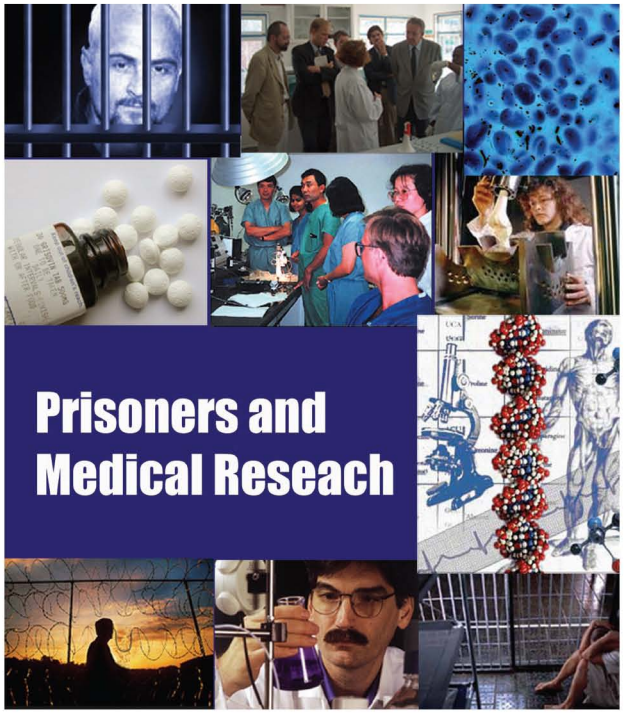
The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume V, Issue 1, March 2005

# NCPLS Access

## Research Involving Prisoners Re-Examined

The National Academies of Science, Institute of Medicine recently commissioned a study to re-examine the ethical considerations for the protection of prisoners involved in research. Regulations that presently govern such research have been criticized as out-of-date, unduly restrictive, and overly protective of prisoners.




The history of the use of prisoner subjects in research is relatively short and deeply troubling. Following the widely publicized abuses of Nazi experimentation in the concentration camps of the 1930's and '40's, European countries adopted conventions that essentially banned the use of prisoners in research. For example, the Nuremberg Code (1949) required that human subjects "be so situated as to be able to exercise free power of choice." The Declaration of Helsinki, which was adopted by the American Medical Association in 1966, included similar requirements, but they were deleted in 1975. Nonetheless, countries other than the United States do not generally permit prisoners to participate in biomedical research.

However, beginning in World War II American prisoners were recruited as subjects of medical research to develop treatment for infectious diseases that afflicted people in the armed forces. In the years and decades that followed, the use of prisoners in research became increasingly common. By the mid 70's, as much as 85% of research involving cosmetics and drugs was conducted on prisoners. Many abuses were documented, including the deliberate infection of prisoners with disease in order to test the efficacy of treatments.

But beginning in the 60's, the ethical propriety of involving prisoners in research has been the subject of inquiry. As a result, Congress passed the National Research Act, P.L. 93-348, 88 Stat. 348 (July 12, 1974) and created the National Commission for the Protection of Human Subjects of Biomedical Research. The Commission identified and weighted competing considerations regarding the use of prisoners in research. On the one hand, the principle of respect for persons requires that an individual be permitted to exercise independent judgement and that freely made choices be honored. On the other hand, prisoners are subjected to an inordinately restrictive environment, they are subject to coercion, and an appropriate expression of respect in such a context requires a high

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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 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*

# RESEARCH RE-EXAMINED (CONTINUED)

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degree of protection from exploitation.

After months of fact-finding, study, and deliberation the National Commission issued a 1976 report containing recommendations and principles governing the use of prisoners in medical research. Those recommendations were incorporated into regulations adopted by the Department of Health and Human Services (DHHS) at 45 C.F.R 46 Subpart C (1978). In essence, the regulations permit the use of prisoners who knowingly and voluntarily consent to participate in research of four types. Research involving "minimal risk" (that is, risk not greater than that "ordinarily encountered in daily life") is permitted when the research examines "the possible causes, effects, and processes of incarceration, [or] of criminal behavior;" or the "study of prisons as institutional structures or of prisoners as incarcerated persons." 45 C.F.R. 46.306(2)(A) & (B).

Other types of research involving prisoners include "research on conditions particularly affecting prisoners as a class," and "research on practices, both innovative and accepted, which have the intent and reasonable probability of improving the health or well-being of the subject." 45 C.F.R. 46.306(2)(C) & (D). However, these latter categories of research require the approval of the Secretary of DHHS after consultation and publication in the Federal Register. *Id.*

There are several concerns about these regulations. First, they apply only to research funded by DHHS or other agencies of government that have expressly agreed to be bound by the rules. 45 C.F.R. 46.101. Second, the regulations have been criticized as overly protective, preventing the participation of people who would benefit greatly from research into the treatment of HIV/AIDS, or Hepatitis C, for example. Third, researchers have complained that the regulations are too restrictive and that they frustrate efforts to expand knowledge. Finally, much has changed during the two-and-a-half decades since the rules were promulgated and some observers question whether they are continue to be in keeping with the realities of prison life, societal perceptions about research, and the need for the protection of well-informed and consenting participants in research.

As a result, the National Academies of Science, Institute of Medicine has created the Committee on Ethical Considerations for Revisions to the Department of Health and Human Services (DHHS) Regulations for Protection of Prisoners Involved in Research. Among those named to the Committee is NCPLS Executive Director Michael Hamden.

The Committee will examine whether the conclusions reached by the 1976 Commission remain appropriate today. This examina-

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# MAR Results in Sentence Reduction

On behalf of a man sentenced for second degree rape from Forsyth County, NCPLS Staff Attorney Elizabeth ColemanGray filed a Motion for Appropriate Relief (MAR). The Honorable Lindsay R. Davis, Jr., Resident Superior Court Judge for Guilford County, was the visiting judge who heard the case, granted the MAR and re-sentenced the Petitioner.

Following trial and conviction, the Petitioner had been found to have a Class C felony and a Prior Record Level of III. He was determined to have five prior record points based on four misdemeanor convictions, and the fact that the offense was committed while Petitioner was on probation. According to court records, one of the prior convictions was for attempted misdemeanor breaking and entering. The defendant's prior record level was calculated based upon the mistaken application of misdemeanor breaking and entering, which is a Class 1 misdemeanor. N.C. Gen. Stat. §14-54. Under N.C. Gen. Stat. §14-2.5, attempted misdemeanor breaking and entering is a Class 2 misdemeanor. But, according to N.C. Gen. Stat. §15A-1340.14(b)(5), Class 2 misdemeanors are not countable as prior record points. Thus, Petitioner should not have received a point for the attempted misdemeanor breaking and entering conviction. His prior record points should have been calculated at four points, resulting in a Prior Record Level of II. Petitioner was originally sentenced to 105-135 months. The MAR court re-sentenced him to 91-119 months to reflect the correct Prior Record Level. *State v. Thomas*, No. 99-CRS-036198, Forsyth County Superior Court (2005).

# Ex Post Facto Appeal

*By NCPLS Senior Attorney Richard E. Giroux*

Prisoner Larry Eugene Smith filed a *pro se* petition in Wilson County Superior Court. Changes in DOC rules were adopted after the dates of Smith's criminal offenses. Those changes increased the amount of good time that could be lost for certain prison disciplinary infractions. Smith challenged those changes as violative of due process and the Ex Post Facto Clause.

Formerly, major infractions could result in the loss of up to 30 days of good time credits. Under the new regulations, this was increased to 40. Minor infractions, which formerly could not result in the loss of *any* good time, now can result in the loss of up to 20 days. Smith alleged that such rule changes violate the Ex Post Facto Clause of the U.S. and N.C. Constitutions, the Due Process Clause of the U.S. Constitution, and state statutes.

The Superior Court appointed NCPLS to represent Smith. The DOC's lawyers filed a motion to dismiss, and NCPLS filed a motion for summary judgment. On February 14, 2005, a hearing was held on the motions. The court denied Smith's motion and dismissed the action, citing only a Fourth Circuit case that held that prison officials, consistent with the Ex Post Facto and Due Process Clauses, could increase the penalties for prospective violations of prison regulations, even though the increased penalties involved the loss of good time credits. *Ewell v. Murray*, 11 F.3d 482 (4th Circuit 1993), *cert. denied*, 51 U.S. 1111 (1994).

Because this case could affect the release date of so many prisoners, NCPLS has decided to offer Smith representation on appeal to the North Carolina Court of Appeals. The record on appeal is being prepared, and briefs will be filed later in the spring.

# Supreme Court Report

*Death Penalty*

Seventeen years ago, the U.S. Supreme Court considered whether the Eighth Amendment barred execution of people who were younger than 16 years old when they committed the crimes for which they were sentenced to death. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The decision of a closely divided Court turned on the opinion of Justice O'Connor that there was no clear national consensus against imposing the death penalty against juveniles and, thus, such executions did not violate the Eighth Amendment. A similar result was reached a year later in *Stanford v. Kentucky*, 492 U.S. 361 (1989)(death penalties imposed on 16- and 17-year-old defendants not unconstitutional).

This term, in *Roper v. Simmons*, __ U.S.__, 125 S.Ct.1183 (2005), the Supreme Court reconsidered its decision in *Stanford v. Kentucky*. In another 5-4 decision, the Court found that, in light of evolving societal standards, the Eighth Amendment now prohibits the execution of defendants who were under 18 at the time that the crimes were committed. In reaching this result, the majority noted that 30 states had rejected the death penalty for juveniles, including 12 states that had abandoned capital punishment altogether. 125 S.Ct. at 1192. The Court also pointed to distinctions between juveniles and adults, such as the lower maturity level, greater susceptibility to negative influences and outside pressure, and the fact that a juvenile's character is not as fully formed as an adult's, which rendered juveniles less culpable than an adult. 125 S.Ct. at 1195-1196. Finally, the Court observed that the United States was the only country that gave official sanction to the juvenile death penalty. 125 S.Ct. at 1198.

*Sentencing*

A series of Supreme Court cases construes the right of an accused person to a jury's determination beyond a reasonable doubt of any fact (other than prior conviction) that increases the maximum penalty for a crime, and the limitations upon judicial sentencing discretion. See, for example, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *States v. Jones*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Blakely v. Washington,* __ U.S. __, 124 S.Ct. 2531 (2004).

The most recent decision in that line of cases was announced by the Supreme Court in *United States v. Booker*, 125 S.Ct. 738 (2005). In *Booker*, the Court held that the Federal Sentencing Guidelines were unconstitutional, at least to the extent that they required a sentence to depend upon facts neither charged in the indictment nor proven to a jury. Booker's sentence was increased ten years because the judge found by a preponderance of the evidence that he possessed more cocaine than he was tried for possessing.

The remedy for this Sixth Amendment violation was not the remedy urged by the plurality of the Court, which had championed the cause for years. Rather, a new "remedial" majority of the Supreme Court held that the solution was simply to make the Guidelines "advisory," and not binding on the sentencing judge.

The "remedial majority" reasoned that non-mandatory guidelines would be consistent with the Sixth Amendment, so long as judges are allowed to take any number of factors into account when imposing a sentence within the statutory range. But that does not seem consistent with the logic of *Apprendi*, which held that any factor (other than a prior conviction) that changes the sentencing range should be understood as an element of the crime and must be proven to a jury beyond a reasonable doubt. In *Booker*, only Justice Ginsburg found both that the Guidelines violated the Constitution and that rendering them advisory was the proper remedy for the constitutional infirmity. The remainder of the Court was equally divided as to whether the Guidelines were unconstitutional, and as to whether the constitutional violation could be remedied by treating the Guidelines as advisory.

It seems clear that *Booker* is not a final resolution of the tension between the desire for consistency (reflected in determinate sentencing schemes such as the Federal Sentencing Guidelines) and fairness (encompassed by the jury trial imperative). The response of Congress and the legislatures of the states will doubtless occasion new litigation before a fully satisfactory balance is struck between these competing interests.

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# Supreme Court Report (Continued)

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*Classification*

In California, prisoners newly admitted to a correctional institution (whether as the result of a transfer, or upon admission) were segregated by race for a two-month period. The California Department of Corrections (CDOC) argued that this measure was necessary to prevent violence among racial gangs. That practice was the subject of a legal challenge which came before the Supreme Court this term. *Johnson v. California*, __U.S.__, 2005 WL 415281 (February 23, 2005).


The CDOC provided evidence of numerous incidents of racial violence and identified five separate gangs separately comprised of racially distinct members. The CDOC argued that the unwritten segregation policy was equally applicable to prisoners of all races and, therefore, was not discriminatory.

The central question in the case was the standard of review to be applied by the courts in assessing whether the segregation policy violated the Constitution. Under *Turner v. Safley*, 482 U.S. 78 (1987), the Court held that prison regulations that infringe upon the constitutional rights of prisoners are to be evaluated by determining whether the regulation was "reasonably related" to a "legitimate penological interest." Under this deferential standard, prison officials are accorded broad discretion over regulating virtually all aspects of prison life.

In the *Johnson* Case, however, the Supreme Court found an earlier decision to be controlling. In *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam), without publishing a majority opinion, the Court affirmed a decision that held unconstitutional Alabama's policy of segregation in its prisons. *Id*., at 333-334. By implication, the *Johnson* Court viewed *Lee* as precedent for the application of a heightened standard of judicial review in cases involving racial segregation.

According to the Court, the *Turner* standard applies when assessing the infringement of rights inconsistent with the status of prisoners, because "certain rights must necessarily be limited in the prison context." For example, the *Turner* test has been applied in cases involving First Amendment rights. See, for example, *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)(restrictions on freedom of association; visitation); *Lewis v. Casey*, 518 U.S. 343 (1996)(restrictions on inmates' access to courts); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (restrictions on receipt of subscription publications); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)(limitations on prisoners' attendance at religious services); *Washington v. Harper*, 494 U.S. 210 (1990) (involuntary medication of mentally ill prisoners); and in *Turner*, itself. *Turner v. Safley*, 482 U.S. 78 (1987)(restrictions on the right to marry).

The Court explained: "The right not to be discriminated against based on one's race is . . . a right that need [not] necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system."

Thus, the Court concluded that the CDOC policy must be examined under "strict scrutiny" to "guard against invidious [racial] discrimination." On remand to the trial court, prison officials "must demonstrate that race-based policies are 'necessary to further a compelling governmental interest,' and that the policies are 'narrowly tailored to that end.'"

# HOLD YOURSELF ACCOUNTABLE

*By Michael G. Santos - Reg. No. 16377-004*

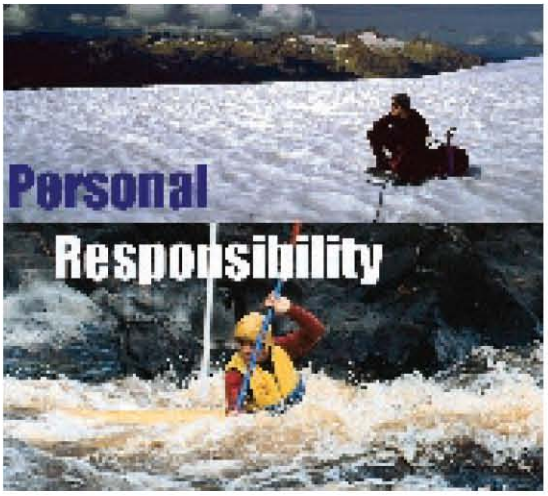
**Editor's Note:** The following article, "Hold Yourself Accountable," follows a series of articles republished in ***ACCESS*** by permission of the author, Inmate Michael G. Santos. Mr. Santos was convicted of drug distribution and sentenced to serve 45 years in Federal prison. He is scheduled for release in 2013. While in prison he has earned Bachelors and Masters Degrees. He has also written three books available for review and purchase on his web site: *www.MichaelSantos.net.* Although Mr. Santos does not have direct access to the internet, he can be reached by email at: *info@michelsantos.net* Mr. Santos can also be reached by writing to him at the following address: Michael G. Santos, Reg. No. 16377-004, FCI – Florence, Teller 6-212, P.O. Box 5000, Florence, CO 81266-5000.

Those of use who serve time in prison cannot change the past. We do have it within our power to anticipate the future. As prisoners it is incumbent upon each of us to expect challenges and obstacles to follow our release. Many will come. We should make preparations while inside these cages so that we leave prison with the skills, values, and resources necessary to succeed. Statistics suggest that success will not come easily.

My own imprisonment began in 1987. I have come into contact with tens of thousands of other prisoners, and I have tried to learn from my observations. I do not need newspapers to tell me that recidivism rates are high. I only have to look at the men around me. Most all of them have histories of previous confinement.

Some people return to prison with new criminal charges and new lengthy sentences only months after their release. They frequently have a few new stories and someone to blame for their failure to live among the broader society. The truth about their inability to make it usually comes down to their own bad decisions. All too often those decisions began during their original term of confinement.

In my book, *About Prison*, I wrote about Redneck Rick. I met him soon after I was assigned a cell in the United States Penitentiary in Atlanta. Rick was about 30, and he




was in his ninth year of a lengthy sentence for bank robbery. He had been convicted under a sentencing scheme that would make him eligible for release on parole after he served ten years in prison. Like most prisoners, Rick enthusiastically anticipated his release.

Many prisoners serve their time by breaking their days into steady routines, and Redneck Rick was no different. Each morning he would leave his cell for breakfast, then walk to work in the prison factory where he sewed canvas mailbags that were used by the U.S. Postal Service. Rick's shift earned him approximately $150 each month. It ended at 3:30 in the afternoon, at which time he would return to his cell for the daily census count. After that, Rick would accompany his friends for dinner in the chow hall, then return to the cellblock for a few hours of card playing or television until the evening's lockdown. He was a model prisoner.

Since he had been assigned to a cell near mine, I observed Rick following this daily routine for over a year. The night before he was schedule for release, several guys chipped in a few items from the commissary for the customary send-off. Rick walked out of USP Atlanta's gates just after the New Year. But he returned to my same cellblock with a new 25-year sentence before the following holiday season rolled around. Rick did not stay out long enough to enjoy a single Christmas as a free man.

It did not take Rick long to settle back into the routine he had come to know during the first decade he spent in confinement. His former supervisor assigned him to the same job he had held before his release, and after he was able to maneuver his way back into the identical bunk assignment to which he had grown accustomed during

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# Hold Yourself Accountable (Continued)

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his first decade, Rick resumed his evening card game. I asked Rick what happened, and he narrated the difficulties of living on parole.

Because Rick did not have any family support, the parole board required him to spend his first six months after release in a halfway house. It is a system to help long-term prisoners find stability after their release. Generally, those prisoners who have over a year to serve spend the last ten percent of their sentence, or up to six months, in a halfway house. Participants in the program agree to pay 25 percent of their gross earnings for room and board, but they also must abide by strict rules, curfews, and personal accountability systems. Despite the many years Rick had served in prison, he was not prepared for the new structure.

After several weeks of struggling, Rick became frustrated with his ability to secure employment. That and a combination of pressures from both his parole officer and administrators of the halfway house pushed him to a catastrophic decision. He purchased a handgun from a street peddler, then impulsively walked into a bank with the intention of robbing it. Despite Rick's firearm, security guards quickly foiled the robbery attempt and brought Rick into custody before he was able to cause physical harm to any of the people inside. That was the end of Rick's attempt at living outside prison gates.

Rick's story is not unusual. Many prisoners revert to crime after their terms expire. In spite of the enthusiasm they once felt for release, many prisoners return to these caged communities with new sentences to serve.

The books I write describe steps prisoners can take to ensure that when they leave prison, they do so permanently. Success is a matter of choice and making adequate preparations for the frustrations and obstacles that are certain to follow release.

# Research Re-Examined (Continued)

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tion will consider the impact of developments since that time in correctional systems and the societal perceptions of the balance between research burdens and potential benefits of research. More specifically, the committee will consider whether the ethical bases for research with prisoners differ from those for research with non-prisoners; develop an ethical framework for the conduct of re-search with prisoners; based on the ethical framework developed, identify considerations or safeguards necessary to ensure that research with prisoners is conducted ethically; and identify issues and needs for future consideration and study.

The Committee's first meeting was held in Washington, D.C. at the Institute of Medicine on March 16 and 17, 2005. The Committee welcomes comments from the public, which should be directed to:

Tracy G. Myers, Ph.D.
Senior Project Officer
Institute of Medicine
500 Fifth Street, NW
Washington, DC 20001.

# FILING FEE INCREASES FOR FEDERAL CIVIL CASES

*By Staff Attorney Ken Butler*

On February 7, 2005, the civil case filing fee in federal court increased from $150.00 to $250.00. 28 U.S.C. §1914(a). This fee applies to all civil cases filed in federal court, including civil rights complaints under 42 U.S.C. §1983.

Under the Prison Litigation Reform Act (PLRA), prisoners are obligated to pay the full amount of the filing fee when filing a civil rights claim. If a prisoner does not have


the full amount of the fee at the time of filing, an application to proceed *in forma pauperis* (IFP) can be filed with the complaint. Prior to the PLRA, a prisoner who was granted IFP status could be excused from paying some, or all, of the fee. However, under current law, a grant of IFP status simply means that the prisoner may proceed by paying an initial partial filing fee, and the remainder will be collected in monthly installments from the prisoner's trust account. 28 U.S.C. §1915(b).

# IOLTA AWARDS NCPLS $5,000 MATCHING GRANT

The North Carolina State Bar is the organization that governs lawyers in the practice of law. The State Bar has many functions, probably the most familiar of which is the responsibility to enforce the Rules of Professional Conduct and to discipline attorneys who transgress those rules. But the State Bar also has other roles. For example, the State Bar established and administers the Plan for Interest on Lawyers' Trust Accounts (IOLTA). IOLTA uses the interest collected from lawyers' trust accounts to fund programs that benefit the public.

For quite some time, IOLTA has awarded NCPLS a grant which funds the *Safe & Humane Jails Project*, an effort to provide legal advice and assistance to an ever-changing population of approximately 14,000 people who are held in the State's jails, detention facilities and municipal lock-ups.

In 2004, IOLTA offered NCPLS an additional $5,000 grant, conditioned upon a requirement that we raise the same amount through contributions. As you might imagine, with so many compelling causes to which public-spirited people might donate money, it is difficult to persuade people to contribute hard-earned income to support our work.

As the spring of 2004 gave way to summer, then autumn, and despite considerable planning and effort, several fund-raising initiatives fell flat. By late November it began to look hopeless. But, by the end of December, thanks to the generosity of more than twenty people and one law firm, NCPLS actually exceeded (by more than $500.00) the amount required to qualify for IOLTA's matching grant!

We are grateful to those whose generosity made it possible for us to meet this challenge. We are proud that most of the amount we raised was contributed by members of our Board of Directors and staff. We are thankful to have additional funding to better serve our clients. And, we especially appreciate the support of IOLTA for this important work.

# Failure to Protect Settlement (Re-Visited)

*By NCPLS Staff Attorney Michele Luecking-Sunman*

As reported in the December 2004 issue of *Access*, NCPLS represented five prisoners in failure to protect claims arising from an incident that occurred in a segregation unit. The claims of the prisoners were settled out of court and the DOC agreed to provide better security at the segregation unit. More specific details were withheld in an effort to protect the privacy of our clients.


On February 27, 2005, the *News & Observer* published an article by Staff Writer Dan Kane explaining the claims of the prisoners and the investigation by prison officials in greater detail. Mr. Kane's interviews with some of our clients, prison officials, local attorneys and attorneys at NCPLS provided the basis for his report, including information that DOC paid $43,500 in settlement of the claims. Several days later, an opinion piece authored by the editorial board appeared in the *News & Observer*. The editorial called for a more open approach to, and greater public oversight of prison investigations. Both articles were supportive of our clients and their right to be protected from harm while in the custody of the Department of Correction.

The result of increased awareness of problems within the state's prisons is a positive step toward addressing those problems. It is encouraging that the issue has been identified by the *News & Observer* as one of general concern and broad public interest.

# *Booker* and North Carolina: A Policy Perspective

*By: Billy Sanders, CLAS; Commissioner, NC Sentencing & Policy Advisory Commission*

The remedy to the unconstitutionality of the Federal Sentencing Guidelines mandated by the United States Supreme Court in *United States v. Booker*, 125 S.Ct. 738 (2005), highlights the tension between two competing interests in criminal proceedings – the modern preference for determinate sentencing and the Supreme Court's recent cases that require all facts that increase punishment be submitted to a jury and proven beyond a reasonable doubt.

Many states have opted for determinate sentencing policies in recent years. This approach to sentencing allows judges to look to a variety of factors and, if they are present in the case, increase punishment for crimes based on facts that are not elements of the offense. As noted above, recent Supreme Court cases have held this practice to be unconstitutional, as they did in *Booker* in regard to the Federal Sentencing Guidelines. However, the Supreme Court's remedial scheme in *Booker* construed the Sentencing Guidelines to render them "advisory" in nature. This "*Booker* remedy" would be particularly unsuitable for application in North Carolina.

Indeterminate sentencing schemes, such as the one which existed in North Carolina prior to 1994, *The Fair Sentencing Act*, permitted the court broad discretion to impose a sentence "tailored" to fit the defendant and the crime, taking into consideration the facts and circumstances involved in the commission of the crime, together with aggravating and mitigating factors. The indeterminate approach in North Carolina produced widely divergent results in sentences imposed for similar crimes committed by similarly situated defendants (in terms of the defendant's prior criminal history). Consequently, it provided little predictability as to outcomes and essentially no basis upon which to anticipate the needs

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# *BOOKER* AND NORTH CAROLINA (CONTINUED)

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of the criminal justice system, particularly with regard to the correctional system. The long-term consequences of indeterminate sentencing led to a call for "truth in sentencing" and consistency in sentencing practices.

Determinative sentencing, exemplified by North Carolina's *Structured Sentencing Act*, was the legislative response to the inadequacies of indeterminate sentencing. Determinative sentencing generally requires the imposition of a specific penalty upon conviction of any particular crime, allowing for departures from the prescribed sentence only upon findings of aggravated or mitigated circumstances, and even then, only within narrowly prescribed ranges. Determinative sentencing has been criticized for its inflexibility, resulting in arguably unjust results, and for reducing the role of judges in sentencing to that of administrative functionaries. As suggested below, however, the benefits provided by North Carolina's determinative sentencing policy argue strongly for a plan that retains the salutary components of *The Structured Sentencing Act.*

Months before *Booker* was decided, *Blakely v. Washington*, 542 U.S. __, 159 L.Ed.2d 403, 124 S.Ct. 2531 (2004), held that a determinative sentencing scheme, much like that of North Carolina, was constitutionally flawed because factors that could be used to increase the penalty for a crime were decided by a judge, and not determined beyond reasonable doubt by a jury. *Blakely* forced North Carolina lawmakers and policymakers to focus on the constitutionality of *The Structured Sentencing Act*. As they began to understand that North Carolina's sentencing practices were subject to a *Blakely* challenge, legislators began searching for ways to bring North Carolina into compliance with *Blakely*'s mandate.

> a (*Booker*) approach would essentially convert Structured Sentencing into an indeterminate sentencing policy. It bears remembering that twenty years ago indeterminate sentencing (as reflected in The Fair Sentencing Act) nearly resulted in a federal takeover of North Carolina's prison system.

*Blakely*, and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000), brought determinative sentencing policies into question by requiring that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt." In North Carolina, based upon "a preponderance of the evidence," a judge could make findings of fact as to aggravating factors and increase the sentence a defendant received. Consequently, North Carolina's sentencing practices run afoul of *Blakely* and are unconstitutional.

North Carolina could adopt the remedy imposed in *Booker* by redefining the sentencing grid, designating the bottom of the mitigated range as the lowest possible minimum sentence, and the top of the aggravated range as the highest maximum sentence (for the class of felony committed at the prior record level of the defendant). Moreover, aggravated and mitigated sentencing ranges could be denominated as "advisory." Thus, the sentencing judge could impose any sentence between the extremes without submitting aggravating factors to a jury, or making any specific findings about such factors at all.

Such an approach would essentially convert Structured Sentencing into an indeterminate sentencing policy. It bears remembering that twenty years ago indeterminate sentencing (as reflected in *The Fair Sentencing Act*) nearly resulted in a federal takeover of North Carolina's prison system.

The more rational alternative is for North Carolina, like Kansas, to make changes to its laws that will comply with *Blakely* while maintaining the integrity of its current sentencing policy. Although North Carolina could adopt either means

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# *BOOKER* AND NORTH CAROLINA (CONTINUED)

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of constitutional compliance, there are sound policy reasons to reject a remedy such as the Supreme Court fashioned in *Booker*. North Carolina should instead opt for relatively minor adjustments to *The Structured Sentencing Act.*

**Historical Background: Prison System in Crisis**

Prior to 1994, under indeterminate sentencing schemes, North Carolina inmates served sentences subject to complicated formulas of sentence reduction credits, the unpredictable decisions of the Parole Commission (which involved the application of many different parole eligibility calculations for different types of offenses), and the need to free-up prison beds by releasing inmates earlier than expected at the time of their sentencing because of overcrowding. This combination of factors often meant that the sentences pronounced by judges bore little resemblance to the sentences actually served by offenders. Consequently, the public began to lose confidence in the ability of its criminal justice system to adequately address issues of crime and punishment.

The spike in the crime rate experienced nationwide in the 1980's, the rapid growth of the prison population, and the absence of an established mechanism to plan for and meet the needs of the criminal justice system for prison facilities led to an overcrowding problem of dramatic proportions in North Carolina. Overcrowding in the State's prisons caused intolerable living conditions – inmates were routinely stacked three levels high in bunks crowded tightly together, with an associated diminution in the availability of programs and services, and ever-escalating incidents of violence harming prisoners and staff. The threat of federal intervention meant that overcrowding in North Carolina's prisons could no longer be ignored.

By 1985, overcrowding had spawned litigation such as *Small v. Martin* (No. 85-987-CRT, E.D.N.C.). In that case, the inmate plaintiffs asked the federal court to declare that the overcrowded conditions in 48 of the State's 97 prisons amounted to cruel and unusual punishment in violation of the Eighth Amendment. Companion cases made the same challenge in other North Carolina prisons. The Legislature eventually came to understand that the plaintiffs might well be successful in their challenges and launched a plan to circumvent federal intervention.

**North Carolina Responds: Limit the Demand**

Since prisons could not be built immediately and without great cost, the Legislature initially sought ways to reduce the prison population. In 1985, the General Assembly enacted the *Emergency Powers Act*, giving the Parole Commission power to release some felons 180 days before their established release dates. N.C. Gen. Stat. §15A-1380.2(h).

In 1987 the Legislature passed the *Emergency Prison Population Stabilization Act*. N.C. Gen. Stat. §148-4.1. The act established a formula for setting a "prison cap," limiting the population. The Act also gave the Parole Commission the authority to release enough offenders to stay within the prison population cap, but prohibiting the early release of those sentenced for certain crimes requiring the service of a minimum sentence prior to parole eligibility (such as the offense of robbery with a dangerous weapon). N.C. Gen. Stat. §14-87.

Although North Carolina could adopt either means of constitutional compliance, there are sound policy reasons to reject a remedy such as the Supreme Court fashioned in *Booker*.

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# *BOOKER* AND NORTH CAROLINA (CONTINUED)

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The Parole Commission, operating under a legislative mandate to maintain the prison population at or below the limits established by the prison cap, granted early release to more and more offenders. During that time, some classes of felony offenders served less than twenty percent of the sentence originally imposed in their cases. In addition, only limited community corrections alternatives to incarceration existed prior to 1994, and those programs soon began to break down at the most fundamental level. Because a defendant could refuse probation and elect to serve his sentence, many of those convicted and placed on probation opted to go directly to prison, knowing that their early release, particularly for low-level felony convictions, would be almost immediate.

**North Carolina Responds, Part II: Increase Supply**

The temporary measures employed by the Legislature to limit the demand for prison beds came at a cost. There was a strong public outcry about the "revolving door" of the criminal justice system. Victims of crime complained bitterly and publicly about offenders who were often released in months instead of the years they received at sentencing. Prosecutors and judges themselves expressed surprise and disbelief when they learned that offenders were released after serving much shorter sentences than they received.

These complaints had an impact on the General Assembly, but the threat of a federal takeover of the State's prisons brought urgency to plans for prison expansion. When the State settled *Small v. Martin* in March of 1989 the immediate threat of federal intervention passed. However, the settlement in *Small* obligated the state to eliminate triple bunking and to provide 50 square feet of living space per inmate by specified dates. To meet those requirements, prison expansion had to be part of the equation.

In its initial attempt at major prison capacity expansion, the General Assembly placed on the ballot a $200 million bond referendum for prison construction. The referendum passed by less than one-half percent of the voting electorate. From that narrow margin it could be inferred that either North Carolina's citizens had limits to what they were willing to spend on prison expansion, or they did not understand and appreciate the constitutional constraints on prison overcrowding.

The crisis experienced in the 1980's and early 1990's convinced many of North Carolina's legislators that only broad-based change in sentencing practices could prevent future problems. *The Structured Sentencing Act* was the eventual result of this legislative conclusion.

**North Carolina Responds, Part III: Systemic Change**

By 1990 the search for a more rational approach to the development of criminal justice policy spurred the General Assembly to create the North Carolina Sentencing and Policy Advisory Commission. The Commission was to make recommendations regarding State criminal sentencing policies. The 23-member Commission represented virtually every constituency with an interest in sentencing. (The Commission's membership encompasses the prosecutorial, defense and adjudicatory functions, correctional perspectives, law enforcement leaders, victims' and prisoners' advocates and others.) After three years of considering possible alternatives, the Commission submitted their recommendation that North Carolina adopt a determinate sentencing model. In 1993, the General Assembly reviewed and revised those recommendations, enacting *The Structured Sentencing Act* which applies to almost all felony and misdemeanor crimes committed on or after October 1, 1994.

The goal of Structured Sentencing was to help the State maintain control over the criminal justice system and to restore credibility to sentencing, exactly the areas where North Carolina's indeterminate sentencing policy had failed. Under *The Structured Sentencing Act*, a defendant must serve all of a mini-

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# *BOOKER* AND NORTH CAROLINA (CONTINUED)

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mum sentence from which there is no parole, so the sentence is always "truthful." Because there is little latitude for the exercise of judicial discretion, and consequently little deviation from prescribed sentences, it is possible to predict the number of prison bed spaces that will be required. Thus, the Act prioritizes the use of correctional resources and balances sentencing policies with correctional capacity.

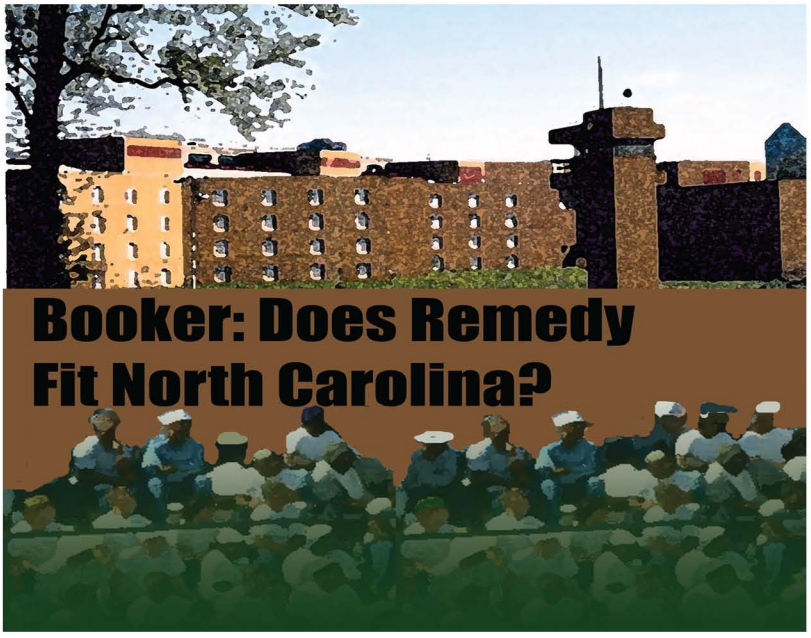
*The Structured Sentencing Act* is based on the following principles:

- **Sentencing policies should be rational:** The sentence should be proportional to the severity of the crime as measured by the harm to the victim and to the offender's prior record.

- **Sentencing policies should be truthful:** The time actually served in prison or jail should bear a close and consistent relationship to the sentence imposed by the judge. Early parole release should be abolished.

- **Sentencing policies should be consistent:** Offenders convicted of similar offenses, who have similar prior records, should generally receive similar sentences.

- **Sentencing policies should set resource priorities:** Sentencing policies should be supported by adequate prison, jail and community-based resources. The use of prisons and jails should be prioritized first for violent and repeat offenders and community-based programs should be first utilized for non-violent offenders with little or no prior record.




**Structured Sentencing: Core Principles Work**

As a result of Structured Sentencing, the rise of the prison population in North Carolina has been managed rationally. The staff of the Commission makes prison population projections on an annual basis, using a computer simulation model. These projections predict prison space needs for 10 years into the future, and have proven remarkably accurate. In recent years, armed with the knowledge that Structured Sentencing provides and with confidence in the accuracy of the predictions made by the Commission's staff, the Legislature has authorized construction that will increase prison capacity by 2,700 beds by 2008 to meet the Commission's population projections.

Other outcomes of Structured Sentencing include: individuals convicted of serious felonies are serving longer sentences; "truth" has been introduced into sentencing practices; community correction and alternatives to incarceration are now important parts of the criminal justice system; and the public perception of crime and punishment has greatly improved since the "revolving door" days of the late 80's and early 90's.

With Structured Sentencing, North Carolina introduced fiscal discipline to sentencing policy. Other states have passed similar types of sentencing policies, but North Carolina is perhaps unique in making fiscal responsibility a part of every sentencing decision. The Commission's data on how much the system will be affected by

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# *BOOKER* AND NORTH CAROLINA (CONTINUED)

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proposed changes in the law has been extremely reliable. Every bill proposing a new crime, or proposing a harsher penalty for an existing crime, is now analyzed to determine its actual cost, both in terms of dollars and cents, and its projected impact on the prison population. The sobering realities of this analysis have brought fiscal responsibility into the process of modifying sentencing policy.

**A *Booker* Remedy?: Not for North Carolina**

As noted above, one approach to compliance with recent Supreme Court cases would be simply to enact legislation that would broaden the range of available sentencing options for conviction of a crime to encompass the lowest possible minimum sentence and the highest possible maximum sentence, essentially converting Structured Sentencing into an indeterminate sentencing scheme. The adoption of such a remedy, the "*Booker* remedy," would have adverse affects on North Carolina's sentencing policy and our criminal justice system. In many ways, North Carolina would be taking a step backward, returning to the unpredictable and unstable model of indeterminate sentencing that existed prior to 1994.

For example, consistency of sentencing, a cornerstone of Structured Sentencing, is likely to suffer if a *Booker* remedy is adopted in North Carolina. Judges would have much greater discretion, which may be desirable, but with broader judicial discretion, the sentences imposed upon similarly situated defendants could vary from judicial district to judicial district, and even from judge to judge within judicial districts. Consequently, it would be difficult or impossible to accurately predict the needs of the correctional system. Sentencing practices would once again be subject to attack and the integrity of the criminal justice system would suffer.

The North Carolina Sentencing and Policy Advisory Commission now has over 10 years of experience in predicting the impact of legislation against crime in terms of cost to the public. This cost analysis includes the projected impact of proposed legislation on prison beds and growth of the prison population. Those projections have been remarkably accurate, always within two percent of the actual prison population. Because of the accuracy of those predictions, State lawmakers have not had to guess how much prison space will be needed in the future and have been able to plan accordingly. If a *Booker* remedy were adopted, it might not be possible to accurately predict growth in the prison population, and it certainly would not be possible in the short- to mid-term. As a result, the ability to set priorities and to make rational decisions about criminal justice policy could be significantly compromised.

In the worst case scenario, a *Booker* remedy could lead to the same quagmire that existed prior to Structured Sentencing. Overcrowded prisons and the inability to forecast the need for prison space could leave the State no choice but to take emergency action to control the prison population. The State might respond by re-instituting parole, prison caps, and early release. In that event, "truth in sentencing" could also become a casualty of a *Booker* remedy.

Some might argue that these drastic consequences might not eventuate, or if they did, that the State might be able to overcome the adverse affects of a *Booker* remedy. However, when relatively minor adjustments to Structured Sentencing can meet the constitutional requirements of *Blakely,* the sounder policy is to reject a *Booker* approach as a remedy in North Carolina.

**A *Blakely* Refinement: The Best Response for North Carolina**

In 2004, at the request of the General Assembly, the North Carolina Sentencing and Policy Advisory Commission addressed how North Carolina might best address the requirements of *Blakely*. Pending Senate Bill 542 generally reflects the Commission's recommendations.

The major components of the bill are:

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# *Booker* and North Carolina (Continued)

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- Non-statutory aggravating factors must be pled in the indictment;

- Twenty days notice to the defendant of statutory aggravating factors;

- Jury trial of aggravating factors, determined by application of the "beyond a reasonable doubt" standard.

The bill provides that aggravating factors can be tried as part of the State's case-in-chief, unless to do so would prejudice the defendant. The trial judge may order a separate jury trial on aggravating factors that could otherwise prejudice defendants if tried in the guilt/innocence phase.

These changes would comply with the requirement of *Blakely* that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt." *Blakely v. Washington*, 1 24 S.Ct. 2531, 2536 (U.S., 2004) *citing, Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000).

The U.S. Supreme Court has never construed the Fifth Amendment right to "presentment or indictment of a Grand Jury" as a right applicable to state court defendants. But the Court has held that the right to be "informed of the nature and cause of the accusation" is a part of a state court defendant's rights under the Sixth and Fourteenth Amendments. *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 252, 45 L.Ed.2d 562 (1975). Though "notice" is not addressed specifically by *Blakely* or *Apprendi,* due process is at the heart of both decisions. Indeed, if a fact must be proven to a jury "beyond a reasonable doubt," then it would seem axiomatic that the state must provide notice to the defendant of such a fact.

The notice provisions of the bill would be consistent with a defendant's Sixth and Fourteenth Amendment right to notice "of the nature and cause of the accusation." And requiring that aggravating factors be found by a jury beyond a reasonable doubt would comply with the holdings in *Apprendi* and *Blakely*.


If these modest recommendations of the Commission are enacted, then the model that has worked well for years in North Carolina can remain in place.

**Conclusion**

Clearly, North Carolina will have to adjust its sentencing practices. Relatively simple refinements to Structured Sentencing would comply with the requirements of *Blakely*, mooting the necessity to adopt a correlative remedy like that imposed on the federal system by *Booker*. Leaving the legal analysis aside, there are sound policy reasons to adopt these refinements and preserve Structured Sentencing as a determinative sentencing scheme in North Carolina. While acknowledging that legislatures do not always act in logical or predictable fashion, the likelihood is that North Carolina's policymakers will opt for the alternative represented by Senate Bill 542 rather than a *Booker* remedy.

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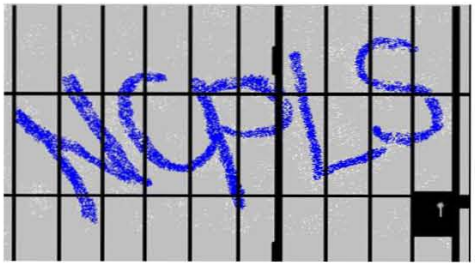


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