The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume VI, Issue 4, December 2006

NCPLS ACCESS

IN RE: HERNANDEZ

NCPLS Staff Attorney, Lisa Chun, successfully defended a client in immigration court on removal proceedings in which the Bureau of Immigration and Customs Enforcement (BICE) attempted to deport our client to his native country of Mexico. *In Re Hernandez*, File No. A 44-278-189.

Our client has been a legal, permanent resident of the U.S. since 1993. In 2005, he was convicted of involuntary manslaughter and misdemeanor possession of marijuana. He was sentenced to 14–17 months to be served in the North Carolina Department of Correction. While incarcerated, the BICE filed an immigration detainer against him and commenced removal proceedings, alleging that he was deportable due to his convictions of two crimes involving "moral turpitude." Upon his release from DOC custody, he was transferred into federal custody pursuant to the detainer BICE filed earlier.

In response to the government's allegations, our client turned to NCPLS. Ms. Chun filed a motion to terminate the deportation proceedings. Ms. Chun argued that Mr. Hernandez was not convicted of two crimes involving moral turpitude. The case was set for a master calendar hearing and the immigration judge granted the motion to terminate and ordered our client's release from immigration custody. Our client has been reunited with his family, which includes his United States citizen wife, his six-month-old son, and his mother, who is also a legal permanent resident. We expect this will be a happy holiday season for the Hernandez family, to whom we wish "Felice Navidad!"

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 38,000 prisoners and 14,000 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.

PLEASE NOTE: ACCESS is published four (4) times a year.

Articles, ideas and suggestions are welcome: *tsanders@ncpls.org*

IN PROFILE: ANGELA G. SMIGIEL, R.N.

One of the most frequent concerns we hear from our clients has to do with the quality of health care services, or a lack of such services. As attorneys, we can often answer these health care questions and determine whether legal standards have been violated. But there are occasions when the opinion of a health care professional is required. Unfortunately, it is often difficult to identify such an expert who will agree to work *pro bono*, or for the discounted fees we can afford to pay.

Angela G. Smigiel, R.N.

To address this problem and to provide in-house medical analysis and advice to our attorneys, we are pleased to announce that Angela G. Smigiel has joined our staff. Ms. Smigiel is a Registered Nurse with 23 years of nursing experience in a wide array of health care settings, including five years with the North Carolina Department of Correction, and some experience with the Florida Department of Correction. Other experiences include inpatient treatment at Charter North Ridge Hospital, the Durham Med-Care Center, the Wake Medical Center, Rex Hospital, and similar settings in Florida. Her clinical experience includes teaching, precepting, physical assessment, counseling and direct nursing. She also has a strong background with pharmacology and substantial knowledge of chemical dependency, psychiatric care, chemotherapy and HIV & TB patient teaching.

Part of her responsibility will be to develop good relationships with correctional health care professionals, and to recruit experts in various disciplines who will be both willing and able to assist in our review of our clients' inquiries and concerns.

With all of this education, training, and experience, Ms. Smigiel has already demonstrated a great deal of useful skills, sound judgement, and a pleasant disposition. We are pleased to welcome her to the NCPLS Team.

HEALTH FACTS: HEPATITIS C

By: Angela Smigiel, R.N.
NCPLS Nurse/Consultant

Introduction

Hepatitis-C is a liver disease caused by the hepatitis C virus (HCV), which is found in the blood of persons who have this disease. The infection is spread by contact with the blood of an infected person. It is the most common blood-borne disease in the U.S., with more than 2.7 million people diagnosed as chronically infected to date.

Most people who contract Hep-C suffer no serious or debilitating symptoms throughout their entire lives. But for others, it can be life threatening. Hep-C attacks the liver. It can cause scarring of the liver (cirrhosis) and, over a long period of time, it can cause the liver to fail.

Exposure: Protect Yourself and Others

Hep-C is transmitted in many of the same ways as sexually transmitted disease, through the blood. Most commonly, transmission occurs through sharing needles and unprotected sex, although it can be contracted when the blood or bodily fluids of an infected person come into contact with your blood.

To prevent contracting or spreading the disease, do not share personal items that may have blood on them (such as toothbrushes, razors, nail clippers, and the like). Be sure to cover any open wounds or sores. Avoid unprotected sex, especially with multiple partners.

Hep-C normally cannot be transmitted through sharing glasses or eating utensils, food or water, coughing, sneezing, and other types of casual contact.

Diagnosis

A diagnosis of hepatitis C infection will require life-style changes to protect your health. Some of the changes you will need to make include a change in diet (eat more vegetables and fruit) and discontinue the use of *any* alcohol or *any* drugs that are not prescribed by your physician. (Make sure your doctor is aware of all medications you are taking – including Tylenol, vitamins and over-the counter medications.) In other words, the maintenance of good health diminishes the chances of developing serious consequences.

Treatment for hepatitis C depends on many factors, including the extent of damage to the patient's liver, other health conditions the patient may have (such as a weakened immune system), how much virus is present in the body, and the type of hepatitis C the patient has contracted. Treatment is not always prescribed because the medicines used to treat hepatitis C have significant side-effects and do not work for everyone. Initial treatment may also depend on whether you have a short-term (acute) infection or a long-term (chronic) infection.

Treatment of short-term (acute) hepatitis: Most people with acute hepatitis C are not treated because they do not know they have the virus. It is common for people to live with hepatitis C for years without knowing they have it, simply because they do not have symptoms. By the time hepatitis C is diagnosed in most people, they already have long-term chronic infection. There is still debate over when and whether treatment is recommended. There are many factors in deciding when treatment should begin. A patient should thoroughly discuss these matters with the physician.

There is debate in the medical community over whether and when to begin treatment and how long to treat acute hepatitis C because there are so many relevant factors that are unique to an individual patient. One patient may receive treatment, another may not be actively treated, and still another may opt out. Again, this is an individualized disease process and no two patients are exactly alike. You may have no symptoms or elevated liver enzymes, therefore your provider may decide against treatment. That's why it is extremely important to continue with follow-up blood work on a routine basis, even when your last results were normal. Keep yourself informed and ask your physician any questions you may have.

Treatment of long-term (chronic) hepatitis: If your blood tests show that you have a chronic infection but no damage to your liver,

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HEALTH FACTS: HEPATITIS C (CONTINUED)

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again, you may not need treatment. Should you have some liver damage, you may be treated with a combination of medicines that fight the viral infection. Antiviral medicines ***may not*** be recommended if you:

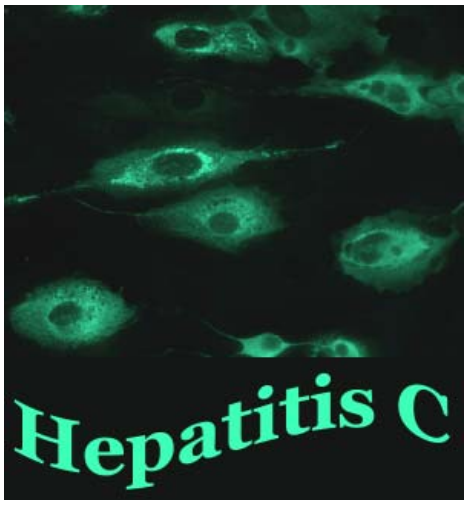
-- Drink alcohol, use IV drugs, or any other drugs not prescribed by your physician;
-- Have advanced cirrhosis (a chronic liver disease marked by degeneration of cells and thickening of tissue);
-- Have depression or other psychiatric problems;
-- Are pregnant or might become pregnant (the medications used are toxic and may cause harm to the fetus);
-- Have an autoimmune disease (such as lupus, rheumatoid arthritis or psoriasis) or other particular medical problems (such as advanced diabetes, heart disease or seizures).

The U.S. National Institutes of Health has recommended treatment for those over 18 that have significant detectable levels of the virus in their blood and/or significant liver damage confirmed with a liver biopsy.

Hepatitis C
Treatment Medications

Most commonly, hepatitis C is treated with pegylated interferon and other interferons, which are similar to a protein your body makes to fight off infection. In cases in which the condition is drug-resistant, a combination of antiviral therapy with interferons and ribavirin increases the chances of getting rid of the virus.

Medicines for hepatitis C have serious side-effects, such as constant fatigue, headaches, fever, nausea, depression, thyroid problems, and many other side-effects. It is



important to weigh the benefits of medicines for hepatitis C against the drawbacks. If you are confronted with a choice to use these medications, you do not need to make a quick decision because the disease progresses very slowly. You and your doctor must discuss prior medical conditions and current test results. You will need to have routine blood tests to help your doctor know how well your liver is working.

Treatment Procedures

Peginterferon and other interferons are given as a weekly injection. Ribavirin is taken as a pill two times a day. The time that treatment will continue depends on the hepatitis C genotype (the genetic constitution of the individual organism). If the liver does not show improvement after three months of treatment, or the patient is unable to tolerate the side-effects, treatment may be stopped. Even if treatment is recommended, it may not work or have a lasting effect. Chronic hepatitis C treatment simply is not successful in all patients that complete the full course of medication prescribed. On the other hand, while treatment may not lower the amount of virus in the blood, it may reduce scarring in the liver, which can lower the chances of developing cirrhosis (degeneration and thickening of tissue), and liver cancer.

Bibliography: *www.webmd.com* (WEBMD) (last accessed December 2, 2006)
www.cdc.gov/ncidod/diseases/hepatitis/c/index.htm#corrections (CDC: Hep-C in Correctional Settings) (last accessed December 2, 2006)

Contact info:
Center for Disease Control
www.cdc.gov/hepatitis (last accessed December 16, 2006)

or write:

CDC and Prevention
Division of Viral Hepatitis
Mailstop G37
Atlanta, GA 30333

CUSTODIAL RAPE CASE SETTLED

By: Michele Luecking-Sunman

Over the past few years, NCPLS has vigorously advocated for victims of sexual assault at the hands of correctional officials in North Carolina prisons. Again, we can report a favorable outcome in a case that recently settled.

Throughout 2004 and 2005 an officer at North Piedmont Correctional Center for Women abused his position of power and trust by engaging in inappropriate and unlawful sexual activities with numerous female inmates. This officer's victims included our current client, on whose behalf we were able to reach a settlement this month.

In a prison work assignment, our client was under the supervision of an officer who exploited his position. Our client had been unable to remove herself from the physically and emotionally damaging environment in which she found herself.

In our client's case, multiple sources of information indicated that the officer had previously been investigated for sexual misconduct, but was subsequently returned to his post. We do not know why this officer was re-assigned to a position where he could isolate our client and make sexual advances towards her.

We learned of our client's situation when she wrote to us in May of this year. We have successfully advocated for several other women involved in similar situations at North Piedmont Correctional Center for Women. Through these earlier cases, we learned that this officer had engaged in unlawful sexual conduct with numerous other female inmates. We also knew he had been investigated and returned to his post before some of his abuses of our current client. Through serious negotiations with the Attorney Generals' Office, we secured a settlement of the case, providing monetary compensation in an amount our client found acceptable.

What we do know is that officials throughout the DOC must take allegations of sexual misconduct by officers more seriously. Correctional officials at North Piedmont Correctional Center for Women would later learn with certainty that the earlier internal investigation reached an erroneous conclusion when the officer in question was convicted in Davidson County of custodial rape of several female prisoners.

At NCPLS, we are committed to advocating on behalf of individuals who have suffered abuse of any kind at the hands of guards. If you are in a situation like the one described above, or a similar one, please write and ask for our help.

BUREAU OF JUSTICE STATISTICS RELEASES NEW REPORT: PRISONERS IN 2005

In 2005, the prison population of the U.S. grew 1.9% for a total population at year's end of 2,320,359 according to a recently released report. Beck & Harrison, ***Prisoners in 2005***, Bureau of Justice Statistics (November 2006). An annual increase of 1.9% is slightly less than the 3.1% average increase over the previous three years.

People are being detained or incarcerated in a variety of correctional settings, including juvenile facilities (with an estimated 96,655), local jails (747,529), and state and federal prisons (1,446,269).

As you might imagine, a prison population of more than 2.3 million has resulted in crowded conditions in many correctional facilities Some state facilities report prison populations that are as high as 14% above capacity. The federal prison system is operating at about 34% above capacity. From December 31, 2004 through December 31, 2005 (the most recent period for which statistics have been compiled), North Carolina has experienced a 2.8% growth in the number of people it imprisons. With a present population over

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IN-HOUSE TRAINING AT NCPLS: CUNNINGHAM ADDRESSES NCPLS STAFF

By: Senior Staff Attorney Elizabeth ColemanGray

Bruce Cunningham, an experienced and knowledgeable lawyer who practices in Southern Pines, came to the office of NCPLS. Mr. Cunningham is a distinguished and respected attorney who has litigated literally hundreds of cases in North Carolina courts at every level. His scholarship and insight into the *Blakely* line of cases was stimulating and educational.

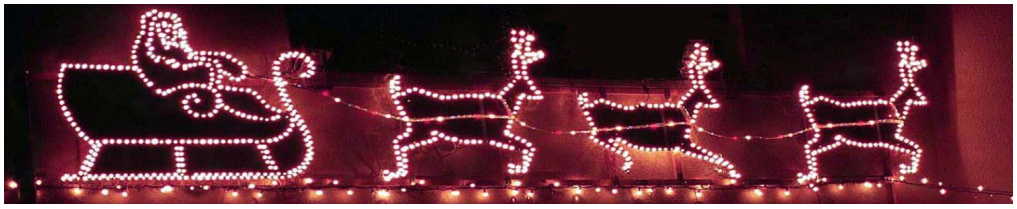
On November 17, 2006, Mr. Cunningham led a two-hour discussion about the *Jones*/*Apprendi*/*Blakely* line of cases. (Readers of ***ACCESS*** will recall that the general holding of these cases is that, except for prior convictions, any factor that could lengthen a criminal sentence must be tried to a jury and proven beyond a reasonable doubt. Previously, many sentencing schemes, including Structured Sentencing in North Carolina, required the judge to determine whether "aggravating factors" outweighed "mitigators," and if so, the judge was required to impose a lengthier sentence.)

About twelve NCPLS attorneys and one paralegal attended the presentation. In preparation for the event, staff was assigned about 200 pages of case law to review to ensure that discussion and an exchange of views with Mr. Cunningham would be productive.

Mr. Cunningham focused on the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (June 24, 2004). *Blakely* holds that a defendant can

legally be sentenced based only on facts that were either admitted or that were found by a jury to be true beyond a reasonable doubt. Without a plea of guilty or a jury finding of additional aggravating facts, only a sentence within the standard range is authorized by law. A sentence in the aggravated range had been imposed on Mr. Blakely because a judge found that the aggravators were more likely true than not, and that the aggravating factors outweighed mitigating facts. This, the Supreme Court explained, violated Blakely's right to a jury trial and required the sentence to be set aside and re-determined by a jury (or acceptance upon agreement by Blakely). Mr. Cunningham compared the holding of *Blakely* to the Supreme Court's earlier ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Afterward, the group discussed many complicated issues that remain unresolved in the wake of *Blakely*, including whether the case might be applied retroactively.

Staff Attorneys Hoang Lam and Elizabeth ColemanGray arranged and coordinated Cunningham's presentation. They also applied for and obtained Continuing Legal Education (CLE) credits for the attorneys who prepared for and attended the presentation. (The State Bar requires every North Carolina attorney to complete at least 12 hours of continuing legal education every year.) While many of our attorneys had already met that requirement, NCPLS feels it is important to keep up with changes in the law and the ideas of experienced and scholarly practitioners. We are grateful for Mr. Cunningham's participation.



CORRECTIONAL OFFICERS: OFFICER MISCONDUCT REFLECTS POORLY ON THE PROFESSION

It is a truism that the public does not adequately appreciate the important public service provided by correctional officers. Regrettably, many prisoners lack appreciation for their work, as well. Each day, they risk their lives to protect prisoners from harm, to ensure that prisoners are not deprived of basic needs, and in some cases, endure despicable conduct from those for whom they perform these services. All this correctional officers do without recognition or reasonable pay.

But there is a difference between correctional officers and mere guards. This latter category of correctional employees fail to treat prisoners with basic human respect, they engage in misconduct of all types, and they have little concern that they will be held accountable because correctional officers have a strong sense of comradery and a code of silence to which they strongly adhere.

Although a code of silence may be understandable, it is not appropriate in these situations for several reasons. First, these law enforcement officers are duty-bound to comply with the law themselves. It is illegal for one who has been given the badge of authority to ignore her duty and fail to stop another officer who summarily punishes a prisoner in her presence. In other words, if one officer is using unconstitutional force against a prisoner and a second officer observes this use of force and fails to intervene to stop or prevent it, then the second officer also violates the prisoner's rights by her inaction. *Jackson v. Pantazes*, 810 F.2d 426 (4th Cir. 1987).

The corrections profession has worked long and hard to develop respect in the broader community. The development of standards, specialized techniques, and humane, forward-thinking policies are but a few of the measures that correctional officers have embraced and which they consistently employ. The inevitable outcome of this effort is a professionalized correctional staff, a greater sense of pride and self-esteem, and a higher regard among prisoners, their families, political leaders, and the public.

Of course, the actions of a few knuckleheads who reject the principles of professionalism and are actively engaged in misconduct, do not deserve the respect or the support of the professional corps of correctional professionals. (Since Abu Ghraib or the recent reports of custodial rape and other such misconduct in this country's correctional facilities, how often have your families, friends, and others questioned you about the frequency of sexual assaults or the use of excessive force in prison?) Very few of the correctional professionals I have known over the years would conduct themselves in these ways, but they have sometimes covered-up such conduct by guards.

The code of silence does not serve the corrections profession or correctional professionals and it should not be tolerated. You and all of the correctional professionals with whom you work should make that clear to officers new to the facility. This Code of Correctional Professionalism may be the best defense available to diminish prisoner lawsuits, minimize damage awards, de-escalate mistrust among prisoners, and to support a misguided colleague by holding him accountable for improper or illegal conduct. With such guidance, guards can be mentored and transformed into the kind of correctional professionals who will deserve and command respect from everyone.

PRISONERS IN 2005 (CONTINUED)

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38,000, North Carolina projects that the DOC will operate in excess of capacity for the next decade, in spite of an aggressive plan for prison construction.

To obtain a copy of this report, write to:

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics
Washington, D.C. 20531

Request a copy of Beck & Harrison, ***Prisoners in 2005***, Bureau of Justice Statistics (November 2006).

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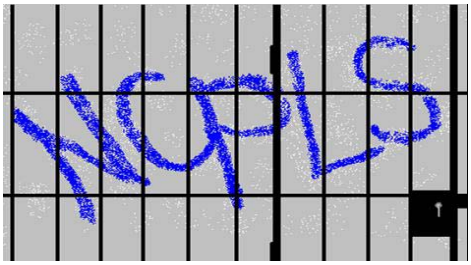

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