

Tony's Tips – How to Vacate a Wrongful Conviction

By Tony Viola

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I was wrongfully imprisoned for nearly a decade, often wondering if there would ever be any “justice”. I wanted to fight back and not let prosecutors get away with breaking the law, but it’s no small trick from jail, where officers did everything they could to make it virtually impossible for me to fight my case. Several times, my legal work was thrown away. That’s illegal, throwing away legal work – but no one polices the police and correctional officers often do whatever they want. To further disrupt my efforts, I was also shipped around to nearly a dozen jails (something prisoners call “diesel therapy” and generally reserved for prisoners who fight their cases). Once I arrived at a new jail, frequent “lockdowns” meant we weren’t allowed to go to the law library. Even when we could leave our cells, access to typewriters was limited, no legal resources for prisoners exist, and I had no ability to do on-line research. Still, against all odds, I took apart my conviction – thanks in large part to help from other inmates who taught me what they knew. Finally, after admissions by both the FBI and Justice Department they made false statements about evidence in my case, I was released from jail.

I was ecstatic, but it was a bittersweet moment -- so many others shouldn’t be in jail now, and prosecutors continue to utilize illegal tactics to “win” their cases. Even when law enforcement officials are caught red handed breaking the law, they are immune from prosecution. Their feelings of invincibility and a total lack of accountability insures that the cycle of wrongful convictions and unchecked misconduct continues. But the key is to fight back – to refuse to be defeated and not allow prosecutors to get away with breaking the law to imprison innocent people.

It sounds great, to fight back. Fight injustice and wrongful convictions. But how? How can you fight within a system that doesn’t fairly administer justice but protects itself? It can be done – it has been done – and I hope that sharing ideas, suggestions and tips that I learned will help you – or at the very least, spark your creativity and encourage you to formulate a plan of attack. These tips are written for men and women still in jail and who are fighting their cases, but these ideas may be helpful to anyone who wants to get back into court and correct an injustice.

As always, your feedback or recommendations are welcome and appreciated. Comments or requests for assistance are always welcome on the

FreeTonyViola.com blog! And if you think we left something off this list, PLEASE let us know so we can include your ideas in future editions of this publication!

STEP ONE – GATHER EVIDENCE AND IDENTIFY WINNING ISSUES

Your first step is to gather as many documents as you can – start with the Clerk of Court and your lawyers. The Clerk has all of the court filings in your case and your lawyer’s files are worth reviewing -- they may have missed something, so don’t assume they reviewed (or that you saw) all the documents. Start fresh by writing the Clerk of Court and requesting the case docket (Sample letters to the Clerk and to your attorneys are provided below). Carefully read your case docket, line by line. If any entry looks interesting, or is something you were not aware of, get that particular item. Court records are public so anyone (you, a family member or a friend) can request them. If you can access the federal court’s PACER records system (Pacer.gov), that will expedite things. Accounts are free to set up and there is no charge for downloading / printing the first several hundred pages of the documents each quarter. Other steps to take include:

- (1) **REQUEST A FULL AND COMPLETE COPY OF YOUR CLIENT FILE** from all attorneys who handled your case, including all Emails. If your attorney does not respond, write back and say that unless the information is provided, you will be forced to contact the bar association and file a formal complaint. The law says your client file is YOUR property – even if you owe legal fees – and the attorney can, at his or her own expense, make a copy for themselves, if they want one. Regardless, an attorney must give you a copy of your client file upon request.
- (2) **IDENTIFY WHAT IS UNJUST** – In a few sentences, quickly summarize the injustice in your case, and describe it in terms of a “winning” issue in court. Did prosecutors withhold evidence? That’s a “Brady violation” and can lead to your conviction to be reversed. Look for the most frequent causes of wrongful convictions, which include:
 - Misconduct by prosecutors (including making false statements in court)
 - Conflicts of Interest (Did your lawyer represent a co-defendant, for instance?)

- Faulty eyewitness identification
- Undisclosed financial compensation to government witnesses or informants, proving they had a motive to lie
- Questionable forensic evidence
- Inadequate defense if your lawyer failed to interview witnesses who could establish innocence or substantially mitigate your sentence.
- Perjured testimony at trial or in your case by government witnesses. In my case, witnesses told FBI Agent Jeff Kassouf and Assistant U.S. Attorney Mark Bennett that I was innocent. Their response: "That's not what we want to hear. Try again." Once prosecutors decide you are the target, they NEVER veer from their "theory." The question is this: can you find evidence they altered evidence or coerced witness testimony to manufacture evidence? Or are there other ways to identify perjured testimony? In my case, the government's lead witness, Kathryn Clover, tried to terminate her supervised release early. Her request was opposed by prosecutors, who said she committed perjury at my trial! I used that filing to argue that prosecutors KNEW their witness lied, and failed to withdraw false testimony, which is a violation of the constitutional guarantee of due process of law.

(3) **READ YOUR TRANSCRIPTS** -- Even though it was hard to re-live my Federal trial, I'm glad I re-read the entire transcript because I found instances of witnesses lying, inconsistent statements, and prosecutors making false statements, or making statements that contradicted earlier representations in their own court filings.

STEP TWO: LEARN THE CASE LAW THAT GOVERNS YOUR CLAIMS

Once you make a list of key facts that cast doubt on your conviction, research those issues. Do you have newly discovered evidence? Did a witness recant? Can you prove false statements were made in your case? Is there an error at sentencing about the amount of money involved? Head to the jail law library and see if another inmate will show you how to look up cases. The Supreme Court, in a case called Bounds v. Smith, 430 U.S. 817 (1977), stated that "the fundamental constitutional right of access to the courts requires prison authorities to assist

inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." While some prisons take the right of access to courts less seriously than others, every jail has some kind of law computers for inmates to look up cases and statutes. True, the law computers are archaic – but, still, there's nothing else to all day and you can (with great effort) find helpful case law on there! Make a schedule – commit to an hour or two a day, every day, and start reading cases. See how courts look at certain issues and find out the key "elements" or "Three part tests" that are often set forth in these cases.

Here are some of the things to look for while researching your case:

- First, look up the statutes and rules related to your proceedings, particularly statutes you were charged with violating so you know the elements of the offense you were convicted of. Try finding the "lead case" that's most often cited by courts when addressing issues raised in pleadings.
- Is there any new case law? Sometimes, courts have struck down laws (Like "unconstitutionally vague" laws that don't define certain offenses). Other times, the Supreme Court narrowed what charges can be brought under various statutes (like "honest services fraud") -- rendering charged conduct legal! I was in jail, shooting hoops with a guy, when he was paged to the office. A Supreme Court case rendered his conduct legal and he was released! And, no, he didn't finish the basketball game!
- Let's say you think prosecutors hid evidence and committed a Brady violation. Read several cases adjudicating these claims. Did someone win on the issue? Why? What did they submit to a court? Find a case where someone did not prevail on that issue. Why not? See if you can figure out the difference between a "winning" issue and a "losing" claim concerning the same issue!
- If the law computer has the option, try finding law review articles or use Bender's Federal Forms or Moore's Federal Practice manuals to assist. And if you have a friend who can send law review articles discussing key issues, please ask – those articles helped me craft winning court filings!

PART THREE: BUILD YOUR TEAM

From jail, I tried hard to build support for what I was trying to do. Most letters went unanswered, but I remained undeterred. Here are some of the organizations I reached out to:

- (1) Innocence project – My experience with innocence projects was mostly disappointing. The Ohio Innocence Project was the worst – they finally replied, said they'd take my case, then sent a second letter a year later saying they never agreed to take the case. Many of these projects offer false hope – failing to respond to prisoners' requests while others only look for DNA evidence that would easily exonerate somebody. Still, it's worth a stamp and a letter to write the innocence project in your state to see if they'll take your case.
- (2) Does your local prosecutor's office or state Attorney General's Office have a "Wrongful Conviction Unit?" Some prosecutors' offices have conviction integrity units that review previous convictions and consider new evidence. Use your short case summary that identifies injustices in your case and send it off to the conviction integrity unit in your city.
- (3) Write the public defender's office, asking them to review your case.
- (4) Some inmates found inexpensive paralegals on Fiverr.com or Gigsalad.com, and spent \$50 - \$100 a month to have someone help with research or print documents for them.
- (5) My case was widely covered and became of interest to a few local bloggers, and was discussed on True Crime blogs or fan pages on Facebook. But even if your case had no media coverage, reach out and see if you can find some amateur sleuths to help!
- (6) Finally, fire up family and friends and see who has time to help!

PART FOUR: INVESTIGATE YOUR CASE

Here's the biggest challenge ... investigating your case while stuck in jail, without access to the internet or any helpful investigative tools. I'm not saying it's easy, but here's what I was able to do from the "inside."

- (1) Don't underestimate the U.S. Mail! I was amazed at the documents I obtained, simply by typing letters and making requests. I acquired the following records by typing letters on a jail typewriter: (1) Police reports (2) Crime scene photos (3) Coroner's reports (4) Witness statements made in other court proceedings (5) Campaign finance reports (6) The results of Bar association investigations (7) Documents from an investigation by insurance companies; (8) Court filings and (9) Public records.
- (2) My friends set up an inexpensive website (which, over time, we gradually improved). FreeTonyViola.com told our story and put the prosecutor's names in there. We asked people to send us investigative leads, and many did. We also discovered that prosecutors and FBI agents are generally not allowed on social media. If you start blogging and mentioning their names on line, anyone Googling them quickly discovers your website and may contact you with helpful information.
- (3) I was able to pay a private investigator, Bob Friedrich of Friedrich & Associates. Bob never gave up on the case and was able to obtain affidavits and witness statements from individuals who felt guilty I was in jail or who felt what was going on was wrong. I discovered that people who lie in court are often haunted by their actions – and they will sometimes tell the truth later (especially after the statute of limitations is up) to have peace of mind.
- (4) I also was able to connect with people who have the same legal interests (others fighting cases prosecuted by the same prosecutors, co-defendants, or people who used the same lawyers I did). We shared information and ideas. The old maxim about odd bedfellows applies here: The enemy of my enemy is my friend.
- (5) In my case, I discovered that prosecutors collected "restitution" on behalf of "victims" in my case, but never actually sent any of the money to those

parties, instead they used funds as they saw fit. These actions violated court orders and were the basis of litigation I filed. Be creative and open to all possibilities – prosecutors in my case (Mark Bennett and Dan Kasaris) were so used to getting away with everything that they got sloppy – and left a paper trail of misconduct that we later unearthed. Bennett was ultimately fired and disbarred.

(6) Focus on NEW EVIDENCE. Unfortunately, rehashing old arguments or old issues is not a winning strategy. Our justice system is built upon a principle called “res judicata” which is a Latin term meaning a cause of action may not be re-litigated once it has been judged on the merits. Without "finality," the Courts would be overwhelmed with litigation from parties who do not accept a court’s decision. Unfortunately, “finality” is more important than justice in many cases, but the best way to overcome this impediment is to argue that newly discovered evidence warrants your case be re-opened.

(7) Are there any related civil cases that you can check out? See if any witnesses or co-defendants in your case were involved in litigation related to your case. These cases may contain court filings that may be helpful, or depositions in those cases that you can use in your case!

(8) I was prosecuted by a by a multi-jurisdictional Mortgage Fraud Task Force. For years, the U.S. Attorney in Cleveland claimed that the Task Force was merely a collection of local law enforcement officials and that no FEDERAL evidence was ever located there. Then, I made a records request for documents in my case. Lo and behold, buried in the middle of 3,000 pages of evidence was one single piece of paper that said FBI agents relocated 19 boxes of evidence from the U.S. Attorney’s Office to the Task Force location BEFORE my first trial. One sheet of paper proved prosecutors lied for years in court filings – causing a judge to appoint attorneys to review ALL of the government’s previous filings, most of which were later proven false. Below are sample public request forms you should make, they could unravel your entire case!

PART FIVE: PREPARING COURT FILINGS

Many inmates are unaware that many court filings can be submitted after a conviction that can lead to your case being overturned. Study the list below and figure out which one may be the most helpful to you. Then, research the filing on the law computer or see if you can find filings made by others to use as a template. In any filing made in the trial or sentencing court, you can attach any documents, particularly any new evidence, including witness statements, affidavits or documents you've obtained. I strongly encourage you to include any new evidence to your court filings!

- Direct Appeals of a conviction can be filed, but a "Notice of Appeal" must be filed within 14 days of your final judgment. Courts of Appeals will generally appoint an attorney to assist inmates with these filings.
- Petitions for Habeas Corpus, often called a "2255" after 28 U.S.C. Code Section 2255, can be made within a year of the final judgment to raise constitutional issues, like ineffective assistance of counsel claims.
- Rule 33 Motions for a New Trial can be filed within three years of the jury verdict (not the date of sentencing), generally concerning newly discovered evidence.
- If you already submitted a Habeas / 2255, a Second or Successive 2255 can be submitted only after a court of appeals has granted permission.

Finally, before submitting any court filing, read the statutes and rules related to the preceding you're in and those that could reasonably follow. For example, if you are seeking relief through a 2255 motion, read 28 U.S.C. Section 2255 and know the "rules of the road" for the proceedings. Also know the rules of court for the forum you are in. Courts of appeal have specific rules you should follow closely, and district courts have different rules for different proceedings. The rules should guide what you ask the court to do by way of relief and also guide your planning for what lies ahead.

Courts can grant exceptions and extensions "for good cause shown," but they generally won't extend deadlines for inmates. Try your best to follow the rules

and meet deadlines. Every moment you spend correcting your procedural mistakes is taken away from time that could be spent presenting the merits of your case.

Most courts will provide inmates forms that are required to submit these filings, so be sure to request forms or instructions from the Clerk of Court. And, let's be honest, it's not easy to prevail, so always have a plan for what you will do if your submission is denied. Find out in advance if you can appeal the decision, and if so, how many days you have to file a notice of appeal. Where do you file it? Future proceedings will be shaped by the proceeding that you are currently in. For example, if you are in a 2255 proceeding in a district court, your filings should not only have the district court in mind, but should also consider the filing's place in a potential appeal. Courts of appeal make their decisions by reviewing the record of the district court proceedings, so make sure you build the record you will need as your case makes its way through the courts. If you don't include all new evidence or key documents in the district court record, it won't be there for the court of appeals to review.

Please consider these thoughts on properly preparing court filings:

- (1) Keep your submissions short and sweet. Judges know the law, but they don't know the facts in your case. Be crisp, quickly explaining the key facts and why there is an injustice. Judges don't want commentary (This is outrageous!) or name calling in court filings. It's very hard for inmates to get the attention of a judge, and most figure if someone can't quickly come to the point and identify key issues on the first page of the filing, it's probably not that serious of an issue.
- (2) When seeking post-conviction relief, is very important to cite specific pages in the transcript or actual documents. Courts will not take your word for it, nor will they draw an inference in your favor. An inference is a belief that is reasonably held but not based on actual evidence. Let's say you go to sleep and there was no snow on the ground. The next morning, you wake up and saw there was snow on the ground. You would reasonably infer that it must have snowed last night. But you didn't see it snow, and you don't have proof it snowed. That's an inference. Courts will not draw inferences. They "presume" your conviction is just. You must overcome that presumption

with hard evidence – using transcript page numbers, documents or evidence to prove what you’re saying.

AND FINALLY ...

Lastly, and most importantly, NEVER GIVE UP! The fight ends when you give up, not when a prosecutor or a judge says so! Throughout my long fight, I was strengthened by the kindness of others ... and by prayer. I’m Catholic and went to services and made many great friends in jail. Speaking of great friends, I’m giving the last word to my friend Kara Bennett, who wrote to me for many years and even sent books for the guys to read. Once, I wrote her and admitted I was getting discouraged, and I wondered if I’d ever win. Her response: “Tony, don’t you realize you already won? You already won because you refuse to be defeated!”

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Sample Freedom of Information Act Request:

FBI Records Office
Freedom of Information Act Section
170 Marcel Drive
Winchester, VA 22602

and

FOIA/Privacy Staff
Executive Office for United States Attorneys
Department of Justice
175 N Street, NE
Suite 5.400
Washington, DC 20530-0001

RE: Public Records Request

I am requesting all documents and information concerning my criminal case, including all documents that have my name on them that are in your records system. Kindly note the following personal information:

FULL NAME:

DATE OF BIRTH:

SOCIAL SECURITY NUMBER:

CASE CAPTION AND CASE NUMBER: (Please include the city or judicial district where your case took place.)

Kindly note that I am willing to pay any reasonable costs for the production of these materials. Please acknowledge receipt of this request at your earliest convenience. Thank you very much!

Very Truly Yours,

NOTE: If state or local law enforcement had any involvement in your case, make local records requests as well, asking for all documents with your name on them!

Letter to Clerk of Court for Your Case Docket

RE: Case #

Dear Sirs:

I am respectfully requesting a full and complete copy of the case docket concerning the matter captioned above. Thank you very much for promptly responding to this important request.

Respectfully Submitted,

Letter to attorney for client file

RE: Case #

Dear Attorney _____,

I am writing to respectfully request a full and complete copy of my file, including all emails to/from the prosecutor's office or other communications about my case. Thank you very much for promptly sending me the client file.

Respectfully Submitted,