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2 Boutique Associates Snag Prisoners' Rights Win At 2nd Circ.

By **Aebra Coe**

Law360 (June 5, 2018, 5:30 PM EDT) -- It doesn't take a large law firm or high-powered partner to win a big pro bono victory, as two associates from litigation boutique Sher Tremonte LLP made clear earlier this month by securing a precedential Second Circuit decision finding prisoners have the right to refuse to become government informants.

Although Sher Tremonte is a litigation boutique with 17 lawyers and a small group of support staff, the firm's attorneys strongly believe they can and should "punch above their weight" when it comes to promoting the public interest, said associate Noam Biale, who worked on the case.

"This is an example of how a small firm and two lawyers can make a significant difference both to a client and also to the law itself," he said. "We hope it encourages other lawyers at smaller firms who don't have the same kinds of resources as big law firms to take on these pro bono representations and pursue them as vigorously as they would for a private client."

Biale and fellow Sher Tremonte associate Michael Gibaldi took on prisoner Mark Burns' case in 2016, launching an appeal with the circuit court after Burns was denied his pro se fight to ward off New York state prison guards' demands he become an informant for them — a dangerous proposition while incarcerated — and falsify his account of a minor incident in the commissary where he worked as a clerk, or else face extended periods of time in solitary confinement.

Burns lost his case before the lower court in February 2015 when a federal district judge concluded that the First Amendment did not protect Burns' refusal to snitch.

The attorneys were appointed to become Burns' counsel after the appeals court decided there was a meritorious issue in the case that required counsel to help the pro se appellant litigate it. Biale serves on the Second Circuit's pro bono panel.

Two years later, the men's work paid off when on May 9 the Second Circuit agreed with their arguments and broke new legal ground, finding that the First Amendment protects a prisoner's "right not to snitch" and to refuse to provide false information to prison officials, saying "compelled speech presents a unique affront to personal dignity."

Biale and Gibaldi said Burns has been released from prison after serving a 20-year sentence, but at the time the appeal was launched faced an impossible choice due to officials' demands he provide information to them about other prisoners.

A "snitch" in prison, if found out, can be in danger of harm from other prisoners, and yet

the guards in New York placed Burns in segregated confinement for nearly nine months, until he was transferred to another prison, due to his unwillingness to become an informant, his lawyers said.

"We argued that here the guards put him in a cruel Catch-22," Biale said. "They said, 'You become our snitch and put yourself in significant danger of bodily harm or we'll put you in solitary confinement' with all the psychological and mental harm we know comes along with that."

Gibaldi added, "The interesting thing is had he signed up to become an informant, because [of the potential for harm from other prisoners], he might have been put in the same segregated confinement anyway" to protect his safety.

Further complicating matters, taking on a case that was litigated pro se in a lower court can make it more difficult to prevail on appeal, especially in the prison context, in which there are additional procedural hurdles for a pro se litigant to overcome, including restricted access to libraries, legal materials, the internet and telephones.

But Biale said he and Gibaldi were lucky that their client did a good job in the district court of preserving his issues for appeal.

"He didn't have the resources or the knowledge to be able to develop a constitutional theory, which we ultimately put before the Second Circuit, but he did a good job of putting the facts in front of the district court and that made it possible for us to litigate and ultimately succeed in convincing the court that his rights had been violated," Biale said.

A moment during the case that stands out most to the two attorneys is when they first brought a draft of their appeals brief before their client, who was still in prison at the time.

"I think for him, having lawyers recognize the injustice he suffered, and putting it into terms of case law and precedent and explaining why this wrong that was done to him is of constitutional significance — I think seeing his appreciation for that was the most memorable moment of the case for me," Biale said.

Burns is now working several jobs and is a "productive member of society," his attorneys said. He was unable to recover monetary damages from the prison guard defendants due to qualified immunity laws — which protect government officials when their actions don't violate clearly established constitutional or statutory rights — but is pleased that guards will not be covered by qualified immunity for similar actions in the future because of the court's decision, they said.

"For him it was very important to have somebody recognize that what was done to him was not right. And I think that he feels that he has a measure of justice and closure because of the court's decision," Biale said.

The case is *Mark Burns v. Daniel F. Martuscello Jr. et al.*, case number 15-1631, in the U.S. Court of Appeals for the Second Circuit.

Pro Bono Spotlight is a recurring Law360 series profiling law firm pro bono efforts.

--Editing by Kelly Duncan and Alanna Weissman.