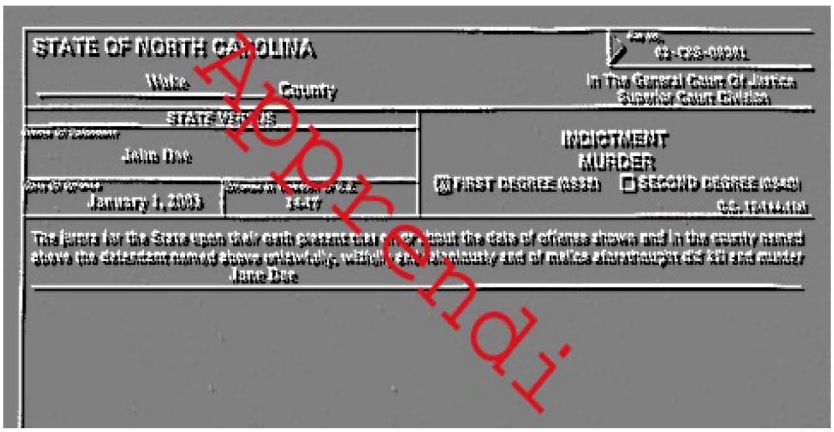
The Newsletter of North Carolina Prisoner Legal Services, Inc.

NCPLS ACCESS

Apprendi v. New Jersey: Constitutional Requirements for "Enhanced" Sentences

By Senior Attorney J. Phillip Griffin

It is difficult to predict what issues will become important as the courts deal with new kinds of cases. Some legislatures have passed laws to limit the disparities in sentencing that appear when individual judges have a lot of discretion in setting sentences. Some statutes, such as the federal sentencing guidelines, list various factors and prescribe a sentence based upon which of those factors are present in a given case. In other kinds of statutes, the legislature has decided that it wants to punish certain crimes more severely, such as crimes committed with a racial motive or committed with a firearm. Both kinds of statutes can require the judge to base the sentence on factors shown to be present by a preponderance of the evidence. Over the last few Supreme Court terms, sentences based upon factors found by the judge have come into question.



Jones v. United States, 526 U.S. 227 (1999), involved a provision of the federal car-jacking statute that increased the maximum sentence from 15 to 25 years if a serious injury resulted from the crime. When the defendant was arraigned, he was advised that the maximum sentence was 15 years. After the jury found him guilty, the judge found that his victim was seriously injured and sentenced him to 25 years. The Supreme Court held that this procedure violated the Fifth and Sixth Amendment rights to notice of the charges and to trial by jury. The Court held that every fact that increases a sentence for a crime, other than prior convictions, must be treated as an element of the crime, alleged in the indictment, and proven to the jury beyond a reasonable doubt.

In the following term, a state prosecution raised the same issues. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant had fired shots into a house and was charged with possession of a firearm for an unlawful purpose. The charged crime had a maximum sentence of ten years. After the entry of a guilty plea, the prosecution asked for an enhancement of the sentence based upon a provision of New Jersey law that increases the maximum sentence if a crime is motivated by racism. The trial court found that the defendant shot at the house to frighten his neighbors because of their race, and imposed an enhanced sentence. The Supreme Court held that the Due Process Clause of the Fourteenth Amendment imposed upon the states the same requirements of notice and jury trial that applied to the federal government. Those requirements were announced in *Jones*. Since the racial motive for the crime was not proven to a jury and not admitted in the guilty plea, it could not serve as a basis for an enhanced sentence.

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In this Issue:

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 33,500 prisoners and 14,000 pretrial 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.

ACCESS is published four (4) times a year. Articles, ideas and suggestions are welcome: *tsanders@ncpls.org*

Apprendi v. New Jersey (Continued)

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Since the decisions in *Jones* and *Apprendi*, various provisions of the federal sentencing guidelines have come under attack. In particular, the quantity of drugs involved in an offense, if in dispute, cannot be the basis for an enhanced sentence unless it was alleged in the indictment and found beyond a reasonable doubt by the jury. *United States v. Cotton*, 535 U.S. 625 (2002).

However, the implications for state laws are more complicated, partly because the Supreme Court has never held that state criminal prosecutions require an indictment at all. *Hurtado v. California*, 110 U.S. 516 (1884) (the Supreme Court refused to require that states initiate criminal prosecution by grand jury indictment). For example, some crimes in North Carolina are charged in "short form" indictments, which do not include all the elements of the crime. The North Carolina courts have refused to apply *Apprendi*'s requirement that the elements of the crime must be included in the indictment. *See State v. Braxton*, 352 N.C. 158, 174-175 (2001) (upholding the short form murder indictment); *State v. Love*, ___ N.C. App. ___ (September 3, 2002) (upholding the short form sexual offense indictment).

Thus far, the federal courts have not applied *Apprendi* to invalidate a conviction based upon a "short form" indictment, partly based upon the authority of *Hurtado*.

However, the North Carolina Supreme Court has applied the rule in *Apprendi* to require indictment and jury conviction before the application of the firearm enhancement penalty. *State v. Lucas*, 353 N.C. 568 (2001). N.C. Gen. Stat. §15A-1340.16A purports to authorize a sentencing judge to add 60 months to the minimum term of imprisonment if the defendant is convicted of a Class A, B1, B2, C, D, or E felony in which he used a firearm. In *State v. Lucas*, 353 N.C. 568, 598, the court ruled that "in every instance where the state seeks an enhanced sentence pursuant to N.C. Gen. Stat. §15A-1340.16A, it must allege the statutory factors supporting the enhancement in the indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury." The North Carolina Court stated it would limit the effect of its ruling to cases which were not yet final at the time (June 20, 2001). Of course, the ruling in *Apprendi* would be applicable to the unconstitutional application of the firearm enhancement from its own date, a year earlier.

Obviously, the federal and state courts both have a long way to go before the full implications of the decisions in *Jones*, *Apprendi*, and *Lucas* are spelled out. This report provides only general information. If you have a question about the validity of your own sentence, let us know and we can provide an individual application of these principles to your case.

UPDATE: *STATE V. HEARST* - IMPACT CREDIT

By Managing Attorney Kari L. Hamel

This is to update you about a case we reported in the September 2002 issue of ***ACCESS***. As you may recall, the North Carolina Supreme Court recently ruled that anyone who spent time in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) while on probation is entitled to receive credit against their active sentence. *State v. Hearst*, 356 N.C. 132, 567 S.E. 2d 124, 2002 N.C. LEXIS 679 (August, 2002).

Many DOC inmates have already benefited from the *Hearst* decision. NCPLS has successfully advocated that IMPACT credit be awarded to reduce activated sentences for many of our clients in Superior Courts throughout North Carolina. Since the *Hearst* decision, NCPLS has been able to help almost 100 individuals obtain orders providing credit against their active sentences.

Inmates entitled to such credit generally serve relatively short terms of incarceration. Consequently, NCPLS legal staff has had to work quickly to contact those with the earliest projected release dates, investigate each persons' particular situation to determine whether there is a meritorious legal claim, and then approach the Superior Courts seeking an Order providing credit. During our investigations, NCPLS also discovered that some inmates who are entitled to IMPACT credit were also entitled to additional jail credit under N.C. Gen. Stat. §15-196.1.

Our efforts have been helped by hearing directly from individuals who are incarcerated, as well as the Department of Correction, which provided us a list of IMPACT participants. However, people who entered the DOC after August 2002, and went to IMPACT as part of the terms of their probation are not listed. IMPACT operations closed in July 2002. We know that more than 900 people participated in IMPACT annually, but many of those individuals are still on probation. IMPACT credit for those individuals will only become an issue if their probationary sentences are revoked. We will learn about people in that situation only if they contact us.

If you participated in the IMPACT program as part of the terms of your probation and you believe you were not provided credit for that time against your activated sentence, you should write to us at: NCPLS, P.O. Box 25397, Raleigh, NC 27611.

A REPORT ON NCPLS ACTIVITIES: 2000-2002

In preparation for negotiations to renew the contract with the Department of Correction, NCPLS has reviewed program activities for the period of October 1, 2000 through September 30, 2002. This article reports on highlights of that period.

During this period, the inmate population increased by 7.9%, from about 31,500, to over 34,000. Inmate requests for legal assistance increased by about 17% over calendar year 2000. In 1999, we received 9,146 requests for legal assistance; this year, we project that we will receive approximately 11,300 requests. In doing this work, we expended more than 75,000 hours. The contract called for 43,467 attorney hours; more than 48,867 hours were actually spent, about 12% more than the allocated number. Paralegal hours allocated under the contract totaled 21,733; more than 26,907 hours were billed, exceeding the contract requirement by almost 24%. In addition, NCPLS has a dynamic program for legal interns through which we employ an average of six law students per year to assist in our work. Through the Intern Program, we contributed more than 3,800 hours of legal assistance to inmates. Although law clerks are generally compensated in the market at rates comparable to those paid paralegals, the contract provides no compensation for any of that time.

NCPLS staff continues to learn, grow and improve their skills. Our attorneys participate in dozens of training events on an annual basis (both as students and teachers). Our paralegals have made tremendous strides in professional development. Eight have been accredited by the National Association of Legal Assistants (NALA) as Certified Legal Assistants; two have gained further NALA recognition as specialists -- one has specialty certification in civil litigation, and the other has achieved specialty certification in both civil litigation and criminal law and procedure. All of the remaining paralegals are nearing completion of the course work necessary to take the two-day examination. Certification provides objective assurance that the recipient has a command of fundamental legal principles and a mastery of basic paralegal skills.

In litigation, literally hundreds of inmates have been represented by NCPLS attorneys. We have reported in detail on some of that litigation in previous issues of ***ACCESS***. Significant victories include: *Thebaud v. Jarvis*, 5:97-CT-463-BO(3) (E.D.N.C. 1997) (class action to improve health care for women); *State of North Carolina v. William Anthony Hearst*, No. 684PA01 (N.C., filed Aug. 16, 2002) (class action to require sentence reduction credit for time spent in IMPACT); *Hamilton, et al. v. Theodis Beck, et al.*, COA00-1470 (NCCt.App. 2002) (class action that reversed a DOC practice and required that sentences be entered by Combined Records as specifically stated on a judgment and commitment); *Bates v. Jackson*, 5:98-HC-915-BR(2) (October 19, 2000), *Fields v. Chavis*, 5:00-HC-9-BR(3) (January 29, 2001) and *Milligan v. McDade*, 5:00-HC-8-H (February 15, 2001) (individual habeas corpus actions brought in federal court for the Eastern District of North Carolina finding violations of the Double Jeopardy Clause, and resulting in the immediate release of all three clients); and *In re: Bullis*, 00-J-139 (October 3, 2001) (gaining and enforcing client's right of visitation with minor child).

Pending litigation includes: *Vereen, et al. v. Beck, et al.* (No. 01-CVS-15053) (Wake Co. Superior Ct., Dec. 7, 2001) (class action seeking declaration that inmates serving Class C life sentences under Fair Sentencing Act are entitled to have sentence reduction credits toward calculation of their parole eligibility date); and *Harris v. Thompson Contractors*, No. 122P002 (NCSCt) (NCPLS appears as a friend of the court in a case involving the right of a work release inmate to recover workers' compensation for injuries suffered on the job).

NCPLS staff members have been involved in a host of other activities related to our mission. For example, our Executive Director, Michael Hamden, served two terms on the American Correctional Association's Standards Committee. As a result, standards governing operations at all kinds of accredited correctional facilities now include requirements that inmates have access to reasonably priced telephone services, and that facilities comply with the *Americans with*

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ACTIVITIES 2000-2002 (CONTINUED)

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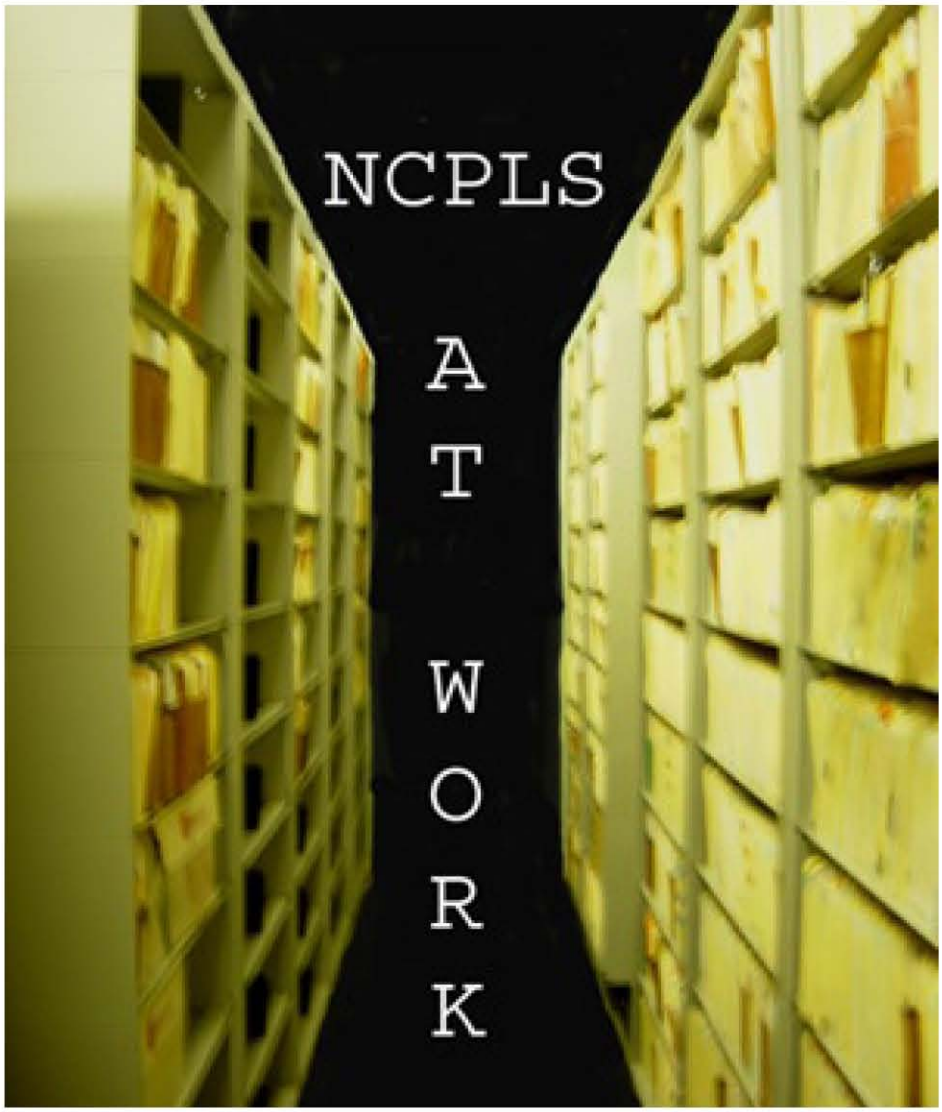
Disabilities Act in all programs, services, and activities. Hamden is presently serving a second four-year term as a member of the Commission on Accreditation for Corrections. He also serves as a member of the Advisory Board for the Women's Prison Writing Project, and as a consultant for the protection of prisoners in research projects at Research Triangle Institute.

Staff Attorney Ellie Kinnaird was recently elected to a fourth term in the State Senate, where she will continue efforts to create the Prison Nursery Project. The nursery would provide intense pre-natal services in health care, nutrition, drug addiction treatment, personal dysfunction therapy, and parenting skills for pregnant, incarcerated women. After the child is born, the best available child care would be provided through Early Head Start and Smart Start. Mothers would learn about how their infants develop and how to interact appropriately with them. Mothers and infants would bond in the healthiest environment possible. Mothers would also be provided support through instruction in important parenting and life skills. Two years of after-care, including the best available child care and housing, employment, education and addiction treatment, would be part of the continuum of services.

Certified Legal Specialist Billy Sanders serves as a Commissioner on the North Carolina Sentencing and Policy Advisory Commission. As a Commissioner, Sanders has been actively involved in refining policies regarding criminal justice and sentencing structure.



Senior Attorney Letitia C. Echols is a member of the American Bar Association's Corrections and Sentencing Committee, a body that studies the justice system and recommends reform. This year, the Committee has worked to develop a recommendation on sentence reduction in "extraordinary and compelling" circumstances. If approved by the Criminal Justice Section Council at its November 16 meeting, the recommendation will be considered by the ABA's Board of Governors for adoption as official policy. The Corrections and Sentencing Committee has also been working across the country to reinstate the right of former felons to vote.

Senior Attorney Linda B. Weisel serves as a member of the Carolina Justice Policy Center's Board of Directors. The Center is a well regarded "think tank" that has successfully advocated the use of community punishment as an alternative to incarceration.

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Update: The Unauthorized Practice of Law

By Managing Attorney James W. Carter

NCPLS continues to receive requests for information about certain individuals and organizations offering legal services to inmates and their families. Generally, these questions concern whether a particular service provider is legitimate. Unfortunately, we usually get these questions too late. Often, money has already been paid, but the promised service has not been delivered. Once a person is in this position, recovering a loss can be a long trip down a road with few promising results. If the person to whom the money was paid was running a scam, there is little chance of recovering the money.

The best advice we can offer is to use common sense and check out the individual or organization offering the service. First, and foremost, if someone offers you a deal to good to be true, proceed with extreme caution. This is especially true where there is a guarantee that you will prevail. Whether you are filing in a post-conviction matter, a tort claim, or a civil rights suit, there are few, if any, guarantees that can be made to a client regarding the outcome of a case. This is especially true where the person making the guarantee has not thoroughly investigated all of the available facts or researched the law.

Secondly, know who you are dealing with. With few exceptions, it is unlawful for any person or organization, except licensed members of the North Carolina State Bar, to practice law in North Carolina. N.C. Gen. Stat. §84-4. Therefore, any person who offers to represent you, advise you of your rights, or give you a legal opinion about your rights should be a member of the North Carolina State Bar and should have a valid Bar number. Ask the person or organization who is offering the legal advice or legal services for their Bar number. If they refuse, they most likely cannot deliver legal services.

Third, some individuals may claim that they are working with a licensed attorney. If that is the case, get the attorney's name and address. Write the attorney and ask for written verification of what you have been told about the services to be provided, the expected results and the fees to be charged. If you do not get a response, you may have avoided losing your money.

If you believe someone is practicing law without a license, consider contacting the Authorized Practice Committee at the North Carolina State Bar with all of the relevant information that you have. You can contact the Committee at:

North Carolina State Bar
Authorized Practice Committee
P.O. Box 25908
Raleigh, NC 27611-5908

Also, based on the number of complaints we receive, we highly recommend that you share this information with your family and friends and encourage them to be on their guard.

Workers' Compensation For Work Release Inmates? The N.C. Supreme Court Will Decide

On October 16, 2002, NCPLS Director Michael Hamden and Senior Attorney Linda Weisel filed an amicus brief in *Harris v. Thompson Contractors and United States Fidelity* in the N.C. Supreme Court. This case deals with the important issue of an inmate's eligibility for workers' compensation if he is injured on a work release job for a private employer.

Following a favorable ruling for the inmate before the Full Industrial Commission and the Court of Appeals, the employer asked the N.C. Supreme Court to review the issue. The employer argued that former inmate Harris was being worked by the state when he was injured on his work release job for a private employer. Because of the importance of this issue to our clients on work release, NCPLS consulted with Mr. Harris' attorney and requested permission from the N.C. Supreme Court to file a "friend of the Court" brief.

NCPLS's brief argued that inmates on work release jobs are not being worked by the state, but are working to further the business of the

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Limits on Consecutive Sentences for Misdemeanors

by Staff Attorney Elizabeth Hambourger

As many inmates already know, North Carolina law limits the number of consecutive sentences a defendant may receive when convicted of misdemeanors. Many inmates believe that they cannot serve consecutive sentences for more than two misdemeanors. However, the law is more complicated than that.

N.C. Gen. Stat. §15A-1340.22(a), titled "Limits on Consecutive Sentences," reads:

> If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior record level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

To examine how this statute applies, we will consider an example. Suppose defendant is convicted of three Class 1 misdemeanors and he has a prior record level of III. According to the Structured Sentencing grid, the maximum he can receive on any one of those sentences is 120 days. Twice 120 days is 240 days. Therefore, defendant's total sentence for all three misdemeanors cannot be more than 240 days. If defendant receives three consecutive sentences of 120 days each, that equals 360 days, and it violates the statute.

However, if defendant receives three consecutive sentences of 30 days each for a total of 90 days, this would not violate the statute because the total amount of time would not exceed 240 days (twice the maximum). In this way, it is possible to have three consecutive misdemeanor sentences that do not violate the statute.

The statute is generally interpreted to mean that all three sentences must be imposed <u>on the same day</u> for the statute to be given effect. In other words, if defendant receives two consecutive sentences on one day and then receives another consecutive sentence on another day, this sentence structure does not violate the statute. That interpretation may not be consistent with the language of the statute.

NCPLS Attorneys Tracy Wilkinson and Elizabeth Hambourger were successful in challenging consecutive misdemeanor sentences that were imposed at the time of the revocation of probation. *State v. Wester*, 01-CR-3590 (2002); and *Williams v. Beck*, *et al.*, 01-CR-60650 (2002). In these two cases, defendants originally received suspended sentences. When their sentences were activated, the judge chose to run multiple sentences consecutively in a way that violated the statute. In both cases, the suspended sentences had not been imposed on the same date, although the revocations had all occurred on the same day. In each case, the court granted relief based upon an argument that §15A-1340.22(a) applies to sentences imposed upon revocation of probation.

Workers' Compensation (Continued)

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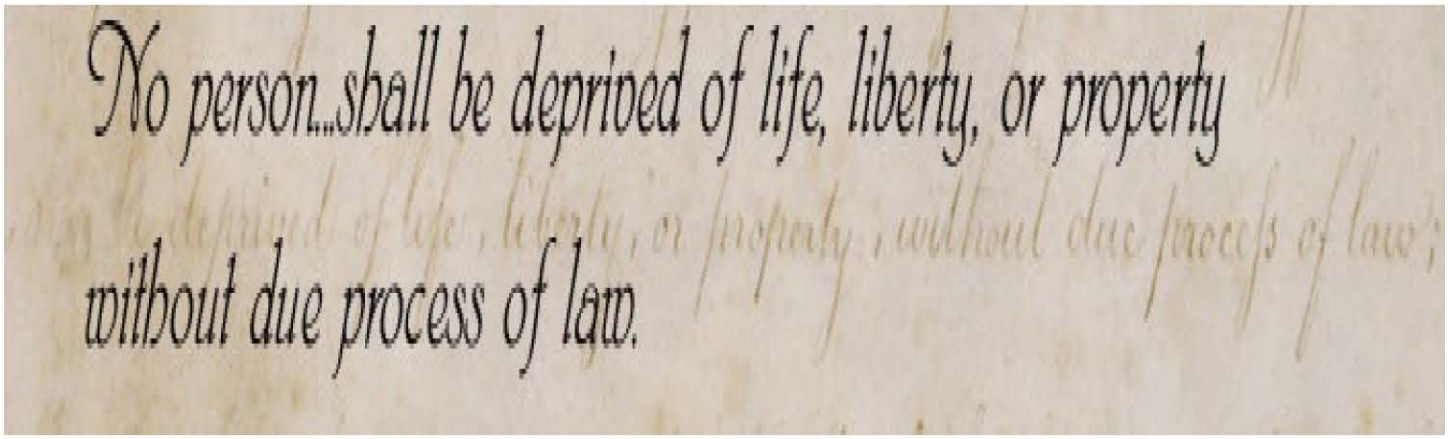
private employer for whom they are working. NCPLS further argued that the principles of the Workers' Compensation Act and the work release policies of North Carolina require an employer who uses inmate labor in its private business to compensate an injured inmate employee in the same manner the employer would compensate any non-inmate employee of the business.

The Department of Correction also filed a brief in support of Mr. Harris. The Supreme Court has not yet set the case for oral argument. The outcome will be reported in a future addition of *Access*.

The Due Process Clause in the Prison Context – A Brief Overview

By Staff Attorney Ken Butler

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall "deny any person of life, liberty, or property, without due process of law." U.S. Const. Amend XIV, Sec. 1. Due process, at its most basic level, involves protecting individuals from arbitrary governmental action. *Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974). This includes insuring both defining procedural fairness and in setting boundaries as to the types of actions that governments can take, either legislatively or through the acts of individual government officials. *See County of Sacramento v. Lewis*, 523 U.S. 833, 140 L.Ed.2d 1043, 1053-54,118 S.Ct. 1708 (1998). These two areas are known as *procedural* and *substantive due process*.



Procedural due process, as might be gathered from the name, focuses on the adequacy of procedures which must be employed for the government to deprive someone of life, liberty, or property. Procedural due process is a flexible concept and depends upon the particular circumstances at issue. *See Mathews v. Eldridge*, 424 U.S. 319, 334, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) (holding that due process requires "such procedural protections as the particular situation demands"). In *Wolff v. McDonnell*, for example, the U.S. Supreme Court recognized that inmates can be protected by the Due Process Clause, but that the scope of this protection is properly restricted by the nature of their status as lawfully convicted persons. 418 U.S. at 556.

The first step in a procedural due process claim is to determine whether an individual has been deprived of a protected "liberty" or "property" interest. *Tigrett v. Rector & Visitors of the Univ. of Va.*, 290 F.3d 620 (4th Cir. Va. 2002). Such interests arise under either the Constitution itself, federal law, or the laws of the various states. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 104 L.Ed.2d 506, 109 S.Ct. 1904 (1989). In order for either a liberty or property interest to exist, an individual must be able to show that he has an *entitlement* to a particular interest or benefit. The fact that he may hope to obtain a particular benefit is not sufficient to create this interest. Similarly, where the decision to confer the benefit is discretionary with prison administrators, no protected interest arises. By example, the courts have rejected claims that the Constitution provides a protected interest in remaining in a particular prison, or in being transferred to a different unit. *Meachum v. Fano*, 427 U.S. 215 (1976). Furthermore, the Fourth Circuit Court of Appeals has stated that placement in administrative segregation and the reclassification of inmates "are discretionary administrative acts in which an inmate obtains no liberty interest under North Carolina law." *O'Bar v. Pinion*, 953 F.2d 74, 84 (4th Cir. 1991).

One area in which inmates most commonly voice due process concerns is that of prison disciplinary hearings. In *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), the Supreme Court addressed due process requirements in prison disciplin-

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The Due Process Clause (Continued)

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ary proceedings. In determining whether a protected liberty interest existed, the Court focused on the particular deprivation at issue and whether the punishment "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. *Sandin* involved an inmate who had been convicted of a disciplinary offense and placed on disciplinary segregation for 30 days, but he had not lost any good time. The Supreme Court found that the conditions of disciplinary segregation were similar to those in administrative segregation and protective custody, both statuses that any inmate could reasonably expect to be subject to during incarceration. Thus, the 30-day disciplinary confinement did not constitute an "atypical or significant hardship." Following *Sandin,* courts have looked to both the conditions of confinement and the length of time that the inmate is confined to them, in assessing whether a liberty interest exists. The Fourth Circuit has held that a six-month segregation stay does not implicate a protected liberty interest. *See Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997) (finding that six-month stay in administrative segregation for violation of prison rules did not constitute an atypical hardship).

From these cases, we can see that a transfer to disciplinary segregation is not, by itself, sufficient to invoke due process protections. Instead, something more must be shown. Specifically, according to *Sandin*, due process is required only when a prison official intends to impose a punishment that "imposes atypical and significant hardship." *Sandin,* 515 U.S. at 484. For example, the deprivation of earned sentence reduction credits (i.e., gain time) will have the effect of prolonging the term of imprisonment. Thus, such a deprivation may be viewed by the courts as the type of interest that requires due process protections.

However, even where a protected liberty or property interest is involved, there are other obstacles to overcome in prosecuting due process claims. In *Wolff v. McDonnell*, the Supreme Court recognized that inmates are entitled to certain due process protections when they are being deprived of good time credits to which they are entitled under state law. However, under *Wolff*, the due process protections applicable to disciplinary hearings are minimal. They consist of:

1. Written notice of the charges, given at least 24 hours in advance of the hearing.

2. An opportunity for the inmate to tell his side of the story. Generally, the inmate should be allowed to present documentary evidence in his defense and to call witnesses when that will not threaten institutional safety or correctional goals. However, prison authorities have the discretion to keep hearings within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority. Additionally, prison officials may limit access to other inmates to collect statements or to compile other documentary evidence.

3. A written statement by the factfinder as to the evidence relied upon and the reasons for the disciplinary action taken.

Wolff did not engraft the right of cross-examination into disciplinary proceedings. Nor are inmates entitled to be represented by attorneys at such hearings, although an inmate *may* be entitled to the assistance of a staff member if the inmate is illiterate or is otherwise unable to prepare a defense to the charges.

The burden of proving a disciplinary offense is less demanding than in a criminal case. A prison disciplinary conviction that is supported by "some evidence" will not be disturbed by the courts. *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 454 (1985). This means that a court will not re-weigh the evidence or overturn a disciplinary officer's determination as to the credibility of witnesses.

A reading of the plain language of the Fourteenth Amendment might lead one to believe that due process must be provided before the state can deprive a person of property. But there are some circumstances under which the courts allow due process proceedings after the deprivation. In the prison context, for example, the Supreme Court has held that the negligent deprivation of property through the acts of a state or federal employee is not actionable under 42 U.S.C. §1983. *See Daniels v. Williams*, 474 U.S. 327, 333-34, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986). According to the

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NCPLS HOSTS REPRESENTATIVES OF FAMM

By Staff Attorney Ken Butler

On October 25, 2002, the NCPLS legal staff met with representatives of Families Against Mandatory Minimums (FAMM). Speaking at this meeting were Laura Sager, FAMM's Executive Director, Angelyn Frazier, the State Organizing Director, and Bruce Cunningham, a distinguished North Carolina criminal defense attorney who helped organize FAMM's visit to North Carolina.

As explained on their website, FAMM.org., "FAMM is a national nonprofit organization founded in 1991 to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM promotes sentencing policies that give judges the discretion to distinguish between defendants and sentence them according to their role in the offense, seriousness of the offense and potential for rehabilitation. FAMM's 25,000 members include prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens. FAMM does not argue that crime should go unpunished - but the punishment must fit the crime."

At the meeting with NCPLS staff, Ms. Sager spoke about FAMM's role in pursuing legislative and administrative reforms in several states and at the federal level to eliminate the harshest aspects of mandatory minimum sentences, particularly in the area of drug related offenses. FAMM is studying North Carolina's habitual felon sentencing laws, among other aspects of our sentencing structure. There was discussion about previous challenges that have been brought regarding the habitual felon laws, none of which have yet been successful in the courts. We also reviewed the ways in which habitual sentencing laws can be manipulated to the disadvantage of defendants, and the unnecessarily harsh sentences that can result. FAMM is currently seeking information about North Carolina defendants who have been harshly punished under the habitual felon laws.

Inmates and others can contact FAMM at the following address:

FAMM
1612 K Street, N.W., Suite 1400
Washington, D.C. 20006
Tel: (202) 822-6700

ACTIVITIES 2000-2002

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The Wake County Chapter of the American Civil Liberties Union has been active in the fight to uphold the Bill of Rights and to preserve basic freedoms for all North Carolinians. Senior Attorney Susan H. Pollitt serves as a member of the Board of Directors for this organization.

Perhaps the most significant work performed by the NCPLS staff was handled predominately by our paralegals and involved efforts to have sentences properly structured. (Obviously, neither the Department of Correction nor the taxpayers of North Carolina have any desire to incur the expense of incarcerating individuals longer than the law requires.) Excessive time on a sentence arises from sentencing errors, a failure to properly calculate sentence structure, and a failure to properly calculate or apply jail time or sentence reduction credits (merit time, good time, gain time, etc.).

From October 1, 2000 through September 30, 2002, NCPLS advocates have succeeded in having at least 183,120 days of credit applied against our clients' sentences. At an average cost of $65.29 per inmate day, the Department will save a total of $11,955,904.80. More importantly, as a result of these efforts, our clients will enjoy 501 years, 8 months, and 15 days of freedom.

At NCPLS, we appreciate the opportunity to be of service and we look forward to the next two years.

The Due Process Clause (Continued)

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Court, state law provides adequate post-deprivation remedies for such claims. (For example, if an officer lost or misplaced your personal property, you might have a remedy through the tort claim procedure.) Similarly, the intentional deprivation of property through the random and unauthorized acts of a state or federal employee does not constitute a deprivation of **due process** if "a meaningful post-deprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984).

In contrast to procedural due process, substantive due process is intended to limit the arbitrary use of government authority, "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. at 331; *see also Collins v. Harker Heights*, 503 U.S. 115, 126, 117 L.Ed.2d 261, 112 S.Ct. 1061 (1992) (noting that the Due Process Clause was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression). It almost goes without saying that there are many aspects of day-to-day prison life, and actions or decisions by prison administrators and correctional staff, which strike inmates as unfair or oppressive. However, a subjective, personal feeling about the conduct of state officials does not determine whether a substantive due process claim exists. Instead, there are two important elements which must be shown in any attempt to bring a substantive due process claim. Because substantive due process is not a precisely defined concept, the courts are reluctant to expand its scope and applicability. Where a particular constitutional provision already covers the type of government conduct complained of, the courts will not interpret the claim under substantive due process grounds. *Graham v. Connor*, 490 U.S. 386, 395, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989). What this means for DOC inmates is that conduct covered by specific provisions of the Constitution cannot be pursued as substantive due process claims. Eighth Amendment claims (excessive force, denial of medical care, conditions of confinement), Fourth Amendment claims (unreasonable searches), and First Amendment claims (freedom of speech, religion, association) are all examples of matters for which a substantive due process claim may not be available. However, some types of claims that might have arisen prior to an inmate's conviction are governed by the Due Process Clause. These include claims of excessive force against, or conditions of confinement imposed upon, a pretrial detainee. *Martin v. Gentile*, 849 F.2d 863 (4th Cir. 1988). Such claims may encompass a "substantive" element.

A second factor to consider in any substantive due process claim is that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento v. Lewis,* 523 U.S. at 846 (quoting *Collins v. Harker Heights*, 503 U.S. at 129). The standard applied in such cases is whether the official conduct at issue can be said to "shock the conscience." *Id*.; *Breithaupt v. Abram*, 352 U.S. 432, 435, 1 L.Ed.2d 448, 77 S.Ct. 408 (1957) (conduct that "shocked the conscience" and was so brutal and offensive that it did not comport with traditional ideas of fair play and decency in violation of substantive due process principles). As with other aspects of due process, there is no standard test to be applied, and the level of conduct that can be said to "shock the conscience" will have much to do with the particular circumstances at issue. However, under any test, a mere claim of negligence by a government official will not rise to the level of a constitutional violation. *County of Sacramento v. Lewis*, 523 U.S. at 849 (liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process).

Due process is a complex and evolving area of the law. This article introduces its basic principles. While due process protections apply in the prison context, such protections are often narrowly construed. Nevertheless, if you believe you may have suffered a violation of your constitutional rights, whether in the due process context or some other area, write to NCPLS for a review of your claim. Also, please be aware that federal law requires inmates to exhaust administrative remedies before seeking relief under the federal civil rights laws. 42 U.S.C. §1997e(a). Therefore, in order for our office to fully review a particular claim, we will need to see copies of your inmate grievances concerning the claim, as well as all administrative responses and appeal results.

THE NEWSLETTER OF NORTH CAROLINA PRISONER LEGAL SERVICES, INC.

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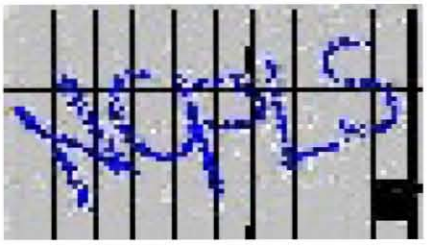

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