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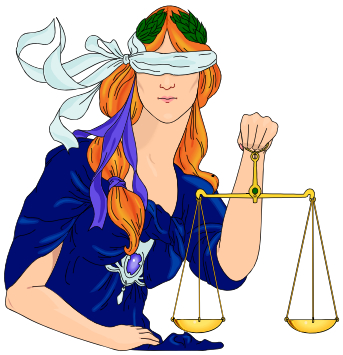

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"The pursuit of justice is a team effort."

Newsletter

Legal News Briefs for Law Libraries & Defense Attorneys

RETROACTIVE GUIDELINES EXPANDED: NEW DEVELOPMENTS IN CRACK COCAINE SENTENCING

On August 30, 2010, the Fair Sentencing Act (FSA) became effective. The Fair Sentencing Act replaced the 100-to-1 crack to powder cocaine sentencing ratio with an 18-to-1 ratio under 21 U.S.C. § 841. Unfortunately, Congress did not act to have this law applied retroactively, meaning that those convicted and sentenced prior to the enactment of the law have been in legal limbo, having to argue for the common sense, retroactive application of the Fair Sentencing Act.

Fortunately, the United States Supreme Court has recently issued a decision in Dorsey v. United States (case no. 11-5683), 2012 U.S. LEXIS 4664 (June 21, 2012) that serves to grant relief form those involved with crack cocaine in the federal justice system. In Dorsey, two defendants were convicted of selling crack cocaine, with the offenses occurring before enactment of the Fair Sentencing Act. Both defendants were sentenced after August 30, 2010, the effective date of the FSA. The trial court ruled, in the cases of both defendants, that the FSA did not apply and would not apply to any defendants who committed their crimes prior to August 30, 2010. The trial court's ruling was upheld by the United States Court of Appeals for the Seventh Circuit. However, the United States vacated the rulings of the Seventh Circuit. The Supreme Court stated that the FSA applied to defendants who committed their crimes before August 30, 2010, but were sentenced after that date.

The Court's decision was based upon the finding that six considerations, taken together, made it clear that Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded August 30, 2010, but who were sentenced after that date. First, the 1871 saving statute permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act.

Second, the Sentencing Reform Act sets forth a special and different background principle. That statute says that when "determining the particular sentence to be imposed" in an initial sentencing, the sentencing court "shall consider," among other things, the "sentencing range" established by the Guidelines that are "in effect on the date the defendant is sentenced." 18 U.S.C. §3553(a)(4)(A)(ii). Although the Constitution's Ex Post Facto Clause, Art. I, §9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties. The Sentencing Commission has consequently instructed sentencing judges to "use

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the Guidelines Manual in effect on the date that the defendant is sentenced," regardless of when the defendant committed the offense, unless doing so "would violate the ex post facto clause." U.S.S.G. §1B1.11. And therefore when the Commission adopts new, lower Guidelines amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter.

Third, language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act background principle here. A section of the Fair Sentencing Act entitled "Emergency Authority for United States Sentencing Commission" required the Commission to promulgate "as soon as practicable" conforming amendment" to the Guidelines that "achieve consistency with other guideline provisions and applicable law." §8, 124 Stat. 2374. Read most naturally, "applicable law" refers to the law as changed by the Fair Sentencing Act, including the provision reducing the crack mandatory minimums. §2(a), id., at 2372.

Fourth, applying the 1986 Drug Act's old mandatory minimums to the post-August 30 sentencing of pre-August 30 offenders would create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent.

Fifth, not to apply the Fair Sentencing Act "would do more than preserve a disproportionate status quo; it would make matters worse. It would create new anomalies--new sets of disproportionate sentences--not previously present."

Sixth, the Supreme Court was unable to find any strong countervailing consideration to a broad application of the FSA, a position held by NLPA since the enactment of the Fair Sentencing Act and argued many times on behalf of our clients!.

Clearly, it is an exciting time in the federal justice system, as the federal government continues to rapidly erase years of unfair and unconscionable sentencing practices for those involved with crack cocaine. As with all issues involved in a criminal case, NLPA has been at the fore in protecting defendants' rights, from the time of indictment until all avenues of relief have been pursued. Due to its long tradition of criminal research, NLPA is in a position to assist with the preparation of the necessary motions to obtain a fair sentence. Should you have concerns that you are entitled to a lesser sentence based upon involvement with crack cocaine, contact NLPA immediately, and we will help you in your fight for justice!

NLPA CONTINUES A TREND OF EXCELLENCE - A REFLECTION ON THE SUCCESSFUL OUTCOMES WE HELPED TO ACHIEVE DURING THE SECOND QUARTER OF 2012:

If you follow our newsletter releases then you probably already know that in 2011 we announced we had helped save our clients more than 150 years and countless Life sentences in 2011. During our second quarter in 2012 the positive results are continuing their trend. Take a look at what we've been able to help accomplish for our clients during the second quarter of 2012:

Gage, S - NLPA assisted Attorney James Belt in preparing for sentencing in the case of Mr. Gage. The case was heard in the USDC ED TX (Sherman) (Case No. 4:09-cr-00087-9) where Mr. Gage was charged with Conspiracy to Manufacture, Distribute or Possess with Intent to Distribute Cocaine, Cocaine Base and Marijuana. Mr. Gage was facing 360 to Life. Counsel advises that at the sentencing the court imposed 360 months based upon arguments raised to avoid the Life sentence.

Hatch, T - NLPA assisted counsel in the case Torrence Hatch aka rapper, Lil' Boosie who was charged with first degree murder in the State of Louisiana, East Baton Rouge Parish (Case Nos. 06-10-0603, 06-10-0605, 06-10-0607, 07-11-0383). One of the things NLPA did was to provide a jury questionnaire and voir dire questions to be used by counsel in selecting the best possible jurors from the jury pool to ensure that Lil' Boosie would receive a fair trial. This strategy was successful in helping Lil' Boosie have a jury of his peers who were impartial and willing to give him a fair hearing. As a result, the jury was able to see through the government's efforts to incriminate Mr. Hatch with their unfounded allegations and on Friday, May 11, 2012 after six days of testimony and one hour of deliberations, Torrence Hatch aka Lil' Boosie was found not guilty!

McCaslin, A - NLPA assisted the firm of Robinson & Brandt, PSC in the case of Mr. McCaslin who was charged in the USDC, Middle District of Florida (Tampa) Case No: 8:10-cr-00332-1 with Sell, Distribute, Dispense Narcotics. Mr. McCaslin entered into a plea of guilty in the case. Accordingly, NLPA assisted counsel in the preparation of a §2255 motion. The court agreed with the arguments

and granted the motion. They issued a new judgment which carried the same sentence but reinstated Mr. McCaslin's right to appeal. Accordingly, NLPA is now working with counsel to present the appeal in the U.S. Court of Appeals - Wish us luck!

Wonson, M - NLPA was hired to assist counsel for Mr. Wonson with his direct appeal. His case was heard in the DC Superior Court Case where he was charged with First Degree Murder While Armed; Assault with Intent to Kill While Armed; Possession of Firearm During the Commission of a Crime of Violence; Felony Destruction of Property. Mr. Wonson was sentenced to 70 years in 2003 for the case. Though many years later, the court of appeals finally granted the appeal and remanded the case for a new trial.

Kimsey, W - NLPA was hired to assist Robinson & Brandt in the preparation of a writ of error coram nobis. His case was heard in the State of Tennessee, Grainger County Circuit Court (Orig. Crim. Nos. 3515, 3516) where he was charged with child molestation. After pleading guilty, Mr. Kimsey was sentenced in 2003 to 12 years. Counsel contacted NLPA to advise that although the writ of error coram nobis did not exonerate the defendant, the court decision was favorable.

Wilson, F - NLPA assisted counsel for Mr. Wilson in the preparation of research to help keep his sentence at the lowest possible level. His case was heard in the USDC SC (Florence) in case number 4:11-cr-02161-14 where he was charged with Conspiracy to Distribute Narcotics (Cocaine and cocaine base). Mr. Wilson had entered into a plea of guilty in the case and a guideline range of 78 months per his PSI report. At the sentencing, however, the judge imposed only 41 months - saving Mr. Wilson more than three years in prison and after credit, giving him only 2 more years to serve if he doesn't get a further reduction for good time and drug treatment participation.

GRAHAM EXPANDED

On June 25, 2012, the United States Supreme Court issued its decision in Miller v. Alabama, 2012 U.S. LEXIS 4873 (June 25, 2012). In Miller, the Court found that the Eighth Amendment to the United States Constitution forbade a sentencing scheme that mandated life in prison without possibility of parole for juvenile offenders. The Miller decision relied upon the previously issued decision in Graham v. Florida, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Writing for a 5-to-4 majority in Graham, Justice Anthony Kennedy called life without parole an "especially harsh punishment" for a juvenile and said that while states may be permitted to keep young offenders locked up, they must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. As such, juvenile offenders could not receive a life sentence for non-murder offenses.

The Graham decision further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, the Supreme Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (plurality opinion). In Miller, the confluence of these two lines of precedent led to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment. Such would violate "the evolving standards of decency that mark the progress of a maturing society."

Based upon evolving concepts of justice, along with a view of the individual characteristics of defendants, NLPA believes that Justice Kennedy's rationale can be applied in any case in which a mitigating factor exists that would make the defendant less culpable than a similarly situated adult, including but not limited to, a difficult childhood, lack of education, or psychological difficulties. NLPA has been making such arguments since the Graham decision was issued. With the expansion of Graham by the Miller decision, NLPA will continue to be at the forefront of further attempts to expand the Graham and Miller decisions.

NLPA notes that the Court did not specifically find that the decision was retroactively applicable. Similarly, the Graham decision has yet to be applied retroactively. However, NLPA continues the fight to have these decisions expanded to all criminal defendants.

NLPA will continue to be at the forefront of arguing for such change and in assisting defendants receive fair treatment. Should you have concerns that you are entitled to a lesser sentence based upon recently announced sentencing laws, contact NLPA immediately, and we will help you in your fight for justice!

EXPANSION OF STRICKLAND V. WASHINGTON

The Sixth Amendment to the United States Constitution guarantees that criminal defendants are entitled to the assistance of counsel in presenting their defense. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to prevail on an ineffective assistance of counsel claim, the defendant must satisfy Strickland's two-prong test, demonstrating that the representation received "fell below an objective standard of reasonableness" and "a reasonable probability [exists] that, but for counsel's unprofessional errors, the results of the proceedings would have been different." Id.

Little has changed in the field of ineffective assistance of counsel claims since the Strickland decision was announced in 1984. The Strickland standard has been applied to claims regarding counsel's effectiveness during pre-trial negotiations, at sentencing, on appeal, and in plea negotiations. However, the United States Supreme Court has recently issued several decisions that serve, at long last, to expand the duties of counsel during plea negotiations beyond the base line requirements of Strickland.

Generally during plea negotiations, counsel must give objectively reasonable advice before the presumption of effectiveness will be applied. Hill v. Lockhart, 474 U.S. 52 (1985). In order to be found ineffective during plea negotiations, the defendant must show that a reasonable probability exists that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Id. With the recent decisions issued in Lafler v. Cooper, 132 S. Ct. 1376; 182 L. Ed. 2d 398 (2012) and Missouri v. Frye, 132 S. Ct. 1399; 182 L. Ed. 2d 379 (2012), the Supreme Court has expanded the reach of Strickland to force counsel to provide more competent assistance.

In Missouri v. Frye, 132 S. Ct. 1399; 182 L. Ed. 2d 379 (2012), the defendant was charged with a felony. The state prosecutor sent defense counsel a letter offering to have the charge reduced to a misdemeanor and, if the defendant pleaded guilty to that reduced charge, recommend a sentence of just 90-days in jail. But the attorney did not tell the defendant about the proposed deal, and the offer expired. The eventual sentence, following a guilty plea without any plea agreement, was three years incarceration. The United States Supreme Court found that the attorney's conduct fell below any objective reasonable standard and that the error prejudiced the defendant.

The Frye decision means that an attorney's failure to inform his client of a plea offer could be considered constitutionally ineffective performance. "Plea bargains have become so central to today's criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires." Id. In order to demonstrate that counsel was ineffective, a defendant must show that a reasonable probability exists that he would have accepted the more favorable plea offer if he had known about it, and that the plea would have been entered and accepted by the trial court.

In Lafler v. Cooper, 132 S. Ct. 1376; 182 L. Ed. 2d 398 (2012), the defendant was charged with four offenses, including assault with intent to murder. The state made a plea offer: If the defendant pleaded guilty to two charges, the state would dismiss the other two charges and recommend a sentence of 51 to 85 months incarceration. The offer was rejected, and the case went to trial. The defendant was convicted on all four counts, and was sentenced to a mandatory minimum sentence of between 185 and 360 months incarceration. The defendant claimed that, while he had wanted to take the plea offer, his attorney convinced him to reject it. The allegation was the attorney suggested that, because the victim had been shot below the waist, the state would not be able to prove that he intended to murder the victim. The state courts rejected the idea that this incredibly bad legal advice could constitute ineffective assistance, pointing out that the defendant was the one to ultimately decide to turn down the plea offer and go to trial.

After proceedings in the federal district court, the United States Court of Appeals for the Sixth Circuit found that state courts had unreasonably applied the constitutional effective assistance standards as laid out in Strickland and Hill. The Sixth Circuit concluded that the attorney had provided deficient legal counsel by advising the defendant of an incorrect legal rule, and that the defendant suffered prejudice because the sentence imposed was much longer than what had been offered in the plea deal. The Supreme Court concluded that a defendant shows prejudice if he shows a reasonable possibility exists that the outcome of the plea process would have different if he

had received competent legal advice. The Supreme Court concluded that had counsel provided competent advice, the defendant would have pleaded guilty and the trial court would have accepted that plea. To remedy the error, the Lafler Court ordered the state to re-offer the plea deal.

It is fundamental that defendants have more than just the right to counsel for plea bargaining. Defendants should be afforded effective assistance leading to the best possible plea deal. NLPA will continue to be at the forefront of arguing for such fairness. Should you have concerns that counsel has provided ineffective assistance during plea negotiations, contact NLPA immediately, and we will help you in your fight for justice!

sentencing reform in the south

Recently, several southern States have enacted sentencing reform which will serve to decrease the amount of time served in prison by criminal offenders. Sentencing reform in Missouri focuses on the role of more intensive community supervision. For example, probation officers could issue immediate, 48-hour jail stays when an offender violates a rule of supervision, such as failing a drug test. Backers of the legislation say swift punishment would get the message across better than the current system, in which minor violations accrue and then result in the offender being sent to the penitentiary.

The impetus behind the bill was largely the cost of incarcerating non-violent offenders. In a "State of the Judiciary" speech given in 2010 by Missouri Supreme Court Judge William Ray Price, it was stated that incarcerating nonviolent offenders was costing the State billions of dollars without serving to decrease crime rates. Missouri spends more than $660 million a year to keep 31,130 people behind bars and 73,280 offenders on probation and parole. More than 11,000 employees, or one out of every five people on the state government payroll, work for the Department of Corrections. In preparing research for the sentencing reform bill, it was found that 71 percent of prison admissions in Missouri resulted from probation or parole violations. Nearly 43 percent of the incoming prisoners had committed "technical" violations, such as failing to report a move or missing an appointment with a probation officer.

The new legislation aims to shorten an offender's supervision period, specifically by allowing 30 days of credit for every 30 days of compliance, thereby saving the State $168,657 next year and potentially more in future years.

Georgia has followed suit, hoping to save the taxpayers money. Gov. Nathan Deal has signed an executive order continuing the work of a special council that studied the state's prison system and recommended sweeping changes to control unimpeded growth in prison spending. The reforms in House Bill 1176 are projected to save taxpayers $264 million over the next five years. The Bill: (1) creates new categories of punishment for drug possession crimes, with less severe penalties for those found with small amounts; (2) increase the felony threshold for shoplifting from $300 to $500 and for most other theft crimes to $1,500; (3) creates three categories for burglaries, with more severe punishment for break-ins of dwellings by burglars who are armed and cause physical harm to a resident, with the least severe penalties for those who break into unoccupied structures or buildings; and (4) create degrees of forgery offenses, with graduated punishment for the type of offense and amount of money involved.

Although not addressed in the current legislative session, Georgia lawmakers are also expected to address the decriminalization of many of the State's traffic offenses and allowing for "safety valves" for some mandatory minium sentences in future sessions. States such as Texas, Mississippi, North Carolinas, and South Carolina are considering similar changes to their sentencing laws.

While the economic downturn has had dramatic and devastating effects on personal households, the shrinking of state budgets has created a call for states to re-evaluate their priorities. It has become clear that state no longer have either the means or the desire to incarcerate large numbers of citizens for non-violent offenses. Accordingly, NLPA expects states to continue to reduce sentences for such offenders. Further, NLPA expects states to offer non-violent offenders an increasingly wider array of treatment and rehabilitation options. NLPA will continue to be at the forefront of arguing for such change and in assisting defendants receive fair treatment. Should you have concerns that you are entitled to a lesser sentence based upon recently amended state sentencing laws, contact NLPA immediately, and we will help you in your fight for justice!

CONTINUED EFFORTS FOR INCREASE IN FEDERAL GOOD

TIME AND THE BARBER AMENDMENT

The Barber Amendment ~ 112th Congress

(FedCure - 8/15/12) Many thanks to the tens of thousands of American's who supported H.R. 1475 in the 111th Congress. Although the bill did not pass, it is not the last hurrah for federal good time legislation. FedCURE announces The Sentencing Reform Act of 2011 and The Barber Amendment. Please continue to contact your Congresspersons urging them to sponsor FedCURE's proposals in 112th Congress.

SECOND LOOK: Introducing The Sentencing Reform Act of 2011 ~ (best practices, evidence based legislation to establish a retroactive, hybrid system of parole and good time allowances; retroactive 1-1 ratio for crack cocaine penalties and retroactive repeal of mandatory minimum sentences, for most federal offenders; and provide reentry opportunities for people coming home from prison).

FedCURE NEWS Special Video Presentation: http://www.fedcure.org/SecondLook.html

NOTE: The Sentencing Reform Act of 2011 has not been introduced. FedCURE is seeking bipartisan support for the bill in the 112th Congress.

BARBER AMENDMENT: A bill to amend Title 18 U.S.C. Section 3624(b)(1) as follows: by striking the number "54" in the first sentence as it appears and inserting in lieu thereof the number "128"; and in the same sentence, by striking "prisoner's term of imprisonment" and inserting in lieu thereof "sentence imposed" . This amendment is retroactive. [END].

NOTE:The Barber Amendment has not been introduced. FedCURE is seeking bipartisan support for the bill in the 112th Congress.

Petitioning U.S. Congress to Enact the Federal Prisoner Good Conduct Time Act

By: Brandon Sample
Waxahachie, TX

Federal prisoners are currently eligible to earn a modest 47 days of good conduct time for each year they were sentenced to. But hold on! THIS IS NOT WHAT CONGRESS WANTED. When the current federal good time statute was enacted, Congress thought that federal prisoners would receive 54 days of good conduct time for each year they were sentenced to. The Federal Bureau of Prisons decided--on its own--to narrowly interpret the good time statute to limit good time to 47 days.

The Federal Prison Good Conduct Time Act, a legislative proposal supported by the U.S. Justice Department, would conform the federal good time statute with Congress' true intentions, giving federal prisoners an extra seven days of good time each year. In addition, this change would apply retroactively to all federal prisoners still in custody.

We waste billions of dollars a year on incarceration as it is. Estimates suggest that the Federal Bureau of Prisons would save tens of millions of dollars a year if this simple legislative fix were enacted. Combine that with the unnecessary human cost associated with over incarceration, passing this legislation is a no-brainer.

To support this petition please visit:

http://www.change.org/petitions/u-s-congress-enact-the-federal-prisoner-good-conduct-time-act

LETTER FROM FAMM REGARDING NEW MASSACHUSETTS SENTENCING LAW

August 22, 2012

We are absolutely thrilled to hear that some prisoners serving long mandatory minimums have already gone home due to the new sentencing law. These men and women had earned a lot of good time over the years and were now able to use it to wrap up their sentences. That's the best news we could get, following the enactment of the new sentencing law on August 2. We have learned more since that time.

Parole eligibility. If someone's minimum sentence is greater than their mandatory minimum, the Parole Board is taking the position that the new law does not change their parole eligibility date. Here are three examples to show what this means, all with a 5-year mandatory minimum but different sentences. Assume that the drug offense in question is covered by the new law:
5 years to 5 and a day, with a 5-year mandatory minimum – eligible for parole after 3½ years;

5 to 8 years, with a 5-year

mandatory minimum – also eligible for parole after 3½ years;

8 to 10 years, with a 5-year mandatory minimum – not eligible for earlier parole date under the new law; eligible only after serving the 8-year minimum sentence.

For the third example, we had hoped that someone serving such a sentence would also be seen as eligible for parole after serving 3½ years. But that is not the Parole Board's position. Prisoners who do not agree with the Parole Board's interpretation may wish to contact their lawyers.

Parole hearings. The Parole Board tells us that hundreds of drug offenders became immediately eligible for parole under the new law. The Parole Board says that the hearings for these prisoners should start in August and continue into the fall. Remember, the new law does not guarantee that anyone will be paroled. If your loved one sees the Parole Board, please let us know the outcome.

Increases in earned good time. The changes to earned good time apply to all activities where good time can be earned – programs, jobs and education. However, the Dept. of Correction still decides how many credits each activity is worth. Thousands of prisoners are affected, so it may take a while for the DOC to fully implement this part of the new law.

We will forward new information as it becomes available. In the meantime, please let us know if you have any questions

Barbara J. Dougan
Massachusetts Project Director
Families Against Mandatory Minimums (FAMM)

Contact FAMM's Massachusetts Project:
By phone: (617) 543-0878
By email: bdougan@famm.org
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¡NTERESTED IN HIRING NLPA?

Do you have pressing deadlines? - Give us a due date and you can relax. Have a brief due? - Call us for a free preliminary consultation so we can determine a cost estimate. NLPA can provide anything from a research memorandum to a file-ready brief - whichever you may need. 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 office.

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 the past two decades' 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. NLPA is a BBB Accredited Business with an "A" rating. If you would like to know more about the services we offer, please contact us at:

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