ineligible for Section 212(c) relief. This was

applied retroactively to aliens convicted of offenses prior to 1996. However in 2001, the Supreme Court held that the 1996 amendments could not be applied retroactively to render aliens who pled guilty to aggravated felonies prior to 1996 ineligible for Section 212(c) relief. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

Sosa was deported in 1997 based on a his 1992 conviction for sale of heroin. He re-entered the U.S. and was convicted for an illegal re-entry, but appealed. The issues on appeal arose from the fact that the Immigration Judge never informed Sosa that he was eligible to seek discretionary relief from deportation under former Section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq.

Sosa argued that his deportation proceeding was "fundamentally unfair" because he was never informed of the fact he could seek relief from deportation under § 212(c). The court held that failing to advise Sosa of his right to seek Section 212(c) relief was prejudicial and fundamentally unfair within the meaning of Section 1326(d)(3). Therefore, Sosa's conviction for illegal re-entry into the United States after deportation is reversed where his deportation, an element of the offense, was fundamentally unfair.

Sixth Circuit Answers the Questions: How Long Do I Have to File a Post-conviction Motion Based on a New Rule of Constitutional Law? More important, Who Determines Whether the Rule Is

Retroactively Applicable to Cases on Collateral Review? *Wiegand v. United States*, 380 F.3d 890 (6th Cir. 2004)

Since the recent Supreme Court decision in *Blakely v. Washington*, NLPAs have received hundreds of questions from attorneys and inmates concerning whether the decision can apply retroactively to cases on collateral review. If so, how long does a defendant have to file a § 2255 motion based on *Blakely*? After all, many § 2255 motions were turned down in the past based on the reasoning that the Supreme Court did not apply the rule in *Apprendi* retroactively to cases on collateral review. However, the Sixth Circuit has provided some favorable guidance concerning retroactivity and timing that many defendants can use in their attempt to seek a reduction in their sentence based on the *Blakely* decision.

In *Wiegand v. U.S.*, 380 F.3d 890 (6th Cir. 2004) the defendant had filed a § 2255 motion based upon the rule announced in *Jones v. United States*, 529 US 848 (2000). The *Jones* decision restricted the scope of the federal arson statute, decriminalizing conduct that the court's previously viewed as within the statute's reach. However, the Supreme Court did not state that its decision should be applied retroactively to cases on collateral review.

Wiegand filed his § 2255 motion well outside the typical one year deadline from when his conviction became final. However, he filed the motion within one year from the Court's decision in *Jones*. Wiegand argued that the *Jones* issue was properly raised in his §

2255 motion and that the motion was timely filed under § 2255 (6)(3). That section provides a one year deadline for filing a § 2255 motion from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; . . ." 28 U.S.C. § 2255 ¶ 6(3).

The district court denied Wiegand's § 2255 motion because the Supreme Court in *Jones* did not make its decision retroactively applicable to cases on collateral review. However, the Sixth Circuit held that the Supreme Court does not have to determine retroactivity in order for a § 2255 motion to be filed under § 2255 ¶ 6(3). Instead, "any federal court can make the retroactivity decision." Therefore, the court reversed the district court's judgment and remanded "for the district court to consider whether *Jones* applies retroactively. If the district court decides *Jones* applies retroactively, it should consider the merits of Wiegand's claim and any procedural defenses the United States raises."

Obviously, the *Wiegand* case does not deal with the *Blakely* decision. But, the case is important because it can be applied to § 2255 motions filed based on *Blakely* under § 2255 ¶ 6(3). Therefore, even if a defendant was sentenced 15 years ago, he should first file a § 2255 motion raising *Blakely* arguing that it is within the time limits set out in § 2255(6)(3). Further, it is the district court's duty to determine whether the Supreme Court in *Blakely* (1) spelled out a newly recognized right, and (2) whether that right should be made

retroactive to cases on collateral review.

Over the past several months, NLPA has prepared research and arguments for attorneys and their clients raising the *Blakely* issue in § 2255 motions. If you or someone you know needs NLPA's research assistance, please contact us.

One Year Deadline to File § 2255 Motion Did Not Bar Defendant's Untimely § 2255 Motion When Defendant Raised Viable Claims of Actual Innocence: *United States v. Montano* 381 F.3d 1265 (11th Cir. 08/26/04)

Denial of defendant's untimely motion to vacate his sentence is reversed where the procedural bar to defendant's claim was overcome by his proof of innocence of the crime to which pled guilty.

The Court addressed the following: First, does bartering drugs for guns (not guns for drugs) constitute "use" of a firearm within the meaning of § 924(c)? If not, does actual innocence excuse Montano's failure to bring his § 2255 motion within the one-year statutory period under 28 U.S.C. § 2244(d) for filing a motion to vacate a sentence?

The Court determined that actual innocence is not itself a substantive claim, but rather serves to lift the procedural bar caused by Montano's failure timely to file his § 2255 motion. *Bousley v. United States*, 523 U.S. 614, 622, 140 L. Ed. 2d 828, 118 S. Ct. 1604.

Montano argued that he is actually innocent of the § 924(c) conviction and contends this actual innocence provides an exception to the one-year filing requirement under § 2244(d)(1)(A). In order to determine whether Montano can overcome the procedural bar to the filing of his § 2255 petition, then, the court must first examine the merits of Montano's underlying claim to determine if he is actually innocent of the crime to which he pled guilty: use of a firearm during a drug transaction in violation of § 924(c).

The court concluded that as a matter of law, trading drugs in exchange for guns is not a violation of § 924(c). Therefore, Montano's claim of actual innocence was meritorious. Therefore, the fact the § 2255 motion was filed well after the one year deadline had expired did not bar the court from considering Montano's § 2255 motion.

CASE LAW UPDATE

CAZAREZ-GUTIERREZ v. ASHCROFT (9th Cir. 08/24/04 - No. 02-72978) A state drug offense is not an aggravated felony for immigration purposes unless it is punishable as a felony under the Controlled Substances Act or other federal drug laws named in the definition of a drug trafficking crime.

OLATUNJI v. ASHCROFT (4th Cir. 10/19/04 - No. 00-6650) Plaintiff's habeas petition, seeking review of his continued detention pursuant to a final order of removal, is granted where the Illegal Immigration Reform and Immigrant Responsibility Act, enacted in 1996, had a retroactive effect on

plaintiff's 1994 guilty plea that is impermissible.

OWENS v. US (7th Cir. 10/19/04 - No. 03-1507) Trial counsel's failure to make a Fourth Amendment objection to the admission of evidence can amount to a later ineffective assistance of counsel challenge.

US v. SAMPSON (2nd Cir. 09/28/04 - No. 03-1124) Defendant's conviction for two drug offenses committed in 1998 and two drug offenses committed in 2000 are reversed where the district court erred in denying defendant's motion to sever the 1998 counts from the 2000 counts.

US v. SANDRIDGE (6th Cir. 09/30/04 - No. 03-6046) Defendant's drug conviction is affirmed, however, his sentence is vacated where the government converted cash seized from a defendant at the time of arrest into an equivalent drug amount, which improperly enhanced his sentence.

US v. MAXWELL (11th Cir. 10/01/04 - No. 03-14326) Defendant's conviction for possession of child pornography is reversed where the government's attempt to prove that child pornography moved across state lines was an unconstitutional exercise of the Commerce Clause.

FISCHETTI v. JOHNSON (3rd Cir. 09/22/04 - No. 02-4026) Defendant's burglary conviction is reversed where the admission of prior testimony without a preliminary determination that the witnesses were unavailable for trial infringed on defendant's Sixth Amendment right to confront witnesses.

US v. SCHAEFER (7th Cir. 09/13/04 - No. 03-1189) Defendant's sentence for fraud is reversed where, under *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the district court improperly relied on facts not found by a jury when calculating his sentence.

US v. MESSINO (7th Cir. 08/31/04 - No. 02-1411, 02-1607, 02-3641) Two of three co-defendants successfully challenge their sentences for a drug conviction on grounds that the district judge made findings of fact when he imposed enhancements to their sentences contrary to the holding of *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

EARLS v. MCCAUGHTRY (7th Cir. 08/16/04 - No. 03-2364) Plaintiff's writ of habeas corpus is granted where he was denied effective assistance of counsel, in violation of his Sixth Amendment rights, after his counsel failed to object to testimony regarding the truthfulness of a witness.

RANDOLPH v. PEOPLE OF THE STATE OF CALIFORNIA (9th Cir. 08/19/04 - No. 03-16064) If a State places a cooperating informant in a jail cell with a defendant whose right to counsel has attached, and if the informant then makes a successful effort to stimulate a conversation with the defendant about the crime charged, the State thereby violates the defendant's Sixth Amendment right under *Massiah v. US*, 377 U.S. 201 (1964).

CRUEL AND UNUSUAL PUNISHMENT

As with any civilized society, the United States has long abhorred the use of cruel and unusual

punishments. Hoping to escape the arbitrary and ruthless nature of justice as doled out by an all-powerful monarch, the United States enacted the Eighth Amendment to the United States Constitution, placing a ban on such punishments. As a result, the United States has long been intolerant of the use of torture or extremely painful methods of putting convicted individuals to death. With the innovation of seemingly painless methods of executing prisoners, the importance of the Eighth Amendment seems to have faded. However, the Eighth Amendment does more than just protect against a painful imprisonment or execution.

The Eighth Amendment succinctly prohibits "excessive" sanctions. *Atkins v. Virginia*, 122 S.Ct. 2242, 2246 (2002). It provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Weems v. United States*, 217 U.S. 349 (1910), the U.S. Supreme Court held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. The Court explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 367.

The High Court has repeatedly applied the proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin v. Michigan*, 501 U.S. 957, 997-998 (1991). Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty

for "the 'status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

Seemingly, California's well known "Three Strikes" system of sentencing defendants, which allows for status-based sentencing, constitutes neither cruel nor unusual punishment. In essence, the three strikes law allows for one to receive a much harsher sentence for a criminal conviction when the defendant has had two prior qualifying convictions. In judging whether the Three Strikes law is unconstitutional, the Supreme Court has traditionally looked to three criteria in evaluating the proportionality of the sentences issued: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 462 U.S. 277 (1983). Importantly, the proportionality test does not require strict proportionality, but only forbids cases of 'gross' disproportionality. *Harmelin*, 501 U.S. at 1001.

The proportionality concept was used in two recent challenges to California's sentencing structure. In *Ewing V. California*, 538 U.S. 11 (2003) and *Lockyer V. Andrae*, 538 U.S. 63 (2003), unsuccessful challenges were raised against the three strikes law. In *Ewing*, the defendant was sentenced to a term of imprisonment between 25 years and life under the Three Strikes

laws. The defendant's most recent crime for which the sentence was imposed was for stealing golf clubs valued at \$1,200. The underlying convictions which served as strikes one and two were first degree robbery and residential burglary. Noting that the crimes committed by the defendant exhibited increasing violence, Justice O'Connor ruled that the sentence was not grossly disproportionate to the crime committed.

In *Andrae*, the United States Court of Appeals for the Ninth Circuit granted the defendant's petition for a writ of a habeas corpus on the ground that his sentence was disproportionately harsh, only to be overturned by the United States Supreme Court. In that case, the defendant received a term of imprisonment of 25 years to life under the Three Strikes laws for stealing \$153 worth of videotapes from a discount store. Like the Court in *Ewing*, the decision rested upon increasingly serious crimes throughout his criminal history.

Despite these setbacks, Isaac Ramirez raised a challenge to his Three Strikes sentences in *Ramirez V. Castro*, 365 F.3d 755 (2004). Ramirez was convicted of shoplifting a \$199 VCR. Ramirez's prior crimes were two counts of second degree robbery, resulting in a total of one year imprisonment in county jail. The Supreme Court ruled that "Ramirez's sentence is harsh beyond any dispute." This decision was based upon two reasons. First, the Court noted that Ramirez's shoplift did not "threaten to cause grave harm to society." The purpose of the three strikes law was to punish those exhibiting a threat against persons in terms of physical harm as well as

via drug crimes. Second, Ramirez's criminal history did not exhibit increasingly serious criminal behavior or even a pattern of criminal behavior.

Finally, the Court noted the sheer ridiculousness of Ramirez's sentence under California law. The Court noted that had Ramirez's third strike been manslaughter, he would have been eligible for only up to eleven years of imprisonments under the Three Strikes laws. Under the federal Sentencing Guidelines, Ramirez's offense would have only garnered a maximum of seven months imprisonment.

Clearly, the Three Strikes law is not without reproach. Importantly, the Supreme Court has now seemingly admitted that both the nature of the instant offense, as well as the relationship between the first two strikes and the third strike are factors weighing heavily when determining proportionality of a sentence. Sentences will now be judged as the fact specific situations which they are. Perhaps, with this new salvo as fired by the Supreme Court is the signal shot marking the beginning of the end of the cruel and unusual punishment as promulgated by California's Three Strikes law.

MORE RECENT NLPA SUCCESS STORIES

WITHDRAWING A GUILTY PLEA

Oftentimes, NLPA is contacted by counsel who represent defendants wishing to withdraw their pleas of guilty because they face a significantly longer sentence than was promised. The case of *People*

v. Baker, (CR-01-584, 01-540, 02-542 Paulding County Court of Common Pleas, Ohio) demonstrates how NLPA can assist counsel in the preparation of motions to withdraw a guilty plea and to reinstate a client's right to go to trial. Mr. Baker entered a plea of guilty when he was assured by his counsel that he would receive a sentence that would only be 59 months, with the option of enrolling for a judicial release program after six months of incarceration. However, counsel misled Mr. Baker, and the result was that he was sentenced to eleven years in prison, with no opportunity for judicial release. Mr. Baker continuously maintained his innocence but agreed to plead guilty out of fear of receiving the harsh sentence that he actually received. However, after sentencing, Mr. Baker discovered that, in fact, he was punished as if he had been convicted at trial. Mr. Baker then successfully asked the trial court judge to permit him to withdraw his plea. Mr. Baker's argument was based upon the fact that his plea was entered unknowingly, as he was coerced into pleading guilty based upon a promise of a lenient sentence. Mr. Baker then contacted NLPA and retained Jeffrey M. Brandt, Esq., as his new counsel in a continuing effort to withdraw his guilty plea.

Mr. Brandt determined that the appropriate action was a motion to withdraw Mr. Baker's guilty plea under Ohio Criminal Rule 32.1, and directed NLPA to assist in preparing research for that motion. The Government argued that it had not made an offer of sentencing leniency to Mr. Baker and that any claims of ineffective assistance of counsel raised by Mr. Baker were merely a convenient ruse in order to

withdraw his plea. Mr. Brandt and NLPA presented arguments to the contrary, noting that many of Mr. Baker's family members had been told by Mr. Baker's counsel of the availability of sentencing leniency and that it was rather inconvenient for Mr. Baker to be wasting away in jail based upon an unconstitutional plea. The trial court agreed with the arguments presented by NLPA and Mr. Brandt and ordered Mr. Baker's plea withdrawn and his right to proceed to trial reinstated.

Should you find yourself in a similar situation, NLPA stands ready to assist you in the research and preparation of any motions necessary to assist you in the vigorous defense of your client.

USING DURESS IN OBTAINING A DOWNWARD DEPARTURE AT SENTENCING

Many times individuals become involved in criminal activity in order to raise the money to deal with major problems in their lives. The federal sentencing guidelines provide a way for the U.S. District Court to take into consideration these circumstances when determining what sentence to impose. § 5K2.12 of the federal sentencing guidelines addresses this issue and gives the court the ability to give consideration to coercion or duress as the basis of a downward departure.

The case of Kimani Davis is an excellent example of how this issue can be utilized to help a defendant receive a much lower sentence than otherwise would be the case. Mr. Davis was charged along with six

other co-defendants in the United States District Court for the District of South Carolina (5:03-CR-391-05) with participating in a conspiracy to distribute cocaine and cocaine base. After pleading guilty to this offense but, before his sentencing, Mr. Davis' family retained NLPA to assist his counsel, Reginald Simmons, Esq. in the preparation of research for his sentencing. This was critical to Mr. Davis because his Pre-sentence Investigation Report recommended the imposition of a sentence in the range of 108-135 months and because of Mr. Davis' compelling family circumstances it was critical to do everything possible to help reduce his time in prison.

NLPA worked with Mr. Davis' counsel in the research and preparation of objections to his Pre-sentence Investigation Report as well as a Sentencing Memorandum to address downward departures and alternative sentencing programs. One of the issues addressed was that pursuant to § 5K2.12 that due to the duress under which Mr. Davis participated in the offense that the court was entitled to consider a downward departure from his otherwise applicable sentencing guidelines.

The sentencing memorandum documented for the court the fact that Mr. Davis' involvement in illegal activity was triggered as the result of the fact that his fiancé and the mother of his daughter had developed a life threatening cancer condition. At that time he was unable to obtain proper medical insurance to cover the cost of treatment that she needed and it was solely because of this reason that he initially agreed to become a

part of the conspiracy. His intention was to use the funds received to pay for her treatments. Additionally, his fiancé became involved in an auto accident and suffered serious spinal injuries. Again, Mr. Davis had no medical insurance or funds to cover the medical expenses involved.

After taking into consideration all of the arguments raised by NLPA in the Sentencing Memorandum and reviewing the medical documentation received from the physicians for his fiancé, the court agreed to make a downward departure and sentenced Mr. Davis to 24 months incarceration. The court also recommended that the defendant participate in the ICC, Federal Boot Camp Program. As the result of the research NLPA prepared for counsel, the defendant was saved from having to serve an additional ten years in prison.

If you have a client who has participated in a criminal offense who is waiting to be sentenced that became involved in the offense due to coercion or duress, contact NLPA.

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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.

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