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Most Effective Lawyers 2011 Public Interest Finalist: A successful fight against the Bureau of Prison's 'gulag'

Miami lawyers Daniel Fridman and David O. Markus took on the Federal Bureau of Prisons, and succeeded in getting a court to order the release of a wrongly-imprisoned inmate, a settlement of \$300,000, a letter of apology from the Bureau of Prisons and a probe by the U.S. Department of Justice Inspector General into the BOP's actions.

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Daniel Fridman, Holland & Knight and David O. Markus, Markus & Markus

Miami lawyers Daniel Fridman and David O. Markus took on the U.S. Bureau of Prisons and succeeded in getting a court to order the release of a wrongly imprisoned inmate, a settlement of \$300,000, a letter of apology from the U.S. Bureau of Prisons and a probe by the Justice Department inspector general's office.

The case centered on Nicole DeFontes, a young woman who had two months left at a halfway house for recovering substance abusers. In August 2009, DeFontes was arrested by federal marshals and charged with failing a drug test for opiates. She was taken to the Federal Detention Center in Miami.

DeFontes insisted she was innocent. Holland & Knight represents DeFontes' halfway house, the Treatment Center, and Fridman was hired by DeFontes' father. Fridman brought in Markus, his friend from their Harvard law school days, with whom he had always wanted to work.

DeFontes was not brought to the preliminary BOP administrative hearing at which the agency found her guilty. Fridman emailed the agency's legal department formally requesting that DeFontes be provided with a copy of the lab report indicating she had opiates in her system, that DeFontes be allowed to call witnesses at her upcoming formal disciplinary hearing and that the hearing be delayed several days to allow her to prepare her defense and have an independent hair sample test conducted.

After the email, DeFontes was removed from the general prison population, placed in solitary confinement and barred from contacting her lawyers.

The lawyers said the BOP's actions were retaliation because DeFontes had hired them.

DeFontes' final disciplinary hearing also was held without her knowledge Aug. 27, 2009. Her lawyers later learned a BOP employee forged forms that wrongly indicated DeFontes waived her rights to a defense and to present evidence. She was asked to sign one form while handcuffed.

DeFontes was found guilty of using drugs, the time off she had accrued for good behavior was revoked, and she was placed in solitary confinement for 17 days as additional punishment. The result: DeFontes faced an extra 1½ years in prison.

Fridman asked the U.S. attorney's office in Miami to intervene and free DeFontes but the office refused, saying he would have to sue the Bureau of Prisons. In September 2009, Fridman filed a petition for a writ of mandamus and habeas corpus in U.S. District Court in Miami.

The BOP would not tell the lawyers what threshold it used to declare a finding of drug use, so Fridman conducted

exhaustive research of various policy manuals and websites. He submitted a Freedom of Information Act request to obtain the information and ultimately found the information in a 200-page manual from the halfway house. It turned out DeFontes' drug test showed the drugs in her system were three times below the BOP's threshold for prosecution, and that she had eaten a poppy seed roll the day before the test. In his filing, he also claimed DeFontes' due process rights were violated.

The day before a schedule hearing with U.S. District Judge Marcia Cooke in Miami, the BOP released DeFontes. An outraged Cooke said BOP's actions resembled those of a gulag, the brutal system of labor camps run by the Soviet Union. She said it was the kind of conduct Amnesty International might investigate.

Cooke ordered DeFontes to be permanently released and blasted the "blatant constitutional violations" and "egregious actions" of the BOP. She also ordered the BOP to pay DeFontes' attorney fees and costs under the Equal Access to Justice Act.

In the end, the BOP settled with DeFontes for \$300,000 — about 90 percent of her fees and costs — and wrote an apology to DeFontes outlining steps it has taken to correct due process violations, including retraining all BOP personnel.

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