The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume IX, Issue 2, August 2009

NCPLS ACCESS

An Introduction to Civil Claims

By Ken Butler, NCPLS Staff Attorney

Broadly speaking, legal actions fall into one of two categories. The first consists of *criminal* actions. These are brought by the government, either state or federal, to punish individuals who have violated some provision of the criminal law. All other types of legal actions fall on the *civil* side of the law.[1] This article seeks to discuss the nature of civil claims, outline the types of claims that may be pursued by inmates in the N.C. Department of Correction, and to suggest the appropriate legal forum in which to bring such claims.

Civil claims cover vast areas of the law. They include claims for injury to persons or property, employment law, family law, contracts, real estate issues, and many others. The person who brings a civil claim is referred to as the *plaintiff* and the document that typically starts a lawsuit is referred to as a *complaint*. The persons or entities against whom the lawsuit is brought are called *defendants*.

Civil actions are brought to achieve two types of remedies. The first, and most common, is referred to as *legal* relief which is an award of money damages. There are various categories of money damages that may be awarded. These include: (1) *compensatory* damages – an award of money designed to compensate a person for the amount of injury, whether personal injury or loss of property, he or she has suffered; (2) *punitive* damages – which are awarded in exceptional cases where a defendant's conduct is so serious that additional damages are considered appropriate both to punish the defendant, and serve as a warning to others who might commit the same type of actions; and (3) *nominal* damages – this is a small amount of money (such as $1.00) which is awarded where there has been no injury to justify compensatory damages but where a symbolic award is thought necessary to recognize that a person's rights were violated.

The second type of remedy is referred to as *equitable* relief. This includes claims for *declaratory* relief, or a decision from the court that spells out the rights of the parties. An example of this would be an action in which a court declares that a particular statute, regulation, or policy violates a party's rights. A similar type of relief is *injunctive* relief, in which a court orders the defendant either to take a particular action, or cease a particular action. In many cases a party will seek both declaratory and injunctive relief.

Inmate civil claims for damages typically include such issues as:

- The quality of medical care provided for an illness or injury;
- The use of excessive force by correctional staff
- Claims that staff failed to protect them from violence by other inmates
- That the inmate has been injured or put at risk by some condition of confinement.
- The actions of staff have resulted in the loss of or damage to personal property.

Other types of civil rights claims are more likely to focus on declaratory or injunctive relief. These would include challenges to particular prison policies that are claimed to infringe on a prisoner's rights, including religion, free speech, equal protection, or similar matters.

The plaintiff in a civil action bears the burden of proving his or her claim. The burden of proof in a civil claim is by "a preponderance

(Continued on Page 4)

In this Issue:

An Introduction to Civil Claims **1**

Changes in NCPLS Access **2**

The North Carolina Innocence Inquiry Commission **2**

Supreme Court Rejects Prisoner's Right to DNA Testing **3**

Prisoner Participation in Medical Research and Clinical Trials **5**

Frequently Asked Questions **10**

New Edition of Prisoner's Self Help Litigation Manual to be Published **11**

Admissibility of Testimony of Planted Police Informant **12**

Report on New and Pending Legislation in North Carolina **12**

Changes in NCPLS Access

As many of you know, the recession has taken its toll on the North Carolina state budget. Like every state-funded entity, NCPLS has had to look for places to trim expenses. NCPLS is committed to quality client service and will continue to evaluate issues raised by inmates, and litigate those issues when appropriate. Because of budgetary constraints, however, the decision has been made to publish *Access* twice a year instead of quarterly. Although we are not publishing as frequently, we intend that the new issues be more useful to our clients. This means that the issues will be lengthier, and the articles will attempt to explore certain legal issues in more depth.

The North Carolina Innocence Inquiry Commission

By Kendra Montgomery-Blinn, J.D.
Executive Director
North Carolina Innoceny Inquiry Commission

The North Carolina Innocence Inquiry Commission is now in its second year of operation. The Commission was created in 2007 to review post-conviction claims of actual innocence. Since then, the Commission has received 535 claims. Many claims are submitted directly by North Carolina inmates.

The Commission is a state agency that operates through the court system. By law, the Commission is only permitted to review claims of actual innocence. This means that it cannot review cases in which the person claims that his or her rights were violated or there were errors in the trial. The Commission can only review cases if a person is completely innocent of the crime for which they were convicted.

It is important to note that the Commission is not allowed to consider evidence that was already presented at trial or available at the time of plea. The Commission cannot reevaluate the jury verdict. It can only review cases in which credible and verifiable <u>new</u> evidence of innocence exists.

Thinking about submitting a claim? Consider the following tips:

- ***Se habla español.*** The Commission has translator services available and can answer letters in Spanish or other languages.
- You **cannot** submit a claim if your case is being actively reviewed by a law school innocence project or the NC Center on Actual Innocence. The Commission will not review your claim until it is closed with those other agencies.
- You **can** submit a claim if you pleaded guilty. The Commission is permitted to review convictions that resulted from a trial or a guilty plea.
- You **can** submit a claim if your case is still on appeal. You do not have to wait until all of your appeals are exhausted.
- You **can** submit a claim if you currently have an attorney. Please provide the contact information for your attorney.

(Continued on Page 3)

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 Advocates for Justice, the ACLU of North Carolina, and the Office of Indigent Defense Services.

NCPLS serves a population of more than 41,000 prisoners and 14,000 pretrial detainees (with about 250,000 annual admissions), providing information, advice, and representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

Executive Director
Mary S. Pollard

Editor
Ken Butler

Publisher
Mike Pearson

Please Note: ***Access*** is published four (4) times a year.

Articles, ideas and suggestions are welcome. Contact: *ncpls@ncpls.org*

The North Carolina Innocence Inquiry Commission

(Continued)

(Continued from Page 2)

- You **can** submit a claim if you are about to be released from prison or even if you are no longer serving time for the conviction for which you are claiming actual innocence.
- **If you are not actually innocent, the Commission's investigation could be harmful to you.** If the Commission uncovers new evidence of your guilt, they are required to turn that evidence over to the District Attorney.

If you wish to apply to the North Carolina Innocence Inquiry Commission all you need to do is send a letter. The mailing address is:

The North Carolina Innocence Inquiry Commission
North Carolina Administrative Office of the Courts
P.O. Box 2448
Raleigh, NC 27602

Be sure to explain why you are innocent and the new evidence that can prove your innocence. The Commission will review your letter and may send you further documentation.

Please be aware that the Commission's investigation is a lengthy process and can take months or even years. To date the Commission has conducted innocence hearings in two cases and are moving forward on many others.

Supreme Court Rejects Prisoner's Right to DNA Testing

By Michele Luecking-Sunman, NCPLS Staff Attorney

In *District Attorney's Office for Third Judicial Dist. v. Osborne* 129 S.Ct. 2308, 2314 (2009) the Supreme Court ruled that prisoners do not have a constitutional right to DNA testing that might prove their innocence. William Osborne, convicted of sexual assault and other crimes in Alaska, claimed that he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense. The federal district court first dismissed his claim under *Heck* v. *Humphrey*, 512 U. S. 477 (1994), holding that Osborne must proceed in habeas because he sought to set the stage for an attack on his conviction. The Ninth Circuit reversed and concluded that Osborne's claim was properly brought under §1983. On remand the district court addressed Osborne's assertion that he had a constitutional right to a more sophisticated form of DNA testing than he was afforded at trial. The district court agreed with Osborne and noted that the testing sought was not available at the time of trial, that it could be accomplished at little cost to the state (because Osborne would pay for it himself) and that the results were likely to be material. The Ninth Circuit affirmed the district court's decision and the case was argued before the Supreme Court this spring.

Chief Justice John Roberts, writing for the majority, concluded that this issue is best left for the states to decide. The Court rejected the argument that a constitutional right exists to DNA tests for prisoners. The Court noted that forty-six states and the federal government currently have legislation that allows prisoners some access to DNA testing. However, the Court concluded that the availability of new DNA technologies does not suddenly cast doubt on every criminal conviction involving biological evidence and that it is the province of the legislatures to enact laws that address these new issues. Addressing the Court's concern that Osborne had been offered and refused a more in-depth DNA analysis at trial (but not one as sophisticated as the tests available now), Justice Alito questioned the motives of prisoners seeking DNA testing. "After conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident — for example, degradation or contamination of the evidence — would provide the basis for seeking postconviction relief." In a dissent Justice Stevens questioned the majority's decision. "For reasons the state has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all."

Although the Supreme Court rejected a constitutional right to post-conviction DNA testing, many states have provided for such testing by statute. North Carolina's DNA testing statute is found at N.C. Gen. Stat. § 15A-269. NCPLS has prepared a packet for inmates who are interested in learning more about this right which is available at no cost upon a written request.

An Introduction to Civil Claims

(Continued)

(Continued from Page 1)

of the evidence." This differs from the criminal law burden of "beyond a reasonable doubt." A preponderance of the evidence is also referred to a "the greater weight of the evidence" meaning that the evidence is not simply equally balanced between the parties, but tips at least slightly toward the plaintiff.[2]

Section 1983 Claims

Section 1983 of Title 42 of the United States Code is the oldest of the nation's civil rights laws having been enacted shortly after the Civil War. This statute has been the leading source of federal civil rights claims brought to seek relief from prison conditions.

There are two requirements in order to bring a claim under Section 1983. First, the plaintiff must show that he or she has been deprived of a right secured by the U.S. Constitution or some other *federal* law.[3] The violation of a state law, regulation or policy is *not* a basis for bringing an action under Section 1983 unless the conduct also violates a specific federal right. For example, a claim that the DOC is not following its own policies or rules is not enough to support a civil rights claim under Section 1983.

The second requirement is that the deprivation of the federal right was caused by someone who was acting "under color of state law." [4] This means that a defendant must "have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'" [5] For the purposes of this article correctional officers and administrators will almost always be considered to have acted under color of state law with regard to claims brought by inmates.

Section 1983 claims for money damages are most commonly brought alleging a violation of the Eighth Amendment's ban on "cruel and unusual punishment." These involve issues regarding conditions of confinement that have resulted in some type of physical injury, and include claims of inadequate medical care, the use of excessive force, and the failure of staff to protect an inmate from violence by other inmates.[6] However, not every such injury will result in a successful constitutional claim.

An Eighth Amendment claim requires an inmate to satisfy a two-part test. First, it must be shown that the inmate has been deprived of a "basic human need" that is sufficiently serious to justify Eighth Amendment protection.[7] These basic needs include food, clothing, sanitation, shelter, medical care, and personal safety.[8] This is often referred to as an "objective" prong of showing a sufficiently serious injury. However,

> the constitutional prohibition against the infliction of cruel and unusual punishment does not mandate comfortable prisons, and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. Indeed, the ordinary discomfort accompanying prison life is part and parcel of the punishment those individuals convicted of criminal offenses endure as recompense for their criminal activity. Accordingly, *only extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim*.[9]

The second prong is referred to as a "subjective" requirement of showing that the defendant(s) acted with a "sufficiently culpable" state of mind. [10] The need for showing a defendant's mental state is required by the fact that the Eighth Amendment addresses "punishments," not simply injuries that a prisoner may have suffered. Therefore, there must be some mental state that a court can find was the equivalent of an intent to punish in a prison official's actions.[11] In cases alleging inadequate medical care, failure to protect from inmate violence, and conditions of confinement, it must be shown that prison officials were "deliberately indifferent" to a significant risk of serious harm to the inmate.[12] However, in cases of excessive force, the inmate must show that prison officials used force "maliciously and sadistically for the very purpose of causing harm" rather than in a good faith effort to restore order or maintain prison discipline. [13]

Since 1996, prisoner civil rights cases have been subject to the provisions of the Prison Litigation Reform Act (PLRA). This was enacted by Congress to deal with what was claimed to be a large amount of "frivolous" litigation brought by prison and jail inmates. The result of this was to place a number of significant barriers to inmates who seek to use the federal courts to seek redress of rights.

(Continued on Page 5)

An Introduction to Civil Claims

(Continued)

(Continued from Page 4)

One such provision is that prison inmates are now required to pay the full amount of the federal civil filing fee (currently $350.00) upon filing a federal complaint. Before the PLRA, most inmates were able to avoid the federal civil filing fees by asking to proceed *in forma pauperis* (IFP). The fact that federal litigation was virtually cost-free for inmates was seen as one of the reasons behind the enormous volume of *pro se* prisoner litigation. An inmate can still seek to proceed IFP if he or she does not have the fee amount at the time of filing. Under these circumstances federal law sets up a schedule by which payments are periodically deducted from his or her prison account. [14]

Under the PLRA federal courts have the power to dismiss a prisoner claim that is found to be frivolous or malicious, or which fails to state a claim for upon which relief can be granted, or which seeks money damages against a defendant who is immune from such liability. [15] The PLRA also provides that a court can deny an inmate IFP status if he or she has had three previous complaints dismissed under one of those grounds, *unless* the prisoner is found to be in imminent danger of serious physical injury.[16] Thus, the filing of prior frivolous claims can bar an inmate from later proceeding IFP on a valid claim.

Prisoners must also completely exhaust all available administrative remedies before seeking relief in federal court. [17] For inmates in the DOC, this means that an inmate must have raised the same claim in a prison grievance (using a DC-410 form) and have taken the matter all the way through Step III. Failure to do so can result in a federal court granting a motion by the state to dismiss a claim for the failure to exhaust remedies. The PLRA also prohibited inmates from recovering money damages based on claims of mental or emotional injury, unless they also showed the existence of a *physical* injury.[18]

The PLRA also set significant limits on the authority of federal judges to grant injunctive relief in prisoner cases.[19] Many of the lawmakers who drafted the PLRA were primarily concerned with what they perceived as unwanted intrusions by federal courts into the operation of state prisons. The power of a judge to use injunctive relief in claims regarding prison conditions now can go "no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." [20] Furthermore the court cannot grant an injunction 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." Courts are also required to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." [21]

State Tort Claims

The State Tort Claims Act[22] provides another forum for inmate claims. Under the Act, a person who is injured by the negligence of a state officer or employee, acting in the course and scope of his job, can bring a claim against the State. These claims are brought in the North Carolina Industrial Commission, which acts as the court for deciding tort claims. Hearings are conducted before a Deputy Commissioner, who subsequently renders an opinion as to whether the plaintiff has proven negligence and the amount of damages, if any, the plaintiff should recover. A party that disagrees with the Deputy Commissioner's decision can appeal to the Full Commission. Such an appeal consists of briefing and argument before a panel of three Commissioners. Full Commission decisions can be appealed to the N.C. Court of Appeals.

Negligence claims under the Act are governed by the same rules that apply to any other negligence claim under North Carolina law. The basic elements of a negligence claim are: (i) a legal duty owed to the plaintiff by the defendant, (ii) a breach of that duty by the defendant, and (iii) that the defendant's breach of duty was a proximate cause of an injury to the plaintiff. [23] A benefit of filing under the Act, particularly for inmates, is that the plaintiff can seek recovery for injury from the State, without having to sue the individual officer, who may not have sufficient personal assets to pay an award of damages. The Tort Claims Act currently allows for a maximum recovery of one million dollars.[24] However, the Industrial Commission has no jurisdiction to hear claims other than those alleging negligence, and has no authority to grant injunctive or declaratory relief against a state agency.

In some cases, it is a close question as to whether an inmate' claim concerning inadequate medical care, failure to protect from violence, or conditions of confinement, should be brought as a tort claim, or a civil rights action under Section 1983. A key issue for most of these claims is whether the inmate can prove the necessary state of mind for a Section 1983 action. As noted above, an Eighth Amendment claim requires at least a showing that the defendant was "deliberately indif-

(Continued on Page 6)

An Introduction to Civil Claims

(Continued)

(Continued from Page 5)

ferent" to a risk of harm. Deliberate indifference is a higher showing than negligence.[25] Rather, a plaintiff must show that the officer or employee had *actual knowledge* of a risk of harm and yet disregarded the risk.[26] To prove negligence, however, a plaintiff need only prove that a reasonable officer or employee in the defendant's place knew, *or should have known*, of the danger.[27]

Tort claims are also not subject to the terms of the PLRA, meaning that inmates can apply to proceed IFP, to avoid paying filing fees. Tort claim proceedings are also more informal than many types of court actions, and deputy commissioners are used to dealing with individuals who are pursuing their own claims.

This does not mean that there are not hurdles than an inmate must overcome. Like any other civil claim, it is the plaintiff's burden to show that he or she should recover. This means showing that the agents or employees of the DOC were negligent, and that this negligence was the cause of an injury. Some types of cases will require evidence from expert witnesses to prove negligence. Medical cases in particular, require that a medical expert (such as a doctor) testify that the care that the inmate received was not in accordance with the generally accepted standards of practice for medical professionals in the same field, and in the same or similar communities.[28] Indeed, Rule 9(j) of the North Carolina Rules of Civil Procedures requires that a complaint alleging medical malpractice contain a statement that the medical care at issue has been reviewed by a medical expert who is willing to testify that the medical care did not comply with the applicable standard of care. Unfortunately, most inmates will find it difficult, if not impossible, to obtain the services of a medical expert to testify in tort claim proceedings.

North Carolina General Court of Justice

State law claims against individual defendants, including persons unconnected with the prison or criminal justice system, are brought in the North Carolina state courts. State courts are the appropriate forum for bringing claims under the North Carolina Constitution, as well as for *intentional torts*. Intentional torts include such actions as assault and battery, libel and slander, conversion, and malicious prosecution. With a few exceptions, the original jurisdiction for all civil cases in North Carolina is found in the trial courts of the superior and district court divisions.[29]

The appropriate division to hear a particular civil claim is determined by the amount in controversy. Claims greater than ten thousand dollars, are heard in the superior court, while claims of ten thousand dollars or less are heard in district court.[30] Claims of five thousand dollars or less can be heard in small claims courts.[31] However, regardless of the amount at issue, any claim that seeks:

> (1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;
> (2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation;
> (3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or
> (4) The enforcement or declaration of any claim of constitutional right.

must be brought in superior court.[32] In addition, civil matters dealing with decedents' estate and the probate of wills is exclusively in the superior court.

Civil actions, particularly those for damages, operate under *statutes of limitation*. These are special statutes, passed by the General Assembly, which determine how long a person has in which to pursue a particular type of claim. The reasons behind statutes of limitation are that it is thought unfair for a defendant to have to defend a claim after the passage of time, where evidence might be lost and memories concerning the events in question have faded. Claims concerning personal injury, injury to personal property, assault and battery, and false imprisonment have a *three year* statute of limitation.[33] (This same limitation period applies to Section 1983 claims raised in federal court.[34]) Previously persons who were imprisoned were considered to be under a disability, and unable to pursue their legal remedies. For persons under disabilities (which included prisoners, minors, the insane, and incompetent) the statutes of limitation were suspended until the disability was removed. However, North Carolina prisoners have not been considered to be under disability since January 1, 1976.[35]

A key question in civil cases is where a claim must be brought. There are eight Judicial Divisions, comprised of over 60 superior court districts. The determination of where to file a claim is said to be an issue of the proper *venue*. Some venue provisions are very strict.

(Continued on Page 7)

An Introduction to Civil Claims

(Continued)

(Continued from Page 6)

For example, claims involving real property must be brought in the county in which the property lies.[36] Similarly, any claim "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer," must be brought in the county where the cause of action arose.[37] With some additional exceptions, which are not likely to apply to inmates,

> In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute.[38]

A court has the power to change the venue of a case if it is later discovered that venue is not appropriate in that county, or if the convenience of the witnesses and interests of justice would be served.[39]

Section 1983 claims can be filed in state courts, as well as federal courts. However, despite the *concurrent jurisdiction* of state courts, most Section 1983 claims filed by prisoners are removed to federal court by defense counsel.[40] One reason for this is usually that federal court civil dockets are often not as crowded as those in state courts.

Proceeding on Your Own / *Pro Se*

NCPLS has self-help litigation packets for Section 1983 actions, tort claims, general state civil litigation, and small claims actions. These are available without cost and can be provided upon an inmate's written request. Unfortunately, given our limited staff and resources, our office cannot provide litigation support to inmates who are proceeding with legal claims on their own. This means that we cannot provide copies of cases or statutes, copying service for documents, legal research, filing, or similar clerical services.

In some situations, particularly where an inmate will be released before his or her statute of limitations expires, it may be advisable to wait until after release before filing a claim. Of course, a former inmate, like any other citizen, can try to obtain services from a private attorney. However, it is an unfortunate fact that many private attorneys are reluctant to take cases from current or even former prisoners.

One factor that often causes a private attorney to reject a particular claim is the cost of litigating a claim amount when compared with the potential recovery. An attorney's greatest expense in any case is his or her time. Any civil case can take months, or even years to resolve, and an attorney could spend dozens or hundreds of hours on a single case. The hours that are spent on one case are hours that cannot be spent on another case. Therefore, private attorneys are likely to focus on cases that are most likely to result in a substantial award or settlement in order to justify their time. In most cases, the factor that drives the size of an award is the degree of injury suffered by the plaintiff. Therefore, for example, even if your claim meets the legal elements of negligence it may be difficult to secure attorney representation unless you suffered permanent or significant injuries. Unfortunately, this is not a situation that is unique to former prisoners. Many persons of limited means often face the same problems in securing representation for their claims.

However, even if the inmate tries to litigate the case *pro se*, there are advantages to doing so after release. First, the former inmate will hopefully have a more stable address, instead of possibly being moved around the state to different prison camps. This will help him or her keep in contact with the court, so as not to miss deadlines. Former inmates can also access a large range of legal information services. These include information available from public libraries, as well as the internet. In addition, former inmates can obtain copies, file documents on their own, and take care of many routine functions that are part of litigating any civil case.

Conclusion

NCPLS receives many letters from inmates asking for "civil" forms. We hope that this article will help state prisoners determine precisely what type of case they may have, and the appropriate forms that are needed. Of course, our office will still review inmate letters raising complaints about prison conditions to determine whether the facts

(Continued on Page 8)

An Introduction to Civil Claims

(Continued)

(Continued from Page 7)

alleged state a claim with which NCPLS can provide attorney representation.

(Endnotes)

[1] There are also some types of actions, primarily in the area of administrative law and concerned with regulations enacted and enforced by government agencies, that can share some characteristics of both criminal and civil law. However, inmates are rarely involved in these types of actions so they will not be addressed in this article.

[2] *Kelly v. Duke University,* 190 N.C.App. 733, 739, 661 S.E.2d 745, 748 (2008).

[3] *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999).

[4] *West v. Atkins*, 487 U.S. 42, 48-49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988).

[5] *Id*., at 49, 108 S.Ct. at 2255(quoting *United States v. Classic,* 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941).

[6] *See Helling v. McKinney*, 509 U.S. 25, 31, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993)(the Eighth Amendment extends to 'the treatment a prisoner receives in prison and the conditions under which he is confined).

[7] *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

[8] *Johnson v. Lewis* 217 F.3d 726, 731 -732 (9th Cir. 2000).

[9] *Shakka v. Smith* , 71 F.3d 162, 166 (4th Cir. 1995)(emphasis added).

[10] *Wilson v. Seiter***,** 501 U.S. at 298-299, 111 S. Ct. at 2324-25.

[11] *Id*.

[12] *Farmer v. Brennan*, 511 U.S. 825, 837, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994)

[13] *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995, 998, 117 L.Ed.2d 156, (1992).

[14] 28 U.S.C. § 1915(b)

[15] 28 U.S.C. § 1915(e)(2).

[16] 28 U.S.C. § 1915(g).

[17] 42 U.S.C. § 1997e(a).

[18] 42 U.S.C. § 1997e(e).

[19] 18 U.S.C. § 3626.

[20] *Id*. §3626(a)(1).

[21] *Id.*

[22] N.C.Gen. Stat. § 143-291

[23] Hunt By and Through Hasty v. North Carolina Dept. of Labor, 348 N.C. 192, 195, 499 S.E.2d 747, 749 (N.C.,1998).

[24] 143-299.2

[25] *Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 302 (4th Cir. 2004)*

[26] *Id*.

[27] *See Martishius v. Carolco Studios, Inc., 355 N.C. 465, 473 ; 562 S.E.2d 887, 892 (2002)(negligence occurs where* a defendant of ordinary prudence would have foreseen that the plaintiff's injury was probable under the circumstances).

[28] *See* N.C. Gen. Stat. §90-21.12

[29] N.C. Gen. Stat. § 7A-240

[30] N.C. Gen. Stat. §7A-243.

[31] N.C. Gen. Stat. § 7A-210.

[32] N.C. Gen. Stat. § 7A-245.

[33] N.C. Gen. Stat. § 1-52,

[34] Section 1983 does not have its own statute of limitations but takes the limitations period of the most analogous state statute of limitation. *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), *cert. denied* 504 U.S. 931 (1992).

[35] N.C. Gen. Stat. § 1-17.

[36] N.C. Gen. Stat. § 1-76.

[37] N.C. Gen. Stat. § 1-77.

[38] N.C. Gen. Stat. §1-82

[39] N.C. Gen. Stat. § 1-83.

[40] 28 U.S.C. §1441 provides that any civil action commenced in state court can be removed to a federal court where the federal district court would have had original jurisdiction of the claim.

Prisoner Participation in Medical Research and Clinical Trials

By Angela G. Smiegel, R.N.

NCPLS receives letters from inmates who have heard about potential treatments for various illnesses and who want to know if they can participate in drug trials or receive experimental treatment. The answer to this can be complex, and policies governing inmate participation in medical trials must be viewed from a historical perspective.

After World War II, it was discovered that Nazi physicians performed unethical medical procedures and research on Holocaust victims who had been confined in concentration camps. In response to those abuses, the "Nuremberg Code" was developed as the first major international document that addressed moral and ethical treatment of human volunteer participants for medical research purposes. It requires that consent must be voluntary and free of any type of coercion. The volunteer participants must be able to fully understand the risks and possible benefits. The risks must be minimal and possible benefits must outweigh the risks. The volunteer must be able to withdraw at any time from the study.

Prior to 1974, it is estimated that 90% of the drug trials in the United States were performed using inmates. From the 1950's to 1970 multiple instances of abuse were reported around the United States, and a number of inmate lawsuits alleged abuse during clinical trials. The history of inmate research confirms inmates involved in clinical trials suffered more abuse than

(Continued on Page 9)

Prisoner Participation in Medical Research and Clinical Trials

(Continued)

(Continued from Page 8)

benefits. There were no mandatory regulations present for monitoring of possible abuse, which would help prevent rampant abuse in the penal system. The push for prison experiments were more motivated by business profits, exploitation, and expediency and accessibility of a large population that was expendable. Among other incidents, prisoners were exposed to cancer causing agents, given venereal diseases without treatment, and exposed to radioactive chemicals and other contaminants without their knowledge.

Once prison abuses were exposed, the Food, Drug Association (FDA), Department of Health and Human Services, Institute of Medicine and other federal agencies joined together to produce ethical guidelines and federal regulations concerning the use of human subjects in research. Special attention was given to a category that pertained to the rights of prison inmates. The research companies then had federal guidelines they had to follow in order to use human subjects called the "common rule." The regulations are many and very restrictive. The protective guidelines offered increased safety in clinical trials. The rules pertain to federally funded research and must be followed with additional protective restrictions for special groups such as the mentally ill, prisoners, elderly and children.

Within the last several years, many federal agencies and research companies have discussed the possibility of loosening restriction of federal guidelines in utilizing inmates for research. There are many ethical, moral and legal obligations to consider and answer before changing the current system, so that abuses that happened previously do not occur again in this country. No matter what safeguards are put in place, there can be no such thing as totally harmless research. More inmates residing in prison have HIV, tuberculosis, Hepatitis C and cancer in an overall population, than in any other recognized community group. Some researchers believe that inmates, as a whole, would benefit and should be permitted to subject themselves to greater risks than the federal government currently allows.

Currently there are only four (4) categories of research inmates are allowed to participate in according to federal guidelines. 45 CFR 46.306(a)(2). They are as follows: study of criminal behavior, study of institutionalized incarcerated individuals, medical research affecting prisoners as a class after multiple penal experts have been consulted, federal approval and publication in the Federal Register and lastly, research which has the intent of improving the well-being of the subject. The research must prove minimal risk to the inmate and nothing more than inconvenience to the subjects involved, comply with all federal guidelines, provide for confidentiality, pass review by the Institutional Review Board, Office of Human Research Protection and Human Health Services.

Further recommendations state that the inmate should only be involved in the later stages of a drug study or trial, the study should consist of a mix of inmate ages, race and gender. Half (50%) of the participants should consist of population from the outside community. Also an inmate should not serve as a subject to research involving placebo medication since it does not benefit the health and welfare of the inmate. This automatically disqualifies inmates from most drug studies. (A placebo is a non-active substance that is given to some percentage of trial participants without their knowledge. The purpose of a placebo is to determine whether any subsequent effects are the result of the drug being tested, or are caused by the person simply convincing himself that the drug is working. Changes that occur without administration of the test drug are referred to as a "placebo effect.")

The North Carolina Department of Corrections has a Medical research policy that is enforced by the "Human Subjects Review Committee." It is set up to follow the "Protection of Human Services State and Federal Guidelines." While the policy is far too lengthy to set out here, some important points are as follows. First, the researcher must certify that the value of the research must outweigh the cost and disruption to the DOC. The research must pose only minimal or no risk to the inmate and cause nothing more than slight inconvenience to the inmate. State and Federal mandatory regulations must be strictly followed. Should you have any questions concerning your North Carolina Inmate Rights to participate in any research activity, you must contact the committee in Raleigh for further clarification and permission.

Other issues raised concern the payment of inmates for research. Many researchers pay individuals up to $1500.00 dollars for a study. Should an inmate be allowed the same amount or get paid what the DOC currently pay per day as a wage allowance? If they were paid more, would this be considered voluntary coercion? If the inmate were paid more, would this make him/her a target for further abuse by staff or inmates? Should the funds be dispersed to victims or family members? No one seems to agree what would be fair and equal.

Should an inmate suffer permanent harm- who would be responsible

(Continued on Page 10)

Prisoner Participation in Medical Research and Clinical Trials

(Continued)

(Continued from Page 9)

for the medical care of the inmate for the remainder of life? If the inmate is released to home is it fair to impose the care and disabilities of the inmate on his/her family and community due to a clinical trial gone awry? Unfortunately no one expects the worse but it does happen without notice or intent. An example is the removal of Bextra and Vioxx from the market after it caused irreparable harm. No one every believed the damage an inflammatory drug could cause. People claimed to suffer from heart attacks, strokes and a fatal skin allergy, months after it became available on the market. Many side effects of drugs are not immediately known. Several diet drugs removed from the market were not known to be the cause of death until they had been marketed for over a year. Can any drug company promise or guarantee minimal risk?

There is also a cost factor involved. Who pays for the transportation to and from the research sites or facilities? Who pays for the guard's salary? What about overtime for staff that may be involved in transportation or assessments of medical condition? Should the inmate become ill, who pays for his care even if it is short term? If hospitalization is needed, who should be responsible for the medical bills? What if it can not be determined conclusively that the illness may or may not be related to the research or drug? Who should then pay for the litigation that may or may not be involved? Who would be responsible for long term care should the inmate be released? Is it fair to utilize two officers for inmate transportation for research, leaving post assignments, and thereby causing less safety and security at the prison facility? Is every camp properly equipped to handle any medical emergency that may arise? How close are you to a facility that can treat emergencies related to potential complications? Can the researcher guarantee you that all DOC medical staff will be trained in knowing what adverse signs may exist and what to look for? Will they all be aware you are in a research study? How available is the research staff in the event of an adverse reaction? These are just some of the issues that need to be responsibly addressed.

In conclusion, volunteering for research studies, especially those involving medical research may not be as promising as the researchers hope for or disclose. Marketing is an art. It is designed to make a bill of goods more attractive than what may actually exist. "Buyer Beware" and "if it's too good to be true it must be" are slogans to keep in your mind when considering becoming a research subject. Incarcerated or not, you must ask questions and demand full disclosure.

Once you are incarcerated, you become the responsibility of the Department of Corrections. The DOC is in charge of your safety and security. They have the responsibility to over see conditions to make sure inmates are not taken advantage of by greed or profit. While there is no way to guarantee a person's health or safety, the added safeguards surrounding clinical trial participation are in place to prevent history from repeating itself and to insure that previous abuses do not occur here.

Frequently Asked Questions

1. Is North Carolina bringing back the "65% Law?"

> For years many inmates have heard that North Carolina was abandoning the Structured Sentencing Law (also referred to as the 85% law because an inmate's minimum sentence is roughly 85% of the corresponding maximum sentence) and returning to the former Fair Sentencing Act. While there have been legislatively approved studies to look at some of the disparities between the two sets of sentencing laws, there has been **no** legislation enacted or proposed that would return to the FSA or require mass re-sentencing of inmates under either law.

2. I am in a prison far away from my family and it is a hardship for them to visit me. Can NCPLS help me get a transfer?

> Unfortunately, prisoners do not have a legal right to be assigned to any particular prison. The courts have given state prison systems broad discretion in terms of where they house inmates. Therefore, there is no legal claim based on the DOC's decision to house an inmate at one unit, or failing to move him to another unit. An inmate can request a transfer, usually through his case manager. However, the ability of an inmate to transfer requires that there be a prison that matches the inmate's custody level and that there is open bedspace at that unit. Even if a transfer is approved, it may take some time before it actually occurs, particularly if there are other inmates whose

(Continued on Page 11)

Frequently Asked Questions

(Continued)

(Continued from Page 10)

transfer requests were earlier.

3. I was injured on my job and I want to file a lawsuit. What are my options?

The answer here depends upon whether your job was a prison work assignment (such as maintenance, road squad, kitchen, etc.) or whether you were out on a *work release* job for a private employer. The North Carolina Supreme Court has held that the only remedy for a prisoner who has been injured on a prison job is a workers' compensation claim. Furthermore, such a claim can only be filed within 12 months after your discharge from the DOC, and then only if you are still disabled from your work-related injury after your release from custody. *Richardson v. North Carolina Dept. of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996). This means that you cannot file a tort claim alleging that you were injured on your job due to the negligence of your employer, or another inmate.

If, however, you were injured on a work-release job, you can file a worker's compensation claim now. NCPLS has self-help packets for such claims which we can send to you at no cost upon your written request.

4. How can I get my "motion of /for discovery?"

Inmates seeking copies of a "motion for discovery" are generally asking about the discovery that was obtained in their criminal case. The discovery available to criminal defendants is much more limited than the discovery available to parties in civil cases. However, there are some types of evidence that the prosecution is constitutionally obligated to turn over to the defense. This would include any evidence that is in the possession of the prosecution that would tend to show the defendant's innocence of committing the crime. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Neither NCPLS, nor the Clerk of Superior Court, have copies of the discovery that was provided in your case. The attorney who represented you may have obtained discovery materials from the state in the course of handling your case, and these materials may still be in his or her files. Many district attorneys have an "open file" policy, which means that your attorney may have received discovery materials without having had to file a formal motion for discovery. If there was no "open file" policy in your case, your attorney might have filed a motion for discovery depending on the circumstances of your case. If you have not previously done so, you should write your attorney and ask for a copy of your file.

New Edition of *Prisoner's Self Help Litigation Manual* to be Published

As many readers of *Access* know, the *Prisoners' Self-Help Litigation Manual 3d. ed.*, by John Boston and Daniel E. Manville has been a valuable tool for prisoners who wish to pursue their own legal claims, or to gain a greater knowledge of prisoner rights. The third edition of the manual, formerly published by Oceana Press, came out in the mid 1990s. There have, of course, been many developments in prisoner law since that time.

NCPLS has learned that Oxford University Press will be publishing a fourth edition of the manual, which is currently expected to come out this fall. (This publication date is, of course, subject to change.) The list price is $35.00, with a $5.50 shipping fee for domestic orders. This 1500 page volume will discuss a broad range of legal areas dealing with prisoner rights, including: civil liberties in prison (conditions and practices, property, medical care, freedom of expression, privacy, religion, access to the courts, and more), procedural due process, equal protection of the laws, the court system, actions, defenses, and relief, how to litigate, legal research, and writing legal documents.

The sales office address for Oxford University Press is:

Oxford University Press
198 Madison Avenue
New York, NY 10016 U.S.A.

We advise prisoners *not* to try ordering the book in advance, in the event that you may be transferred to a different unit between now and the final publication date.

Admissibility of Testimony of Planted Police Informant

By Hoang Lam, NCPLS Staff Attorney

In *Kansas v. Ventris*, ___ U.S. ____129 S. Ct. 1841, 173 L.Ed.2d 801 (2009), defendant Ventris and a codefendant were charged with murder and other crimes. Before trial, an informant planted in Ventris's cell heard him admit to shooting and robbing the victim. At trial, Ventris testified that his codefendant was solely responsible for the crimes, and the State was called the informant to testify to Ventris's contradictory statements. Even though the State conceded at trial that there had "probably" been a violation of Ventris's Sixth Amendment right to counsel, it argued that the informant's testimony should come in for impeachment purposes. The trial court agreed and allowed the testimony. The jury subsequently convicted Ventris of aggravated burglary and aggravated robbery. The Kansas Supreme Court reversed, holding that the statements were not admissible for any purpose, including impeachment. In a 7-2 opinion, the U.S. Supreme Court reversed the Kansas Supreme Court.

The Supreme Court recognized that the Sixth Amendment right to counsel extends to various "critical stages" of a criminal prosecution, including "the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge." *Kansas v. Ventris*, 129 S. Ct. at 1845, (quoting *Massiah v. United States,* 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)). However, while the State agreed that this testimony could not be admitted in the prosecution's case to prove Ventris's guilt, the question remained as to whether it could be admitted for impeachment purposes to counter Ventris's false statements on the witness stand.

The Court observed that "whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes that explicitly mandates exclusion from trial, and sometimes it does not." In assessing whether the evidence must be totally excluded the Court conducted a balancing test. The Court observed that the admissibility of a defendant's prior contradictory statements were necessary to protect the integrity of the trial process by preventing potential perjury. On the other hand, the *Ventris* Court found that any additional deterrent effect on law enforcement by excluding such informant testimony would be minimal. Under these circumstances, the testimony was admissible for the purposes of impeachment, even in light of a constitutional violaton.

Report on New and Pending Legislation in North Carolina

NCPLS receives many letters from inmates asking about the status of various bills before the North Carolina legislation that they have heard about. Many inmates have heard rumors about bills that will alter sentencing, habitual felon status, the classification of crimes, or other matters related to the criminal justice system. Unfortunately, NCPLS does not have the staff to personally respond to these types of individual requests. As of the date of this article over 400 new session laws had been enacted, and over 2500 bills had been introduced in the 2009 session of the General Assembly. We have, however, reviewed the bills that have been introduced in the 2009-2010 session looking for those that may be of particular interest to incarcerated persons and have listed them below. Some bills are self-explanatory by their title while others require a brief summary to explain their relevant provisions.

In reviewing the list provided, it is important to know the following information about how a bill becomes a law:

1. A piece of legislation, called a "bill," can be introduced in either house of the General Assembly (the House of Representatives or Senate).

2. A bill can go through three "readings" in the house where it started. The first reading is when the bill is first introduced onto the floor. The bill can be debated on the floor at the time of the readings, and will be referred to various committees between both the first and second, and second and third, readings. A bill requires a favorable vote to advance at each reading stage after the first reading.

3. If a bill passes its third reading in the house where it started, it must then "cross-over" to the second house for consideration. This means that bills which start in the House must move to the Senate, and vice-versa.

4. Under the rules of both the House and Senate, there is a "crossover" deadline set for each session. Bills that have not passed at least one house, and "crossed over" to the second house generally will not become law during that session. **An exception to the crossover**

(Continued on Page 13)

Report on New and Pending Legislation in North Carolina

(Continued)

(Continued from Page 12)

deadline applies to those bills which involve spending money. A bill that does not make the cross-over deadline can also be considered at a later time if it is amended to include a financial component.

5. Once a bill has passed both houses of the General Assembly it is considered *enrolled*.

6. The enrolled bill, which includes all approved amendments, must next be signed by the presiding officers of each house, the Speaker of the House and the President Pro Tempore of the Senate. Once both officers have signed the bill it is said to have been *ratified*.

7. The bill is then presented to the Governor for her consideration. The Governor can approve the bill by either signing it, or by taking no action which allows the bill to become law within ten days. The Governor may also *veto* the bill. If a bill is vetoed, the General Assembly can override the veto by a three-fifths majority vote of both houses.

8. A bill that passes through all of these steps has become law and is now called a *Session Law*.

9. A session law may affect the North Carolina General Statutes by either adding or amending one or more sections of the General Statutes.

Session Laws Passed / Ratified Bills Awaiting Signature

As of August 10, 2009

SL 2009-86 Guilty Plea Form revisions.

The Administrative Office of the Courts is directed to revise the Transcript of Plea form used by defendants who

plead guilty or no contest to criminal charges. The changes will more clearly inform the defendant that by entering a plea, his or her appeal rights are limited and that the plea may also limit the length of time that DNA or other biological evidence may be preserved. Revisions are to be finished by September 1, 2009 and be available for use by October 1, 2009.

SL 2009-91 Permit Access to Capital Defendants.

Provides that attorneys for a defendant sentenced to death may visit their client on the date that state or federal courts rules on the client's petition or motion for post-conviction relief.

S.L. 2009-179 Plea Bargain Disclosure.

Amends G.S. 15A-1023(b) to provide that If a judge rejects a plea arrangement disclosed, in open court, pursuant to subsection (a) of this section, then the judge shall order that the rejection be noted on the plea transcript and shall order that the plea transcript with the notation of the rejection be made a part of the record."

S.L. 2009-203 Preservation of DNA & Biological Evidence.

Amends statutes concerning preservation of biological evidence and requests for post-conviction DNA testing. Requires the SBI to promulgate minimum guidelines for preservation by 2010. Establishes procedure for court identification and treatment of relevant biological evidence and clarifies timelines for retention.

S.L. 2009-204 Increase Penalty/ Remove Serial Number From Gun.

Both the alteration / removal of a firearm serial number, and possession of a weapon with a removed / altered serial number are Class H felonies

S.L. 2009-205 Paraphernalia Control Act.

Amends Chapter 90 of the General Statutes by adding Article 5F which regulates the manner in which glass tubes and splitters may be sold by retailers. This includes requiring that such

(Continued on Page 14)

Report on New and Pending Legislation in North Carolina

(Continued)

(Continued from Page 13)

objects be moved behind a counter and not available to the general public; that persons seeking to purchase produce identification; and that purchasers sign a register with their name and address.

S.L. 2009-270 Videoconference technology in court proceedings

Authorizes DOC to establish a pilot program for the use of videoconference technology for court proceedings involving inmates instead of transporting inmates for live court appearances.

S.L. 2009-275 Low Risk Probationers may be unsupervised.

S.L. 2009-336 Amend computer solicitation of child

Amends GS 14-202.3 by including solicitation by computers or any other device capable of electronic data transmission of children under 16 years of age and at least five years younger than the defendant, for the purpose of arranging a meeting for an unlawful sexual act. Act of solicitation is a Class H felony but if the defendant shows up at a prearranged meeting site it is a Class G felony

S.L. 2009-356 Child Witness Testimony/Procedures

Adds new section to General Statutes, § 15A-1225.1 providing procedures by which minor children can offer testimony in criminal proceedings including by giving remote testimony if the court determines (1) that the child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and (2) that the child's ability to communicate with the trier of fact would be impaired.

S.L. 2009-360 Innocence Commission – Limited Witness Immunity

The Innocence Commission may compel the testimony of a witness. Commission Chair has the authority to grant limited witness immunity from prosecution for false statements made under oath in prior proceedings.

S.L. 2009-369 Habitual DWI reinstatement

Provides that individuals convicted of habitual impaired driving may petition for a hearing on restoration of driving privileges after ten years without any traffic or other criminal convictions.

S.L. 2009-372 Probation Reform

Provides that probation officers can access an offender's juvenile records. Grants probation officers the power to conduct warrantless searches of probationer's person, vehicle and premises as a regular condition of probation. Adds additional conditions to defendants sentenced to intermediate punishment.

S.L. 2009-379 Larceny of Motor Vehicle Part

Class I felony if repair costs are $1000.00 or more.

S.L. 2009-380 Permanent No Contact Order for Sex Offenders

Allows a sentencing court to enter a permanent order preventing a convicted sex offender from any future contact with the crime victim. Violation of such an order is a Class A1 misdemeanor. Becomes effective on December 1, 2009, and applies to offenses committed on or after that date.

S.L. 2009-412 Delay bond for a probationer charged with a felony.

Where a probationer is charged with a felony, the judicial official considering conditions of pre-trial release must make a written determination as to whether the probationer poses a danger to the public. If probationer is found to pose a danger, release must be under a secured bond (cash or mortgage). If there is insufficient information on probationer's potential danger, probationer may be held for first appearance before a judge.

S.L. 2009-452 Supervision of Certain Defendants.

An act to allow district courts to supervise certain defendants convicted in superior court and who are assigned to drug courts or other types of therapeutic courts

S.L. 2009-463 Clarify Weight / Measure for Meth Trafficking

Amends the law regarding trafficking in methamphetamine and amphetamine to clarify that the charge of

(Continued on Page 15)

Report on New and Pending Legislation in North Carolina

(Continued)

(Continued from Page 14)

trafficking is based on the weight of the entire powder or liquid mixture rather than the weight of the actual amount of the controlled substance in the powder of liquid mixture.

S461 / H472 Racial Justice Act (Ratified and presented to Gov. Perdue August 6, 2009)

An Act to prohibit seeking or imposing the death penalty on the basis of race and to establish procedures by which relevant evidence can be used to establish that race was a significant factor in seeking or imposing the death penalty. Allows the use of statistical evidence by defendants. Act is effective when it becomes law and is retroactive to persons currently sentenced to death. Persons whose convictions occurred before the statute's effective date must file their motions within one year of the effective date.

H209 Sex offender registry / liberties with students (Ratified and presented to Gov. Perdue August 6, 2009)

Adds offense of taking indecent liberties with a student to list of offenses requiring registration as sex offender.

H473 Magistrates can carry guns in courthouse. (Ratified August 7, 2009)

Allows magistrates who have obtained concealed carry permits and undergone approved training, to carry firearms in courthouse during the discharge of their duties.

S167 No smoking / cell phones on prison grounds. (Ratified and presented to Gov. Perdue August 6, 2009).

No person may use or possess tobacco products on the premises of a state correctional facility. (Exceptions for tobacco that is locked in a vehicle or which may be used in an authorized religious ceremony.) Also prohibits possession of cell phones on prison grounds, with the exception of phones locked in vehicles. Providing a cell phone or tobacco product to an inmate, and an inmate's possession of either item is a Class 1 misdemeanor.

S726 Amend house arrest laws / adult offenders. (Ratified and presented to Gov. Perdue August 6, 2009).

Amends GS § 15A-531 to allow house arrest with electronic monitoring as a condition of pre-trial release

S853 Motion for Appropriate Relief / new requirement. (Ratified and presented to Gov. Perdue August 5, 2009)

Requires an attorney who presents a MAR to provide a written certification that the motion is made in good faith and that he or she has either reviewed the transcript or made other investigation to determine that reading the transcript is not necessary. Also provides for post-conviction discovery for defendants who are represented by counsel in post-conviction proceedings.

Crossover Bills

H275 Sex offenders cannot be EMS

H666/S511 Clarify status of DWI treatment courts as a form of drug treatment court under NCGS 7A-791

H726 Clarify Expunctions – Allows expunction of misdemeanor convictions for defendants who were under 18 at the time the offense was committed, and for misdemeanor convictions for underage possession of alcohol committed when the defendant was under 21.

H813 S679 Uniform Apportionment of Tort Responsibility - Eliminates the defense of contributory negligence by a plaintiff as a complete defense to a defendant's negligence and implements a system of comparative fault recovery.

H1307 Possession of prescription drug not drug trafficking - Creates House Select Study Commission on Trafficking of Prescription Medications. Commission will study the following: (1) What currently manufactured prescription medications are covered by the drug trafficking laws of this State; (2) Whether the current drug quantities in the trafficking statutes are appropriate quantities when applied to prescription medications and taking into consideration the penalties provided; (3) Whether trafficking of prescription medications should be addressed separately from other drugs; (4) What penalties are appropriate for the trafficking of prescription medications; and on what quantities of prescription medication should those penalties be determined.

(Continued on Page 16)

Report on New and Pending Legislation in North Carolina

(Continued)

(Continued from Page 15)

H1317 Sex offender registration changes - Amends GS 14-208.6. Adds provision that persons with reportable convictions must register all residences and mailing addresses, including any temporary residences. (A temporary residence must be reported if the person occupies it for more than five days in a 30 day calendar period, or a 30 day period within a calendar year.)

H1329 Consolidate Expunction Statutes - This bill would gather all current expunction statutes into a single article of the General Statutes; change the language of some statutes to reflect application to the defendant's age at the time a crime was committed, rather than the age at conviction.

H1447 Crime Stoppers tips are confidential - Crime stopper tips are confidential, not considered public records, and may not be disclosed during criminal pre-trial discovery. Information obtained through these sources may not be relied upon by a judicial official in determining the existence of probable cause for arrest or search warrants.

S11 District Attorneys and Assistant DAs who have obtained concealed carry permits and weapon retention training may carry handguns while in courthouses (but not a courtroom itself) to discharge their official duties.

S388 Collection of offender fines and fees - allows Judicial Department to contract with either a county or private collection agency to collect unpaid fines, fees, costs and restitution from defendants not sentenced to supervised probation and more than 30 days past due. Judicial Dept. may also assess the defendant a collection assistance fee.

S 488 Establishes proportionate sentence lengths between Structured Sentencing prior record levels.

S489 Adjusts the prior record level points for felons under the Structured Sentencing Act.

S759 Modify DWI checking station requirements - would require law enforcement agencies conducting traffic checkpoints to have a written policy establishing the pattern for such checks.

S794 Sex offender incapacity to proceed - Provides mechanism for the civil commitment of a person charged with a sex offense who is found to be mentally incompetent to proceed to trial.

S797 Reasons for judge's disqualification - Reasons for a judge or justice's disqualification shall be in writing and specify the reasons for the disqualification.

S928 Establishes the "Castle Doctrine" in North Carolina - provides immunity from both civil and criminal prosecution to individuals who use defensive force (including deadly force) against individuals who are unlawfully and forcefully trying to enter a dwelling or residence.

Bills that Did Not Cross Over

H4 – provide for a "good faith" exception to the exclusionary rule – referred to H Judiciary II in Feb.

H84 – Provides for the denial of bail to illegal immigrants in certain circumstances (sex offenses, drug offenses, driving offenses, violent offenses, gang offenses, etc.)

H123 – Death Penalty Proportionality Review – Supreme Court would review death cases in light of prior cases where the death penalty was imposed and factually similar cases in which life imprisonment was imposed.

H129 – Create the crime of Habitual Misdemeanor Larceny – 5 or more prior misdemeanor larcenies qualifies person for this Class H felony charge upon commission of misdemeanor larceny.

H134 –Makes the offense of simple assault on a govt officer or employee a Class I felony instead of misdemeanor

H137(= S309) – Bans death sentences for defendants who had a severe mental disability at the time their offenses were committed.

H162 – Expands the requirement for electronic recordings of entire custodial interrogations during investigations to Class B1, Class B2, and Class C felonies.

H209 – Adds the offense of taking indecent liberties with a student to the list of sex offenses that require registration under the Sex Offender and Public Protection Registration Program.

H527(=S496) – Authorizes a joint legislative study committee on ex-offender reentry.
The study will examine ways to successfully reintegrate individuals released from prison into society and lower recidivism rates.

H784(=S161) Exempts any health care professional who provides assistance with a lawful execution from disciplinary or corrective action by any state-authorized board or authority.

H876(=S796) – Commissions the Department of Correction to study ways to reintegrate offenders on probation into society without com-

(Continued from Page 9)

Report on New and Pending Legislation in North Carolina

(Continued)

(Continued from Page 16)

promising public safety

H1064 (=S491) Gives convicted criminals the opportunity to expunge certain non-violent convictions upon application and a fee. However, the crimes must be disclosed to law enforcement officials and specified agencies for employment. Individuals applying for expunction of their records must have not been previously convicted of any felony or misdemeanor other than a traffic violation at the time of their felony offense.

H1092 (=S1046) Establishes a 20-member committee to study sentencing and prison overcrowding.

H1117 Instructs the Division of Motor Vehicles not to issue or renew commercial drivers licenses that allow sex offenders to drive commercial passenger vehicles or a school buses.

H1158 Increases the felony class for the offense of continuing criminal enterprise from a Class H felony to a Class C felony.

H1203 Creates a separate statutory sub-section for felony murder and makes the punishment imprisonment for life without parole unless the crime is covered in a separate provision that requires a greater punishment.

H1212 Imposes a $100 fee on anyone who drops criminal charges or refuses to cooperate with the prosecution after causing the issuance of a criminal warrant or summons. H 04/08/2009 Ref to the Com on Judiciary III, if favorable, Finance

H1242 Permits youthful offenders who are incarcerated and have served at least 84 months of a sentence for the conviction of a Class B1, B2, C, or D felony to petition the resident superior court judge in the district where they were sentenced for a post-sentencing review. The judge should determine whether the sentence should be reduced or suspended based on the offender's conduct and record of rehabilitation in prison.

H1259 Creates a civil penalty of drivers license revocation for a person charged with death by motor vehicle. In all cases of death by motor vehicle, a toxicology report and mandatory trauma counseling would be required.

H1276 Makes discharging a firearm at a law enforcement officer a Class D felony with a minimum active sentence of 10 years.

H1307 Establishes the House Select Study Commission on Trafficking of Prescription Medications, which would consist of 11 members.

H1317 Mandates that persons required to register under the Sex Offender and Public Protection Registration Porgrams must also report in person to and notify the appropriate sheriff of the address of any temporary residences maintained by the registrant. The bill would add to the list of properties that are off-limits to sex offenders at all times or under certain circumstances. Out of state sex offenders must adhere to the same restrictions.

H1318 Provides for a new felony death by motor vehicle charge when the death is the result of the operation of a commercial motor vehicle by an owner-operator who knew the commercial vehicle was unsafe for operation.

H1326 Categorizes a felony murder conviction as murder in the second degree and a class B1 felony. The bill also amends the aggravating circumstances to be considered for murders and changes the criteria for determining whether a case is a capital case.

H1332 Makes it a Class C felony to kill someone with a deadly weapon while engaged in an affray. Anyone engaged in an affray who causes serious bodily injury to another is guilty of a Class E felony.

H1334 Creates the criminal offense of home invasion. If the crime is committed at night, the crime will be punished as a Class C felony.

H1360 Changes the habitual felon law by redefining habitual felon as a person who has been convicted of three prior felony offenses that were Class G or higher and modifies the sentence imposed on a person convicted as a habitual felon to be one felony class higher than the underlying felony for which the person is convicted. The post-release supervision and parole commission would be authorized to study the feasibility of reducing the sentence for certain habitual felons currently in prison.

H1362 Expands the situations in which a judge may impose a lesser prison term than the applicable minimum term or suspend the prison term and place a person on probation when such a person has been convicted of a drug trafficking offense.

H1396 Grants superior courts the power to calendar cases in superior court. Currently, the law authorizes district attorneys, rather than superior courts, to calendar cases.

H1401 Increases the penalty for misdemeanor death by motor vehicle from a Class 1 misdemeanor to a Class A1 misdemeanor.

(Continued on Page 18)

Report on New and Pending Legislation in North Carolina

(Continued)

(Continued from Page 17)

H1403 Requires that a DNA sample be taken from any person arrested on suspicion of committing a felony. The Missing Persons DNA Identification System would become part of North Carolina's current DNA database and DNA databank.

H1406 Creates the crime of terrorism and makes it a Class B1 felony if the base offense is a Class B1 or Class A felony. The bill defines terrorism as, "An act of violence committed with the intent to intimidate the civilian population at large or to influence, through intimidation, the conduct or activities of the government of the United States, a state, a county, or a city."

H1416 Instructs the Legislative Study Commission on Children and Youth to research issues related to children of incarcerated parents.

H1432 Permits certified independent companies regulated by the Federal Fair Credit Reporting Act to perform criminal history checks of child care providers.

H1456 Makes the ownership of dogs weighing more than 14 pounds illegal as a special condition of probation for a person convicted of a felony drug offense and sentenced to community or intermediate punishment.

H1477 Provides for payment to translators and interpreters for services offered to parties and witnesses who do not speak English.

H1479 Requires that before a defendant can be tried capitally, the prosecution must present the following evidence at a pre-trial conference: "(1) Biological evidence or DNA evidence that links the defendant to the act of murder. (2) A videotaped, voluntary interrogation and confession of the defendant to the murder. (3) A video recording that conclusively links the defendant to the murder."

H1489 Requires anyone convicted of driving while impaired, driving after consuming alcohol being less than twenty-one years of age, or any other impaired driving offense, or any person who refuses a chemical analysis, to have an ignition interlock system installed on all of their vehicles before that person can get a limited driving privilege.

H1531 Orders the Clerk of Court to deny a name change application from a convicted felon who is serving an active sentence in a correctional facility for the felony conviction.

H1607 (= S490) Adjust B1-E Felony Penalties. Reallocates three months from the minimum sentence of felony Classes B1 through E to the maximum sentence and increases the period of post-release supervision from nine months to twelve months

H1612 Allocates $4 million over the next two fiscal years to services for existing pre-plea and post-plea mental health courts, DWI courts, and adult and family drug treatment courts for adult offenders.

S13 (=H1503) Makes injury to a pregnant woman past her twentieth week of pregnancy during the commission of a felony a separate offense one class higher than the offense committed if the defendant has knowledge of the pregnancy and the injury results in a miscarriage or stillbirth. The bill includes as an aggravating factor in felony cases that the victim was pregnant.

S26 Unlike the bill above, this bill would make such an injury a separate offense one class higher than the felony committed regardless of how many weeks the victim has been pregnant.

S32 Commands all North Carolina employers to use the federal E-Verify Program or a similar verification of work authorization program when hiring new employees.

S46 Creates civil and criminal penalties for communicating libelous or slanderous material over an electronic medium.

S74 Increases the penalty for second degree murder from a Class B2 felony to a Class B1 felony.

S94 Makes it a felony to assault or otherwise endanger a probation or parole officer.

S131 Requires anyone convicted of driving while impaired to be imprisoned for at least 24 hours in a confinement facility.

S140 Makes it a felony for a person who is the subject of a valid protective order to trespass on property where the protected party resides and that is operated as a safe house or haven for domestic violence victims without regard as to whether the person covered by the protective order is present on the premises

S153 Obligates the Division of Motor Vehicles to notify an employer of any convictions affecting the status of a commercial drivers license by an employee.

S158 Raises the penalty for felony death by vehicle from a Class E felony to a Class D felony and raises the penalty for felony serious injury by vehicle from a Class F felony to a Class E felony.

S262 Clarifies that an order to expunge an individual's record must be forwarded by the clerk of

(Continued on Page 19)

Report on New and Pending Legislation in North Carolina

(Continued)

(Continued from Page 18)

court to all applicable state and local government agencies. According to the bill, those agencies must forward notice of such expunction orders to any private entity that disseminates criminal history records for compensation that is licensed by the agency to access the agency's criminal history record database.

S351 Provides for a constitutional amendment that bars a convicted felon from being elected sheriff.

S431 Classifies robbery with an apparent firearm as a Class D felony. The term "apparent firearm" is defined by the bill as "any article that a reasonable person would believe to be a firearm."

S449 Creates harsher penalties and new categories for obtaining property by false pretenses. For example, the bill would punish someone who obtains $85,000 worth of property by false pretenses as a Class D felon rather than a Class H felon.

S527 Amends the criminal offenses of second degree rape and second degree sexual offense to make it illegal for a person in a position of authority to engage in a sex offense with a victim who is unduly influenced by the person in a position of authority.

S597 Grants trial judges in criminal cases the sole discretion to determine whether jurors may take exhibits introduced into evidence in the jury room. According to the bill, the consent of all parties would not be necessary.

S659 Provides for a procedure for determining when a judge should be disqualified from a case. A denial of a motion to disqualify a judge would not be immediately appealable and is only reviewable by the appellate division on appeal from a final judgment.

S680 Raises penalties for drug trafficking by one class level of felony.

S709 Creates the criminal offense of home improvement fraud. Home improvement fraud is committed when the following actions are perpetrated: (1) The use by a contractor of any false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, with the intent to cause any other person to enter into a home improvement contract. (2) The damaging of any property of any person by a contractor with the intent to induce that person to enter into a home improvement contract.

S710 Increases penalties for the offense of obtaining property by false pretenses when the money or property obtained is valued between $5,000 and $100,000.

S759 Requires law enforcement agencies to designate patterns in writing for stopping vehicles at checking stations.

S788 Allows expunction of records for first offenders who are under 18 years of age at the time of the commission of a non-violent felony. However, according to the bill, a non-violent felony does not include Class A through Class G felonies.

S789 Prohibits a person from being licensed as a bail bondsman if the person is convicted of a misdemeanor drug violation.

S794 Provides for the civil commitment of certain sex offenders who lack the capacity to proceed to trial.

S852 Determines that a positive result for an alcohol screening test is .08 or higher on an alcohol screening device and a negative result is any result that registers lower than .08 on an alcohol screening device.

S1036 Makes the criminal offense of simple assault a felony rather than a misdemeanor when the simple assault is committed against a law enforcement officer, a firefighter, or emergency personnel. Also, the bill would increase the penalty for assault against certain emergency personnel if the assault is with a deadly weapon or inflicts serious bodily injury.

S1045 Expands the situations in which a judge may impose a lesser prison term than the applicable minimum term or suspend the prison term and place a person on probation when such a person has been convicted of a drug trafficking offense.

S1048 Defines a "delinquent juvenile" as a juvenile who is between six years of age and eighteen years of age who commits a crime or infraction. In addition, the bill establishes a 17-member Task Force for Juvenile Justice Administration.

S1087 Permits the use of continuous alcohol monitoring systems as a condition of probation.

The Newsletter of North Carolina Prisoner Legal Services, Inc.

1110 Wake Forest Road
P.O. Box 25397
Raleigh, NC 27611

Phone: (919) 856-2200
Fax: (919) 856-2223
Email: *ncpls@ncpls.org*

Visit our website at:
http://www.ncpls.org