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“The pursuit of justice is a team effort.”

Newsletter

Legal News Briefs for Law Libraries

NLPA celebrates landmark: Our 20th Anniversary! **MORE SUCCESSFUL IN 2005 THAN EVER BEFORE!**

NLPA is proud to announce that we are celebrating 20 years of serving inmates, their families and their counsel in fighting for justice. This has certainly been no easy path but, through all of the battles we have encountered and all of the cases we have played a part in winning - we thank all of our contributors, all of our former clients and all of our existing clients for helping NLPA to become one of the most successful legal research & consulting firms in the country!

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It is because of you that we are here and you are the reason we will not give up the fight!

Not only did the year 2005 mark a milestone for us but, we also enjoyed many high points of our past years and broke numerous records for ourselves as compared to the past twenty. It is safe to say that everything we could have dreamed possible for ourselves in that past has very much been an inspiration and a tool of success that has brought us to our present.

NLPA has remained atop the list of groups such as ours and twenty years is certainly no "easy task" for any business. However, NLPA has also maintained true to our purpose - we provide legal research and consultation at a price that everyone can afford. We also offer to our clients the flexibility of

being able to establish payment plans. After all, we know how hard it is to be dealing with a legal situation in your life - finding affordable legal assistance that you can be confident in shouldn't only come to a select few.

NLPA has also stayed true to our original values and commitments to our clients. When you hire NLPA you can rest assured that you a great team of attorneys preparing the research on your case as well as a team of case managers to keep you informed through the entire process.

We are currently offering discounts to our clients and potential clients as a way of showing our appreciation to those who have made our success possible. Please be sure to contact us if you are considering having NLPA assist on your defense team!

NLPA enjoys, along with our anniversary, a record breaking year in winning cases. The number of our victories in 2005 is more than 2004 and 2003 combined! Here are some of our fond memories of 2005.

2005: LOOKING BACK ON A YEAR OF SUCCESS!

Burton, M. - NLPA was hired to help Mr. Burton's attorney in preparing for his sentencing. His PSI recommended 135-168 months. With our help the attorney was able to get for Mr. Burton a sentence of 87 months.

Holbdy, L. - Mr. Holbdy's family hired NLPA to help reduce the 360 month sentence that he was facing in his PSI report. At sentencing he received only 300 months. This saved him 5 years in prison.

Fitzgerald, C. - Mr. Fitzgerald was facing a term of 188-235 months in his PSI report. NLPA was hired to assist counsel in preparing a sentencing memorandum for his case. His attorney, with our help - obtained a sentence of 120 months. This saved Mr. Fitzgerald at least 68 months in prison.

Wilson, T. - NLPA assisted Mr. Wilson's counsel in the preparation of a petition for writ of certiorari. On January 24, 2005 (just 2 weeks after the decisions in Booker/FanFan) the Supreme Court granted Mr. Wilson's petition. His conviction was vacated and remanded.

Stokes, O. - Mr. Stokes was sentenced to 190 months. The guidelines recommended 292 - 365 months. However, statutorily maximum sentence of 20 year is LESS than guideline range and statutorily maximum of 20 years or 240 months shall be the guideline sentence pursuant to U.S.S.G. § 5G1.1(a) Saving him 5 years!

Robinson, L. -NLPA was hired to assist Mr. Robinson's attorney with research for his sentencing. His PSI recommended a guideline range of 262-327 months. With our help his attorney was able to receive for him a sentence of 188 months in prison. This saved him more than 6 years in prison.

Ortega-Chavez, P.- NLPA was contracted in this case to assist counsel in getting a lower sentence than that of the 168-210 months that his PSI was recommending. With our assistance and research his attorney was able to achieve a reduced sentence of only 87 months. This saved Mr. Ortega more than 7 years in prison.

Martinez, R. -NLPA assisted Mr. Martinez's

counsel in the preparation of sentencing research to help reduce the guideline range of 97-121 months that his PSI recommended. At his hearing Mr. Martinez received a sentence of only 48 months in prison.

Howard, H. - NLPA assisted Mr. Howard's counsel in fighting his PSI recommendation of 97-121 months. With our help his attorney was able to get him a sentence of 67 months. This saved Mr. Howard at least 30 months in prison.

Goodrich, C. - NLPA has been hired to assist Mr. Goodrich and his counsel with his sentencing and appeal. His PSI recommended life for him. With our help his attorney achieved a sentence of 138 months (11 ½ years).

Tyler, D. - NLPA was hired to assist counsel for Mr. Tyler in the preparation of the appeal of his life sentence. On March 14, 2005 the Court of Appeals for the 2nd Circuit affirmed the conviction but, remanded the case for re-sentencing. On March 28, 2005 the US District Court established new sentencing date of June 23, 2005 for Mr. Tyler setting aside his life sentence.

Mitchell, N. - NLPA assisted counsel in this case in fighting a recommendation of 240 months in Mr. Mitchell's PSI report. At his sentencing he received just 165 months - saving him more than 6 years in prison.

Nguyen, L. - Mr. Nguyen was facing 168-210 months in prison. With our help his attorney was able to achieve for him a sentence of 154 months - saving him 14-56 months in prison.

Robinson, S - NLPA assisted Mr. Robinson's counsel in fighting a recommendation of 151-188 months in his PSI report. With our help he received a sentence of 144 months. This saved him at least seven months in prison.

Duperval, F. - Mr. Duperval hired NLPA to assist him in fighting his case at sentencing. His PSI recommended 24-30 months. With our help Mr. Duperval received only 18 months - saving him nearly half the time in prison and paving the way for an earlier release via the drug treatment program.

Stokes, O. - NLPA assisted Mr. Stokes' counsel with preparing research for his sentencing to address downward departures and issues to help reduce the 292-365 month sentence that he was facing. At his sentencing Mr. Stokes received a sentence of 240 months saving him from 52-125 months in prison.

Green, D. - NLPA prepared an appeal brief in this case. During April the appeal was

decided and the judgement vacated and remanded back to the District Court for re-sentencing for possible Booker issues.

Tate, E. - NLPA prepared this appeal in which the case was also vacated and remanded back to the District Court for re-sentencing based on Booker.

Smith, T.- NLPA prepared research on Mr. Smith's appeal. The Court of Appeals ruled in favor of Mr. Smith and vacated the judgement remanding the case back to the District Court for re-sentencing based on Booker.

Fish, J. - In the Fish case NLPA was hired by counsel to assist with a Petition for Writ of Cert. The case was remanded to the Court of Appeals for review of Booker application.

Clark, R. - NLPA assisted Mr. Clark and his counsel with his sentencing research. His PSI recommended a guideline range of 292-365. At sentencing he received 236 months - saving him more than 5 years in prison.

Chairez, F. - NLPA was hired to assist counsel with sentencing research to fight the 135-168 month sentence that the PSI was recommending. Mr. Chairez received 121 months. This saved him more than a year in prison.

Howard, C. - NLPA assisted counsel in the preparation of an appeal in this case. One of our biggest arguments was the Booker decision. The decision on appeal was to vacate and remand the case for re-sentencing in light of Booker.

Harris, A. - NLPA Assisted counsel in trying to get Mr. Harris' time reduced in light of cooperation provided by the defendant. Mr. Harris' time was cut.

Stone, J. - NLPA assisted counsel in fighting a guideline recommendation of 324-405 months in the PSI report. At sentencing they gave Mr. Stone 210 months - saving him between 114-195 months in prison.

Lewis, S.- NLPA was hired to prepare an appeal for Mr. Lewis' counsel. Using the argument of Booker Mr. Lewis' appeal was granted and remanded for re-sentencing in light of this issue.

Boudreaux, A.- NLPA prepared appeal research in the case of Mr. Boudreaux. The appeal was granted and remanded to the District Court.

Lewis, M.- NLPA prepared sentencing research for Mr. Lewis' counsel to reduce the 262-327 month recommendation of the PSI report. Mr. Lewis, at sentencing, received only 60 months. This saved him

almost twenty years in prison!

Duke, A. - NLPA assisted Mr. Duke and his counsel in trying to get his restitution reduced. His current restitution amount was \$104,000.00 With the research that NLPA prepared Mr. Duke's restitution was reduced to \$28,000.00. We have saved him \$76,000.00!

Smith, R. - NLPA prepared a Petition for Writ of Certiorari for Mr. Smith's counsel. His petition was granted and remanded for further consideration.

James, R. - NLPA prepared for Mr. James' counsel back in 2004 a Blakely argument for him to use in the Court of Appeals. The court's decision was handed down in June and they have ordered a re-sentencing to take place on the case for Mr. James.

Kotula, M - NLPA assisted counsel with a sentencing memorandum for Mr. Kotula's case. His PSI recommended a guideline range of 63-78 months. At his June sentencing hearing, Mr. Kotula received a 60 month sentence.

Vasseghi, B - NLPA assisted Mr. Vasseghi's counsel in preparing sentencing research. His PSI report recommended a range of an astonishing 324-405 months. After some very extensive research on the case, Mr. Vasseghi called to advise that he received a sentence of 240 months - 7 to 20 years less than he otherwise could have been serving!

Cuevas, J. - NLPA assisted counsel in 2003 with research on Mr. Cuevas' appeal. After much time and many visits to PACER we were able to determine that Mr. Cuevas' case has, in fact, been remanded to the District Court.

Everett, P. - Mr. Everett's family contracted NLPA to assist his attorney in fighting a guideline range of 300 months to life in prison. At his sentencing the judge imposed 240 months saving him the minimum of 5 years and the countless years involved in a life sentence.

Broom, A. - NLPA assisted Mr. Broom and his counsel with his sentencing research. We determined that his PSI recommended a guideline range of 135 -168 months. Mr. Broom was sentenced to only 87 months - saving him 4 - 7 years in prison.

Smith, D. - Mr. Smith hired NLPA to prepare a case evaluation. That evaluation advised that there several options to pursue in the State of Ohio courts. His family immediately has us get started in preparing research for him to file a delayed appeal and a motion for leave of appeal. The courts granted on his motion for a delayed appeal.

Louis, W. - NLPA assisted Mr. Louis' counsel in preparing sentencing research to fight his PSI recommendation of 121-151 months. His sentencing took place on July 25, 2005 and he received a term of 108 months - saving him 13-43 months in prison.

Stratton, J. - NLPA assisted counsel for Mr. Stratton with his appeal. NLPA prepared much argument concerning the Booker decision. His appeal was recently remanded to the District Court for re-sentencing.

Debreus, F. - In a not so common event, NLPA was successful in the case of Mr. Debreus in the Court of Appeals. NLPA received authorization from Mr. Debreus' court appointed attorney to provide appeal research to him. Unfortunately, when the deadline of the Appellant's brief approached counsel he filed an Anders Brief rather than using NLPA's research and ultimately also filed a motion to withdraw as counsel. Because counsel had issued copies of our research copies to his client, Mr. Debreus used our research to prepare *his own* brief supplementing the Anders Brief filed by his counsel. As luck would have it, his appeal was recently granted and his case remanded for re-sentencing.

Clark, R. - NLPA assisted counsel in preparing research on an appeal in Mr. Clark's Meth conspiracy case. The appeal has now been granted and the case remanded for a re-sentencing.

Sobitan, B. - NLPA assisted counsel for Mr. Sobitan in the Court of Appeals by preparing research including Booker applicability. Recently the Court of Appeals agreed with our brief and remanded the case back to the District Court for re-sentencing.

Thomas, M. - NLPA assisted in the case of Mr. Thomas by preparing sentencing research for his counsel to help fight a PSI that recommended a guideline range of 135-168 months. At his recent hearing the court imposed a sentencing of only 87 months upon Mr. Thomas - thus saving him 4-8 years in prison.

Steffen, N. - NLPA assisted with sentencing research on Mr. Steffen's case to help attack his guideline recommendation of 77-96 months. With our research his attorney was able to achieve for him a sentence of 84 months which was one year less than the high end of his PSI recommendation. Although this victory was not under the PSI recommendation, as part of our assistance NLPA also assisted counsel with Institutional Designation as part of our sentencing research for Mr. Steffen to be placed in a Florida BOP facility which has been successful.

Stratton, J. - NLPA was hired by counsel to assist with the appeal of Mr. Stratton's sentence. His appeal was recently granted and his case remanded back to the District Court for a re-sentencing pursuant to US v. Booker.

Harris, D. - NLPA was hired to assist Mr. Harris' counsel in preparing research for his sentencing to help attack the 121-151 month recommendation outlined in the PSI. At his sentencing, Mr. Harris received 90 mos - saving him 31-61 months in prison!

Baughm, R. -NLPA was hired to assist with Mr. Baugham's appeal. Although we have not received the court's formal decision yet in this matter, the attorney for Mr. Baugham has called NLPA to advise that the government has conceded that Mr. Baugham is entitled to a re-sentencing. We are expecting the court's decision affirming this soon.

Sidlauskas, R. - NLPA was contracted to assist Mr. Sidlauskas' attorney with the sentencing in his case. His PSI recommended 121-151 months. At his sentencing Mr. Sidlauskas received 87 months - saving him 3 - 5 years in prison.

White, M. - This may be the biggest victory for NLPA this year. NLPA assisted Mr. White's attorney with sentencing in his case to help fight his charges and PSI recommendation of 97-121 months **with** a statutory minimum of 120 months. Our attorneys prepared research based on the safety valve issue and Booker and, at his recent sentencing Mr. White was sentenced to...**TIME SERVED!**

Hackney, K. - NLPA was hired to assist Mr. Hackney and his counsel in fighting a PSI recommendation of 235-293 months. At his sentencing Mr. Hackney received a sentence of 216 months - saving him 19-77 months in prison.

Beard, H. - NLPA was contracted to assist Mr. Beard's counsel with his appeal. We prepared argumentation raising Booker issues. His appeal was granted and remanded for re-sentencing based on Booker.

De La O, G. - NLPA was hired to assist Mr. De La O's counsel with his sentencing to fight a PSI recommendation of 327 months. Mr. De La O received a sentence of 112 months - saving him well over 17 years in prison!

Evans, M -NLPA assisted Mr. Evans' counsel with a suppression motion concerning a wire tap which was ultimately granted.

Buffin, D -NLPA assisted Mr. Buffin's attorney in preparing sentencing research to help fight a recommended life sentence. Mr.

Buffin received at his sentencing a term of 15 years!

Flynn, W. - NLPA assisted counsel for Mr. Flynn in fighting a PSI recommendation of 360-life. Mr. Flynn received a sentence of only received 9 years!!!!

Lee, T - NLPA assisted Mr. Lee's counsel with research for his sentencing. His PSI recommended a guideline range of 188-235 months. At sentencing Mr. Lee received a term of 152 months and the judge also recommended him for the drug treatment program. With NLPA's help Mr. Lee saved 3-6 years in prison!

Glover, J. - NLPA assisted counsel in the preparation of an appeal to the Eleventh Circuit. NLPA received notice that in November, Mr. Glover's appeal was granted and remanded for re-sentencing.

Smith, M. - NLPA assisted counsel with an appeal to the Sixth Circuit in this case. NLPA argued among other issues, the Booker decision. We received confirmation that Mr. Smith's appeal was granted based on Booker and remanded for re-sentencing.

Montan, L. - NLPA assisted Mr. Montan's counsel with research for the sentencing in his case to help fight a PSI recommending 188-235 months. At his sentencing he received 120 months - saving him 6-10 years in prison!

Jordan, W. - NLPA assisted Mr. Jordan and his counsel in securing a sentence of 222 months. The PSI recommended 262 months. This was a victory saving Mr. Jordan 40 months (more than 3 years) in prison.

Tate, E. - NLPA assisted Mr. Tate and his counsel **after** assisting with a victorious appeal. Mr. Tate was facing a re-sentencing recommendation of 292 months. He received a reduced sentence of 262 Months - saving him 30 months in prison.

Richardson, K. - NLPA assisted counsel for Mr. Richardson in fighting a PSI recommendation of 188-235 months in prison. With our help, Mr. Richardson received a sentence of 108 months in prison - saving him more than 80 months!!!

Ubele, E. - Mr. Ubele needed assistance in fighting his case in which the PSI was recommending a term of 262-327 months in prison. We provided research to counsel and were able to assist in securing him a sentence of 151 months! This saved him more than 111 months in prison!

Ramirez, S - NLPA assisted Mr. Ramirez's counsel in fighting a PSI recommendation of 168-210 months. At sentencing the court

imposed a term of 120 months in prison - saving Mr. Ramirez at least 48 months (4 years) in prison.

WHAT ABOUT BOOKER? THE BOOKER REMEDY OPINION APPLIES TO THE SENTENCING GUIDELINES

The Supreme Court has made clear that the Sixth Amendment's right to a trial by jury means that the maximum allowable sentence a judge may impose is one that is calculated "solely on the basis of facts reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004). "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'" and the additional punishment based upon those unproven facts is unconstitutional under the Sixth Amendment. Id. In other words, any fact "legally essential to the punishment" must be proven beyond a reasonable doubt to a jury or admitted by the defendant. Id.

In United States v. Booker, 125 S.Ct. 738 (2005), the Court concluded that the federal sentencing guidelines violated that rule. Booker, 125 S.Ct. At 746, 749-50. But nothing in the Booker decision undermined the essential holdings of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and Blakely. Instead, Booker reinforced the Blakely decision word-for-word.

Accordingly, we reaffirm our holding in Apprendi: Any fact (other than prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proven to a jury beyond a reasonable doubt.

Booker, 125 S.Ct. At 756. As a result, the fundamental holdings of Blakely and the Substantive Opinion of Booker remain: no district court judge may impose punishment beyond what is authorized by admission or a jury verdict.

In light of the Substantive Opinion's determination that the guidelines were unconstitutional as applied, the Booker Court was faced with a decision on how to remedy the error. It had at least three options: render the guidelines inapplicable in their entirety, graft onto the guidelines the requirement that sentence increases must be admitted or proven to a jury, or sever and excise the offending portion of portions of the guidelines. Booker, 125 S.Ct. At 756.

The first option would have ensured absolutely that Sixth Amendment error would be avoided in all sentencing scenarios. If the sentencing guidelines were completely eliminated, application of the rule of Blakely in

federal cases would be rather easy because the "statutory maximum" would be the maximum articulated in the statute of conviction.

For example, a defendant convicted by a jury of distributing crack cocaine is subject to a guideline sentence range of 63-78 months. At sentencing, the government can still encourage the judge to take into account quantities of crack cocaine the jury had not considered or found. Those additional quantities can substantially increase the sentence beyond the 78 months. The difference since Booker is that the judge may choose to increase the sentence based on the findings at sentencing or not. This is because the guidelines are advisory and the maximum sentence the judge may impose based on the jury verdict is no longer the top of the guideline range, 78 months, but instead a 40 year statutory maximum sentence.

The second option also would have ensured the Sixth Amendment error would be avoided in all sentencing scenarios. If the government were required to charge relevant conduct and enhancements in the indictment, and if either the government proved charged relevant conduct and enhancements beyond a reasonable doubt or if the defendant knowingly admitted relevant conduct and enhancements, the sentencing guidelines would clearly satisfy the constitutional requirements.

Of course, the Booker Court did not eliminate the sentencing guidelines or graft Sixth Amendment requirements onto the guidelines. Booker, 125 S.Ct. at 760-63. Instead, the Booker Court insisted that the guidelines remain as close as possible to their previous form because, the Court concluded, Congress wanted the system to continue in some fashion to retain the goal of uniformity. "Congress' basic goal in passing the [Sentencing Reform Act] was to move the sentencing system in the direct of increased uniformity." Booker, 125 S.Ct. at 761, citing 28 U.S.C. § 991(b)(1)(B).

The Remedy Opinion's choice of remedy was simply to exercise a section of the Sentencing Reform Act that made the guidelines mandatory. Booker, 125 S.Ct. at 756-57. As modified, the Remedy Opinion concluded that he guidelines would become "effectively advisory." Id. at 757.

But even in declaring the guidelines "advisory" rather than mandatory, the Remedy Opinion made clear that the guidelines must be considered. Booker, 125 S. Ct. at 757. ("So modified, the Federal Sentencing Act * * * makes the Guidelines effectively advisory * * * requir[ing] a sentencing court to consider the Guideline ranges * * * but it permits the court to tailor the sentence in light of other statutory concerns.). Critically important to the Remedy Opinion "is the preservation of the entirety of the Sentencing Reform Act with the exception

of only two severed provisions." United States v. Crosby, 397 F.3d 103, 110 (2nd Cir. 2005). "The remainder of the Act" and, therefore, the guideline system, "function[s] independently." Booker, 125 S. Ct. 1476 (1987).

Accordingly, sentencing judges remain under a duty to consider and follow the appropriate guideline range and the guidelines' policy statements. 18 U.S.C. § 3553(a)(4), and (a)(5). This means that sentencing judges will be required to determine the applicable guideline range and consideration of applicable policy statements. Crosby, 397 F.3d at 113. The sentencing judge will then need to decide whether to impose a guideline sentence or non-guideline sentence. Id. In other words, the district court must consider the guidelines in all cases and may choose to impose a sentence based upon the guidelines.

The Booker majority that drafted the Remedy Opinion did not clearly state that all disputed facts considered at sentencing must be proven by the criminal "beyond a reasonable doubt" standard. Some unfortunately seem to suggest that it is the preponderance of the evidence standard of proof. While other federal defenders have argued that the doctrine of constructional avoidance supports continued use of the reasonable doubt standard. United States v. Kikumura, 918 F.2d 1084, 110-102 (3rd Cir. 1990).

One court recognized the need for a *heightened* standard of proof. In United States v. Huerta-Rodriguez, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005), Judge Bataillon of the District of Nebraska held that a court must afford the defendant procedural due process protection under the Fifth and Sixth Amendment. Toward that aim, the court would consider the guidelines, while acknowledging structural and practical problems in their application. As such, to ensure compliance with due process, Judge Bataillon will continue "to require the facts that enhance a sentence are properly pled in the indictment or information, and either admitted, or submitted to a jury (or the court if the right to trial by jury is waived) for determination by proof beyond a reasonable doubt." Id. The Court stated that "although Booker's Sixth Amendment holding did not require such a procedure, it is not precluded. It is up to this court to determine a reasonable sentence and the court will not rely on facts proved to a mere preponderance of evidence to increase a defendant's sentence to any significant degree." Id.

Regardless of the legal solution of this issue, Apprendi has raised the consciousness of the parties and courts of the dubious enhancements based on shaky evidence. One would hope that a district court judge who has been through the Apprendi experience would not apply the old "preponderance" standard to increase a

defendant's sentence.

NLPA News Law Update

IS MANDATORY DEPORTATION FOR BEING CONVICTED OF AN AGGRAVATED FELONY REALLY MANDATORY?

Being faced with deportation from the United States after being convicted of a crime can be a very scary position for immigrants. Many legal permanent residents of the United States have been here since they were very young, as young as a few months old, but have never become naturalized citizens. They are therefore not granted the protections that naturalized citizens are, and are subject to being deported.

When they are thereafter convicted of an aggravated felony under 8 U.S.C. § 1227 the consequences on their immigration status can be ground shaking. Not only will they be imprisoned for their crime, but before they are released from prison, the U. S. government will begin proceedings to have them removed from the country as soon as their sentence is completed. Many people who have lived 99.9% of their lives in the United States are then forced to return to their country of birth, sent away from their wives, children, family, friends, and the only life that they have ever known. They are often sent back to countries where, because they were deported for a crime, they are arrested, imprisoned indefinitely, tortured or killed, all in a country which they may have spent as little as the first few weeks of their life in. Often deportees do not know anyone in their "home" country and do not speak the language. They are not familiar with the local customs, laws, and regulation, which can often get them into hot water very quickly.

It is important for those facing deportation to know that they have rights which can be protected, but often those facing deportation must take affirmative steps to protect those rights. For instance there is no requirement that those facing deportation be afforded legal counsel, the government can have you appear before an immigration judge and order your removal from the country without you ever having an attorney present.

Those facing deportation therefore, must do everything in their power to protect their own rights, and fight to stay in the United States, so as not to lose everything that they have worked so hard for.

As it turns out "mandatory" deportation may not be so mandatory. One example of this is the case of Fredeline Dauphin. Removal proceeding were brought against her after she was convicted of an aggravated felony. She fought the removal however, and proved to an immigration court that those with criminal convictions who were deported to Haiti were indefinitely detained in Haitian jails, under horrible conditions, and often tortured. Mrs. Dauphin was granted deferral of removal under the Convention Against Torture, which under

International Law barred the United States Government from deporting her back to Haiti. The DHS appealed the immigration judge's decision to the Board of Immigration Appeals, which upheld the deferral of removal. Soon after Ms. Dauphin was released back to her family in the U.S. A similar defense may be available to others who are set to be deported to countries with unduly harsh conditions. The DHS will grant protection under CAT whenever it determines that an alien is more likely than not to be tortured in the country of removal, 8 C.F.R. § 208.16(c)(4), though the burden of proof is on the applicant for withholding of removal to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2).

If you are going to be deported and would like NLPA to help with protecting your rights please contact us at _____.
See Thelemaque v. Ashcroft, 363 F. Supp. 2d 198 (D. Conn. 2005)

See the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, art. 1(1), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51.

FORFEITURE AND CONSTITUTIONAL RIGHTS

Criminal proceedings often involve more than the incarceration of a suspect. Along with this incarceration is the seizure of the suspect's property, which can lead to a forfeiture of the property. Although it often seems that the government acts without regard to any constraint on seizing such property, there are well-established laws that limit the government's reach in forfeiture.

As forfeiture is a "quasi-criminal" proceeding, evidence seized in such proceedings is subject to the exclusionary rule. One 1958 Plymouth Sedan v. Comm. of Pennsylvania, 380 U.S. 693 (1965). The exclusionary rule states that if evidence is seized illegally by the police, the evidence obtained as a result of such search will be barred from admission at a defendant's trial. Wong Sun v. United States, 371 U.S. 471, 484-87(1963). As such, law enforcement officials must abide by the restrictions of the Fourth Amendment's rules regarding searches and seizures in forfeiture situations. Further, law enforcement officials must possess the necessary probable cause to seize property pursuant to forfeiture, in that officials must believe that the property seized will ultimately be proved to be forfeitable. United States v. Monsanto, 491 U.S. 600 (1989). Property is forfeitable, and probable cause is satisfied, where there is a nexus between the property and the illegal activity. Importantly, the burden of showing probable cause, as well as the legality of the seizure, rests with the government. United States v. Santiago, 227 F.3d 902 (7th Cir. 2000). Further, government must prove that the property is subject to criminal forfeiture by a preponderance of the evidence. United States v. Smith, 966 F.2d 1045 (6th Cir. 1992).

As important is that one must possess standing in order to challenge a forfeiture. Standing exists where the claimant has an ownership interest in the property at issue, which can be evidenced via actual possession, control, title, or financial stake. United States v. 1998 BMW "I" Convertible, 235 F.3d 397 (8th Cir. 2000). Once standing is established, an individual subject to forfeiture has a due process right, as guaranteed by the Fifth Amendment to the United States Constitution, to prior notice and a fair hearing regarding the forfeiture issue. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).

Once at the hearing, the individual whose property has been seized may raise several defenses in order to re-obtain his property. Of course, it can be argued that the seized property is not tied in any manner to the underlying criminal conduct. Further, it can be argued that the forfeiture violated the Eighth Amendment to the United States Constitution. In limited circumstances, forfeitures have been held to be unduly punitive pursuant to the Eighth Amendment. United States v. 817 N.E. 29th Drive, Wilton Manors, Florida, 175 F.3d 1304 (11th Cir. 1999). This defense has been promulgated as forfeiture has been viewed as payment to a sovereign as punishment for an offense. As such, the payment is subject to the Eighth Amendment's prohibition against the levying of excessive fines. Austin v. United States, 509 U.S. 602 (1993). Punitive forfeiture will generally be held to violate the Excessive Fines Clause if the forfeiture is grossly disproportional to the gravity of the offense. United States v. Ahmad, 213 F.3d 805 (4th Cir. 2000). Factors to be examined in determining whether a forfeiture is grossly disproportional to the offense committed are: (1) the seriousness of the offense; (2) the personal benefit reaped by the defendant in engaging in criminal activity; (3) the defendants motive and culpability; and (4) the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct. United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997). Further factors that are to be evaluated when making a determination as to disproportionality include: (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of the forfeiture on innocent third parties) in comparison to the sentence that could be imposed on the defendant; and (2) the relationship between the property and the offense, including whether use of the property in the offense was: (a) important to the success of the illegal activity; (b) deliberate and planned or merely incidental and fortuitous; and (c) temporally or spatially extensive. United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995).

Unfortunately, the penalties imposed in a criminal forfeiture do not fall within the purview of the Sixth Amendment's right to a jury. Libretti v. United States, 516 U.S. 29 (1995). However, with the constantly expanding role of the jury in sentencing matters via the decisions in Blakely v. Washington, 124 S.Ct. 2531 (2004) and United States v. Booker, 125 S.Ct. 738 (2005), it is hoped that the jury will eventually become part of the equation in determining appropriate forfeitures. Also unfortunate is the fact that an inquiry pursuant to Rule 11 of the Federal Rules of Criminal Procedure has been deemed unnecessary to guarantee that a

forfeiture agreement is knowing and voluntary. See Libretti.

To best understand the view of the government and the courts regarding forfeiture, especially in drug cases, it is helpful to read the decision issued in United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386 (10th Cir. 1997). In that case, the court noted that the forfeiture of proceeds of illegal drug sales serves to reimburse the government for the costs of detection, investigation, and prosecution of drug traffickers and to reimburse society for the costs of combating the allure of illegal drugs, caring for the victims of the criminal drug trade, and for lost productivity.

Clearly, both the government and the judiciary allow for the liberal use of forfeiture to effectuate what is deemed in society's best interests. With the help of licensed legal assistance, forfeiture can be combated and the overreaching arm of the federal government can be kept at bay while the constitutional rights guaranteed to all American citizens are protected. However, only in understanding one's rights can the forfeiture battle be won!

NEW CASES - DECISIONS YOU CAN USE

Defendant's statement during interrogation that he was done talking was adequate to invoke his right to silence, regardless of his motive. Munson v. State, 2005 WL 3081632 (Alaska 2005).

Defendant's statement during custodial interrogation, "Well, I'm done talkin' then," was adequate to invoke defendant's constitutional right to silence, notwithstanding that his request may have been motivated by immediate fear of retaliation from a co-defendant rather than a fear of self-incrimination. Following defendant's unambiguous statement that he wanted to stop the interrogation, the interrogating officer was required to scrupulously honor defendant's request, regardless of what defendant's subjective intent might have been.

Petitioner was "in custody" for Miranda purposes when he first confessed. Holquin v. Harrison, 2005 WL 2257901 (ND Cal. 2005).

Despite a lack of handcuffs, the petitioner, a special education student, was "in custody" for Miranda purposes when he was brought involuntarily to the vice-principle's office because he was trespassing, left with a police officer who never told him that he was free to leave and questioned for nearly an hour by three officers, who made it clear to the petitioner that they suspected him of being a killer and that he was the focus of their investigation. A reasonable person in the petitioner's position would not have believed that he could simply get up and leave while being accused by three officers of having committed a murder.

Agents lacked probable cause to arrest defendant who appeared in lot contemporaneously with person carrying stolen checks. US v. Collins, 2005 WL 2837515 (9th Cir. 2005)

In a case in which much of the government's evidence as discredited, agents lacked probable cause to believe that a defendant was committing, or had committed a criminal offense. Thus, they lacked probable cause to arrest him. They were expecting a person or persons to arrive in a parking lot who would be carrying stolen checks, and at least one person arrived and was carrying checks. However, there was no connection between that person and the defendant other than the fact that they appeared in a public parking lot relatively contemporaneously.

Trial court did not fulfill its duty to inquire into communication conflict between defendant and counsel. Daniels v. Woodford, 2005 WL 2861623 (9th Cir. 2005)

A state trial court did not fulfill its duty under the Sixth Amendment to inquire into a conflict between appointed attorneys and the defendant who was charged with capital murder, by instructing the defendant that he should discuss the conflict with those attorneys. The defendant informed the court that he did not trust his attorneys and could not communicate with them and the court never questioned the defendant or his attorneys individually and did not call any witnesses on that issue.

A retrial on a lesser-included offense after an acquittal on the greater offense was barred by the double jeopardy clause. People v. Hodge, 2005 NY Slip Op. 25440, 2005 WL 2681018 (NY Sup 2005)

Addressing an issue of apparent first impression, the Supreme Court held that the double jeopardy clause precluded a retrial on the lesser included offense of third degree weapon possession after the jury acquitted the defendant of the greater charge of third degree weapon possession and was unable to reach a verdict on the lesser charge. Rather than applying a theoretical and purely logical test of repugnancy of the verdicts, the court ruled on the ground that there was no reasonable view of the evidence under which the defendant could have been found guilty of the lesser-included offense without also being guilty of the greater offense. The only elements distinguishing the greater from the lesser offense were that the firearm was loaded and that the possession was apart from the defendant's home or place of business and the only evidence about the recovery of gun was the integrated testimony of the arresting officer that the loaded gun was recovered from the vehicle that the defendant was driving.

Evidence was not sufficient to convict defendant of possession of cocaine as a principal in the second degree. Cottman v. State, 2005 WL 2839749 (Md. Ct. Spec. App. 2005)

The evidence was sufficient to convict a defendant of possession of cocaine as a principal in the second degree. In this case, the defendant was convicted of possession of cocaine and asserted a claim on appeal that the evidence was insufficient to support the conviction, claiming that he could not be convicted under aiding and abetting theory. In an issue of first impression, the appellate court found that the evidence was sufficient to support a conviction under such theory, noting that nothing in the statutes criminalizing the possession of controlled dangerous substances precluded the applications of general accomplice liability law. In sustaining the defendant's conviction, the court found that the evidence indicated that the defendant assisted the drug seller in selling cocaine to an undercover detective. The court found that the defendant was always in close proximity to drug seller, who physically transported the cocaine in her mouth, that the defendant engaged in the determination of the undercover detective's good faith prior to the sale and that the defendant acted as a "lookout" during the sale.

Evidence did not establish that defendant's teenage son had authority to give valid consent to search of defendant's bedroom. State v. McKinney, 2005 WL 2715864 (Ga. Ct. App. 2005)

The evidence failed to establish that a defendant's teenage son possessed common authority over the defendant's bedroom, such that he could have given valid consent to a search of the defendant's bedroom. Although the teenager lived in the mobile home where the search was conducted, he did not sleep in or use his father's bedroom for any purpose, he did not have any belongings in the room at any point, he never went into his father's bedroom and never invited other people into it, and he did not enter his father's bedroom at any point on the day of the search, before or while the police were present. And the responding officer had minimal interaction with the teenager, he did not ask the teenager whether he was allowed to enter the defendant's bedroom, whether he had free access to the home, or whether he was restricted from entering particular rooms, and he made no inquiry concerning the teenager's access to or control over the mobile home.

Police officer exceeded scope of defendant's consent to search by damaging vehicle to find hidden compartment. People v. Gomez, 2005 NY Slip Op. 7828, 2005 WL 2759218 (NY, 2005)

A police officer exceeded the scope of a defendant's consent to search his automobile during a traffic stop when the officer damaged the vehicle by removing attached carpeting and physically altering sheet metal with a crowbar to reach a compartment hidden in the gas tank. A reasonable person would not have understood the officer's request to search to include prying open a hole in the floorboard and gas tank with a crowbar. In reaching this result the New York Court of Appeals held that a general consent to search alone cannot justify a search that impairs the structural integrity of a vehicle or that results in the vehicle being returned in a materially different manner than it was found.

Supreme Court grants Certiorari to review constitutionality of policy denying inmates access to newspapers, magazines and photographs. Beard v. Banks, 74 USLW 3014, 74 USLW 3299, 74 USLW 3301, 2005 WL 3027718 (US 2005)

The United States Supreme Court has agreed to decide whether a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and good behavior violates First Amendment under the standards set forth in Turner v. Safley, 482 US 78, 107 S.Ct. 2254, 96 L.Ed. 2d 64 (1987) and Overton v. Bazetta, 539 US 126, 123 S.Ct. 2162, 156 L.Ed. 2d 162 (2003). Under Turner a court assesses the reasonableness of a prison regulation that impinges on inmates' constitutional rights by considering (1) Whether there is a valid, rational connection between the regulation and the legitimate governmental interest put forward to justify it, (2) Whether there are alternative means of exercising the right that remain open to inmates, (3) The impact that accommodations of the asserted constitutional right will have on guards, other inmates, and prison resources generally and; (4) Whether there are ready alternatives to the regulation that fully accommodate inmates' rights at a *de minimis* cost to valid penological interests.

Prosecutor's improper rebuttal argument resulted in substantial prejudice to defendant, thus warranting reversal. Fearwell v. US, 2005 WL 3005741 (DC 2005)

The prosecutor's improper rebuttal argument resulted in substantial prejudice to the defendant, thus warranting reversal in the prosecution for willfully failing to appear in court. The prosecutor stated that the defendant told the jury he "chose" not to come to court, despite the fact that the defendant testified he had no choice and was unable to attend court due to his poor health. The prosecutor's actions were grave in light of the fact that the prosecutor's statement had a direct relationship to the issue of failure to appear and the defendant had no opportunity to address the prosecutor's argument after the

government's rebuttal argument. Additionally the judge's instruction was insufficient to alert the jury to the prosecutor's clear mischaracterization of the evidence. Finally, the government's evidence on the failure to appear charge was not strong. Thus, the prosecutor's rebuttal statement mischaracterizing the defendant's testimony rose to the level of "substantial prejudice".

Counsel's total failure to prepare for penalty phase of capital trial constituted ineffective assistance. Marshall v. Cathel, 2005 WL 2861987 (3d Cir. 2005)

Petitioner's counsel's total failure to prepare for the penalty phase of capital murder trial constituted unconstitutionally ineffective assistance. Insofar, as counsel failed to prepare any witnesses or conduct any investigation into potential penalty phase mitigating evidence or testimony, counsel's representation was objectively unreasonable, and there was a reasonable probability that the outcome of the penalty phase of petitioner's trial would have been different but for counsel's objectively unreasonable performance.

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