The Newsletter of North Carolina Prisoner Legal Services, Inc.

NCPLS ACCESS

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The Prison Litigation Reform Act: A New Chapter in Prison Law

Inside this issue:

The Prison Litigation Reform Act ("PLRA"), Pub.L. No. 104-134, Stat. 1321 §§ 801-810 (April 24, 1996), amended, Pub. L. No. 105-119, 111 Stat. 240 (November 26, 1997) has dramatically changed the legal landscape of prisoner litigation. The changes ushered in by the passage of this law have and will continue to affect inmates.

Two major provisions of this act affect the plaintiff-petitioner's burden in a class action challenge to prison conditions [18 U.S.C. § 3626] and the ability of prisoners to make individual claims arising out of their confinement. The first of these new provisions limits the ability of federal courts to order remedies such as population reductions in state prison condition cases.

PLRA states that remedies (called "prospective relief") "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs."

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Robbins v. Freeman: A New Way to Look at Old Sentences

The way that parole eligibility dates were calculated under Fair Sentencing and pre-Fair Sentencing has changed as a result of the decision in *Robbins v. Freeman*, 127 N.C. App. 162, 287 S.E.2d 771 (1996), *aff'd,* 347 N.C. 664, 496 S.E.2d 375 (1998).

As a result of this decision and the resulting publicity, there have been several misconceptions about the affect this case will have.

First, this decision does not impact those sentenced under the Structured Sentencing Act at all. It only applies to those whose crimes occurred prior to October 1, 1994.

Second, this decision does not mean an end to consecutive sentences. And it does not mean that sentences that were to be served consecutively will now be served concurrently. This decision only affects the way that parole eligibility is calculated.

The basic holding in *Robbins* abolishes the former practice of "paper parole." Under this method of calculating parole eligibility, mandatory sentences with parole eligibility dates were considered for "paper parole" to another consecutive sentence. This meant that the North Carolina Parole Commission would evaluate these sentences and decide whether or not an inmate would be paroled to his next sentence.

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Message From the Editor

Welcome to the first edition of *ACCESS*. For some time, NCPLS has considered publishing a report or newsletter for our clients. We are pleased that we are now able to provide information on the work of our program and developments in the area of prison law.

The mission of NCPLS is to provide legal advice and assistance for those incarcerated in North Carolina. We have a contractual commitment to provide such services for people in custody of the Department of Correction which arises out of the State's constitutional duty to provide inmates with access to the courts.

In this inaugural edition, we examine The Prison Litigation Reform Act (PLRA). This new federal statute has dramatically altered the legal landscape in the area of prison law.

In addition, several regular features will appear in this edition. Each quarter, we will highlight a court case that impacts our area of law in the "Court Spotlight" section. In this edition, we examine the North Carolina Court of Appeals decision in *Robbins v. Freeman*, 127 N.C. App. 162, 487 S.E.2d 771 (1996), *aff'd,* 347 N.C. 664, 496 S.E.2d. 375 (1998), and how that decision impacted parole eligibility calculations for thousands of North Carolina inmates.

In future editions, we also hope to feature a writer from outside of our office on an issue of current interest in our "View from the Outside" column.

NCPLS *ACCESS* will also offer an explanation of a post-conviction issue in each edition. This edition looks at the Habitual Felon Act, and how it has been impacted by The Structured Sentencing Act.

We hope that NCPLS *ACCESS* will be a source of information as well as a resource to those involved in the different aspects of prison related issues. We welcome your comments and suggestions on how we can improve the newsletter. Thank you for the opportunity to share with you the work of our program.

Billy Sanders, *Editor*

Theodis Beck Named Secretary of NCDOC

On April 19, 1999 North Carolina Governor James Hunt named Theodis Beck as the Secretary of the Department of Correction.

Beck started working for the Department in 1975 as a probation and parole officer. He piloted the intensive supervision program and was one of the original eight officers in the division.

It is gratifying to see so dedicated a public servant rise to head the agency to which he has devoted his professional career. NCPLS congratulates Secretary Beck and wishes him every success as he undertakes his new duties.

PLRA

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Under PLRA courts can order relief that "extend[s] no further than necessary to correct the federal right of a particular plaintiff or plaintiff's . . .."

In addition, such orders "shall not be granted or approved . . .unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).

Even when prospective relief has been granted, there are new provisions that limit the duration of the order. The order will be terminated on the motion of any party two years after entry. 18 U.S.C. § 3626(b)(1)(A)(i). Or, it may be terminated by motion of any party one year after the denial of a prior termination motion. 18 U.S.C. § 3626(b)(1)(A)(ii).

Finally, prospective relief can be terminated by motion of any party immediately if it was entered without findings that it "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(b)(2). See *Tyler v. Murphy*, 135 F.3d 594, 597 (8th Cir. 1998)

The North Carolina Department of Correction, as a result of litigation in *Smith v. Bounds*, 657 F. Supp. 1327 (1986); *aff'd, Smith v. Bounds*, 813 F.2d 1299 (4th Cir.1987); cert.denied, was ordered to contract with NCPLS to provide access to the courts for inmates within the North Carolina prison system. After PRLA was enacted, the North Carolina Department of Correction moved that this order be terminated, consistent with the provisions of the act.

The above termination provision has already been applied in a major case affecting inmates in North Carolina. In 1986, The North Carolina Department of Correction was ordered to contract with NCPLS to provide legal assistance to inmates within the North Carolina prison system. *Smith v. Bounds*, 657 F. Supp. 1327 (1986); *aff'd, Smith v. Bounds*, 813 F.2d 1299 (4th Cir.1987); *cert. denied*, 488 U.S. 869 (1988). After PLRA was enacted, the Department of Correction moved that the order be terminated, consistently with the provisions of the Act.

After briefs and a hearing, the United States District Court for North Carolina, Eastern Division, ruled that the order should be terminated because the court was unable to conclude that "prospective relief remains necessary to correct a current and ongoing violation of the Federal right." *Smith v. Freeman*, (5:72-CV-3052-F) slip opinion at p.6 (U.S.D.Ct., E.D.N.C.,19 June 1998), *citing* 18 U.S.C. § 3626(b)(3).

Although no longer compelled to do so, the Department of Correction continues to contract with NCPLS in order to fulfill its ongoing constitutional obligation to provide access to the courts for inmates.

Physical Injury

Major changes caused by the PLRA affect the ability of an individual plaintiff to file an action in federal court. For example, according to the Act, "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). This provision appears to conflict with the well established right to seek redress for constitutional violations, including, for example, intrusions upon liberty. A person deprived of liberty without due process may suffer no "physical injury" in the sense of bodily harm.

Cases decided under PRLA illustrate how important the answer will be. In several cases, cases about threats of violence or exposure to a risk of violence from others have been dismissed because no actual violence had actually occurred. For example, *Tapia v. Sheahan*, 1998 WL 919709 at *5 (N.D.Ill., Dec. 30, 1998); *Flannery v. Wagner*, 1998 WL 709762 at *1 (D.Kan., Aug. 10, 1998) (dismissing claim that prison officials spread rumors that subjected the plaintiff to a risk of assault, which did not

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Robbins *Continued from page 1*

Since the decision in *Robbins,* the North Carolina Parole Commission has had to recalculate thousands of parole eligibility dates.

As an example of how the changes affect parole calculation, consider this hypothetical example:

An inmate was sentenced to a Class A life sentence in 1982, followed by a consecutive term of 25 years for a Class C felony.

A conviction for a Class A life sentence under the Fair Sentencing Act required the inmate to serve a mandatory sentence of 20 years, day-for-day, prior to being considered for parole. (the inmate would be credited for time served while awaiting trial towards this 20 year requirement).

This inmate would have to serve until the year 2002 before he could be considered for "paper parole" to his sentence of 25 years. The North Carolina Parole Commission could, in its discretion, deny "paper parole."

Since many prison privileges and changes in custody depended upon being within a specified length of time from a release date, the effect of this practice could dramatically extend the term of incarceration. There was no way to determine when an inmate would begin a second sentence until "paper parole" was granted.

Under the new method of parole calculation (the "single sentence rule") the parole eligibility dates of the two sentences are combined, and the inmate is provided with a single parole eligibility date, when an inmate will be considered for parole to society, not to a second sentence.

In the example, the inmate would have to serve 20 years on the first sentence. If eligible for Community Service Parole on the second sentence, the inmate would have to serve one-eighth of 25 years, roughly three years, to be eligible for parole on that sentence. Under *Robbins*, the two eligibility dates are then combined, so that in the example the inmate would have to serve approximately 23 years before becoming eligible for parole.

Robbins has affected thousands of inmates in the Department of Correction. Information about whether your parole eligibility date has been affected can be obtained through your parole case analyst. NCPLS can assist inmates in calculating parole eligibility dates, but parole decisions are made by the North Carolina Parole Commission. These decisions involve many factors, and the Parole Commission has significant discretion in applying those factors to arrive at a decision on parole.

Prison Rumors: Caution!

Frequently, NCPLS receives mail from inmates that have "heard" about far-reaching changes in the law that will benefit them in a dramatic way.

For example, inmates have written to us saying they have heard that the "85%" law is going to be modified to "65%" retroactively, that all consecutive sentences are going to be changed to concurrent sentences, and that a decrease in federal funding is going to result in a mass release of those sentenced prior to the Structured Sentencing Act.

None of the above "changes" are being considered. Rumors are as old as dirt and rarely have any validity. To avoid being disappointed when these rumors make the rounds of the prison yard, take an "I'll believe it when I see it" attitude.

Remember the old adage that if something sounds to good to be true, it probably is.

Prison Litigation Reform Act

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Types of claims barred by the "physical injury" language include claims based on placement or conditions in segregated confinement, *Warren v. McDaniel*, ___ F.3d ___ (unpublished), 1998 WL 823390 (9th Cir., Nov. 19, 1998) (dismissing claim of being housed with mentally disturbed prisoner); *Williams v. Scott*, 142 F.3d 441, 1998 WL 152969, 1998 U.S.App. LEXIS 6556 (7th Cir. 1998) (unpublished) (prisoner's claim that segregation for refusing to take a TB test on religious grounds violated the Eighth Amendment is barred); *Valentino v. Jacobson*, 1999 WL 14685 at *3 (S.D.N.Y., Jan. 15, 1999) (dismissing claims of psychological injury resulting from segregated confinement); *Walker v. Hubbard*, 1998 WL 205130 (N.D.Cal., Apr. 22, 1998) (dismissing complaint of being held in high-security unit in fear of life); *Evans v. Allen*, 981 F.Supp. 1102 (N.D.Ill. 1997) (dismissing claim of segregated confinement during which bodily fluids were thrown on plaintiff).

Filing Fees

A prisoners who wants to file a civil suit as a poor person *(in forma pauperis)* must submit certified statements of their prison accounts for the preceding six months and will be required to pay the entire filing fee. amounts over a number of months

The filing fees will be sent by the prison from the prisoner's account. (The fees are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(17)).

Cases may be dismissed, even if a fee has been paid, for a false allegation of indigency, if the action is deemed malicious or frivolous, it fails to state a claim for which relief can be granted, or if it seeks monetary relief against a defendant who is entitled to claim immunity from suit. 28 U.S.C. § 1915(a)-(e). See *Leonard v. Lacy*, 88 F.3d 181, 186 (2d Cir. 1996) (holding that liability for fees on appeal includes both $5 filing fee and $100 docketing fee).

The initial fee is 20% of the greater of the average monthly deposits or the average monthly balance for the preceding six months, which the court is to "assess and, when funds exist, collect." 28 U.S.C. § 1915(b)(1).

After the initial filing fee, monthly payments will be deducted from the prisoner's trust account at a rate of 20% of the preceding month's income, to be forwarded by the prison "each time the amount in the account exceeds $10 until the filing fees are paid." 28 U.S.C. § 1915(b)(2).

However, "in no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." 28 U.S.C. § 1915(b)(2).

Three Strikes Provision

In addition to the filing fee, another important restriction concerns prisoners who have filed multiple lawsuits. Prisoners, under PLRA, may not proceed *in forma pauperis* in civil actions or appeals if, while they were incarcerated or detained, they have brought three of more prior actions or appeals in a court of the United States that were "dismissed as frivolous, malicious, or for failing to state a claim." 28 U.S.C. §1915.

The only exception to this rule is when the inmate is "under imminent danger of serious physical injury." In such a case, the action may be filed. The "three strikes" rule has withstood constitutional attack. *Rodriguez v. Cook*, 163 F.3d 584, 587-91 (10th Cir. 1998) (rejecting due process, equal protection, access to courts, Ex Post Facto Clause, and separation of powers arguments).

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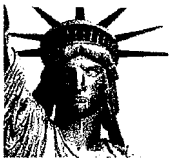
SUCCESS STORY: NCPLS Wins Pardon in Immigration Case



North Carolina Prisoner Legal Services (NCPLS) Attorney Kristin Parks has achieved remarkable results in her work for a political refugee from Liberia who faced deportation and execution upon his return to his home country.

The execution of immediate family members of the client precipitated his flight from Liberia several years earlier. After arrival in this country the client, upon the advice of his trial counsel, pled guilty to a non-violent criminal offense without understanding the resulting immigration. Initial efforts to overturn the conviction and the Immigration and Naturalization (INS) deportation order were unsuccessful. In conversations with the INS attorney who was prosecuting the deportation proceedings, Parks was told that the only thing that could prevent the man's return to Liberia was a pardon.

Demonstrating extraordinary advocacy, Parks persuaded the Governor to grant her client a pardon - reportedly only the second pardon granted to a prisoner in North Carolina in the last twenty years. However, when she advised the INS attorney that her client had indeed been granted a pardon, the INS attorney retracted his previous statement. Instead, he informed Parks that the deportation would go forward.

Undaunted, Parks preserved and succeeded in re-instating her clients right of appeal with INS and in securing his release from prison.

NCPLS provides representation in some immigration cases where the outcome of the immigration matter may adversely affect our clients interests.

Habitual Felon Act and Structured Sentencing

The Habitual Felon Act has had a long and sometimes tortured history of interpretation. With the advent of Structured Sentencing, this recidivist statute has again been the subject of judicial decisions that seek to fit the act into a new sentencing scheme.

The changes brought about by Structured Sentencing have forced the courts to consider how the Habitual Felon Act fits into that scheme. The first decision that addressed the interaction of the two statutes dealt with whether a felony used to establish Habitual Felon status could also be used for Prior Record Level calculations. In *State v. Truesdale*, 123 N.C. 639, 473 S.E.2d 670, 672 (1996), Defendant had previously been convicted of two felonies on 18 October 1988, two more felonies on 14 June 1991, and four felonies on 25 June 1992. The State used one conviction from each of the three days to prove habitual felon status. The trial court then used another conviction from each day to determine prior record points. The North Carolina Supreme Court found no fault with the trial court's interpretation of the statute, stating, "The language and plain meaning of G.S. 14-7.6 prohibits using the same conviction to establish both habitual felon status and prior record level. The language and plain meaning of G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained during the same calendar week to increase the defendant's prior record level.

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Damage Awards

Another provision concerns what happens to any award of damages that a prisoner receives if he successfully litigates a claim. Under PLRA, damage awards against prisons or their personnel shall be paid directly to satisfy any outstanding restitution orders, with the remainder forwarded to the prisoner.

Conclusion

NCPLS will probe the legal contours of the act, and engage in litigation consistent with the interests of our clients. However, the changes brought about by PLRA will impact every litigation decision made by NCPLS.

Habitual Felon Act and Structured Sentencing

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However, we find nothing in these statutes to prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained the same week to determine prior record level."

The next case to explore the relationship between the two acts came in *State v. McCrae,* 124 N.C. App. 664, 478 S.E.2d 210 (1996). In that case, the trial court determined Defendant's prior record level pursuant to N.C. Gen.Stat. § 15A-1340.14 (1995) by assigning points for a prior conviction which was consolidated for judgment with a conviction already used to convict Defendant as an habitual felon.

Again, the reviewing appellate court found no error with this practice, stating, " the sentencing court could use one of defendant's convictions obtained in a single calendar week to establish his habitual felon status and could use another separate conviction, obtained during the same week, [consolidated for judgment] to determine his prior record level."

The next development came in *State v. Vaughn*, 130 N.C.App. 456, 503 S.E.2d 110 (1998), *aff'd* 350 N.C. 88, 511 S.E.2d 638 (1999). There, the court treated Defendant's 1984 conviction of breaking and entering, not as a Class H conviction, but as a Class C conviction for purposes of determining his prior record level. The Defendant's total "points" for prior offenses thus totaled 16, and his prior record level was determined to be Level V.

The Court of Appeals ruled, " In this case, when defendant was convicted of felonious breaking and entering in 1984, he was convicted of a Class H felony. N.C.Gen.Stat. § 14-54(a) (1981). His contemporaneous conviction of being an habitual felon did not reclassify the offense of breaking and entering as a Class C felony. Rather, the habitual felon conviction required that defendant be 'sentenced as a Class C felon.' Defendant's 1984 conviction of breaking and entering was not, therefore, a 'prior felony Class C conviction.' It was a prior felony Class H conviction."

NCPLS will continue to report on cases that impact sentencing in future issues of NCPLS *ACCESS.*

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