

# NCPLS ACCESS

## LEGISLATURE BANS SMOKING IN PRISON

In the waning days of the 2005 Session of the General Assembly, lawmakers passed a bill that prohibits smoking inside the state's prisons. Senate Bill 1130 "An Act to Prohibit Smoking in State Correctional Institutions," amending Article 2 of Chapter 148 of the General Statutes, §148-23.1, ratified August 24, 2005. The measure was adopted "to protect the health, welfare, and comfort of inmates . . . and to reduce the costs of inmate health care."

According to the newly adopted legislation, "No person may use tobacco products inside of a State correctional facility, except for authorized religious purposes." Prisoners who violate the law may be subjected to disciplinary measures that may include the loss of sentence reduction credits. Correctional officers and other DOC employees, as well as visitors, may also be sanctioned for violations of the law.

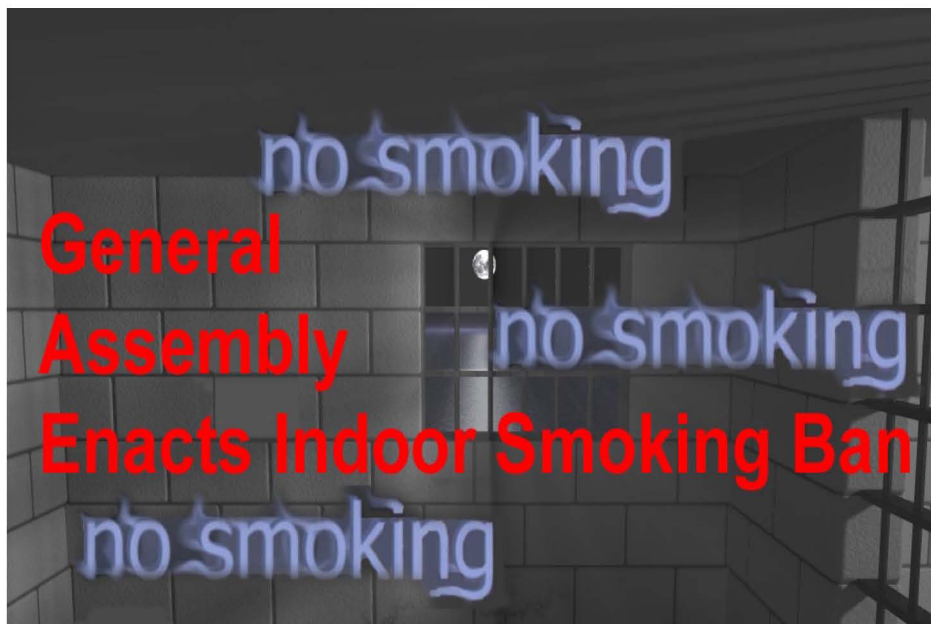
The law will take effect on January 1, 2006, and smoking inside cor-

rectional facilities will be prohibited after that date.

The legislation also directs the Department of Correction to conduct a pilot project "banning smoking both inside buildings and on the grounds of State correctional institutions." In connection with the pilot project, DOC is directed to administer smoking cessation programs for inmates and staff. Participation in such programs cannot be coerced, according to the law, but must be voluntary. The smoking cessation program "shall include instructions and education that will help inmates and staff

cease the use of tobacco products and remain smoke free."

The purpose of the pilot project is to study the feasibility "of a two-year phase-in program banning smoking by all inmates, personnel, and visitors in all buildings and on all grounds of State correctional institutions operated by the Department of Correction."



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## ABA ENCOURAGES LIBERAL ACCESS TO PRISON TELEPHONES

*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 36,000 prisoners and 14,000 pre-trial detainees, providing information and advice concerning legal rights and responsibilities, discouraging frivolous litigation, working toward administrative resolutions of legitimate problems, and providing representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

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

Articles, ideas and suggestions are welcome: [tsanders@ncpls.org](mailto:tsanders@ncpls.org)

**Editor's Note:** NCPLS Executive Director Michael Hamden chaired a committee that drafted the following resolution. Members of the committee included Kay Perry, MI-CURE; Deborah M. Golden, DC Prisoners' Legal Services Project; and Laura K. Abel, Brennan Center for Justice. Substantial editorial assistance and advocacy were provided by Attorney Margaret Colgate Love. Hamden presently serves as co-chair of the American Bar Association's Corrections & Sentencing Committee. Copies of the Resolution and accompanying Report will be provided upon request.

**Chicago** – On August 11, 2005, The American Bar Association's House of Delegates passed by overwhelming voice vote, without any changes or amendments, a resolution developed by the Corrections and Sentencing Committee on correctional telephone services. The resolution is as follows:

### AMERICAN BAR ASSOCIATION

RESOLVED, that the American Bar Association encourages federal, state, territorial and local governments, consistent with sound correctional management, law enforcement and national security principles, to afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.

\* \* \* \* \*

Encouraging legislators and correctional officials to expand opportu-



nities for prisoners to maintain and develop community ties through reasonably priced phone services, ABA policy now accords with that of with the American Correctional Association (ACA) (Oct. 1996 Resolution on Excessive Phone Tariffs); ACA's Public Correctional Policy on Inmate/Juvenile Offender Access to Telephone (adopted Jan. 24, 2001); and ACA's related standards (Standards for Adult Correctional Institutions (3rd ed.); Standards for Adult Local Detention Facilities (3rd ed.); Standards for Adult Community Residential Facilities (4th ed.); Standards for Adult Correctional Boot Camp Programs (1st ed.); Standards for Juvenile Community Residential Facilities (3rd ed.); Standards for Juvenile Detention Facilities (3rd ed.); Standards for Juvenile Correctional Boot Camp Programs (1st ed.); Standards for Juvenile Training Schools (3rd ed.); Standards for Small Juvenile Detention Facilities (1st ed.); and Small Jail Facilities (1st ed.)). See also, the National Sheriffs' Association Resolution of June 14, 1995; and USDOJ-BOP, Program Statement 5264.06, Telephone Regulations for Inmates (Jan. 31, 2002).

# GENERAL ASSEMBLY RESTRUCTURES DELIVERY OF LEGAL SERVICES TO PRISONERS

As reported in the June edition of *ACCESS*, the N.C. General Assembly has been reconsidering the way that legal services are delivered to North Carolina prisoners. As our readers may recall, legislation was introduced that proposed to eliminate funding for NCPLS, opting to allow the Office of Indigent Defense Services (IDS) to provide legal services through other, unspecified means.

For over 16 years, NCPLS has provided legal services to North Carolina prisoners under the terms of a contract with the North Carolina Department of Correction (DOC). Mechanisms built into the contract to ensure that NCPLS advocates could exercise independent professional judgement on behalf of their clients were reviewed and approved by the federal courts. Since the contract was approved, no court has found that any North Carolina prisoner has been deprived of access to the courts.

Neither NCPLS nor any agency of state government sought to change the contractual relationship between DOC and NCPLS. IDS took no position on the legislation, but NCPLS, DOC and the Department of Justice actively opposed the change.

Supported by the reports of independent attorneys and accountants who audited NCPLS earlier this year, members of the Board and

staff worked hard to inform legislators that the program has functioned effectively and efficiently, delivering high quality legal services to our clients in a manner that serves the public interest.

The General Assembly of North Carolina enacts:

SECTION 14.9.(a) G.S. 7A-498.3 reads as rewritten:

§7A-498.3. Responsibilities of Office of Indigent Defense Services.

(a) The Office of Indigent Defense Services shall be responsible for establishing, supervising, and maintaining a system for providing legal representation and related services in the following cases:

(1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;

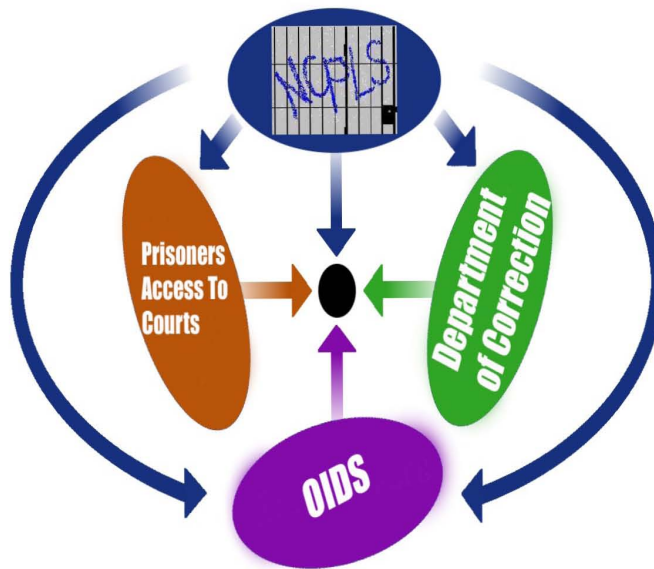
representation;

(2) Cases in which an indigent person is entitled to legal representation under G.S. 7A-451 and G.S. 7A-451.1; and

(2a) Cases in which the State is legally obligated to provide legal assistance and access to the courts to inmates in the custody of the Department of Correction; and

(3) Any other cases in which the Office of Indigent Defense Services is designated by statute as responsible for providing legal representation.

(Continued on Page 4)



Those efforts met with substantial success when the original legislative proposal was abandoned in favor of a bill that requires IDS to contract with NCPLS for two years and to conduct a two-year study of the program. That legislation was passed by the General Assembly on August 5 and was signed into law by the Governor the following day. The relevant portion of the bill is reproduced below.

## TRANSFER RESPONSIBILITY FOR PROVIDING LEGAL ASSISTANCE TO INMATES FROM THE DEPARTMENT OF CORRECTION TO THE OFFICE OF INDIGENT DEFENSE SERVICES

## DELIVERY OF LEGAL SERVICES TO PRISONERS (CONTINUED)

*(Continued from Page 3)*

(b) The Office of Indigent Defense Services shall develop policies and procedures for determining indigency in cases subject to this Article, and those policies shall be applied uniformly throughout the State. Except in cases under subdivision (2a) of subsection (a) of this section, the court shall determine in each case whether a person is indigent and entitled to legal representation, and counsel shall be appointed as provided in G.S. 7A-452.

(c) In all cases subject to this Article, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services.

(d) The Office of Indigent Defense Services shall allocate and disburse funds appropriated for legal representation and related services in cases subject to this Article pursuant to rules and procedures established by the Office.

SECTION 14.9.(b) Effective October 1, 2005, the State's responsibility for providing inmates in the custody of the Department of Correction with legal assistance and access to the courts shall be administered by the Office of Indigent Defense Services. The existing contract between the Department of Correction and Prisoner Legal Ser-

vices, Inc., shall not be extended or renewed beyond that date.

The Director of the Office of Indigent Defense Services shall contract with Prisoner Legal Services, Inc., to provide legal services and access to the courts for inmates for a period of two years, from October 1, 2005, through September 30, 2007.

During this time, the Director of Indigent Defense Services shall evaluate the services provided by Prisoner Legal Services, Inc. The Office of Indigent Defense Services shall provide an interim report of its evaluation to the Chairs of the Senate and House of Representatives Appropriations Committees and Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by May 1, 2006, and a final report of its evaluation by May 1, 2007. The interim report shall describe the evaluation process and criteria, the status of the evaluation, and any preliminary findings.

SECTION 14.9.(c) The sum of one million eight hundred eighty-three thousand eight hundred sixty-five dollars (\$1,883,865) for the 2005-2006 fiscal year and the sum of two million five hundred eleven thousand eight hundred twenty dollars (\$2,511,820) for the 2006-2007 fiscal year shall be transferred from the Department of Correction to the Office of Indigent Defense Services to implement this section.

SECTION 14.9.(d) Subsections (a) and (b) of this section become effective October 1, 2005. The remainder of this section becomes effective July 1, 2005.

### IMPACT OF THE LEGISLATION

Shortly after the original legislation was passed by the Senate in May, NCPLS invited IDS representatives into the office to discuss the contingency that the General Assembly might adopt legislation that affected the delivery of legal services to prisoners. On June 2, IDS Executive Director Malcolm Ray "Tye" Hunter and Assistant Director Danielle M. Carmen visited NCPLS, reviewed program operations, and spoke with the NCPLS Executive Director and Office Administrator regarding the proposed change. Speaking of the possibility that IDS might be delegated the responsibility for administering the contract to deliver legal services to prisoners, Mr. Hunter provided welcome reassurance by stating his commitment to provide services of at least the same quality, and at least to the same extent as those services are presently being provided.

How that commitment will be met is a matter that will become clear as negotiations between IDS and NCPLS unfold. Talks will begin soon and are expected to conclude no later than September 30. Final details will be reported in the next edition of *ACCESS*.

## UPDATE ON *BLAKELY*'S RETROACTIVE APPLICATION

By: Lauren Brennan, NCPLS Summer Intern

Over the last year, NCPLS has followed the implications of *Blakely v. Washington*, 124 S.Ct. 2531 (2004), on North Carolina prisoners. Decided June 24, 2004, *Blakely* held that the statutory maximum sentence a judge may impose must be based on "facts reflected in the jury verdict or admitted by the defendant," and not based on additional fact-finding by a judge. *Id.* at 2537. *Blakely* also clarified the definition of "statutory maximum," referenced in *Apprendi v. New Jersey* 530 U.S. 466 (2000), as the maximum sentence a defendant may receive in the presumptive range, not the maximum sentence for the offense.

One of the concerns of North Carolina inmates and our office is whether the *Blakely* decision will be applied retroactively. The short answer to the question is: sometimes yes and sometimes no. This article will briefly explain in which situations the *Blakely* rule may be applied retroactively. In addition, the article will explore how the *Blakely* decision may affect North Carolina sentencing law going forward.

Criminal appeals fall into one of two categories – direct review, or collateral review. Direct reviews of criminal convictions are reviews of judgments that have not yet become final (for example, an appeal from a jury trial to the North Carolina Court of Appeals involves a judgment that is not yet final). A judgment becomes final when the time for seeking direct review has expired or when a conviction has

been affirmed on appeal. *Morrison v. McDonald*, 113 N.C. 327 (1893). In contrast, collateral review is a review sought (for instance, through a motion for appropriate relief) after a criminal judgment has become final. N.C. Gen. Stat. 15A-1419. This is an important distinction because, generally, courts have held that *Blakely* is retroactive on direct review, but not on collateral review.

### Direct Review

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the court stated that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. Three years later, in *Teague v. Lane*, 489 U.S. 288 (1989), the U.S. Supreme Court affirmed that principle. Accordingly, the new rule established by *Blakely* is properly applied retroactively to all cases pending on direct appeal when *Blakely* was decided.

The North Carolina Court of Appeals applied the *Blakely* rule retroactively in *State v. Speight*, 166 N.C. App. 106 (N.C. Ct. App., 2004). In *Speight* the defendant's case was argued March 30, 2004, (before the *Blakely* decision was announced) and the *Speight* opinion was filed September 7, 2004 (after *Blakely*). In *Speight*, the defendant's motion for appropriate relief contended that "the trial court's imposition of a sentence

in the aggravated range was done in violation of the Sixth Amendment to the United States Constitution." *Id.*, 166 N.C. App. at 117. The court granted the defendant's motion and ordered that the trial court resentence the defendant consistent with the *Blakely* decision. *Id.* at 118.

**A North Carolina inmate may be entitled to relief if:**

- A sentence in the aggravated range was imposed;
- The judgment was not final on direct appeal prior to June 24, 2004;
- The defendant did not stipulate or agree to an aggravating factor or a sentence in the aggravated range in a plea bargain and was sentenced after June 24, 2004.

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## *BLAKELY* (CONTINUED)

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### Collateral Review

The U.S. Supreme Court has the option to specifically state in an opinion whether a new rule shall be applied retroactively to cases on collateral review, but seldom does.

The court did not speak to the issue of retroactivity in

*Blakely*. (*United States v. Marshall*

117 Fed. Appx. 269, 270 (4th Cir. 2004);

*Morgan v. North Carolina Department of Correction*,

110 Fed. Appx. 310 (4th Cir. 2004);

*Carmona v. United States*, 390 F.3d

200, 202 (2d Cir. 2004);

*In Re Olopade*, 403 F.3d 159, 162 (3d Cir. 2005);

*In re Elwood*, 408 F.3d 211, 211 (5th

Cir. 2005); *Simpson*

*v. United States*, 376 F.3d 679, 681 (7th Cir. 2004);

*Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1245

(9th Cir. 2005); *Leonard v. United States*, 383 F.3d 1146, 1148 (10th

Cir. 2004); *In re Hinton*, 125 Fed. Appx. 317, 317 (D.C. Cir. 2005)).

When there is no clear statement by the Supreme Court on the issue, to determine whether the new rule created by the Supreme Court should be applied retroactively to cases on collateral review, the lower courts must conduct the analysis announced in *Teague v. Lane*,

489 U.S. 288 (1989). According to *Teague*, “the costs imposed upon the State[s] by [the] retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits

of conduct or the class of persons that the law punishes.” *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523 (2004). *Blakely*, however, does not affect the range of conduct or a class of persons; it merely alters

the length of the sentence a judge has the authority to impose for a particular crime.

All of the highest state appellate courts and all federal courts that have examined the issue of *Blakely*'s retroactivity on collateral review have concluded that the *Blakely* rule is not substantive. (*Lilly v. United States*, 342 F. Supp. 2d 532, (W.D. Va. 2004); *United States v. Price*, 400 F.3d 844, 845-846

(10th Cir. 2005); *United States v. Ramirez*, 127 Fed. Appx. 414, 417 (10th Cir. 2005)). The next question under the *Teague* analysis is whether *Blakely* announced a “watershed rule.”

For a procedural rule to be applied retroactively it must be a “watershed rule” of criminal procedure. A “watershed rule” is one that raises questions about “the fundamental fairness and accuracy of the criminal proceeding.” *Schriro*,

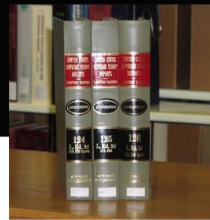
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# Blakely v.

# Washington

## A Question of Retroactivity



of this application.” *Id.* at 310 (internal citation omitted). *Teague* established that unless new rules fall into one of two narrow exceptions, they should not be applied retroactively to cases on collateral review. *Id.* at 310. The first exception arises when the new rule is substantive. The second exception arises when the Court announces a “watershed rule” of criminal procedure. North Carolina law on retroactivity follows the *Teague* doctrine.

“A rule is substantive rather than procedural if it alters the range

## *BLAKELY* (CONTINUED)

(Continued from Page 6)

124 S.Ct. 2524. The decision reached in *Blakely* does not affect the guilt phase of a criminal trial, but rather, the sentencing phase. For this reason, courts have held that *Blakely* did not announce a “watershed rule” of criminal procedure. (*Castro v. Keith*, 2005 U.S. App. LEXIS 9914 (10th Cir. 2005); *Orchard v. United States*, 332 F. Supp. 2d 275, 277 (Maine 2004)). This means that *Blakely* does not fall into either of the categories of exceptions established by *Teague*, and therefore, will not be applied retroactively to cases on collateral review.

### **The *Schriro v. Summerlin* Effect**

In *Schriro v. Summerlin*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2519 (2004), the U.S. Supreme Court addressed the issue of whether the rule created by *Ring v. Arizona*, 536 U.S. 584 (2004), should be applied retroactively. *Ring* extended *Apprendi v. New Jersey*, 530 U.S. 466 (2001), to aggravating factors in capital murder cases, holding that facts increasing a defendant’s sentence from life imprisonment to death must be proved to a jury rather than decided by a judge.

In *Schriro*, Defendant Summerlin was convicted of first degree murder in Arizona and sentenced

to death by a judge. Summerlin exhausted all direct appeals before the decision in *Ring*. Summerlin appealed his conviction on collateral review, raising the argument

*Ring* decisions, coupled with the rulings of lower courts in almost all circuits (discussed above), strongly suggest that *Blakely* will not be applied retroactively.



### **The Future of Sentencing Law in North Carolina**

Naturally, the next question is: “Where does *Blakely* leave North Carolina’s Structured Sentencing statutes?” The General Assembly of North Carolina passed a revision to the sentencing law in the 2005 Session to conform with recent Supreme Court sentencing jurisprudence. The

that *Ring* should apply retroactively. The Court ruled that *Ring* does not apply retroactively to cases which had become final on direct review before the *Ring* decision was announced.

The situation in *Schriro* is analogous to *Blakely* because both cases are extensions of *Apprendi*, which created a new procedural rule. The U.S. Supreme Court ruled in *Schriro* that *Ring* did not create a watershed rule of criminal procedure, and therefore, the facts of those cases did not fall into the limited exceptions that warrant retroactive application of the rule first announced in *Apprendi* and clarified in *Blakely*. The *Schriro* and

revised statutes elevate the burden of proof for aggravating factors from “a preponderance of the evidence,” to, evidence “beyond a reasonable doubt.” N.C. Gen. Stat. 15A-1340.16(a). Also, there are provisions which require that, unless the defendant admits them, aggravating factors must be determined by a jury. N.C. Gen. Stat. 15A-1340.16(a1)-(a6). The only sentence enhancement which still does not need to be proved to a jury is prior record level points. The full text of the amended versions of the statutes appears below.

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## *BLAKELY* (CONTINUED)

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It is important to note that under the legislation, while aggravating factors must be proven beyond a reasonable doubt or admitted, they generally do not have to be alleged in the indictment. This is supported by case law. In *State v. Allen*, 2005

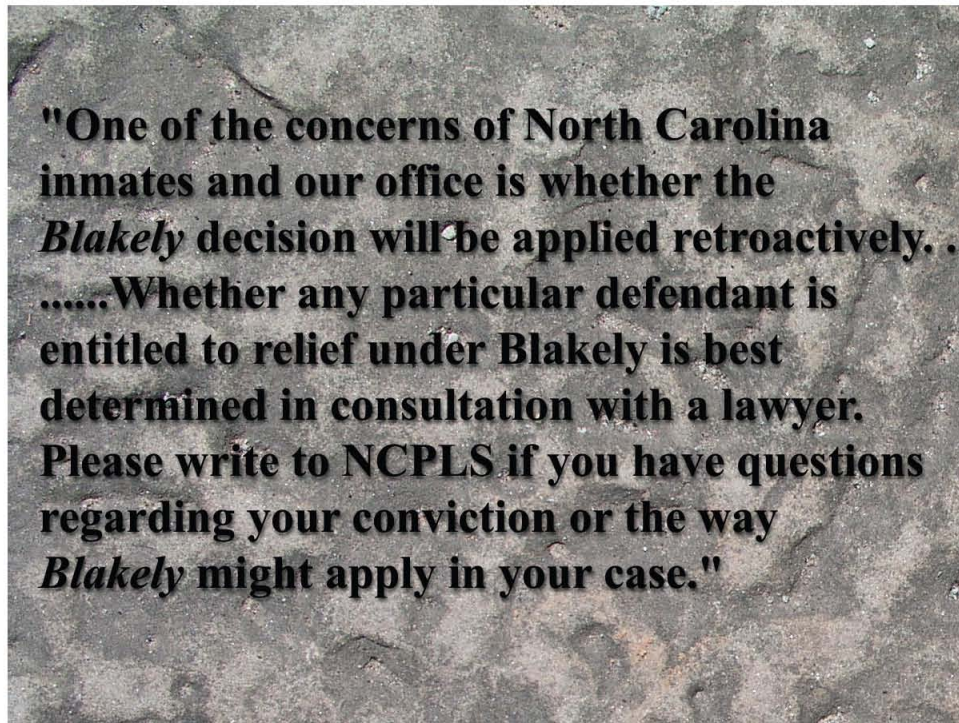
N.C. LEXIS 695 (N.C., 2005), the court overturned a prior decision in *State v. Lucas*, 353 N.C. 568 (N.C., 2001), and concluded “that aggravating factors need not be alleged in an indictment.”

According to revised statute N.C. Gen. Stat. 15A-1340.14, Section 3, the only aggravating factor that

must be alleged in the indictment is, “any other aggravating factor reasonably related to the purposes of sentencing.” The new statute does provide for notice of aggravating factors to be served on the defendant 30 days before trial or the entry of a guilty or no contest plea. The new sentencing laws will place a greater burden on the state to prove aggravating factors, and in turn, will help protect defendants’ constitutional right to have their *entire* case tried to a jury.

The revised statutes, which incorporate the teachings of *Blakely* into the law of North Carolina, only apply to defendants charged after the date the statute took effect, June 30, 2005.

not final on June 24, 2004, the date on which the *Blakely* decision was announced. Unfortunately, neither the statutes nor case law will support relief for those inmates whose judgments were final prior to the *Blakely* decision.



**"One of the concerns of North Carolina inmates and our office is whether the *Blakely* decision will be applied retroactively. .... Whether any particular defendant is entitled to relief under *Blakely* is best determined in consultation with a lawyer. Please write to NCPLS if you have questions regarding your conviction or the way *Blakely* might apply in your case."**

“Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.”

N.C. Gen. Stat. 15A-1022.1, Section 5.

Defendants not sentenced consistently with *Blakely* may be entitled to relief if their convictions were

To summarize, generally a North Carolina inmate may be entitled to relief if:

- A sentence in the aggravated range was imposed;
- The judgment was not final on direct appeal prior to June 24, 2004;
- The defendant did not

stipulate or agree to an aggravating factor or a sentence in the aggravated range in a plea bargain and was sentenced after June 24, 2004.

Whether a particular defendant is entitled to relief under *Blakely* is best determined in consultation with a lawyer. Please write to NCPLS if you have questions regarding your conviction or the way *Blakely* might apply in your case.



## NCPLS HELPS PRISONERS TO GET APPOINTED COUNSEL ON CHILD SUPPORT CIVIL CONTEMPT CHARGES

*By Kady McDonald, Certified Legal Assistant, and  
Michele R. Luecking-Sunman, Staff Attorney*

In early 2005, NCPLS received numerous complaints from inmates being housed in the Brunswick County Jail on civil contempt charges for failure to pay child support. Although NCPLS does not normally accept child support cases, due to the number of complaints we received in a short period of time, our office decided to investigate the matter.

The inmates were being held in jail for several months at a time, with no access to counsel, and no money to pay child support, which was required as a condition of release from jail. Usually, after an initial hearing, the inmate would have to file a motion and wait 60-90 days to appear before the judge again. Without money to hire an attorney, our clients did not know what to file or how to get back in front of the judge, or what to say to the judge when they did return to court.

NCPLS contacted Indigent Defense Services and the Institute of Government, whose staff were aware of, and concerned about the problem. North Carolina case law

requires that specific findings be made about an individual's present ability to pay child support before a contempt order is entered. *Glesner v. Dembrosky*, 73 N.C. App. 594, 327 S.E. 2d 60 (1985), *Plott v. Plott*, 74 N.C. App. 82, 327 S.E. 2d 273 (1985). In our clients' cases, it did not appear that such findings were ever made. Instead, the presiding judge generally checked a box that stated the defendants were "willfully choosing not to pay." In case after case, our clients assured us that there was no money available to pay the "purge" amount.

NCPLS spoke with a Brunswick County attorney who prosecutes child support cases. Our advocate explained concerns about the lack of procedural protections in such cases, as well as the failure to provide defendants with access to counsel. The attorney advised that she was not aware of those problems, but shortly after the conversation, several of our clients were appointed counsel.

The North Carolina Supreme Court stated in *McBride v. McBride*, 431

S.E. 2d 14 (1993), that an indigent person who faces the prospect of incarceration for non-payment of child support must have counsel appointed to represent him at the hearing. According to the *McBride* Court, at the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the court should then inquire into the defendant's desire to be represented by counsel and his ability to pay for legal representation. When a defendant in such a case wants to be represented by counsel but cannot afford to hire an attorney, the court must appoint counsel to represent the defendant. *Id.* at 19.

If you are facing civil contempt charges for failure to pay child support, you should request that an attorney be appointed to your case. You can either do this in person at the hearing or you can write the district court judge and request an attorney.

## EARNING FREEDOM

By Michael G. Santos  
April 2, 2004

**Editor's Note:** The following article, "Earning Freedom," 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.Michael Santos.net](http://www.MichaelSantos.net). Although Mr. Santos does not have direct access to the internet, he can be reached by email at: [info@michaelsantos.net](mailto:info@michaelsantos.net). Mr. Santos can also be reached at the following address: Michael G. Santos (Reg. No. 16377-004), USP Lompoc, Satellite Camp, 3705 W. Farm Road, Lompoc, CA 93436.

In late 1985 I began making a series of bad decisions. I was 21 and working in our family business, but I lacked the good character to act responsibly with the trust my parents had placed in me. At that time I felt the influence of city lights attracting me and I was in too much of a hurry to accelerate my life. Rather than attend college or focus on the family business as my parents expected of me and as a mature young man would have done, I joined a group of friends in a scheme to reap seemingly easy and endless illicit profits by distributing cocaine.

Our group did not carry weapons or use violence, and none of us had

served time in confinement before. Yet when the law came down on us in 1987, as it inevitably would, it held us culpable for the entire scourge delivered upon society as a consequence of the cocaine we distributed. I was 23 then, and the judge in my case concluded that 45 years was the appropriate sentence for me.

As children, my sisters and I attended St. Johns, a Catholic elementary school in Seattle, but our family was not particularly religious. By the time I was in the fifth grade we moved to Lake Forest Park, a suburb community in North Seattle. Rather than continuing our education in Catholic schools, my parents enrolled my sisters and me in the local school system. That move pretty much ended my involvement in the church.

While I languished in the county jail waiting for my judicial proceedings to play themselves out, I picked up the Bible. Those were weak moments in my life. I had no idea what was to become of me. The possibility of serving multiple decades in prison frightened me, and during those lonely nights in my cell when suicide seemed an easy escape, the word of God gave me strength. I read the Bible from cover to cover, drawing fortitude from both the Old and New Testaments.

Those Biblical readings helped me realize that God has blessed me with the power to choose how I

was going to respond to the complexities of my life. I realized that although I was staring down the long end of a 45-year sentence, I still was a young man and my life remained in God's hands. Opportunities would come for me to use my time in prison to grow. If I succeeded, I hoped to emerge from the depths better able to contribute to the world and the lives of others.

I remember struggling with the concepts of free will versus determinism. Somehow I needed to make sense of the twists and turns my life had taken. I had a privileged adolescence with loving parents and two sisters, but for 18 months I strayed into the clutches of vice much like the Old Testament story of the prodigal son. The justice department responded with this lengthy sentence that threatened my sanity. In order to cope, I needed to believe that it was God's will for me to endure the challenges of confinement. I embraced the concept that triumphs through the adversity of my life would inspire others and thus bring meaning to my life. I hoped to reconcile with society. The choice was up to me. Prayer and faith helped me realize that instead of languishing through a lengthy prison sentence, I could redeem my crimes through work and prove myself worthy to continue receiving God's gift of life.

In those early years of my confinement the United States Congress had extended funding for prisoners

*(Continued on Page 11)*

## *EARNING FREEDOM* (CONTINUED)

*(Continued from Page 11)*

to study. I enrolled in undergraduate courses at Ohio University through correspondence and also in courses at Atlanta's Mercer University. In high school I had been a mediocre student, failing to take advantage of the educational

opportunities available through the excellent public school system of my area. During those long nights in prison, reflecting on my wayward youth while I lay in the darkness of the reinforced concrete shell to which I had been assigned, staring up at the steel plate supporting the stranger in the bed above me, I realized that it was my lack of discipline and weak moral compass that led to the bad deci-

sions I had made. I knew that the predicament through which I suffered was a direct consequence of my own actions. I committed myself to making better decisions and took every advantage to make the most of all learning opportunities available to me.

My studies helped me in many ways. Not only was I educating myself, developing skills and credentials that would assist my efforts to overcome the obstacles I expected to encounter upon my release, university studies gave me clearly identifiable goals to work toward. My time was broken up by

90-day quarters and I focused on completing my assignments so that I could move closer to receiving the academic credits necessary to earn a degree. By concentrating on work that had meaning to me, that I was confident had significance



to my life, I had valid reasons to stay away from any activities or behavior that could threaten or delay my progress. While navigating my way through the minefields of prison living, such reasons were necessary to maintain direction.

Without meaningful goals, I have found, prisoners frequently find themselves distracted by the types of vice that exist outside of these closed communities. Indeed, being separated from family and friends, frequently lacking in self-discipline, prisoners may be more susceptible to vice than the broader population. Like me, many of the

men inside these communities of felons serve sentences of multiple decades. Some have no hope of a better life and know that as marginalized citizens they will face even higher hurdles to function in society upon release than they

knew prior to confinement. Without incentives to guide their behavior, many prisoners serve their time in a manner that compounds their problems. They participate in drug rackets. They gamble. They form gangs of extortion and intimidation. For many, it is as if they live in hell and, without hope for a better life, each competes to live as the chief demon.

In 1992 Mercer University awarded my undergraduate degree. Around that same time, the U.S. Congress passed new legislation rendering people in prison ineligible for Pell Grants that would pay for university studies. Some influential citizens, apparently, were upset to learn that a portion of their tax dollars were being used to pay for schooling that would educate prisoners. I considered myself blessed to have earned my undergraduate degree before Congress had terminated funding opportunities.

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## *EARNING FREEDOM* (CONTINUED)

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My academic studies represented an integral and essential aspect of my adjustment. I had begun serving my sentence at the United States Penitentiary in Atlanta, a maximum-security facility that the New York Times had labeled the most violent prison in America. Despite being young and inexperienced, I managed to serve the six years I spent there without receiving a single disciplinary infraction. The primary reason was my laser-like focus on achieving credentials that I expected would help me overcome the stigma of my criminal convictions; earning that degree was crucial to my sense of self. I deliberately avoided areas, activities, and people that could disrupt my progress.

In the fall of 1992 I began studying independently at Hofstra University. I wrote to the dean of that school expressing my commitment to advancing my academic standing and asking for permission to enroll in a program that would lead me to a graduate degree. After a lengthy correspondence, the faculty agreed to waive its residency requirement and admit me. Although federal funding was not available, my parents and my sisters all contributed to help me meet the tuition obligations.

As a long-term prisoner, I wanted to study aspects of the federal prison system and the people it holds. My advisory faculty at Hofstra, therefore, enabled me to structure an interdisciplinary

course of study with concentrations in sociology and cultural anthropology. I would become an ethnographer, writing about foreign culture while living as a participating member. The subculture I studied, of course, was the growing American prison population. Hofstra awarded my master of arts degree in the spring of 1995.

Our nation now confines more than 2.1 million people at an annual cost to taxpayers of over 40-billion dollars. Each year more than 600,000 people are released from places of confinement to resume their lives in their respective communities. Sadly, during their confinement many of those released felons adjusted in ways that prepared them to live in prison while simultaneously conditioning them to fail in society. With recidivism rates that exceed 60 percent, it is clear that legislators and prison administrators ought to consider another approach. After all, what is the goal of imprisonment? If it is to warehouse human beings then prisons succeed brilliantly. On the other hand, if prisons are supposed to correct behavior and thinking patterns, then our recidivism rates suggest that our system of corrections is an abject failure. I suggest a reform. Providing opportunities for felons to develop skills will enable them to contribute as law-abiding citizens upon their release.

Of course, I am not a prison administrator. I am a prisoner. As such, I have never managed one

of the enormous budgets that fund these caged cities. Nor have I had to contend with the tough-on-crime politics that result in myopic policies like the elimination of educational funding. Obviously, issues complicating prison management exist that I have no knowledge about. Still, I have lived virtually my entire adult life inside these communities of men that society has condemned. My experiences and observations have spawned ideas that legislators and administrators might consider implementing to improve this so-called system of corrections.

One fundamental problem with the prison system, as I have experienced it, is that administrators manage it with the threat of punishment rather than the promise of incentives. It is a system that contradicts the principles of American life. Indeed, there is no limit to the quantity of actions that can exacerbate a prisoner's problems; every disciplinary infraction he receives will raise the prisoner's custody scoring, exposing him to sanctions and higher-security living. Administrators may find such punishments necessary for management reasons. Yet they should consider balancing those punishments with incentives that inspire the contributing, law-abiding behavior and values that society expects from its citizens.

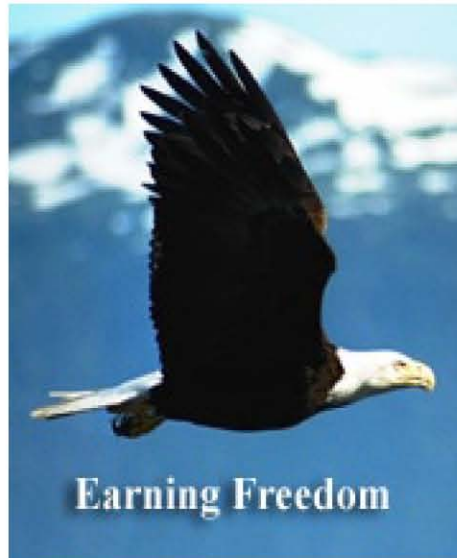
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## *EARNING FREEDOM* (CONTINUED)

*(Continued from Page 12)*

Unfortunately, as correctional policies exist today, there is no way for a prisoner to enhance his classification status. The individual who disciplines himself and works to develop skills that will contribute to society fares no better while in prison than the individual who passes all of his time watching music videos or playing dominoes. Only behavior that violates disciplinary codes constitutes a change in formal scoring, and, of course, that change will be for the worse. Under the current system, if an individual wants his scoring to change for the better, he must wait for calendar pages to turn. That is a flaw.

Many of the people who live in prison lack personal backgrounds or values that prompt introspection. These prisons are filled with men who have lived by the codes of immediate gratification for their entire lives. They have never placed much value on education or acquiring job skills. They are not well suited to contemplate steps they can take to prepare for the challenges that will follow confinement. As a consequence, they squander their time in prison. After encountering obstacles that are insurmountable to them upon release, many revert to behavior and activities that returns them to these penitentiary societies. It is a vicious circle, one that our enlightened society ought to make efforts to stop.



Rather than managing prisons with the constant threat of punishment, administrators ought to lead these caged communities by offering the men inside opportunities to earn graduated levels of freedom. Instead of following the patterns of a communistic society, where every prisoner is treated the same, administrators ought to prepare prisoners for society by following the same principles that have made America great. In other words, just as they punish those who have been convicted of violating prison rules, administrators ought to offer an objective system through which prisoners can distinguish themselves formally in a positive way. They should prepare prisoners for liberty by offering opportunities for them to earn it.

Few people in prison take advantage of opportunities to develop skills in prisons because they cannot identify the long-term value of such personal investments. As I

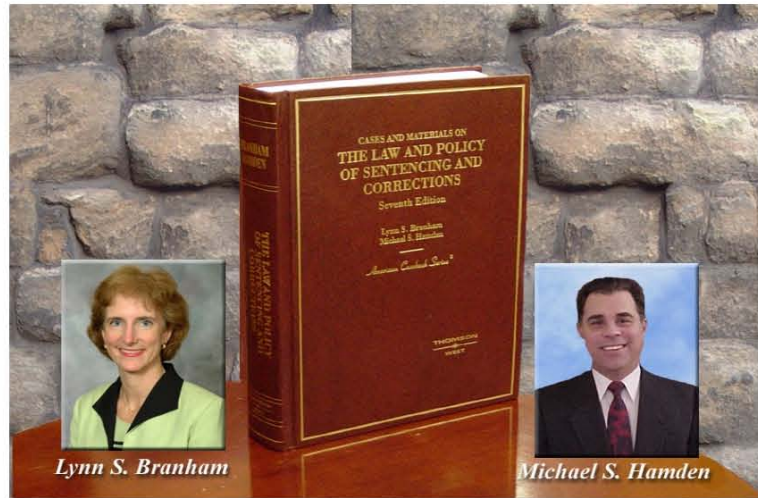
wrote above, the men are serving multiple decades and they notice that the man who earns a graduate degree or develops a marketable skill receives the same consideration as the prisoner who passes years slamming dominoes and cards down on the table. But if administrators were to authorize programs through which prisoners could earn their way into preferred housing, earn better access to family visits, or earn opportunities to advance their education level or trade skills, they would inspire more prisoners to use their time wisely.

Our nation's leaders speak of a compassionate conservatism. That compassion has yet to find its way into these societies of captives. My spiritual readings suggest that Christ taught—among other things—forgiveness. Leaders of our criminal justice system, on the other hand, eschew Christian concepts of forgiveness, redemption, or atonement. A thirst for vengeance demands that those convicted of breaking America's laws pay with years of their lives. Still, well over 90 percent of the people who serve time eventually return to their communities. Perhaps legislators and administrators ought to think more about programs like the ones I suggest above, programs that will introduce people in prison to pragmatic values, and opportunities for them to earn their freedom through merit rather than the flipping of calendar pages.

## NCPLS CONTRIBUTES TO NEW LAW SCHOOL CASEBOOK

A team of NCPLS attorneys contributed to one of the new publications being offered by Westlaw/Thomson for use in the law school classroom. Lynn S. Branham and Michael S. Hamden, "*Cases and Materials on the Law and Policy of Sentencing and Corrections* (7th ed. 2005). Published as part of its American Casebook Series, the book includes coverage of important court decisions that govern this area of law, as well as materials that reflect the practical challenges of effectively representing criminal defendants and prisoners. The casebook serves both as an outstanding instructional tool for legal educators and students, and as a reliable and authoritative reference work for practitioners.

A *summa cum laude* graduate of the University of Illinois, Lynn Branham received her law degree from the University of Chicago, where she was a member of the law review. An expert in sentencing and corrections law and policy, Professor Branham is a well respected author who trains federal judges on the Prison Litigation Reform Act. Professor Branham



has spoken across the country, and testified before Congress, about the need for comprehensive community-corrections laws and effective structured-sentencing mechanisms. From 1990 until 1998, she served as the American Bar Association's representative on the Commission on Accreditation for Corrections, and in 1999, Professor Branham was presented the American Correctional Association's Walter Dunbar Award for her work to improve the correctional accreditation process. She was reappointed to a two-year term on the Commission in 2000. Ms. Branham presently serves as Associate Dean for the Thomas M. Cooley School of

Law in Grand Rapids, Michigan. Commenting on the new publication, NCPLS Executive Director Michael Hamden expressed appreciation to the NCPLS Board of Directors and the staff of the program for enabling him to undertake the project. "The successful completion of this work is attributable to the experience, scholarship, and diligence of a team of NCPLS attorneys: Hoang Lam, Ken Butler, Janine Zanin, Beth McNeill, Lisa Chun, Michele Luecking-Sunman, Richard E. Giroux, and Betsy ColemanGray. The contributions of these bright, talented and committed lawyers are deeply appreciated."

## WRITING TO NCPLS

NCPLS intake staff processes over 500 letters per week from inmates across the state. You can help us give your letter timely attention by ALWAYS doing the following:

1. Put your OPUS number on both your letter and envelope.

2. Print clearly. Block letters are usually best. Please do not use small or fancy handwriting (if your handwriting is hard to read, your letter may find its way to the bottom of the pile).

3. If at all possible, write in ink.

4. If you are writing to complain about a condition of confinement, an injury, or a problem with the medical unit, start the grievance process *before* you write to us.

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## LITIGATION LEADS TO NEW DOC POLICY RECOGNIZING LEGALLY CHANGED NAMES

By Michele R. Luecking-Sunman, Staff Attorney

For many years, the DOC refused to recognize the names of prisoners that had been legally changed after the date the prisoner was first admitted into DOC custody. The situation arose most commonly when prisoners changed their names in connection with a religious conversion, but it was also a problem for female prisoners whose marital status changed.

NCPLS unsuccessfully litigated several cases challenging DOC's position, specifically with regard to legally recognized name changes associated with religious conversion. In all of these cases, DOC successfully argued that it is important to institutional order and security to be able to correctly identify prisoners, and that too great an administrative burden would result from a legal requirement that legally changed names be used as the means to identify prisoners.

Recently, NCPLS was appointed by the court to represent a prisoner who sought to have his legally

changed name referenced on his prison identification card. *Dawed Al-Amin Shabazz v. Michael York, et al.*, Case No. 1:02CV00350 (MDNC 2005). The plaintiff, as well as many others we have heard from, found it difficult to access prison services using his new religious name. Though he followed the correct legal procedures to officially change his name, DOC policy stated that a prisoner must use the name under which he was originally committed to DOC, even if his name was legally changed prior to a readmission to DOC. Therefore, when getting mail, signing up for sick call, requesting trust fund disbursements, and to access many other programs or services, or to participate in various activities, the prisoner would have to provide his former name – one that he found offensive following his religious conversion.

In an effort to resolve the *Shabazz* litigation and several other complaints, DOC has changed the

policy regarding name changes. Now, DOC regulations provide that prisoners who legally change their names may have their new, legal name added directly below the committed name on their identification cards. DOC Rules & Regulations, *Chapter F, Section .2908, Identification Card Procedure, Initial Issue and Reissue Procedures and Requirements*. The policy applies to prisoners in similar situations so that their ID cards will have, not only their committed name, but their legally changed name, as well.

With the adoption of the new regulation, it appears that DOC has made an effort to reconcile legitimate security interests with the religious and personal sensibilities of people who are incarcerated. However, important issues remain to be resolved by the courts, including the question as to whether a prisoner has a legal right to use a religious name to access correctional programs, services, and activities.

## WRITING TO NCPLS (CONTINUED)

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5. Do not send us copies of grievances that have not been submitted to DOC yet.
6. Do not staple or otherwise attach the papers that are in the envelope.
7. If you are writing to request a specific self-help form or packet, it is not necessary to provide any details about your situation. A simple request for the form/packet is fine.
8. It is not necessary to cite case law when you write. We are familiar with prisoner rights law and stay abreast of new developments.
9. Be patient. We respond to every letter we receive, **most** on the same day we receive it.

**THE NEWSLETTER OF NORTH CAROLINA  
PRISONER LEGAL SERVICES, INC.**

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