Vol. 25 No. 2 Second Quarter - May, 2012

NATIONAL LEGAL PROFESSIONAL ASSOCIATES

Margaret A. Robinson Professional Advocacy Center
11331 Grooms Road, Suite 1000
Cincinnati, Ohio 45242
Telephone Number: (513) 247-0082
Facsimile No. (513) 247-9580
Website: www.NLPA.com
E-mail: contactus@NLPA.com

"The pursuit of justice is a team effort."

Newsletter

Legal News Briefs for Law Libraries & Defense Attorneys

NOT GUILTY VERDICT: THE NEED FOR PROPER SELECTION OF JURY - ANOTHER NLPA VICTORY!

Any defendant, defense lawyer or a family member who has been involved in the criminal system understands how important it is to have an impartial and objective jury selected for the trial. The recent case of Torrence Hatch aka rapper, Lil' Boosie who was charged with first degree murder in the State of Louisiana, East Baton Rouge Parish (Case No. 06-10-0603, 06-10-0605, 06-10-0607, 07-11-0383), is a perfect example of how important this aspect of criminal defense is. The acquittals of O.J. Simpson and Michael Jackson are perfect illustration of how critical it is for a defendant to have an impartial jury of his peers.

NLPA was hired to assist Lil' Boosie's attorneys in preparing for trial. 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!

If you or a client are in need of help with jury selection and/or criminal pretrial services, and want to receive a fair trial contact NLPA!

DORSEY SUMMARY & UPDATE

The FSA requires application of the new mandatory minimum sentencing provisions to all defendants sentenced on or after August 3, 2010, regardless of when the offense conduct occurred. See, United States v. Dixon, 648 F.3d 195, 203 (3rd Cir. 2011); United States vc. Douglas, 644 F.3d 39 (1st Cir. 2011);.

Opposite: United States v. Fisher, 635 F.3d 336 (7th Cir. 2011), United States v. Sidney, 648 F.3d 904, 908 (8th Cir. 2011); United States v. Tickles, 661 F.3d 212, 215 (5th Cir. 2011); United States v. Acoff, 634 F.3d 200, 202-03 (2d Cir. 2011)

There is a circuit split regarding whether defendants who committed their crimes before—but who were sentenced after—the enactment of the Fair Sentencing Act ("FSA"), should receive the benefit of the new mandatory minimum sentences. Compare United States v. Douglas, 644 F.3d 39 (1st Cir. 2011) (holding that the new mandatory minimums take effect for defendants sentenced on or after November 1, 2010), United States v. Rojas, 645 F.3d 1234, 1236 (11th Cir 2011) and United States v. Dixon, 648 F.3d 195 (3d Cir. 2011) (holding that the new rules take effect for defendants sentenced on or after August 3, 2010), with United States v. Fisher, 635 F.3d 336 (7th Cir. 2011) (observing that the "relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing"), United States v. Tickles, 661 F.3d 212 (5th Cir. 2011) (per curiam) (finding that the FSA did not apply retroactively), and United States v. Sidney, 639 F.3d 453 (8th Cir. 2011) ("[T]he FSA is not retroactive, even as to defendants who were sentences after the enactment of the FSA where their criminal conduct occurred before the enactment.").

Complicating matters, on July 15, 2011 (after the United States filed its response in this case), the Office of the Attorney General issued a "Memorandum for all Federal Prosecutors" directing United States Attorneys to argue [*21] that the FSA applies to all criminal prosecutions in which the sentence was imposed on or after August 3, 2010, the date of enactment, regardless of when the offense conduct took place. Prior to issuing this Memorandum, the Department of Justice had advised federal prosecutors that the new

penalties of the FSA would apply prospectively only to offenders sentenced for conduct occurring on or after the enactment date. However, as explained in the Memorandum, the Attorney General now agrees "with those courts that have held that Congress intended the Act not only to 'restore fairness in federal cocaine sentencing policy' but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date." Although the Attorney General recognized that this change of position "will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law," he concluded that the new position is "required by the law and our mandate to do justice in every case."

On November 28, 2011, the United States Supreme Court granted certiorari in two cases that present the [*7] issue of whether the FSA's mandatory minimum sentence provisions should be applied to defendants who committed offenses prior to its enactment, but were sentenced after its passage. See Dorsey v. United States, No. 11-5683, 132 S. Ct. 759, 181 L. Ed. 2d 480, 2011 U.S. LEXIS 8649 (Nov. 28, 2011); Hill v. United States, No. 11-5721, 132 S. Ct. 759, 181 L. Ed. 2d 480, 2011 U.S. LEXIS 8493 (Nov. 28, 2011). The Supreme Court's resolution of these cases might assist the court in deciding the issue presented in Lawe's Motion.

The Supreme Court has granted certiorari to address whether the FSA applies to all individuals who were sentenced after the Act became effective. See United States v. Fisher, 635 F.3d 336 (7th Cir. 2011), cert. granted sub nom., Dorsey v. United States, 181 L. Ed. 2d 480, 2011 WL 3422126 (U.S. Nov. 28, 2011). Courts are electing to stay any further decision on the FSA until after the Supreme Court renders its decision.

The Supreme Court has yet to decide whether the Fair Sentencing Act applies to all crack defendants sentenced after August 3, 2010. The case is Dorsey v. United States, 11-5683 . The case was set for argument on Tuesday, April 17, 2012. Below are the summaries of the arguments from both the Govt and the Petitioner-- Both sides support application of the Fair Sentencing Act (FSA) to defendants sentenced after August 3, 2010

SUMMARY OF THE ARGUMENT -Appellant Brief

The issue in this case is one of statutory interpretation, and it involves the intersection of two statutes: one enacted in August 2010 (the Fair Sentencing Act); the other enacted in 1871 (the saving statute). The lower courts have focused primarily on the text of the Fair Sentencing Act, assuming that the saving statute normally precludes the application of an ameliorative amendment to a statutory mandatory minimum penalty provision, even if that amendment was in effect on the date of sentencing. See, e.g., Holcomb, 657 F.3d 445.

Even assuming this assumption is accurate, it is not dispositive. Rather, the saving statute "cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." Great Northern Ry. Co. v. United States, 208 U.S. 452, 465 (1908) (emphasis added). The text of the Fair Sentencing Act provides the "necessary implication" that Congress intended the Act to apply to all individuals sentenced after its enactment. United States v. Dixon, 648 F.3d 195 (3d Cir. 2011). The Seventh Circuit's decision to the contrary should be reversed.

Moreover, the lower courts' assumption is inaccurate. By its own terms, the saving statute saves only penalties "incurred" under a prior statute. This Court's decision in Hertz v. Woodman, 218 U.S. 205, 220 (1910), makes clear that a penalty is incurred only upon the occurrence of all facts and events essential [*17] to its imposition. This definition reflects the plain meaning of the term "incurred" around the time of the saving statute's enactment. Black's Law Dictionary 613 (1891). Under this definition, a penalty is "incurred" only by a subsequent act or operation of law. Id. Accordingly, a penalty is not incurred when an offense is committed.

Instead, with respect to a mandatory minimum penalty under 21 U.S.C. § 841(b), the penalty is not incurred until sentencing because under prevailing law drug quantity under § 841(b), for mandatory minimum purposes, is a sentencing factor, and not an element of the offense. See, e.g., United States v. Martinez, 301 F.3d 860, 865 (7th Cir. 2002). Although it did so in Mr. Dorsey's case, the government did not need to allege drug quantity in the indictment, or prove it to a jury beyond a reasonable doubt. Id. at 864-66. Rather, the district court determines drug quantity, as it does all sentencing factors, under a preponderance of the evidence standard based on evidence submitted at the sentencing hearing. See McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986).

Because Mr. Dorsey was sentenced after the Fair Sentencing Act's enactment, he never "incurred" a mandatory minimum penalty under the prior version of § 841(b) for purposes of the saving statute. Thus, the district court should have sentenced him under the amended provisions of § 841(b). Principles of statutory retroactivity support this conclusion. The saving statute, by its own terms, does not preclude this common-sense result. Accordingly, this Court should [*18] reverse the Seventh Circuit's decision to the contrary and remand this case for resentencing.

The saving statute is also inapplicable in this case because, by its own terms, it applies only to the "repeal" of a statute. 1 U.S.C. § 109. The Fair Sentencing Act did not "repeal" 21 U.S.C. § 841(b); it "amended" it. § 2, 124 Stat. at 2372. Thus, only if the term "repeal" in the saving statute is considered ambiguous could the saving statute be interpreted to extend to amendments. Yet, even if the statute is considered ambiguous, in light of its history and purpose, as well as the statutory presumption favoring strict construction of statutes in derogation of the common law and the rule of lenity, it should be construed strictly not to reach ameliorative amendments to

criminal penalty provisions in effect on the date of sentencing.

The saving statute was enacted as a general rule of statutory construction to assist in the codification of all federal laws. Cong. Globe, 41st Cong., 2d Sess. 2466 (1870); Cong. Globe, 41st Cong., 3d Sess. 775, 1474 (1871). Its purpose was to obviate the common law presumption of abatement following the repeal, or abrogation, of a statute. Warden v. Marrero, 417 U.S. 653, 660 (1974). It was also meant to obviate mere technical abatement, which occurred when a repealing statute increased a penalty provision, rather than abrogated it. Hamm v. City of Rock Hill, 379 U.S. 306, 314 (1964).

In contrast, the saving statute was not meant to obviate the common law rule of amelioration, or the rule "quite generally followed by the federal and state courts alike that where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto," Moorehead v. Hunter, 198 F.2d 52, 53 (10th Cir. 1952). To the extent this Court has suggested otherwise, this suggestion should be revisited. The saving statute has no application in this case because the Fair Sentencing Act involves an ameliorative amendment to a penalty provision, and this amendment was in effect on the date Mr. Dorsey was sentenced. A strict construction of the saving statute, necessary because it is derogation of the common law, as well as the rule of lenity, supports this conclusion. United States v. R.L.C., 503 U.S. 291, 305 (1992); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).

Argument: Govt Brief

THE FAIR SENTENCING ACT APPLIES IN ALL INITIAL SENTENCING PROCEEDINGS AFTER ITS ENACTMENT

The Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, rectifies a glaring disparity in federal criminal law that produced "disproportionately harsh sanctions" for crack cocaine offenses for more than 20 years. Kimbrough v. United States, 552 U.S. 85, 110 (2007). Congress adopted the 100-to-1 ratio in 1986 because it believed crack cocaine to be exponentially more potent, addictive, and dangerous than powder cocaine: "Congress faced what it perceived to be a new threat of massive scope." DePierre v. United States, 131 S. Ct. 2225, 2235 (2011). In fact, the massive threat never materialized, and the factual assumptions that drove Congress to enact the 100-to-l ratio proved to be unfounded. See Kimbrough, 552 U.S. at 97-98; 2002 Report 91. Yet the 100-to-l ratio remained embedded in federal law, generating "extreme anomalies in sentencing" (1995 Report 197) that disproportionately imposed severe mandatory minimum penalties on racial minorities. See 2007 Report 8.

In the FSA, Congress finally accepted the recommendation of the Sentencing Commission to reduce the crack/powder ratio in 21 U.S.C. 841(b)(1) and provide emergency authority for the Commission to coordinate the Guidelines with the new drug quantity thresholds for the statutory minimum penalties. Thus, the Act more than quintupled the threshold quantities of crack cocaine necessary to trigger mandatory minimum prison terms, replacing the 100-to-l ratio with a new ratio of approximately 18-to-1. FSA § 2, 124 Stat. 2372. It repealed the five-year mandatory minimum penalty for simple possession of crack cocaine. § 3, 124 Stat. 2372. And it directed the Sentencing Commission to implement these changes "as soon as practicable" in "emergency" Guidelines amendments that would "achieve consistency" between the Guidelines and "applicable law." § 8, 124 Stat. 2374.

The FSA became effective when the President signed the Act into law on August 3, 2010. Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."). The general federal saving statute, 1 U.S.C. 109, provides that the repeal or amendment of a statute does not extinguish any penalty or liability under the repealed law "unless the repealing Act shall so expressly provide." The FSA does not expressly state that the amended provisions of 21 U.S.C. 841(b) will apply in sentencing proceedings for pre-enactment offenders. But Congress nevertheless made its intent plain in the FSA, and that intent controls notwithstanding Section 109's express-statement rule because "one legislature cannot abridge the powers of a succeeding legislature." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). As this Court has explained, and as all members of the court of appeals recognized, see United States v. Holcomb, 657 F.3d 445, 448 (7th Cir. 2011) (opinion of Easterbrook, C.J.); id. at 455 (opinion of Williams, J.), the default rule supplied by Section 109 has no application whenever Congress has expressed a different intention, "either expressly or by necessary implication, in a subsequent enactment." Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908); see also Warden v. Marrero, 417 U.S. 653, 659 n.10 (1974) ("by fair implication"). Because Congress made clear in the FSA that it intended the [*27] Act's reforms to have immediate effect, petitioners were entitled to be sentenced according to its terms. The judgment of the court of appeals in these cases must be reversed.

A. The Text, Structure, And Background Of The FSA Demonstrate Congress's Intent To Give The Act's Reforms Immediate Effect

1. Congress directed the Sentencing Commission to conform the Guidelines to "applicable law," which meant the FSA's new penalty scheme
2. The history of the crack/powder sentencing disparity supports the inference that Congress intended the FSA's statutory amendments to be immediately effective
3. Congress understood that the Commission could not effectively "achieve[] consistency" with "applicable law" if the pre-FSA mandatory minimums remained in effect

B. The History And Purposes Of The FSA Confirm That Congress Did Not Intend District Courts To Continue To Impose Mandatory Minimum Sentences Under A 100-to-1 Ratio

1. The history of the FSA corroborates Congress's intent
2. The purpose of the FSA reinforces Congress's intent

C. The Court Of Appeals' Reliance On The General Saving Statute Was Misplaced
1. Section 109 provides a default rule that is overcome by a clear contrary legislative intent
2. Congress clearly expressed its intent that the FSA's revised penalties should apply immediately in post-enactment sentencings.

TECHNOLOGY AND THE FOURTH AMENDMENT

Recent Supreme Court decision extends Fourth Amendment protection to use of electronic surveillance devices by the government

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

"The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Michigan v. Tyler, 436 U.S. 499, 504; 98 S.Ct. 1942, 1947 (1978).

Until recently, court decisions had supported the government's ability to use tracking devices without a defendant's knowledge. For example, regarding the use of electronic surveillance devices, the Supreme Court has previously found that placing a radio transmitter inside a can of chloroform sold to a defendant, and then following the vehicle in which the can was placed does not constitute a Fourth Amendment search. United States v. Knotts, 460 U.S. 276 (1983). It was found that the surveillance conducted in the case amounted principally to following car on the public streets, which is not a prohibited action under the Fourth Amendment. At most, such activity is the augmenting of sensory faculties "bestowed at birth." Further, the Court noted that one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view. Id.(citing Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion)). The Court stated that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Id.

Fortunately, the recent unanimous decision issued in United States v. Jones, 132 S. Ct. 945 (2012), narrowed previous interpretations of the Fourth Amendment as applied to situations involving electronic surveillance. In Jones, police applied a GPS tracking device to a suspect's vehicle while the vehicle was parked in a public parking lot. Police then used the GPS to track the vehicle's movements for the next twenty-eight days. A warrant was never obtained for use of the GPS. The Supreme Court determined that the government's installation of the GPS device on the suspect's vehicle, and its use of that device to monitor the vehicle's movements, constituted a search under the Fourth Amendment. Under the common-law trespassory test, the government physically occupied private property for the purpose of obtaining information. Further, the suspect possessed the vehicle at the time the government trespassed and inserted the information-gathering device.

The narrowing of the Fourth Amendment is likely to continue under the conservative stewardship under which the Supreme Court finds itself. In its decision in Jones, the Court evaluated whether conduct constituted a search based upon whether the physical intrusion at issue would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. Obviously, absent the advanced technology of today, the limits of a search in the 1700's was much narrower than it is currently.

Another frontier in the interpretation of the Fourth Amendment in regard to technology is the search of cellular telephones. In California, if an individual is arrested for any reason, the photos, e-mails and other personal data on the arrestee's cell phone are subject to a search absent a warrant. The California Supreme Court had previously upheld this behavior. People v. Diaz, , 51 Cal. 4th 84; 244 P.3d 501 (2011). In response, he California legislature passed a law overriding the California Supreme Court, as the ruling had "legalized the warrantless search of cell phones during an arrest, regardless of whether the information on the phone is relevant to the arrest or if criminal charges are ever filed." See S.B. 914. Under the legislation, California law enforcement officers must first obtain a search warrant when there is probable cause to believe a suspect's portable electronic device contains evidence of a crime. The wording of the legislation specifically referred to "portable electronic devices," defined as "any portable device that is capable of creating, receiving, accessing, or storing electronic data or communications."

Unfortunately, California Governor Jerry Brown vetoed the bill.

Despite this setback in California, the action of the California legislature, as well as the United States Supreme Court in Jones, indicates that the issue of the Fourth Amendment as applied to technology will continue to arise. As with all Fourth Amendment issues, NLPA has been at the fore in protecting the Fourth Amendment rights of American citizens.
Should you have concerns that your client's Fourth Amendment rights have been violated, contact NLPA immediately, and we will help you in your fight for justice!

SERVING A REDUCED FEDERAL SENTENCe - aka "the 65% law"

NLPA is often confronted with hopeful rumors from the many unjustly incarcerated individuals with whom we work. Recent rumors have focused on the opportunities of inmates serving federal sentences to have the amount of time that they have to serve decreased, due to budgetary constraints on the Bureau of Prisons. Unfortunately, there has bene little legislation passed recently that will create such opportunities.

On June 20, 2011, The Second Chance Reauthorization Act ("SCRA") (S. 1231) was introduced in the United States Senate by Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, and Senator Rob Portman (R-OH). One of the purposes of the Bill is to increase the amount of "good time credit" federal prisoners can earn. The Bill has yet to be passed. If the Bill is passed, federal inmates will be eligible to earn a full 54 days per year of good time credit. Although inmates are theoretically able to earn such amounts currently, most prisons cap the amount of good time credit to 47 days per year.

If the SCRA becomes a law, it would also allow federal prisoners to earn up to an extra 60 days of good time credit each year the prisoner is in custody, on top of any other credit he may receive. To earn this extra good time, a federal prisoner must "successfully participate" in a program "demonstrated to reduce recidivism." A program is "demonstrated to reduce recidivism" if the BOP has done research on the program and confirmed that it is effective at reducing recidivism. To "successfully participate" in such a program, the prisoner must: (1) be eligible for the program in question; (2) be enrolled in a program that meets the prisoner's treatment and program needs (for example, a prisoner with no need for drug treatment likely cannot get the extra good time for being in a drug treatment program); and (3) be enrolled in one or more of these programs for at least 180 days during the one-year period before the extra good time is awarded.

There has also been discussion from many inmates regarding a new 65% law in the federal justice system. Such a law would decrease the amount of time that a federal inmate has to serve to 655 of his sentence to be eligible for release. Unfortunately, no such law has been recently passed. No such law has been introduced in the current Congress. Several recently proposed laws, such as The Federal Prison Work Incentive Act of 2008 and The Federal Prison Work Incentive Act of 2009, raised the possibility of inmates having to serve less of their sentences. However, these bills did not pass.

While recent activity has yet to provide a break through on the legislative front regarding serving a reduced federal sentence, NLPA continues to be hopeful that shrinking government budgets, along with fundamental principles of decency and common sense, will cause the long hoped for breakthrough to occur. NLPA will continue to monitor Congressional action regarding federal sentencing, and will be ready to act once Congress enacts favorable law.

RECENT DEATH PENALTY UPDATES

Recently, the American criminal justice system, both state and federal branches, have increasingly recognized the futility of capital punishment. In Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 1194 (2005), the United States Supreme Court recognized that persons who commit crimes while they are under 18 years of age are not as morally culpable as similarly disposed adult offenders, and prohibited the imposition of the death penalty on juvenile offenders, regardless of the heinousness of their crimes.

Following the lead of the Supreme Court, Illinois has recently abolished the death penalty, becoming the sixteenth state to do so. Governor Pat Quinn stated that "I have concluded that our system of imposing the death penalty is inherently flawed." said Quinn in a statement issued after the signing. "Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it." Quinn went on to say.

In April 2012, Connecticut voted to abolish the death penalty, becoming the seventeenth state to do so. As stated by Connecticut state Senator Gayle Slossberg, "[f]or me, the most compelling reason to reject the death penalty is to set ourselves on the path to the kind of society we really want for our future. I want something better for our future. We cannot confront darkness with darkness and expect light." Research in Connecticut, analyzing all murder cases in Connecticut over a 34-year period, revealed that inmates on death row were indistinguishable from equally violent offenders who escape that penalty. The research demonstrated that the death penalty process in Connecticut, similar to those in other death-penalty states, is arbitrary and discriminatory.

The death penalty debate on Connecticut focused, at least partially, on the role of race, especially after the recent execution of Troy Davis in Georgia. Racial bias plagued Connecticut's death penalty, too, as prosecutors were more likely to seek the death penalty when the victim was white than if the victim was a minority. Despite promises of reform, racial bias in the application of capital punishment stubbornly persists. Perhaps because of such concerns, on April 20, 2012 the Georgia Board of Pardons and Paroles reduced the death sentence of Daniel Greene, an African-American inmate, to life in prison without the possibility of parole.

Nationwide, death penalty sentences have plunged to their lowest levels in the last few years due to a concern of the risk of executing the innocent, the high costs of capital punishment and fears over the method of lethal injection used in each of the thirty-four states that still permit the death penalty. Texas, which has had the most executions among all the states, has had a dramatic drop from 48 death sentences in 2000 to only eight death sentences last year. California, the state with the largest death row in the country, has not had an execution for over five years. Currently, Maryland, Montana, Connecticut, Kansas and Florida are considering legislation to abolish the death penalty. Such is the only rational outcome when one examines both the arbitrary and discriminatory nature of how the death penalty is applied, as well as the failure of the death penalty to curb violent behavior. Between 2000-2009, the murder rate in states with capital punishment was 35-46% higher than states without the death penalty. Such has caused the House of Delegates of the American Bar Association (including 20 out of 24 former presidents of the ABA) to call for a moratorium on all executions by a vote of 280 to 119. The House judged the current death penalty system to be "a haphazard maze of unfair practices."

Research in California demonstrates that the appeal and collateral review costs for the last two men who had their death sentences carried out cost the State $1.76 million. Jeanne Woodford, a former warden at the San Quentin prison, said, "We're spending this amount of money for a handful of people and it doesn't really do anything for public safety." California opponents of the death penalty have noted studies that indicate litigation on capital cases runs 21% hire than non-capital murder cases. California is set for a major debate on the death penalty following recent qualification of a November ballot measure that would replace capital punishment with a life term without possibility of parole. If passed, the measure would make California the eighteenth state in the nation without a death penalty Similar concerns over cost of death penalty appeals have been raised in South Carolina, as voiced by Prosecutor David Pascoe.

Aside from arguments based upon racial discrimination or judicial economy, NLPA points to the company the United States keeps it failing to abolish the death penalty. Only one nation from Western Europe and North America still permits the use of the death penalty, the United States. In fact, in allowing the death penalty, the United States finds itself in the company of such nations as Cuba, Nigeria, Iraq, Iran, Indonesia, North Korea, and Libya.

Given the dramatic upswing in resistance to the death penalty, it is time for defendants and their attorneys to again challenge the propriety of the death penalty. Even if unsuccessful, such arguments would keep the issue of improper sentencing practices at the fore of the criminal justice system, allowing the Supreme Court and lesser courts to continue to limit or eliminate this archaic punishment, thereby creating a sentencing structure based upon notions of consistency, rationality, and fairness according to the constitutional principles as embodied in the Fifth, Sixth, Eighth, and Fourteenth Amendments.

CASES OF INTEREST

US v. Jackson, No. 10-3923 (6th Cir. May 8, 2012). Jackson was sentenced one month prior to the passage of the Fair Sentencing Act.

"On appeal, defendant seeks a remand to the district court for resentencing in light of the reduction in sentences under the crack cocaine guidelines issued by the Sentencing Commission and made retroactive during the pendency of his appeal. The government and the dissent contend that defendant is not eligible for any reduction because his sentence was "based on" the career offender guidelines and not the crack cocaine guidelines. The determination of whether an original sentence was "based on" a sentencing range that was subsequently lowered by the Sentencing Commission is a matter of statutory interpretation that we review de novo

We recognize that the defendant's criminal history required the district court to consider the career offender guidelines, but in deciding whether the now-amended and retroactive crack cocaine guidelines apply to defendant, we focus on the range that was actually applied to the defendant in this case. To do otherwise is to impose a harsh sentence on defendant when the severity of the old guidelines has been criticized by nearly every stakeholder in the criminal justice system, as well as by Congress. It is clear in this case that the sentencing court agreed when it took into consideration the fact that the old crack cocaine guidelines were too harsh and would likely be amended. We now give the district court the opportunity to revisit the sentence in light of the newly retroactive guidelines.

When the original sentencing judge decides to vary from the career offender guideline range to some other range, it is fair to say that the sentence imposed is "based on" the adopted range and not the career offender range. At least two ranges are in play, and it is a fiction to look at the sentence and say only one range exists. And where, as here, the sentencing judge made clear his disagreement with the crack cocaine guidelines then in effect, the opportunity to resentence is warranted in light of the revised, and now retroactive, guidelines."

***Padilla* Retroactivity Update**: The Supreme Court has granted cert in

Chaidez v. US, 11-820 concerning whether the decision in *Padilla* applies retroactively to persons whose convictions became final before its announcement.

Issue: Whether the Court's decision in Padilla v. Kentucky, holding that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation, applies to persons whose convictions became final before its announcement.

Word on the street is that *Chaidez* has the potential to be the most significant Teague retroactivity ruling in many years.

If the decision is favorable, it could create a new deadline for foreign or alien defendants wanting to file a 2255 motion. And, it could even become grounds for filing successive 2255 motions (28 USC §2244). And, it may help defendants who are US citizens by clarifying the retroacivity rules of Teague so that other recent Supreme Court rulings may apply retroactively, like *Missouri v. Frye* and *Laffler v. Cooper*, If so, even U.S. citizens who received ineffectve assistance during plea negotiations under *Frye* and *Laffler*, may have a new deadline to file a §2255 motion based on those cases under 2255(f)(4).

Definitely something to keep an eye on.

NLPA CONTINUES A TREND OF EXCELLENCE - A REFLECTION ON THE SUCCESSFUL OUTCOMES WE HELPED TO ACHIEVE DURING THE FIRST 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 first 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:

E. Alberty- NLPA assisted Mr. Alberty's attorney in the preparation of research for his sentencing. His case was heard in the USDC, Eastern District of TEXAS (Sherman) Case No.: 4:09-cr-00197-2. Mr. Alberty was charged with Conspiracy to Possess with Intent to Distribute Cocaine Base. His PSI had him listed in a sentencing guideline range of 262-327 months. However, the court instead imposed 180 months - saving Mr. Alberty more than ***TWELVE YEARS IN PRISON***!

R. Hightower - NLPA assisted Mr. Hightower's attorney in preparing sentencing research toin his case. His case was heard in the USDC, Northern District of Alabama (Jasper) Case No.: 6:10-cr-00276-1 where Mr. Hightower was charged with Possession of Narcotics (Crack Cocaine). Mr. Hightower plead guilty and his PSI listed him at a guideline range of STATUTORY LIFE. However, at sentencing the court instead imposed a sentence of 151 months with the judge's recommendation that he be able to participate in the BOP's Residential Drug Abuse Program (RDAP) which could help him to save another year off his sentence, as well as that he receive designation close to his family / home. With our help Mr. Hightower saved a ***LIFETIME IN PRISON***!

E. Galison - NLPA assisted Mr. Galison and his counsel at the sentencing stage of his case which was heard in the United States District Court for the Southern District of Georgia (Augusta Division) case number: 1:10-cr-00251-4. Mr. Galison was charged with Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances; Use of a Communication Facility in Causing or Facilitating the Commission of a Felony (2 counts). Mr. Galison entered a plea of guilty in the case and received a guideline range of 57-71 months. However, at sentencing the court instead imposed 46 months and also recommended his participation in the Bureau of Prisons drug / substance abuse program. The court also recommended his designation to a low-security facility in two specific locations near his family. Once Mr. Galison completes the drug program and receives his one-year reduction for it and his good time credit he will have saved more than three years in prison!

B. Rhoden - NLPA assisted Mr. Rhoden at the sentencing stage of his case which was heard in the United States District Court for the Southern District of Georgia (Brunswick Division) in case number: 2:11-cr-00015-3. Mr. Rhoden was charged with Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances. After pleading guilty he was facing a guideline range of 135-168 months. However, at sentencing the court imposed a sentence of 94 months - saving him more than six years in prison.

S. Davis - NLPA assisted counsel for Mr. Davis in preparing sentencing research to be used in his case which was heard in the United States District Court for the Eastern District of Virginia - (Norfolk Division). Mr. Davis was charged in case number: 2:11-cr-00081-1 with Conspiracy; Maintaining Drug-Involved Premises; Possess with Intent to Manufacture and Distribute Controlled Substances; Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of, Drug Trafficking Crimes Convicted Felon in Possession of a Firearm and Ammunition. He plead guilty and was facing a guideline range of 322-387 months. However, the court instead imposed a sentence of 120 months with a drug program recommendation which will also save him a year in addition to his credit for time served. This saved Mr. Davis ***TWENTY-THREE YEARS IN PRISON!***

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:

National Legal Professional Associates
11331 Grooms Road, Suite 1000
Cincinnati, OH 45242
Tel.: (513) 247-0082 * Fax: (513) 247-9580
E-Mail: contactus@nlpa.com * Website: www.NLPA.com

NLPA: WE LISTEN, WE CARE, WE GET RESULTS!

National Legal Professional Associates
11331 Grooms Road, Suite 1000
Cincinnati, OH 45242