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NCPLS ACCESS

THE MILITARY: CAN I ENLIST AS AN EX-OFFEND ER?

BY MICHAEL G. AVERY, STAFF ATTORNEY

Many ex-offenders often find that employment opportunities upon release from DOC custody can be limited. These limitations certainly play a role in increased rates of recidivism. According to the most recent study conducted by the United States Bureau of Justice Statistics, an estimated 67.5% of persons released from prisons were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% re-sentenced to prison for a new crime.[1]

With these limitations in mind, some ex-offenders question whether they would be able to enlist and serve within one of the branches of the United States armed forces. The answer is maybe. However, in order to do so, it is necessary to apply for a "moral waiver" which is granted to individuals who otherwise would not qualify for military service because of a criminal background.

It is important to note that applicants who require a waiver are not qualified for enlistment, unless/until a waiver is approved. The burden is on the applicant to prove to waiver authorities that they have overcome their disqualifications for enlistment, and that their acceptance would be in the best interests of the military.

Each branch of the military is different when it comes to recruiting standards, but they all have regulations regarding felonies. The military maintains a high "moral" standard for recruits and is the basis for not allowing most felonies. It generally comes down to the type of offense and how long ago it was.[2] It is important to note that federal law requires applicants to divulge all criminal history on recruiting applications, including expunged, sealed, or juvenile records.[3]

The process begins with an interview by a recruiter, asking the applicant about any records of arrest, charges, juvenile court adjudications, traffic violations, probation periods, dismissed or pending charges or convictions, including those which have been expunged or sealed. Providing false information, or withholding required information is a federal offense, and individuals may be tried by Federal, civilian, or Military Court.[4]

Waiver authorities will consider the "whole person" concept (consideration of the circumstances surrounding the criminal violations, the age of the person committing them, and personal interviews with the applicant and others, as well as a recruit's other aptitudes, experiences, and characteristics [5]) when considering waiver applications.

If a waiver is disapproved, there is no appeal (the waiver process itself is the appeal -- the individual is not qualified for enlistment and submits a waiver request, appealing to recruiting authorities to make an exception in his/her particular case).[6]

Information released in April of 2008 by the House Oversight and Government Reform Committee shows that in 2006 and 2007 Americans who were convicted of serious crimes including sexual offenses, manslaughter, "terrorist

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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 Academy of Trial Lawyers, the ACLU of North Carolina, and the Office of Indigent Defense Services.

NCPLS serves a population of more than 38,600 prisoners and 14,000 pretrial detainees (with about 250,000 annual admissions), providing information, advice, and representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

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NCPLS Welcomes New Executive Director

At the end of an extensive search process, the NCPLS Board of Directors recently appointed **Mary Pollard** as the new Executive Director of NCPLS. Ms. Pollard is a 1993 *cum laude* graduate of Wake Forest University, where she served on the Wake Forest Law Review and earned the I. Beverly Lake Award for Excellence in Constitutional Law. In the fall of 1993, she joined the firm of Womble Carlyle Sandridge & Rice, where she gained experience in a broad range of complex civil litigation, from mediation to pre-trial discovery to trial.

During her time at Womble Carlyle, she began what has become a fierce commitment to public service litigation, particularly for those accused and convicted of committing crimes. She pursued post-conviction work for James Alan Gell, an innocent death row inmate whose direct appeals had been exhausted. Using the new capital post-conviction open-file discovery law, she was able to obtain prosecutorial files that had been withheld from Gell's trial counsel but which proved that he did not and could not have committed the murder. With that information, and the help of others in the legal community, Ms. Pollard secured a new trial for Gell, whose subsequent acquittal was one of the major factors that led to the adoption of pre-trial open-file discovery for accused people in North Carolina. In 2002, Ms. Pollard left Womble Carlyle and joined the Center for Death Penalty Litigation, where she served as a staff attorney representing defendants in capital pre-trial and post-conviction proceedings and consulted with attorneys handling capital litigation statewide.

NCPLS Continues to Work for Lost Jail Credit

As has been reported in earlier editions of *Access*, the NCPLS Jail Credit Team works on requests from inmates to obtain sentence reduction credits from time spent in jail on a charge for which they were ultimately convicted (jail credit). Our Jail Credit Team consists of four full-time paralegals, working under the supervision of a senior staff attorney, whose sole job is to investigate claims by inmates that they are entitled to additional jail credit.

During fiscal year 2007 (7/1/07-6/30/08) our Jail Credit Team found **26,794** days of jail credit that had not been properly applied to sentences. During the first half of the current fiscal year, the Team has found an additional **9,382** days of credit. Not only does this mean earlier release for our clients, but it also results in a savings to the taxpayers of North Carolina of over 2.7 million dollars.

SEXUAL ABUSE AND YOUR RIGHTS

BY STAFF ATTORNEYS ELIZABETH ALBISTON AND MICHELE LUECKING-SUNMAN

For many years, NCPLS has received significant complaints from people housed within the North Carolina Department of Corrections regarding sexual assaults and abuse at the hands of correctional officers and staff. The Eighth Amendment to the Constitution prohibits cruel and unusual punishment and deliberate indifference by prison officials to the welfare of inmates. This includes sexual abuse and inappropriate sexual contact between inmates and officers or staff. Make sure you know what your rights are if you are confronted with a situation of sexual abuse or contact by correctional personnel.

In 2003, Congress passed the Prison Rape Elimination Act (PREA, P.L. 108-79) to address the problem of sexual abuse in prisons and jails. PREA is legislation that establishes a zero tolerance policy for sexual assault and abuse in prisons and jails. The major provisions of PREA include developing standards for the prevention of sexual abuse, collecting statistics, and awarding grants to local and state governments to help stop sexual abuse.

Sexual contact between inmates and prison officers or staff occurs for many reasons. Sometimes officers or staff offer promises or gifts to inmates in exchange for sex. Other times, inmates are afraid to say no to an officer or staff member because they fear retaliation. Officers or staff may even directly threaten inmates with lock-up or harm. Regardless of the reason for the sexual contact, the state of North Carolina has recognized that sex between inmates and correctional officers or staff tends to be coercive. Thus, any correctional officer or staff member who engages in a sexual act with an inmate can be charged with a felony, regardless of whether the inmate consented. N.C.G.S. § 14-27.7(a).

Often victims are unwilling or afraid to report what has happened to them. Unfortunately, this reluctance allows the practice to continue. Communication with NCPLS is protected by lawyer-client confidentiality. If you have been a victim of this type of abuse and you would like information about your rights, please write to us.

NCPLS OBTAINS RELIEF IN TWO SENTENCE CORRECTION CASES

NCPLS was recently presented with a case where a client had been convicted, following a jury trial, of second-degree murder, two counts of armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. Following appeal, he was awarded a new trial. Prior to trial, he entered a plea agreement under which he would plead to the two armed robbery counts. The client's plea agreement specifically stated that the two terms would be consolidated for judgment, and would run concurrently with sentences from other counties that the client was already serving. However, at the time he wrote to our office, the DOC had not changed the manner in which the client's sentences were to run. Following review by post-conviction investigator Bruce Creecy, and NCPLS staff attorney Nicholas Woomer-Deters, we were able to get this error corrected. The result for the client, following both his direct appeal and our assistance in correcting his sentences, was to reduce his projected release date by forty-nine years.

In a second case, we obtained resentencing for a client by arguing that there had been an incorrect calculation of his prior record points. The State did not prove that the client's Florida burglary convictions were substantially similar to North Carolina burglary convictions. We were successful in showing that the particular Florida burglary offense was substantially similar to the North Carolina offense of breaking and entering. Once the prior record was recalculated the client went from a prior record VI to a prior record V. After resentencing, the client's projected release date was reduced by over 6 months.

RECENT CHANGES IN PAROLE REVIEW FOR CERTAIN INMATES

NCPLS has received many letters from inmates asking about changes in the frequency of parole review. Felony parole only applies to persons who were convicted of felonies committed before October 1, 1994, the effective date of the Structured Sentencing Act. For most of those offenders, the Post-Release Supervision and Parole Commission (the Commission) conducts an annual parole review, once the person becomes eligible for parole.

During its last session, the North Carolina General Assembly enacted Session Law 2008-133, which was signed into law by Governor Easley on July 28, 2008. This statute provides, in part, that:

> The Commission shall review cases where the prisoner was convicted of first or second degree murder, and in its discretion, give consideration of parole and written notice of its decision once every third year; except that the Commission may give more frequent parole consideration if it finds that exigent circumstances or the interests of justice demand it."-

This statute became effective on October 1, 2008 and applies to parole reviews conducted on and after that date.

Inmates convicted of first or second-degree murder under the Fair Sentencing Act, or pre-FSA law, have asked whether this change in parole review violates the constitutional principles barring *ex post facto* laws. The U.S. Supreme Court has considered two cases in which there was a retroactive change in the length of time for parole hearings. *California Dept. of Corrections*

v. Morales, 514 U.S. 499, 115 S.Ct. 1597 (1995), and *Garner v. Jones* 529 U.S. 244, 120 S.Ct. 1362 (U.S.,2000). In both cases the Court held that the increase between parole hearings alone did not violate the *ex post facto* clause of the U.S. Constitution.

In each case the issue was considered in light of the particular parole statutes, regulations, and practices in California and Georgia respectively. *See, Garner*, 529 U.S. at 252, 120 S.Ct. at 1368 (The case turns on the operation of the amendment…within the whole context of Georgia's parole system.) Any challenge to changes in North Carolina's parole system would similarly look at the relevant laws dealing with parole in this state. The key for a successful *ex post facto* challenge is for an inmate to prove that any amendment of the statutes creates a "significant risk of prolonging [his] incarceration." *Garner*. 529 U.S. at 251, 120 S.Ct. at 1368.

In North Carolina the decision to grant parole is left to the discretion of the Commission. There are no formal hearings held where the inmate is present and can offer evidence. (An inmate or interested persons can always submit relevant information to the Commission in writing prior to the review date.) There are three Commissioners, each of whom votes on whether to grant parole, and at least two Commissioners must vote in favor of parole. Parole can be denied without lengthy explanation, simply by referring to one of the four statutory reasons set out in N.C. Gen. Stat. §15A-1371(d) (1990) (repealed).

Given the relatively informal, and highly discretionary, nature of North Carolina's parole process, it would be difficult to prove that a change in the frequency of review creates a "significant risk" of prolonging an inmate's incarceration. Furthermore, it must also be noted that the new law gives the Commission the option of holding more frequent reviews in appropriate cases, a factor that would almost certainly count in its favor in any constitutional challenge.

NEW STAFF MEMBERS AT NCPLS

The past year has seen NCPLS add several new members to its staff. They are:

D. Tucker Charns is the new Post-Conviction Litigation Director. A graduate of the University of North Carolina at Chapel Hill for both her undergraduate and law degrees, she has been a criminal defense attorney for 20 years. She was an assistant public defender for 10 years and has been in private practice, handling trial work and direct appeals.

Elizabeth Albiston is a new civil attorney at NCPLS. She is a 2007 graduate of the UNC School of Law, where she represented criminally charged juveniles and worked as an advocate for transgender prisoners. Following her graduation, Ms. Albiston worked as a criminal defense attorney. In her spare time, she volunteers with the Internationalist Books to Prisoners Collective, a program that sends books and resources to prisoners incarcerated in Alabama and Mississippi.

Laura Grimaldi graduated from the University of Iowa College of Law in 2002. She worked as a public defender with the Legal Aid Society in Brooklyn, NY until moving to North Carolina in 2005. Prior to taking her position with NCPLS, Ms. Grimaldi had her own law practice in Durham, NC, specializing in immigration and criminal law. She started work with the post-conviction team at PLS in August of 2008, and is very excited to be a part of NCPLS's mission against injustice.

Sarah J. Farber is the newest member of the Postconviction Team. Before joining NCPLS, she was a criminal defense attorney in private practice. She graduated cum laude from North Carolina Central University School of Law. Prior to law school, she worked for a non-profit organization mentoring college students. She received her B.A. from Penn State University.

Yolanda Carter is the newest member of the NCPLS Civil Team. She is a graduate of the North Carolina Central School of Law. Her employment prior to law school included work as a correctional officer at NCCIW.

Joy Belk is a NC Certified Paralegal with 4 years of experience. She is a graduate of East Carolina University and Meredith College's Paralegal Program. Her prior positions included work as a correctional officer at both NCCIW, and working at Central Prison as both an officer and a Programs Assistant. During 2006-2007, Joy worked for the Department of Justice as a Tort Claims Paralegal.

Carlos Soria was born in Mexico and obtained a degree in graphic design from the Mexican-Italian Studies Center on Graphic Design. He came to the United States in 2000 where he worked at a variety of jobs, and obtained additional technical training. He has worked as a legal assistant for the past three years and currently works in the NCPLS Intake Section as a bilingual English / Spanish interpreter.

RECENT RUMORS ARE UNFOUNDED

NCPLS regularly receives letters from inmates asking about various prison rumors. One of the most common is whether the "65% law" will be reinstated. The term "65% law" is used to describe the former Fair Sentencing Act (FSA). The FSA applied to felonies committed before October 1, 1994, which was the effective date of the current Structured Sentencing Act (SSA). The FSA contained several provisions that allowed many inmates to serve a lower percentage of their total sentence when compared to the SSA These included day-for-day good time (for obeying prison rules), gain time (for working at prison jobs), merit time, as well as the opportunity for parole for many classes of felony conviction.

At this time there has been no legislation, either enacted or proposed, that would reinstate the FSA or which would require current SSA inmates to be resentenced.

Another rumor is that a new DOC policy will require inmates with dreadlocks to cut their hair. We have contacted the DOC and been informed that there has been no official change of policy or regulations concerning dreadlocks at this time.

SEEKING COMPENSATION FOR WRONGFUL CONVICTIONS

BY STAFF ATTORNEY KEN BUTLER

NCPLS often receives inquiries, from both present and former inmates, about *civil* legal claims relating to criminal convictions. These ask about the possibility of seeking money damages for what are alleged to be wrongful convictions, or violations of constitutional rights during a criminal prosecution. In recent years several high-profile cases of wrongful conviction, both in North Carolina and other states, have led to compensation awards for the innocent defendants.

North Carolina has a statutory mechanism for compensating some victims of wrongful convictions, by providing that persons who have been convicted of a felony and imprisoned, and who are later granted a pardon of innocence by the Governor, can petition the State for compensation. N.C. Gen. Stat. § 148-82. These petitions are submitted to the North Carolina Industrial Commission. In 2008, the General Assembly increased the amount of compensation that could be awarded in such cases to $50,000 per year, up to a maximum of $750,000. Sess. L. 2008-173. Furthermore, in determining an appropriate amount of compensation, the Industrial Commission is permitted to examine the extent to which imprisonment deprived the individual of educational or training opportunities. As part of its consideration, the Commission can provide compensation for job skills training for at least one year through an appropriate state program, as well as tuition and fees for any North Carolina public university or community college. This law became effective on August 4, 2008.

This type of statutory compensation *only* applies to a very specific class of persons, namely those who have received a pardon of innocence from the Governor. It does *not* include persons who cases are overturned on appeal, collateral review (such as motions for appropriate relief or habeas corpus), or similar forms of *judicial* action. Furthermore, the compensation under § 148-82 does not require a showing of some type of misconduct on the part of members of the criminal justice system. A person seeking compensation in those types of cases must bring an action through more traditional tort or civil rights remedies.

There are many types of claims that can be made regarding wrongful criminal convictions. These include claims of false testimony by police officers at trial, failure to turn over exculpatory evidence, the fabrication or manipulation of evidence, or knowingly having witnesses give false testimony. However, establishing liability for damages on the part of law enforcement or prosecutors often faces an array of obstacles.

In such cases the first step is to demonstrate that the original conviction was actually improper. The Supreme Court has held that before a person can seek damages under the civil rights laws for an unconstitutional conviction, it must be shown that the "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994). Put another way, a person cannot make a civil rights claim for damages based on a wrongful conviction as long as the conviction is still stands and is presumptively valid.

The next hurdle that a wrongfully convicted person faces is the various forms of *immunity* defenses that are provided by the law. These immunities mean that a defendant does not have to pay damages to the injured party, even if the facts otherwise show a wrongful act by a defendant. Even though an injured party may be left without a legal remedy, these immunities have been approved by the courts on various policy grounds.

First among these are the related doctrines of *sovereign immunity* and Eleventh Amendment immunity. Sovereign immunity protects the states from being sued in their own courts unless they have waived the protection of such immunity. *Evans v. Hous. Auth. of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004). North Carolina has enacted a limited waiver of its sovereign immunity protection through the State Tort Claims Act, N.C. Gen. Stat. § 143-291, for cases where a party claims to have been injured by

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SEEKING COMPENSATION FOR WRONGFUL CONVICTIONS *(CONTINUED)*

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the negligence of a state officer, employee or agent, acting in the course and scope of his or her duty. This waiver does not extend to intentional acts or to claims of civil rights violation. The Eleventh Amendment to the Constitution prevents a citizen from bringing a lawsuit for money damages in the *federal* courts, against a state, a state agency, or a state official in his or her *official* capacity. *Pennhurst State School & Hosp. v. Halderman* 465 U.S. 89, 97-102, 104 S.Ct. 900, 906 - 909 (1984).

Judges enjoy *absolute* immunity from damages liability for judicial acts unless done "in clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356-57, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1972). Court clerks are also accorded derivative judicial absolute immunity when they act in obedience to judicial order or under the court's direction. *See McCray v. Maryland*, 456 F.2d 1, 5 (4th Cir. 1972). Witnesses who testify at a criminal trial are also entitled to absolute immunity for their testimony. This even extends to police officers who are alleged to have given false testimony. *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983).

Prosecutors are entitled to absolute immunity from civil liability for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976). Therefore, a prosecutor will not be liable for the decision to pursue charges, or for actions taken as an advocate for the state. This type of immunity offers broad protection even for acts that clearly have the potential to affect a defendant's trial. *See Reasonover v. St. Louis County, Mo*. 447 F.3d 569, 580 (8th Cir. 2006) (even if prosecutor knowingly presented false, misleading, or perjured testimony, or even if he withheld or suppressed exculpatory evidence, he is absolutely immune from suit). However, absolute immunity does *not* apply when a prosecutor performs other functions, such as acting as an administrator or investigative officer, or providing legal advice to the police. Absolute prosecutorial immunity has been denied in cases involving a district attorney's failure to establish policies or adequately train subordinates concerning the manner in which exculpatory evidence is handled. *Thompson v. Connick*, 2008 WL 5265197 (5th Cir. Dec. 19, 2008); *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1176 (C.A.9 (Cal.),2007).

In situations where absolute immunity does not apply, both police and prosecutors may still be entitled to *qualified* immunity. Under qualified immunity, an officer is not liable for damages if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rish v. Johnson*, 131 F.3d 1092, 1095 (4th Cir. 1997)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Successful wrongful conviction cases generally involve overcoming claims of entitlement to qualified immunity on the part of either police, or prosecutors who were acting in a capacity that does not confer absolute immunity. *See Limone v. Condon***,** 372 F.3d 39, 44-45 (1st Cir 2004)(denying qualified immunity based on fundamental concept that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.).

An important point to note is that absolute prosecutorial immunity, or the qualified immunity for police officers, apply only where a complaint is seeking damages against the prosecutor or police officer in their *individual* capacities. Some complaints of wrongful conviction liability can be asserted against a local government entity, such as a city or county police or sheriff's department based upon liability for a *policy* that violated a defendant's constitutional rights. *Gregory v. City of Louisville*, 444 F.3d 725, 752 -753 (6th Cir. 2006).

Obviously any person who has served time for a crime that he or she did not commit wants, and deserves, compensation for the time they have lost. Where the defendant's actual innocence can be proved, § 148-82 provides a means for compensation. Where the conviction was the result of police or prosecutorial misconduct, obtaining compensation will require negotiating the various immunity defenses. In either case, representation by counsel will be essential to present the defendant's claim and to secure the best possible recovery.

THE NEWSLETTER OF NORTH CAROLINA PRISONER LEGAL SERVICES, INC .

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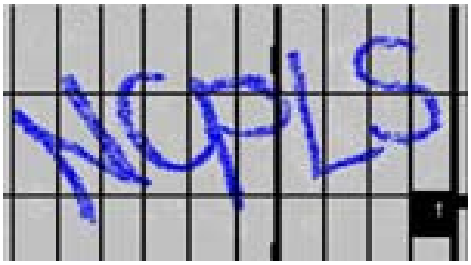

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threats including bomb threats", burglary, kidnapping or abduction, aggravated assault and sexual assault were allowed into the military under moral waivers granted by the services.[7]

According to the data given to the committee by the Department of Defense, the Army allowed the most waivers in 2006 and 2007. During this period, moral or felony waivers were given to 3 soldiers who had been convicted of manslaughter. One soldier was allowed in following a kidnapping or abduction conviction, 11 were convicted of arson, 142 convicted of burglary, 3 who were convicted of indecent acts or liberties with a child, 7 who were convicted of rape, sexual assault, criminal sexual assault, incest or other sex crimes and 3 who were convicted of terrorist threats including bomb threats.[8]

In summary, although there is no specific right to serve in the armed forces, a criminal record does not foreclose one's ability to enlist. According to recent data, the military is increasingly granting "second chances" to those ex-offenders wishing to enlist and serve their country despite having a criminal record.

(Footnotes)

[1] www.ojp.gov/bjs/crimoff.htm#recidivism

[2] www.army.com/articles/may_faq_felony.html

[3] http://usmilitary.about.com/od/armyjoin/a/criminal.htm

[4] Id.

[5] www.gao.gov/archive/1999/ns99053.pdf.Id.

[6] http://usmilitary.about.com/od/armyjoin/a/criminal.htm

[7] *Military has Recruited More Serious Ex-Offenders than Previously Known*, Palm Center Research Institute, University of California, Santa Barbara, April 21st, 2008.

[8] Id..