The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume 1, Issue 4, April 2001

NCPLS ACCESS

Religious Land Use & Institutionalized Persons Act of 2000 - "An act to protect religious liberty . . ."

Last year, the Congress of the United States enacted legislation designed to protect religious liberty. *Religious Land Use & Institutionalized Persons Act of 2000*, 2000 S. 2869 (hereafter referenced as RLUIPA, or the Act). The Act provides:

> "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person --
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest."

RLUIPA, §3(a).

Under the legislation, "A person may assert a violation of this Act as a claim . . . in a judicial proceeding and obtain appropriate relief against a government . . .." *Id.* at §4(a). In such a lawsuit, once the plaintiff has presented evidence that his right to freely practice his religion has been "substantially burdened," the government must show that there is no less restrictive means of furthering a compelling governmental interest. *Id.* at §4(b).

RLUIPA seems to dramatically alter the legal standard that governs claims of governmental intrusions into the religious practices of inmates. The United States Supreme Court has held that prison officials may restrict the practice of an inmate's religion if the restriction is reasonably related to a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). That is generally the same basic approach the Court has taken to analyze the legality of prison regulations. *See, Turner v. Safley*, 482 U.S. 78 (1987). Under this deferential legal standard, corrections officials are given broad discretion in imposing restrictions upon all aspects of religious practices.

RLUIPA appears to require the courts to apply a more rigorous analysis of such restrictions; corrections officials must show a compelling governmental interest for the restriction, as well as the absence of any less restrictive means of furthering that interest. *Id.*

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ACCESS is a publication of North Carolina Prisoner Legal Services, Inc. Established in 1978, NCPLS is a non-profit, public service organization. The program is governed by a Board of Directors who are designated by various organizations and institutions, including the North Carolina Bar Association, the North Carolina Association of Black Lawyers, the North Carolina Association of Women Attorneys, and law school deans at UNC, Duke, NCCU, Wake Forest and Campbell.

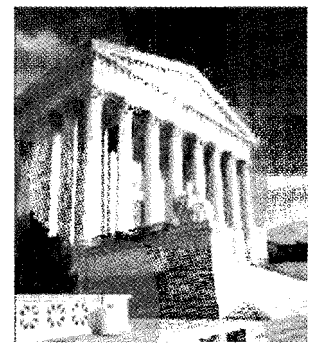
NCPLS serves a population of more than 32,500 prisoners and 10,000 pre-trial detainees, providing information and advice concerning legal rights and responsibilities, discouraging frivolous litigation, working toward administrative resolutions of legitimate problems, and providing representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

NCPLS files appeal in U.S. Supreme Court in Habeas Corpus case

The Fourth Circuit Court of Appeals recently denied a habeas petition in *Bell v. Jarvis*, 236 F.3d 149 (4th Cir., 29 December 2000). At trial, our client was accused of sexual crimes against his wife's grand daughter. The district attorney asked that everyone except the families of the prosecution witnesses be excluded from the courtroom, including our client's wife. The defense attorney objected to this closure on the grounds that it would violate the right to a public trial, but the trial court allowed the motion and only the people the district attorney selected were allowed to be present when the prosecuting witness testified.

Under *Waller v. Georgia*, 467 U.S. 39 (1984), a trial court cannot close the courtroom to the public over the defendant's objections unless the court follows certain procedural protections of the right to a public trial. Under *Waller*, the court must identify an overriding interest that would be protected by closure, consider alternatives to the closure to protect that interest, narrowly tailor the closure, and enter findings that a reviewing court can assess to determine if the closure was justified. Our client's trial judge did none of these things.

On appeal, appellate counsel, who was not the trial counsel, failed to brief the public trial issue and the conviction was affirmed. When the client asked NCPLS for post-conviction assistance, we identified the issue and filed a motion for appropriate relief based upon ineffective



assistance of appellate counsel. The trial court dismissed the motion and the court of appeals upheld that ruling. Neither of the state courts entered an opnion explaining the denial.

We then filed a petition for a writ of habeas corpus in federal district court, again based upon ineffective assistance of appellate counsel. The district judge granted summary judgment to the state based upon a broad view of the trial court's discretion. According to the district court, the fact that the courtroom was only closed temporarily, and the opportunity of the trial judge to observe the prosecuting witness during the motions hearings (she was sitting at the prosecution table), was sufficient to give the trial court grounds to close the courtroom to the public. On behalf of our client, NCPLS appealed the dismissal to the Fourth Circuit.

On the appeal, a three-judge panel of the Court of Appeals agreed with our position and reversed the decision of the district court. But the state moved for a re-hear-

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NCPLS Obtains Federal Habeas Corpus Relief for Three Clients

In the January 2000 issue of NCPLS Access, we reported a success in obtaining federal *habeas corpus* relief for our client in the case of *Bates v. Jackson*, 5:98-HC-915-BR(2) (October 19, 2000). Our client was serving a 50-year sentence on a conviction for conspiring to traffic a controlled substance. That conviction was set aside on double jeopardy grounds by the United States District Court for the Eastern District of North Carolina (E.D.N.C.).

After the *Bates* decision, two of our client's co-defendants, requested assistance from NCPLS. In January 2000, NCPLS extended representation to these two individuals and filed separate petitions for federal habeas relief in Federal Court for the Eastern District of North Carolina. The court granted the petitions and both of our clients were released in February of this year.

The Case

These three co-defendants were originally charged with conspiring to traffic a controlled substance by possession. The conspiracy was alleged to have occurred on or about January 4, 1995. Their cases were joined and they were tried for the conspiracy charge in the Wake County Superior Court in October 1995. At trial, the state presented witnesses who testified about a drug conspiracy which had allegedly taken place sometime between September 1993 and April 1994.

At the close of the state's case, the defendants moved for a dismissal of the charges for insufficiency of the evidence based on the variance between the date specified in the indictment and the evidence presented at trial. With the state's consent, the trial judge granted the motion. However, before the defendants could be released from custody, they were arrested on new warrants.

The Wake County Grand Jury returned new indictments against all three men. In the new indictments, the state for the first time alleged that the defendants had conspired to manufacture and traffic drugs by transportation, sale and delivery, in addition to the charge of possession alleged in the first indictment. The new indictments also alleged that the date of the conspiracy was between September 1993 and December 29, 1994, instead of the "on or about" date of January 4, 1995, contained in the first indictments.

Before the start of the second trial, the defendants moved for a dismissal of the charges on double jeopardy grounds. That motion was denied, a jury was sworn, and the second trial began. At the close of the evidence, the defendants renewed their motion to dismiss on double jeopardy grounds, which was again denied by the trial court. The jury found the defendants guilty and sentenced each to imprisonment for a term of 50 years.

State Court Appeals

The defendants appealed the conviction to the North Carolina Court of Appeals. The Court of Appeals, in an unpublished opinion, found that no constitutional violation occurred because the defendants were tried for different offenses under the second indictments and, therefore, were not placed in double jeopardy. The defendants appealed to the North Carolina Supreme Court on the basis of

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RLUIPA

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But the meaning of RLUIPA is not altogether clear. For example, Section (e) provides that: "Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 . . .." However, the Prison Litigation Reform Act (PLRA), Pub.L. 104-134, amending 42 U.S.C. §1997e(e) (26 April 1996) bars redress for mental or emotional injury in the absence of physical injury. *See*, for example, *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999). Since an intrusion into one's right to freely practice his religion ordinarily will not result in physical injury, PLRA would seem to bar a claim for relief, although RLUIPA clearly provides a cause of action.

Moreover, it should be noted that RLUIPA is not the first legislative

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NCPLS Legal Assistants obtain certification

The legal assistants working at North Carolina Prisoner Legal Services have worked hard to increase their professionalism and knowledge through seeking certification. The National Association of Legal Assistants (NALA) administers a two-day examination which tests the skills required of paralegals.

In order to apply to take the Certified Legal Assistant (CLA) examination, legal assistants must meet certain criteria consisting of some combination of education and experience.

The examination consists of seven sections. All legal assistants are tested in communications (grammar, vocabulary, and writing skills), legal terminology, legal research, judgment and analytical ability, ethics, and human relations and interviewing. In addition, to obtain certification, legal assistants must pass a substantive law portion, consisting of general law and their choice of four other substantive law areas including criminal law and procedure, civil litigation, family law, administrative law, bankruptcy law, business organizations, probate and estates, and real estate.

Some states, such as Florida and Louisiana, require paralegals to pass an examination based on the NALA exam. North Carolina does not require legal assistants to be certified. NCPLS has provided opportunities to its legal assistants to pursue certification, including providing in-house training and providing a training budget for course materials and other study aids.

NCPLS currently employs nine legal assistants. Of those nine assistants, six have taken and passed all portions of the NALA examination and obtained certification as Certified Legal Assistants. Certification of a seventh NCPLS paralegal is contingent upon the succesful completion of one remaining section of the exam. All other NCPLS paralegals are working toward certificaton.

NALA also administers specialty examinations in substantive areas of the law. To become a certified specialist, a legal assistant must have a passing score on the examination which tests that area of the law in greater depth than the CLA examination. Two NCPLS legal assistants have obtained certification in a specialty area, one obtaining a double specialty.

The following legal assistants at NCPLS have obtaincd certification through NALA.

Kimber Bratton, CLA
Kady H. McDonald,CLA
Yvonne P. Oates, CLA
Sharon Robertson, CLAS
Patricia P. Sanders,. CLA
Billy J. Sanders, CLAS

NCPLS recognizes that the efficient use of qualified legal assistants can greatly increase the delivery of quality of legal services to the inmates in the North Carolina Department of Correction.

Prison Rumors

NCPLS continues to receive inquiries regarding changes in the sentencing laws that could result in reduced sentences.

Rumors of this type have persisted for several years, but are without substance. NCPLS is unaware of any proposals to modify the sentences of inmates currently serving time in the North Carolina Department of Correction.

One rumor is that sentences will be changed from 85% to 65%. Another is that the sentences received under the Fair Sentencing Act will be modified to be consistent with sentences under the Structured Sentencing Act. To the best of our knowledge, there is no truth to these rumors.

Double Jeopardy - General Issues

The following is a general discussion of the constitutional protections provided by the Fifth Amendment's Double Jeopardy Clause. We'll try to clarify when that protection does and does not apply in the context of a second trial for the same offense. This is not intended as a treatise on the subject, as that is well beyond the scope of this article. As Chief Justice Rehnquist once wrote concerning the guarantee against being twice placed in jeopardy, "the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333 (1981). Therefore, this article is limited to a very general discussion of some of the key considerations involved in a review of a potential double jeopardy issue in the context of a retrial.

The most well known protection of the Double Jeopardy Clause is the prohibition against a second prosecution for the same offense after acquittal. However, the Clause also protects against a second prosecution after a conviction and against the imposition of multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Because of the fundamental nature of the protection of the Double Jeopardy Clause, the United States Supreme Court has held that the Clause is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

When looking at a potential double jeopardy claim based upon the guarantee against re-trial after an acquittal, there are four key preliminary considerations: (1) whether jeopardy attached in a prior proceeding; (2) whether the offense charged in the second trial was the same offense that was tried in the first trial; (3) whether the offense is being prosecuted by the same sovereign that prosecuted the first trial; and (4) the result of the first trial.

The first consideration is whether the defendant was ever in "prior jeopardy." Before the protections against a retrial are available to a person charged with a crime, the defendant must have been placed in jeopardy previously for the charged offense. The question boils down to when jeopardy attaches in a criminal proceeding. Generally, in North Carolina, jeopardy attaches at the district court level when the trial court begins to hear evidence. In the superior courts, jeopardy attaches in a criminal proceeding when the jury has been selected and is sworn. For example, assume that a defendant entered a plea of not guilty and was going to trial. On the morning of trial, the state determined that there was a fatal variance in the indictment charging the defendant before the jury was empaneled. The state could move to dismiss the indictment at that time and later obtain a new indictment for the very same offense. Even though the

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Bates v. Jackson

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a substantial constitutional issue. However, that court dismissed the appeal.

FEDERAL HABEAS REVIEW

On January 5th, 2000, NCPLS filed petitions for writs of habeas corpus for the co- defendants. In both petitions, we raised the same issue that we pursued in the *Bates* case -- that the second trial violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. This argument was based on the Double Jeopardy Clauses' prohibition against re-trying a defendant for an offense after a previous acquittal on the same offense. In both co-defendants' cases, the federal court relied on its earlier decision in *Bates v. Jackson.*

In *Bates v. Jackson*, the state argued that, because the second indictment

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ing by the entire court, which was granted. After a second oral argument, the *en banc* court affirmed the district judge's dismissal, with three of the members of the court dissenting.

The crucial issue in the appeal was the effect of the *Anti-Terrorism and Effective Death Penalty Act* (AEDPA) on the power of the federal court to review state court dismissals of a defendant's claims of a constitutional violation. In other words, does AEDPA limit the power of the federal court to review claims of unconstitutionality, and if so, how? The Fourth Circuit ruled that, although the state courts did not explain why they were dismissing the case, the federal courts were required by AEDPA to defer to the state courts' decisions if the result were reasonable. The Fourth Circuit decided the result was reasonable because the Supreme Court has never specifically held that the requirements set out in the *Waller* case apply to child sex cases, so the North Carolina courts could have decided that appellate counsel could reasonably have determined that *Waller* did not apply to our client's case.

NCPLS has decided to petition the United States Supreme Court on behalf of our client. Other federal circuit courts have ruled that if the state courts do not explain their decisions, there is no reason for deference to those decisions. One of the reasons the Supreme Court will review a decision from a court of appeals is that the decision conflicts with decisions reached by other courts of appeals. Although such petitions are rarely granted, NCPLS believes this issue merits the consideration of the Supreme Court. A petition for certiorari was filed in late March.

J. Phillip Griffin
Senior Staff Attorney

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effort to protect religious liberty. The *Religious Freedom Restoration Act of 1993* (RFRA), 42 U.S.C. §2000bb, set out similar protections for religious practices. But, the Act was struck down as an unconstitutional exercise of Congress's power under Article 5 of the 14th Amendment in *City of Boerne v. Flores*, 117 S. Ct 2157 (1997).

While RLUIPA appears to extend greater protection to inmates, the precise meaning of the Act will have to await judicial interpretation. Inmates who experience interference with their religious practices may contact NCPLS for advice and assistance.

NCPLS wins Habeas Corpus relief for three clients *continued from page 5*

covered a different time period and contained the the additional crimes -- manufacture, transportation, and sale and delivery -- the defendant was not tried for the same offense of which he was acquitted in the first trial. However, NCPLS argued that, despite the differences in the indictments, the conspiracy charged in the first offense was in fact the same conspiracy. Therefore, since the defendants had been acquitted of that offense -- the conspiracy -- they could not be retried for the same conspiracy.

The *Bates* Court, after an extensive review of the record, concluded that the conspiracy in the first indictment and the conspiracy in the second indictment were the same. Because there was but one conspiracy, it could not be subdivided in time. Therefore, our client's second trial for the same offense attacked the most fundamental protection of the Double Jeopardy Clause: "the constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal." *Bates,* relying on *United States v. Difrancesco*, 499 U.S. 117, 129 (1980).

Staff Attorney James W. Carter

Double Jeopardy - An Overview

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defendant was ready for trial and the state's action caused the criminal proceeding to be terminated, the defendant could be prosecuted a second time because jeopardy never attached in the first proceeding.

The second consideration concerns the offense which provides the basis for prosecution. Generally, if a defendant is acquitted of an offense in the first trial, he cannot be prosecuted by the same sovereign for the same offense in a second trial. While it may seem rather simple to determine whether two offenses are the same, that is not always the case. Ordinarily, a court will look to the *Blockberger* "same elements" test to determine whether two statutory offenses are indeed the same. *See United States v. Blockberger*, 282 U.S. 299 (1932).

Under the *Blockberger* test, the elements of each offense are examined. If either of the two offenses contains an element not contained in the other, then they are not the "same offense" and a re-prosecution would be allowed. *Id.* An example of double jeopardy analysis of two different can be based upon North Carolina statutes for trafficking in controlled substances. Under N.C. Gen. Stat. §90-95(h), a person is guilty if he sells, manufactures, delivers, transport, or possesses a certain quantity of a controlled substance. Based on the statute, it would seem that a person could not be tried and convicted for both transportation and possession, as one would logically have to possess the drugs to transport them. However, the courts have found that the element of transporting the drugs is not the same element as possession of the drugs. Therefore, there is no double jeopardy violation when a person is tried, convicted, and sentenced for both the possession and the transportation of the controlled substance. *State v. Perry*, 316 N.C. 87 (1986).

On the other hand, the defendants in *Bates, Fields,* and *Milligan* were protected from retrial because they were charged with the same offense - conspiracy. Since they were acquitted at their first trial on the conspiracy charge, they could not be re-prosecuted for the same conspiracy.

The third consideration is who is bringing the second prosecution. Under the doctrine of dual sovereignty, a prosecution for the same offense is not barred where the second prosecution is brought by a separate sovereign (another state or the federal government). Therefore, even if you were tried and acquitted in a North Carolina court for an offense, you could be re-prosecuted for that same exact offense by the federal government or another state if the conduct in question violated the laws of that sovereign.

The fourth consideration concerns the outcome of the first trial. In *Bates, Fields,* and *Milligan*, since the defendants had been acquitted, they could not have been re-prosecuted legally by North Carolina. Of course, the same would hold true if they had been convicted. Once convicted and sentenced, if the defendant does not challenge the conviction, the state cannot re-prosecute him for the same offense. However, if, after a conviction, the defendant successfully challenges the conviction and it is reversed, then ordinarily the state *can* re-prosecute without violating the prohibition against double jeopardy. (But, an appellate court reversal based upon insufficiency of the evidence presented at trial precludes re-prosecution.)

As you can see from this brief and general explanation, double jeopardy law is complex. NCPLS evaluates requests for post-conviction assistance, including claims of double jeopardy violations. For further information or assistance, please contact NCPLS.

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THE NEWSLETTER OF NORTH CAROLINA PRISONER LEGAL SERVICES, INC.

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In both, *Fields v. Chavis*, 5:00-HC-9-BR(3) (January 29th, 2001) and *Milligan v. McDade*, 5:00-HC-8-H (February 15, 2001), the federal court found the reasoning of the *Bates* case persuasive and granted both writs of *habeas corpus*. Both of our clients were immediately released from custody.

In many cases where habeas relief is granted, the petitioner is not entitled to immediate release because there is a possibility of a re-trial on the same charges. However, because these cases were decided on double jeopardy grounds, both men were immediately released because they could not be re-tried.

Staff Attorney James W. Carter represented all three former inmates in these cases.