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## Judge slams bureau of prisons for keeping inmate

10-18-2010

Nicole Defontes pulled her life back together in dramatic fashion after serving 4½ years in federal prison for participating in a cocaine deal with her then-boyfriend.

But if it weren't for the work of some determined Miami criminal defense attorneys and for a federal judge who was willing to listen, Defontes would be behind bars, unable to defend herself or present evidence to prove her innocence, and wrongly incarcerated for eating a poppy-seed bagel that produced a false positive on a drug test.

When her case landed before U.S. District Judge Marcia Cooke on a habeas corpus petition to remove Defontes from the clutches of the U.S. Bureau of Prisons, the jurist appointed by President George W. Bush was outraged.

"When this happens in other countries, we call up Amnesty International," Cooke said at a hearing a year ago. "But for the fact of this defendant having resources, she would be in the FDC [federal detention center] supervised release gulag."

She ordered Defontes released from the Miami prison Oct. 7, 2009.

Cooke followed up last month with an order castigating the prison agency for illegally imprisoning Defontes for two months. BOP officials were determined to send her back to prison to complete her original 75-month sentence that ran through January 2011.

"I sought to prevent continued or repeated violations to her constitutional rights, whether due to negligence or retaliation," the judge wrote in the Sept. 30 order.

Prison officials and the head of a halfway house where Defontes tested positive refused to comment on the case, which isn't quite over. Her attorneys are seeking \$300,000 in fees and plan to file a federal Tort Claims Act complaint against the bureau.

### **Time For A Talk**

Defontes was a model inmate after she was imprisoned for intent to distribute narcotics.

She graduated from high school and college in prison and qualified for an exclusive drug rehabilitation program monitored by the Bureau of Prisons. The program offered a full year off her time in prison and the ability to spend the last six months in home confinement.

She was hired at a West Palm Beach drug rehabilitation center and moved up quickly from laundry detail to an administrative position.

The Bureau of Prisons summoned Defontes to a halfway house Aug. 10, 2009, and invited her in the back "for a talk." A law enforcement officer lunged from behind a door and arrested her. She found herself at the FDC, but no one would tell her why.

"I kept asking for my lawyer," Defontes said. "I couldn't believe it. I was totally overwhelmed."

When a guard told her she had failed a drug test, Defontes asked to see the results and for a hair test — the most reliable drug test — at her own expense. She figured a poppy-seed bagel she had eaten before a July drug test may have been the culprit. Opiates, such as heroin, are derived from the poppy flower.

Instead, she claimed the Bureau of Prisons retaliated by putting her in solitary confinement for 17 days after her attorney contacted officials at the FDC.

Defontes ended up being tried twice in administrative hearings, once in absentia and both times without representation, Cooke found. Officials were determined she go back to prison for 1½ more years.

"I kept on saying, 'Am I in America?'" the Stuart woman said. "I had a car, a nice job, a place to live. And then suddenly I disappeared. Nobody knew where I was."

### **'Inmates Have No Rights'**

Defontes said she wouldn't have jeopardized her freedom doing drugs again. Just getting into the early release program in prison was hard enough.

"You have to live in a special unit. If you do one thing out of order, like if you don't have your shoes shined, then you are kicked out," she said. "It's like going to boot camp. It was a big privilege, and I made it through nine months of complete agony."

The drug rehabilitation center where she worked contacted Holland & Knight to support Defontes once it learned she had been arrested for a dirty urine test.

Holland partner Daniel Fridman and David O. Markus of Markus & Markus in Miami took up Defontes' cause, filing the habeas petition seeking her release.

"It's very rare that the Bureau of Prisons gets called out on anything," Fridman said. "Looking at the big picture of this case, inmates have no rights to challenge the way the BOP handles their sentences."

The habeas petition names FCS warden John T. Rathman; Carlos Rodriguez, BOP's community corrections manager who ran the halfway houses; and BOP director Harley Lippin as defendants.

Fridman said the halfway house where she tested positive had a history of irregular testing.

The U.S. attorney's office, which represented BOP, would not turn over the lab report, forcing litigation. "They basically told us, 'You have to sue us,??'" Fridman said.

"Luckily, Nicole had the resources to fight the Bureau of Prisons and their army of lawyers and double-speak," Markus said. "She was also extremely lucky to have a smart federal judge who was willing to listen. Ninety-nine out of 100 times, someone in Nicole's shoes would have been stuck in jail with no recourse."

Cooke wondered how many more inmates might be imprisoned under similar circumstances.

"What really concerns me more than Ms. Defontes — because obviously people care about her and those people who care about her have a checkbook — (is) how many of those people over there don't," the judge said at a hearing last year.

### **'A Normal Life'**

Even with the money to marshal a defense, it wasn't easy for Defontes to take on the Bureau of Prisons. Fridman, a former federal prosecutor, claimed BOP officials were vindictive when Defontes tried to exercise her constitutional right to defend herself.

"BOP tried to send Nicole out of state right after we filed the lawsuit. We had to get a court order to make them keep her there. She was about to board the bus," Fridman said.

Fridman said he was astonished by one claim lodged by the Bureau of Prisons — she had not attended four drug counseling sessions while she was jailed due to the drug test results. Fridman said the FDC never offered those sessions.

Cooke determined Defontes didn't test positive under BOP policies. She tested 0.1 micrograms per milliliter, but a positive drug test for opiates for inmates is 0.3 mpm or above.

"The BOP person in charge of the early-release program didn't even know about the cutoff," Fridman said.

Still BOP officials were determined to re-incarcerate a woman who had been a stellar inmate.

The BOP was looking for an excuse to drag her back in, Defontes said.

Fridman noted drug rehabilitation programs — from halfway houses to drug counselors to drug-testing facilities — make money off the system.

"We do see drug tests being used to put people back to prisons," said Tracy Velazquez, executive director of the Justice Policy Institute, a Washington research organization.

Parole and probation officers often are so overwhelmed with work that they don't hesitate to get a client off the books, she said.

"Are conditions of supervised release making it almost impossible to succeed? By and large, the answer is yes," Velazquez said.

Cooke concluded Defontes was not the "typical" habeas corpus case. She required her to finish a 12-week federal drug counseling program but removed her curfew.

"At this point Nicole can lead a normal life. She can work and come and go as she pleases," Fridman said. "Nicole has a great attitude, and she has learned her lessons and turned her life around. I know she won't have any problems in the future."