The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume 1, Issue 3, July 2000

NCPLS ACCESS

Seeking Relief Through The Courts: Differences between Section 1983 Actions and Tort Claims

Inmates who have decided to file a lawsuit often wonder whether they should file a Section 1983 suit, or a tort claim in the North Carolina Industrial Commission, or in superior court. The purpose of this article is to discuss the differences relating to the standard of proof required in each type of case.

The greatest difference between a § 1983 claim and a tort claim is the standard of proof required in each case. In a § 1983 claim, the standard requires a showing of intentional conduct that is more or less culpable, while the standard in a tort claim requires only a showing of negligence or carelessness.

Section 1983 Actions

First, a constitutional claim under 42 U.S.C. § 1983 must be based upon an injury (or the threat of an injury) that a reasonable person would consider to be serious. *Hudson v. McMillian*, 503 U.S. 1 (1992). For example, a serious injury is one that deprives an inmate of "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337 (1981).

Second, the serious injury must be threatened, or must have resulted from an official's intentional misconduct. See, for example, *Wilson v. Seiter*, 501 U.S. 294 (1991). Intentional misconduct can include a failure to act. *Estelle v. Gamble*, 429 U.S. 97, 102-3 (1976)(deliberate indifference to a serious medical need constitutes the wanton infliction of pain proscribed by the Eighth Amendment); *Farmer v. Brennan*, 511 U.S. 825 (1994)(failure to protect an inmate from a substantial risk of serious harm constitutes deliberate indifference.)

In the context of a constitutional challenge to prison conditions involving safety or health, liability can be established by proving that the defendant was "deliberately indifferent" to a deprivation of the basic necessities of life. See, for example, *Estelle v. Gamble*, *Id.* However,

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, 511 U.S. at 836. This means that a plaintiff has to prove the defendant had a "sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, at 302-303 (1991); *Hudson v. McMillian*, 503 U.S. 1, at 6 (1992).

Plaintiffs alleging an unconstitutional use of force have an even higher burden of proof. The courts have found in such cases that the "deliberate indifference" standard does not accord sufficient deference to the decisions of correctional offi-

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ABOUT *ACCESS*

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 31,000 prisoners and 10,000 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.

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

NCPLS Challenges Sentence Calculation Policies of Department of Correction

In 1996, NCPLS filed *Hamilton v. NC Dept. of Correction*, 96 CVS 6321 (Wake Co. Superior Court) on behalf of inmates in the custody of the North Carolina Department of Correction affected by a policy and practice of the DOC to ignore facially valid judgments of the courts. As a result of this policy the sentences granted to these inmates by the court were summarily and unilaterally changed by the DOC. The Plaintiffs' claims concerned the imposition of concurrent sentences or Committed Youthful Offender (CYO) status by the trial court, although not authorized by the relevant statutes. In cases in which a concurrent sentence has been granted for a crime for which a consecutive sentence is required by statute, the DOC has disregarded the judgment for a concurrent sentence and entered the sentence on their records as consecutive. In cases in which CYO status was granted to an inmate not eligible for it, the DOC has refused to afford the inmate the benefits of CYO status.

The position of the DOC is that the practice is required by law and that Plaintiffs are not entitled to concurrent sentences or CYO status. The DOC claims that the cases, *State v. Isom*, 119 NC App. 225 (1995), and *State v. Wall*, 348 NC 671 (1998), support their position. In *Isom*, the North Carolina Court of Appeals held that, where a criminal defendant has pled guilty under a plea agreement that calls for a sentence which is not authorized by statute, the defendant is constitutionally entitled either to specific performance of his plea bargain, or to have the plea withdrawn. In *Wall*, the North Carolina Supreme Court held that a criminal defendant is not legally entitled to a sentence not authorized by statute. The court further held that, if the inmate has pled guilty in reliance on a promise of the state that he will receive a concurrent sentence, he is constitutionally entitled to renegotiate a new plea which gives him the benefit of his bargain. However, these cases do not authorize the DOC to modify these sentences.

Although the litigation is ongoing, the DOC is taking certain actions. The DOC is in the process of identifying all inmates who are currently serving a consecutive sentence for a crime that carries a mandatory consecutive sentence. (There are 10 categories of such crimes: 1st and 2nd degree burglary under the Fair Sentencing Act; armed robbery under the Fair Sentencing Act; habitual felon; violent habitual felon; habitual impaired driving; repeated felony with a deadly weapon; trafficking controlled substances; 1st and 2nd degree sexual exploitation of a minor; promoting and participating in prostitution of a minor; and possession of drugs in jail or prison.) Although there will be many more inmates identified than have actually been affected by the practice, no one who has been affected should be overlooked.

Each identified inmate will receive

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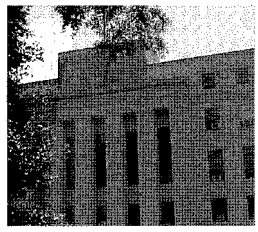
cials when circumstances dictate that action be taken in haste, under pressure, and frequently without the luxury of a second chance. *Whitley v. Albers*, 475 U.S. 312, 320 (1986). In those cases, the plaintiff must show that officials applied force maliciously and sadistically for the very purpose of causing harm. *Whitley*, 475 U.S. at 320.

Negligence simply is not actionable under § 1983. See, for example, *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986)(mere negligent failure to protect inmate does notviolate fourteenth amendment); *Miltier v. Beorn,* 896 F.2d 848 (4th Cir. 1990)(medical negligence does not state a constitutional claim).

Negligence Claims

Negligence cases involve a much less demanding legal standard. In order to establish a claim of negligence, a plaintiff must show that (1) he was injured as a (2) direct and immediate result of (3) the negligence of a person who owed him some duty (4) which was breached (or was not fulfilled). To put it another way, a plaintiff must allege that: (A) the defendants had a specific duty to protect his health, safety or welfare; (B) the defendants breached their duty (that is, that they failed to fulfill their duty); (C) that plaintiff was injured as a proximate result (that is, as a direct result); and (D) that the injury plaintiff suffered was foreseeable (or should have been anticipated by the defendants).



It is also worth noting that, under the law of North Carolina, the doctrine of contributory negligence is a complete defense to a claim of negligence. That doctrine allows defendants to argue that plaintiff was himself negligent, and that the plaintiff s negligence contributed to the injury which he ultimately suffered. Even if the defendants were negligent, they would be excused from paying any money if they succeed in showing that the plaintiff was also partly at fault.

Even so, it is generally easier to prove negligence than deliberate indifference or malice.

Medical Care: § 1983

To successfully maintain a § 1983 suit for improper medical treatment, an inmate must prove that prison officials were deliberately indifferent to a serious medical need, and that this indifference caused serious injury. *Estelle v. Gamble,* 429 U.S. 97 (1976). This means that an inmate must demonstrate that a serious medical condition existed, and that prison officials were aware of the condition, yet failed to provide treatment. (Where some medical attention has been provided, it is often difficult or impossible to

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Sentences

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written notice that his sentence may have been altered and that he may be entitled to relief. That notice will be sent to several thousand inmates within the next 90 days. However, it is likely that only a small number of those who will be notified will actually have been affected by the policy. In addition, the DOC will send notice to any inmate who is affected by the policy in the future and who has his or her sentence modified by the DOC. If you receive such a notice and you want legal help, you can contact your trial attorney or write to NCPLS. We anticipate a large number of requests for assistance with this matter, so it may take us longer than usual to respond to your letter. You can help to ensure a timely response by identifying the nature of your request with this language at the top of your letter: Hamilton Case Request ; or by completing and submitting the REQUEST FOR ASSISTANCE attached to the Notice that the DOC will send. It will also be helpful if you can provide a copy of your judgment and commitment paper(s) and the Transcript of Plea, if you were convicted pursuant to a plea bargain.

Late Update: on July 3, 2000, we obtained a decision from the Wake County Superior Court that, in the future, the Department of Correction will not change a concurrent sentence to consecutive but will notify the court that imposed the sentence that it is erroneous and must be changed.

The Safe and Humane Jails Project

NCPLS provides a wide range of services, from advice about prisoners' legal rights, to representation in all State and Federal courts. The promotion of safe and humane conditions of confinement for our clients continues to be one of the highest priorities of NCPLS. Such advocacy has been the historical focus of our work on behalf of people confined in county jails. Our involvement has improved the lives of thousands of pre-trial detainees in North Carolina.

With funding from the North Carolina State Bar through the IOLTA Program (Interest on Lawyers' Trust Accounts), NCPLS created the *Safe & Humane Jails Project*. The community of persons served through that Project consists of citizens from across the State who are detained in jails and municipal lockups.

That population constantly changes, but is composed of approximately 10,000 individuals at any given time. Most of these people are impoverished, being held pending trial because they are unable to post bond.

With respect to the conditions of their confinement (including matters such as inadequate medical services, substandard or dangerous living conditions, or threats to physical health and safety), people confined in detention facilities have little recourse. Even in jails that treat inmate grievances seriously, complaints often stem from insufficient capital resources; problems often beyond the control of the Sheriff or jail administrator.

Court-appointed attorneys almost always limit their involvement to defending criminal charges and are not compensated to provide representation concerning complaints about conditions of confinement. Those few attorneys who may be inclined to assist their clients with such matters may be unable to do so due to a lack of knowledge concerning prisoner civil rights.

Acting on behalf of our clients, NCPLS representatives have often been successful in working on a cooperative basis with counties across the State to correct problems that threaten the health and safety of people in jail. For example, last year, NCPLS expended substantial resources working with officials in an eastern North Carolina county to ameliorate inhumane conditions in the jail. There, prolonged, severe

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show that a medical need has been ignored.)

The phrase "serious medical need" refers to an "obvious and notorious injury," *Laaman v. Helgemoe*, 437 F.Supp. 269, 311 (D.N.H. 1977), such that even a layman can recognize the clear need for a doctor's immediate attention. *Partee v. Lane*, 528 F.Supp. 1254 (N.D. Ill. 1981); *Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981). A serious medical need can also be established by showing that a physician exercising ordinary skill and care would have concluded that the symptoms evidenced a need for treatment, that there was a substantial chance for harm to result if medical care were delayed, and that harm did result after the delay. *Stokes v. Hurdle*, 393 F.Supp. 757, 761 (D. Md. 1975), *aff'd*, 535 F.2d 1250 (4th Cir. 1976).

In any case where an inmate is attempting to establish deliberate indifference, it must be shown that prison officials were aware of the condition. The most effective means of producing this evidence is by showing that the inmate signed up for sick call, and that the inmate utilized the grievance procedure. Inmates sometimes feel that these actions are useless, and they therefore neglect to sign up for sick call or file grievances. However, the lack of those documents can make it difficult to prove deliberate indifference if the inmate

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later decides to take legal action because there may be no other evidence that the medical problem was called to the attention of prison officials.

Medical Care: Negligence

A medical negligence action under state law has a lower standard of proof than a §1983 action. An inmate must show "by the greater weight of the evidence that the care [provided] was not in accordance with [accepted] standards of practice," and that the inmate's injuries were the proximate result of the medical care received. N.C.Gen.Stat. § 90-21.12. A doctor is expected to exercise reasonable care and diligence, and to use sound professional judgment when treating inmates. *Hunt v. Bradshaw,* 88 S.E.2d 762, 765 (1955). It is not ordinarily negligent for a doctor to prescribe and follow a course of treatment different from that preferred by the patient. See, for example, *Brewer v. Ring & Valk*, 177 NC 477 (1919).

Failure to Protect from Violence

Prison officials may be held liable for "deliberate indifference to a substantial risk of serious harm" to an inmate. *Farmer v. Brennan,* 511 U.S. 825 (1994). There are two ways this deliberate indifference can be established. Corrections officials' deliberate indifference to, or callous disregard of a specific, known risk of harm states a constitutional claim. *Pressly v. Hutto*, 816 F.2d 977 (4th Cir. 1987); *Ruefly v. Landon*, 825 F.2d 792 (4th Cir. 1987). Even where there is no notice of a specific threat of harm, deliberate indifference to a pervasive risk of harm raises a constitutional claim. *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973).

Under State law, an inmate may file suit based upon a "failure to protect" theory under the law of negligence. In this context, the inmate must prove: (A) the defendants knew or should have known that the inmate faced a genuine risk of harm; (B) the defendants had a specific duty to protect the inmate's safety; (C) the defendants breached their duty (that is, that they failed to protect the inmate); (D) that plaintiff was injured as a "proximate" result (that is, as a direct result); and (E) that the injury plaintiff suffered was "foreseeable," (or should have been anticipated by the defendants).

Under both federal and state law, the most difficult aspect to prove is knowledge on the part of prison officials. The inmate must be able to show through grievances, letters, and witness statements that the problem was brought to the attention of the defendants at a time when they could have acted to prevent the assault. The question of whether to prosecute a § 1983 action or a tort claim then turns on whether the defendants' inaction constituted negligence, or involved a higher degree of culpability amounting to deliberate indifference.

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Use of Force

The courts have recognized a privilege for correctional officers to use force against an inmate to maintain institutional order and security. Although the courts ordinarily defer to the judgment of correctional officials concerning such matters, it has been recognized that the Constitution protects against an unreasonable or excessive use of force. See, for example, *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980). Force that is used in a good faith effort to restore or maintain discipline is not excessive, but force that is used maliciously and sadistically for the very purpose of causing harm is considered unconstitutional. *Whitley v. Albers*, 475 U.S. 312 (1986); *Hudson v. McMillian*, 503 U.S. 1 (1992). In determining whether the force used in a particular situation was excessive, such factors as (1) the need for application of force, (2) the relationship between the need and the amount of force used, and (3) the extent of the injury inflicted will be considered. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990)(*en banc*). The extent of the injury the inmate has received may indicate the force used was excessive. *Hudson v. McMillian*, 503 U.S. 1 (1992). However, not every injury is considered to be "sufficiently serious" as to violate the Constitution. *Stanley v. Heijrka*, 134 F.3d 629 (4th Cir. 1998)(bruising, swelling, loose tooth were *de minimis* injuries under 8th Amendment).

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Under state law, an officer may be held responsible for the negligent application of force. This means that, although an officer may have intended to use force, unintended injuries that result may have been negligently inflicted. *Jackson v. North Carolina Department of Crime Control and Public Safety*, 388 S.E.2d 770 (1990)(if an officer employs force but applies it negligently and injury results, the officer may be held liable).

Conclusion

The decision about what kind of lawsuit to file can be complex and confusing. Inmates who believe they may have grounds for legal action can contact NCPLS for advice and limited assistance. NCPLS also provides legal representation in meritorious cases. A meritorious case is one that presents a claim which is either legally recognized, or one for which a good faith argument could be made for recognition. Additionally, the case must have a realistic chance to achieve significant relief for the client, or for inmates, generally (either monetary or injunctive relief, or both). NCPLS does not accept for representation cases that have only *de minimis* value or little likelihood of success.

Authored by Chana Dorrough
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NCPLS Successfully Represents Clients in Two Habeas Cases

NCPLS recently prevailed at the U.S. District Court level in two petitions for writs of federal habeas corpus. In one case, the U.S. District Court ordered a re-sentencing, and in another case, a new trial.

In *Boyd v. Freeman,* the Petitioner had pled guilty in state court to ten counts of robbery and received a single, consolidated sentence of 60 years, under the Fair Sentencing Act. However, under that law, a consolidated sentence cannot be greater than the maximum penalty for the most serious felony consolidated, and the maximum sentence for robbery was 40 years.

The Petitioner filed a motion for appropriate relief seeking a legal sentence. The state judge then unconsolidated one of the robbery sentences, gave him 40 years for the consolidated sentences and a consecutive 20 years for the remaining robbery, thus totaling the original 60 years. But since each robbery conviction carries a mandatory 7 years imprisonment before parole eligibility, Petitioner was required to serve 14 years before parole consideration rather than 7 as under his original sentence. The Petitioner was worse off than before he began post-conviction proceedings.

After exhaustion of the claims in state court, NCPLS filed a Petition for a Writ of Habeas Corpus in the Western District based upon *North Carolina v. Pearce*, 395 U.S. 711 (1969). In *Pearce,* the U.S. Supreme Court ruled that, after a successful appeal, in the absence of new facts justifying a harsher sentence, a more severe sentence is presumed to be the result of unconstitutional judicial vindictiveness.

In *Boyd*, the U.S. District Court for the Western District ruled that the re-sentencing (which resulted in two, consecutive robbery sentences adding up to the same number of years as the original sentence) was more severe than the first sentence because the seven-year mandatory imprisonment prior to parole eligibility was doubled in the second sentence. Because there was no fact in the re-sentencing hearing to dispel the presumption of judicial vindictiveness, the court required North Carolina to either grant a re-sentencing hearing to deal with the increased imprisonment or release the Petitioner from custody.

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NCPLS Paralegals Obtain Professional Certification

NCPLS Paralegals Kim W. Bratton and Yvonne P. Oates have successfully completed the Certified Legal Assistant examination administered by the National Association of Legal Assistants. Passing that milestone, Yvonne and Kim join four other NCPLS paralegals who have already attained professional certification. With this certification, Kim and Yvonne are able to deliver comprehensive support services to NCPLS attorneys and clients. Congratulations to Yvonne and Kim on achieving this landmark in their professional development!

Safe and Humane Jails Project

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overcrowding at the jail had caused a deterioration of the physical plant, a lapse in safety procedures, the degradation of programs and services, and the development of inhumane and illegal practices. Crowding had reached such levels that inmates on suicide watch were housed in common corridors, chained to their beds. Other inmates were even less fortunate, relegated to matts placed on hallway floors and handcuffed to bars or tables. Because there were insufficient officers to handle the population, inmates were rarely afforded exercise or any opportunity to move beyond the length of the chains and bars that restrained them. With literally hundreds of people crammed into poorly ventilated, dark cells and hallways, a lack of adequate staff to supervise and care for the inmates, and no meaningful health screening of inmates upon admission, the potential for profound catastrophe was real and immediate.

While there remain significant problems at that jail, NCPLS advocates worked with County officials to reduce the population by about 30%. Additionally, attention was given to fire safety and evacuation procedures, a tuberculosis screening protocol was developed and implemented, and other actions were taken to improve operations.

Similarly, at the request of a County Board of Commissioners in western North Carolina, NCPLS Attorney Kari L. Hamel appeared at a meeting of the Board to discuss with its members and the Sheriff principles of jail administration, including legal requirements concerning the safe custody and the humane treatment of prisoners.

When officials have been unwilling to work cooperatively to ameliorate inhumane jail conditions, NCPLS has achieved meaningful relief for our clients through litigation. In the last decade, NCPLS has represented jail inmates in class action lawsuits in more than a dozen counties. For example, NCPLS litigation has resulted in the construction of new or refurbished jail facilities in Durham, Gaston and Franklin Counties. The result has been greater safety and more humane conditions for people confined in those counties, benefitting literally thousands of North Carolinians.

Regrettably, NCPLS has extremely limited resources to administer the Safe & Humane Jails Project, despite an almost overwhelming demand. For instance, during the period of 1 October 1998 through 30 September 1999, NCPLS received more than 400 complaints about jail conditions and requests for legal assistance from pre-trial detainees across the State. NCPLS staff provided a response to each inquiry. Our clients were advised of the controlling legal standards, and they were given advice and information about how to resolve particular problems. In appropriate cases, NCPLS intervened on behalf of our clients to attempt to resolve serious complaints and attend serious needs through administrative channels, and when necessary, through litigation.

Although the task is daunting, we believe the Safe & Humane Jails Project provides a genuine service to our clients and the people of North Carolina. This is true, not only in the narrow and abstract sense that every citizen in a civilized society has an interest in the humane treatment of prisoners. It is also true because people who are detained pending trial are themselves citizens and members of the larger community to which they eventually return, as, of course, are detention officers and other jail employees. Unsafe or unsanitary conditions of confinement, coupled with overcrowding, pose a heightened risk of contagion and threaten the health and well being of prisoners and those who work in a detention facility. The health of the general population is threatened when those who have been directly exposed to unhealthy jail conditions return to the community, either after the disposition of criminal charges, or upon their return to friends and family at the conclusion of each shift.

NCPLS works to ensure that living conditions in all of the State's jails are safe and humane. In a very real sense, this work serves all of the citizens of the State.

THE NEWSLETTER OF NORTH CAROLINA PRISONER LEGAL SERVICES, INC.

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NCPLS Prevails in Two Habeas Cases

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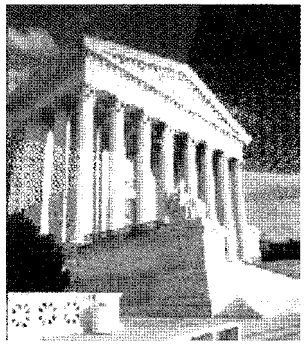
In *Johnson v. Watkins*, NCPLS represented a prisoner who was convicted of sexually abusing children while they were visiting his son at his home. Social Services had investigated the allegations to determine if his son should be removed from the home but found the allegations to be unfounded.

Although the Petitioner had told his attorney that the social services worker had left his child in the home and would likely be a favorable witness, the attorney did not call the witness at trial nor subpoena her reports. At a hearing on a motion for appropriate relief, the social worker testified that she found the allegations of sexual abuse of the children to be unfounded.

The state court judge held that the attorney should have used the social worker at trial, but that it probably would not have made a difference in the outcome. NCPLS then filed a petition for a writ of habeas corpus in federal court, based upon both the failure of the state to turn over the evidence (a *Brady* claim) and ineffective assistance of counsel in failing to use the evidence at trial (a *Strickland* claim).



The federal court ruled that there was no *Brady* claim since the evidence was known to the defense, but ruled that the Petitioner should be awarded a new trial because the attorney should have used the evidence at trial and the evidence would probably have changed the verdict. A new trial was ordered. The case has now been appealed to the Fourth Circuit Court of Appeals.

NCPLS evaluates requests for post-conviction assistance from inmates incarcerated in the North Carolina Department of Correction. When there is a reasonable chance to obtain relief for the prisoner, NCPLS offers representation in such cases.