The Newsletter of North Carolina Prisoner Legal Services, Inc.

NCPLS ACCESS

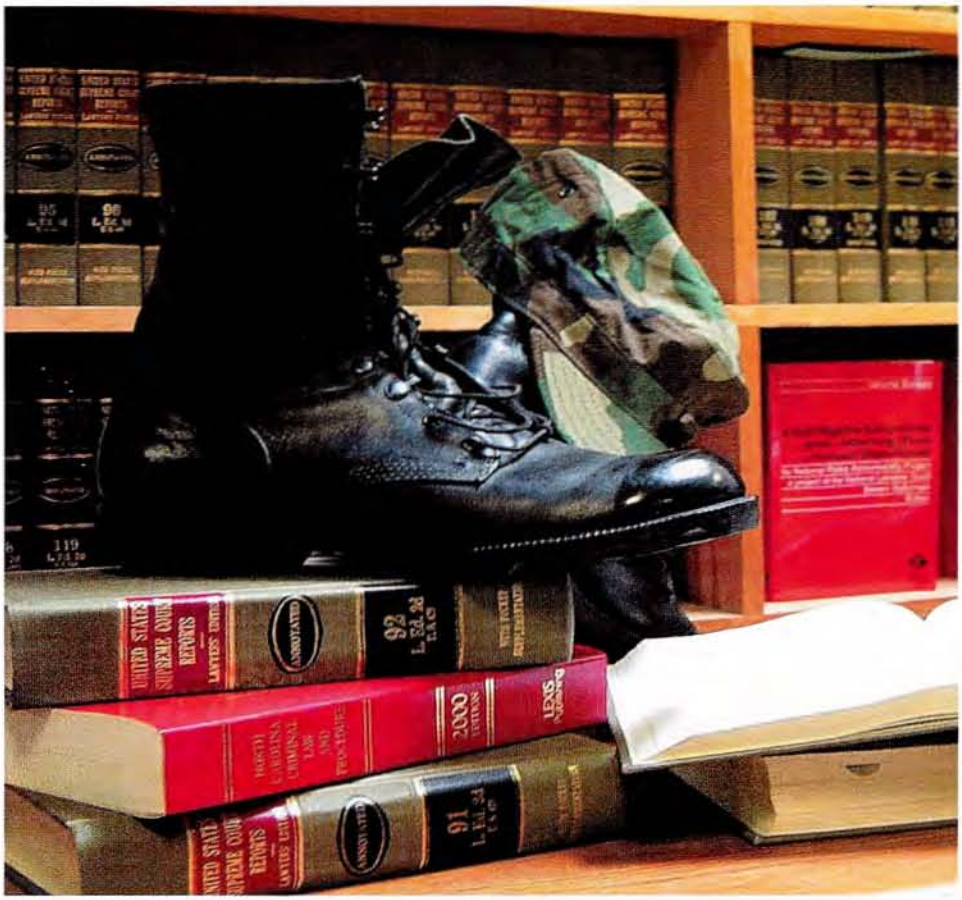
IMPACT Credit:
Department of Correction Acts Quickly to Comply with Ruling of State Supreme Court in *Hearst*

By Managing Attorney Kari L. Hamel & Senior Attorney Susan H. Pollitt

Since the establishment of the program, the time spent in Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) has been credited against terms of imprisonment. Occasionally, either because of misunderstanding or oversight, an inmate would not receive credit against his sentence. In such cases, NCPLS could help to correct the problem by filing a motion for IMPACT credit on behalf of our clients. Those motions were routinely granted. In recent years, however, some judges reportedly denied IMPACT credit, which caused uncertainty in the law.

With a recent decision of the North Carolina Supreme Court, there can no longer be any question that inmates are entitled to credit for time they spent at IMPACT. In *State of North Carolina v. William Anthony Hearst*, No. 684PA01 (N.C. S.Ct., filed Aug. 16, 2002), the Court ruled that a defendant whose suspended sentence was activated was entitled to credit under N.C. Gen. Stat. §15-196.1 for time spent in the IMPACT program, reversing the lower court.

The North Carolina Court of Appeals earlier ruled against the inmate in the *Hearst* case, and consequently, new motions for IMPACT credit had to be delayed.



Buncombe County Assistant Public Defender William H. Leslie represented the inmate in his appeal to the State Supreme Court, and appearing as *amicus curiae* (friend of the court), NCPLS Attorneys Kari Hamel and Susan Pollitt supported Mr. Leslie in successfully arguing that the lower court decision in *Hearst* should be reversed.

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Inside 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 10,000 pretrial detainees, providing information and advice concerning legal rights and responsibilities, discouraging frivolous litigation, working toward administrative resolutions of legitimate problems, and providing representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

ACCESS is published four times a year. Articles, ideas and suggestions are welcome and may be directed to *tsanders@ncpls.org*.

IMPACT Credit

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Now that the Supreme Court has ruled that IMPACT credit must be applied, NCPLS will continue to assist inmates in getting that credit.

Because people who have been required to participate in the IMPACT program generally receive relatively short active sentences, IMPACT credit needs to be calculated and applied before or soon after admission to prison. Otherwise, the inmate may end up serving the entire sentence before legal proceedings and the administrative process can be completed. (In fact, with the cooperation of the DOC, NCPLS has already identified approximately 150 inmates who may be entitled to immediate release under the *Hearst* case.)

In an effort to assist in identifying inmates who may be eligible for, but have not yet received IMPACT credit, the DOC agreed to supply NCPLS a list of all inmates who may be eligible for the credit. The DOC also agreed to post notices in prison facilities across the state. That cooperation demonstrates the Department's commitment to comply with governing law, and it means that many inmates will be released who might otherwise have been confined beyond the term of incarceration lawfully imposed.

If you spent time at IMPACT and you believe you were not provided credit against your activated sentence for that time, you should write to us at: NCPLS, P.O. Box 25397, Raleigh, NC 27611.

Detainers in Immigration Proceedings

By Senior Attorney Kristin D. Parks

Federal Immigration Court convenes about every two months at Raleigh's Central Prison. Inmates who have pending immigration detainers are brought to court for the disposition of those detainers. The purpose of the proceeding is to determine whether the inmate will be deported. Often, these inmates do not understand the nature of the proceeding or their legal rights. NCPLS attorneys are on hand to answer their questions and explain their rights.

Generally, once a person has been convicted of what is called an "aggravated felony" (which includes most crimes punishable by more than one year of imprisonment) there is little that can be done to prevent deportation upon release from prison. The immigration laws treat people with criminal convictions harshly. Signed into law on April 24, 1996, the *Antiterrorism and Effective Death Penalty Act* [Pub. L. 104-132, 110 Stat. 1214], eliminated many defenses to deportation that had previously been available to people convicted of criminal offenses. If the conviction itself is valid, then deportation is often unavoidable. (Upon request, NCPLS provides a legal opinion concerning the validity of

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American Correctional Association Adopts Standard Governing Inmate Telephone Services

The American Correctional Association (ACA) is a national, multi-disciplinary organization of professionals representing all levels and facets of corrections and criminal justice. ACA establishes standards governing correctional practices and operations, and accredits institutions that comply with those standards. The ACA Standards Committee is the body that promulgates standards which reflect "best practices" for all types of correctional facilities.

In early August of this year, the following standard was unanimously adopted by ACA's Standards Committee at the Congress of Correction in Anaheim, CA:

"Written policy, procedure and practice ensure that inmates/juvenile offenders have access to reasonably priced telephone services. Correctional agencies should ensure that:

A. Contracts involving telephone services for inmates/juvenile offenders comply with all applicable state and federal regulations;

B. Contracts are based on rates and surcharges that are commensurate with those charged to the general public for like services. Any deviation from ordinary consumer rates should reflect actual costs associated with the provision of services in a correctional setting; and

C. Contracts for inmate/juvenile offender telephone services provide the broadest range of calling options determined by the agency administrator to be consistent with the requirements of sound correctional management.

Comment

When procuring and renewing telephone serices, correctional officials should inquire into the reasons for proposed deviations from standard charges and seek the best possible rates for the broadest possible range of calling options determined to be consistent with sound correctional management. Toll-free calling and pre-paid or debit calling are among options that should be explored."

The adoption of this standard concluded deliberations that extended for almost four years. But, although this standard represents the considered judgement of correctional professionals regarding best practices governing inmate telephone services, it is binding only on those facilities and systems that are accredited by ACA. None of North Carolina's adult correctional facilities are accredited by ACA, but ACA standards may provide a persuasive reference to officials who consider renewing the contract for inmate telephone services.

[*Editorial Note:* NCPLS's Executive Director serves as a member of ACA's Standards Committee and was the proponent of the standard described in this article.]

Detainers

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criminal convictions to people in custody of the state of North Carolina, as well as legal representation in challenges to invalid or illegal convictions or sentences.)

Recently, however, NCPLS attorneys Wendy Greene and Kristin Parks were successful in proving that a client from Guyana was eligible for derivative United States citizenship through his mother. Proof of citizenship is often difficult to obtain, but if it can be proven, it is a defense to deportation. In proving the case, NCPLS gathered original documents, including birth certificates, death certificates, and the client's mother's naturalization records. These materials were presented to the INS District Counsel. Because the client's mother had become a naturalized citizen before the client turned 18 years old, and because his father had died before our client came to the United States, the client was eligible for United States citizenship through his mother. The District Counsel agreed, and the Immigration Judge issued an Order terminating the removal proceedings against the client. *In the Matter of Persaud.*

Women's Prison Class Action Settled

By Senior Attorneys Linda B. Weisel & Susan H. Pollitt

After five years of litigation, parties to a class action lawsuit have reached a settlement in *Thebaud v. Jarvis*, 5:97-CT-463-BO(3) (E.D.N.C. 1997). Filed on June 10, 1997, on behalf of all women confined at the North Carolina Correctional Institution for Women (NCCIW), the complaint alleged serious deficiencies in the delivery of health care services to about 30 women and included allegations of life-threatening prescriptions for contra-indicated medication, systemic breakdowns in continuity of care, and deliberate indifference to the serious medical needs of inmates in violation of the Eighth and Fourteenth Amendments to the United States Constitution. On December 16, 1997, the Court certified the case as a class action.

Following the favorable resolution of summary judgment proceedings, there was an extended period of investigation and discovery, which included the evaluation of thouands of documents and more than 30 depositions. That information, together with the assessments of medical experts hired by the parties, provided the basis for settlement negotiations. The talks resulted in a "Joint Resolution," which was approved by Chief District Court Judge Terrence Boyle of the United States District Court for the Eastern District of North Carolina, on July 8, 2002. The Joint Resolution requires the following:

— The Defendants agree to use their best efforts to maintain the improvements in the health care system at NCCIW that have been accomplished during the course of the litigation. Among other commitments, Defendants have agreed:

• to continue to seek money for the expansion of the medical and mental health facilities at NCCIW;

• to continue to notify inmates of positive or negative HIV tests and other positive test results; and

• to continue to use best efforts to retain accreditation by the National Commission for Correctional Health Care.

The Defendants will also continue to conduct Quality Improvement Reviews that include assessments of the timeliness of treatment, the chronic care program, medication administration, the accuracy of medical charts, and follow-up of abnormal mammograms and pap smears.

The Defendants also agree:

• to modify medical OPUS to automatically schedule annual callbacks for pap smears and screening mammograms starting at age 50;

• to maintain a secure board outside the dining hall listing all medical and mental health appointments;

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The Equal Protection Clause in the Prison Context

By Staff Attorney Ken Butler

The United States Federal Courthouse, Raleigh, NC

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §§ 1. The Equal Protection Clause is applied in connection with the ways governments make classifications among the population. This does not mean that governments are prevented from making any types of classifications, but instead that decisionmakers are prevented from "treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

An equal protection claim requires an inmate to "first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Thus, it is not enough that an action has had the effect of treating groups of inmates differently. *See Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Furthermore, it requires more than a prisoner's personal belief that he has been the victim of intentional discrimination. *See Chapman v. Reynolds*, 378 F.Supp. 1137, 1140 (W.D. Va. 1974) (absent some evidence, the court will not look behind the decisions of prison officials on the mere allegation that they are racially motivated).

Just because there has been an intentionally drawn distinction does not automatically mean that there has been a constitutional violation. The courts must decide whether the difference in treatment is a permissible one. Courts can view such classifications in one of three ways. In most cases, a statute, regulation, or policy is presumed to be valid and will be upheld if it is shown to be "rationally related to a legitimate state interest." *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). However, the courts give strict scrutiny to claims that concern discrimination based on either "suspect classifications" or "fundamental rights," including those made on the basis

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The Equal Protection Clause in the Prison Context

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of race or national origin. These classifications will only be upheld if they are narrowly tailored to serve a compelling state interst. *Id.*, 473 U.S. at 440. Prison inmates are not a "suspect class" for equal protection purposes. *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997) (noting that neither being a prisoner, nor being indigent, constitutes a suspect class for equal protection purposes). Some classifications (such as gender) have been afforded an intermediate level of scrutiny, where the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

This analysis applies to equal protection claims outside the prison context. However, inside the prison walls, additional factors are considered. In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court held that a prison regulation that infringed upon inmates' constitutional rights would be upheld if it were shown to be reasonably related to a legitimate penological interest. The Fourth Circuit Court of Appeals recently observed that prison officials must have the necessary discretion to operate prisons in a safe and secure manner and that:

"In a prison context, therefore, we must determine whether the disparate treatment is reasonably related to any legitimate penological interests. We apply this deferential standard even when the alleged infringed constitutional right would otherwise warrant higher scrutiny." *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002) (internal citations and quotations omitted). *Veney* applied the *Turner* standard to find that the prison authorities did not violate a homosexual inmate's right to equal protection by denying his request to be switched to a double occupancy cell.

The Fourth Circuit has also upheld the decision of prison administrators which identified the "Five Percenters" as a security threat group and assigned them to long term administrative segregation or maximum control cells. *In re: Long Term Administrative Segregation of Inmates Identified as Five Percenters*, 174 F.3d 464 (4th Cir.), *cert. denied*, 528 U.S. 874 (1999). The court observed that the Constitution does not require that all inmate groups be treated as equal when differentiation is necessary to maintain prison security. In *Morrison v. Garragty*, 239 F.3d 648 (4th Cir. 2001), however, the Fourth Circuit struck down a regulation that required inmates seeking to possess Native American religious items to demonstrate that they were, in fact, Native Americans. This regulation, which distinguished inmates solely on the basis of their race, could not withstand an equal protection challenge where the officials had not demonstrated that the requested religious items posed any less of a security threat in the hands of a Native American inmate.

As you can see, equal protection claims in the prison context present certain inherent difficulties. The immediate problem is proving intentional discrimination. Many complaints concerning discrimination arise out of isolated decisions of prison officials. These include matters such as classification, job assignments, recreation issues, and similar issues. It is often easier to show discrimination where there is an established policy or regulation which applies to a large number of inmates.

The second problem is the deference that such decisions receive from the courts. In matters that do not concern race, gender or national origin, the courts apply the rational basis standard of review. Given the realities of prison life, it is often easy for prison officials to justify a particular policy or decision. Even where strict scrutiny would normally apply, a violation will not be found if the particular distinction is validly related to a legitimate prison interest, such as security. Basically, the inmate will be required to show that the discrimination in question is either wholly arbitrary, or that there is a complete absence of relationship between the policy and the goal that it is alleged to promote.

An inmate who believes that he or she has been the subject of improper discrimination may write to NCPLS for a review of the particular claim. However, it is a useful first step for the inmate to file a grievance. That process helps to establish the facts and aids in the investigative process. Additionally, federal civil rights laws require exhaustion of all available administrative remedies as a prerequisite to the institution of a lawsuit. *See*, for example, 42 U.S.C. §1997c(a).

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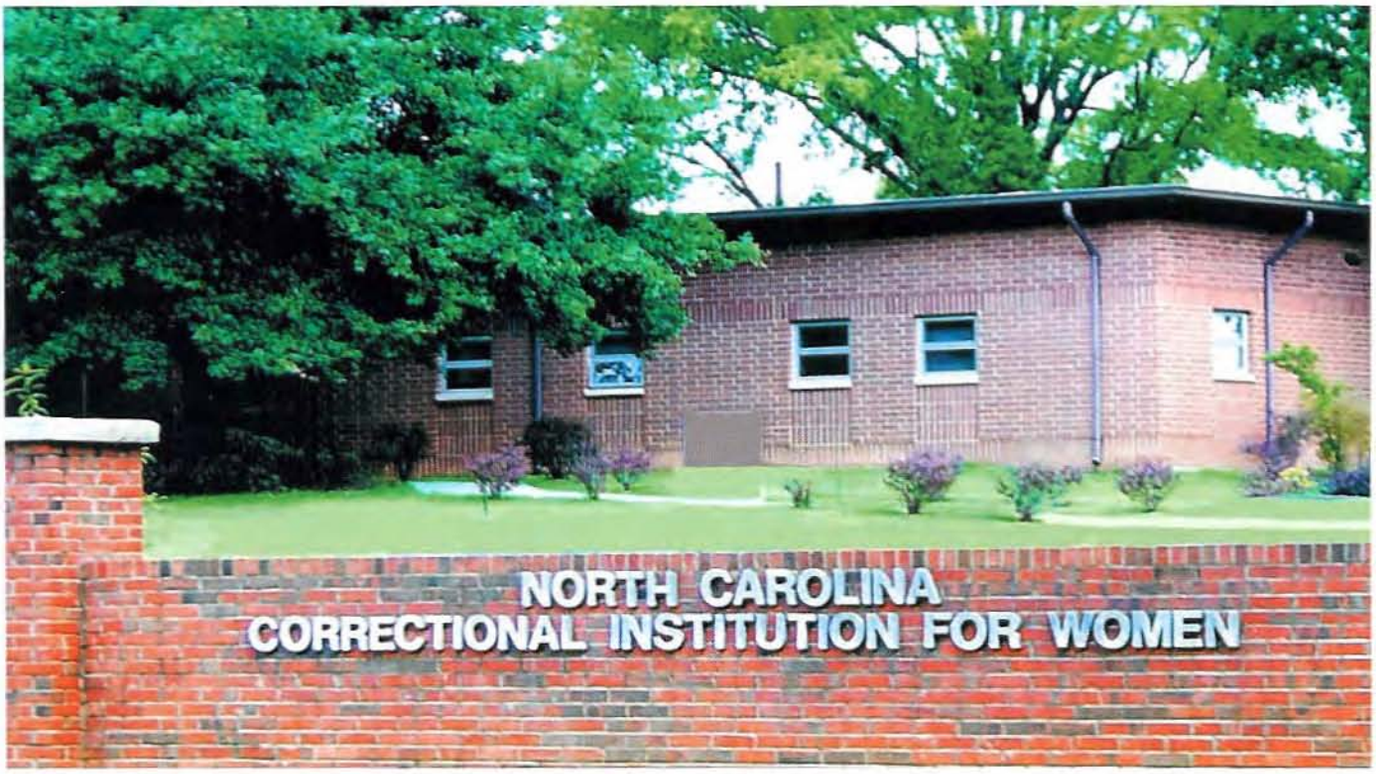

North Carolina Correctional Institution for Women (NCCIW), Raleigh, NC

• to notify inmates affirmatively of negative test results (indicating there is no problem) for mammograms, pap smears, biopsies, and matters of comparable magnitude;

• to maintain a system for inmates to notify the Health Treatment Administrator in writing of perceived delays in follow-up treatment after a 60-day period has passed.

In recognition of the improvements and the commitments Defendants have undertaken, Counsel for the Plaintiff Class, in consultation with the class representatives, will dismiss the case on July 8, 2003, unless there is objectively reasonable evidence that the Defendants have failed or refused to use their best efforts to maintain the accomplishments or implement any material component of the Joint Resolution. During the monitoring period, Counsel for Plaintiffs will be able to inspect and copy appropriate and relevant documents. If the parties are unable to agree about any material component of the Resolution at the end of this period, Counsel for Plaintiffs may ask the Court to resolve the matter.

NCPLS Senior Attorneys Linda Weisel and Susan Pollitt, Counsel for the Plaintiff Class, are actively monitoring compliance with the Joint Resolution and will evaluate Defendants' efforts to maintain the improvements and fulfill their obligations.

All women who are confined at NCCIW are members of the plaintiff class. Class members can obtain a copy of the Joint Resolution by directing a written request to the attention of Linda Weisel or Susan Pollitt at NCPLS.

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