The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume II, Issue 2, June 2002

# NCPLS ACCESS

## Legal and Professional Services: Getting What you Pay For

*By James W. Carter, Managing Attorney*

Inmates often write to NCPLS asking for information about legal services from private attorneys and organizations. Sometimes we're asked if we know anyone who might be able to represent the inmate, and others just want to know if we have any information about a particular person or organization. But recently, we've received a number of complaints that inmates have paid for services that they haven't received.

The December 2000 issue of *Access* reported that we were receiving complaints regarding an Ohio-based operation known as National Legal Professional Association (NLPA). At the time, the State Bar of North Carolina was formally investigating such a complaint (State Bar File No. 00AP0053). Since then, the State Bar took NLPA to court and an injunction was issued which barred the firm from operating in North Carolina. (In North Carolina, it is illegal for a non-lawyer to act as a lawyer. NC Gen. Stat. §84-4. It is even against the law for a non-lawyer to tell others that he is competent to give legal advice or counsel, to prepare legal documents, or to otherwise act as a licensed attorney. *Id.*)
We are now receiving inquiries about two other organizations.

First, we have been asked what we know about a group called Nationwide Criminal Justice Consulting Services operating out of West Virginia. Nationwide's founder and chief consultant is Grover C. Jones, Jr. The group's advertisement lists Mr. Jones as a former state prosecutor and a criminal lawyer. However, no information is provided as to whether or where Mr. Jones is currently licensed to practice law. The advertisements state that Nationwide is not a law firm and that they provide only non-legal assistance as outlined in their brochure. We have contacted the North Carolina State Bar regarding Nationwide and we learned that the Bar has initiated an investigation (State Bar File No. – 02AP0039).


We have also received complaints about RDM Legal Research Services out of Mt. Airy, North Carolina. The State Bar has reviewed three complaints against RDM. Two letters of caution were issued to RDM for providing unauthorized post-conviction legal advice to inmates (State Bar File Nos. 00AP0073 and 00AP0081). Another complaint that RDM rendered fraudulent financial investment services was dismissed (State Bar File No. 01AP0034) because the State Bar does not regulate such services. However, that complaint was referred to the district attorney for investigation and possible criminal prosecution. Additionally, the Consumer Protection Section of the Attorney General's Office is investigating RDM.

We will follow these investigations and, in future editions of *Access*, we will advise you of any significant developments. In the meantime, remember that people who are incarcerated in this state can get legal advice and assistance
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***Inside this Issue:***

***Access*** is a publication of North Carolina Prisoner Legal Services, Inc. Established in 1978, NCPLS is a non-profit, public service organization. The program is governed by a Board of Directors who are designated by various organizations and institutions, including the North Carolina Bar Association, the North Carolina Association of Black Lawyers, the North Carolina Association of Women Attorneys, and law school deans at UNC, Duke, NCCU, Wake Forest and Campbell.

NCPLS serves a population of more than 33,000 prisoners and 14,000 pre-trial detainees, providing information and advice concerning legal rights and responsibilities, discouraging frivolous litigation, working toward administrative resolutions of legitimate problems, and providing representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

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# The Right to Counsel: *Alabama v. Shelton*

*By Tracy Wilkinson, Staff Attorney*

It has long been established that a defendant has a sixth amendment right to counsel in all felony trials, regardless of the punishment imposed upon conviction. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Arsinger v. Hamil*, 407 U.S. 25 (1972), the Supreme Court extended the right to counsel to all indigent misdemeanor defendants faced with the possibility of a jail sentence. On the other hand, when an indigent defendant will not be sentenced to imprisonment, the state is not required to appoint counsel for him, even if the crime is one for which imprisonment is authorized. *Scott v. Illinois*, 440 U.S. 367 (1979).

In the most recent Supreme Court case dealing with this issue, the court ruled that a defendant has a sixth amendment right to counsel at a misdemeanor trial when the defendant could be sentenced upon conviction to a term of imprisonment, even when the sentence was suspended. *Alabama v. Shelton*, 535 U.S. __ (2002). The state argued that appointed counsel was not constitutionally required because the defendant faced only a misdemeanor charge, and upon conviction, defendant's sentence had been suspended and he had been placed on probation. However, when the defendant violated the terms of his probation, his sentence was activated and he faced imprisonment, even though he had not had the benefit of counsel. The Supreme Court rejected the state's argument. In proceedings where counsel has not been provided, a judge may order a fine, impose court costs, or require the defendant to pay restitution. But unless the defendant was represented by counsel, or properly waived counsel, a judge cannot constitutionally impose even a suspended term of imprisonment. If a term of imprisonment is to be imposed upon defendant's conviction, suspended or otherwise, the sixth amendment right to counsel applies. *Id.*

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*Tracy Wilkinson, NCPLS Staff Attorney*

# IMPACT Credit?

## The North Carolina Supreme Court Will Decide

*By Senior Attorneys Kari L. Hamel & Susan H. Pollitt*

The North Carolina Legislature amended the wording of N.C. Gen. Stat. §15A-1343.1 and the changes took effect on December 1, 1998. The Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) was redesignated as a residential program within the meaning of N.C. Gen. Stat. §15A-1340.11(8).

Both before and after the amendment, NCPLS requested and successfully obtained credit toward active sentences for the number of days participants spent at the boot camp.

However, on November 20, 2001, the North Carolina Court of Appeals issued a decision in *State v. Hearst*, holding that the legislative amendment meant that participants in IMPACT are not entitled to credit against their activated sentence. Hearst appealed the decision to the North Carolina Supreme Court. *State v. Hearst*, 147 N.C. App 298, 555 S.E.2d 357 (2001), Review or Rehearing granted, Appeal dismissed in part: 2002 N.C. LEXIS 26 (January 31, 2002).

Mr. Hearst's counsel, William Leslie, a Buncombe County Assistant Public Defender, invited NCPLS to appear in the case as *amicus curiae* (friend of the court). Understanding the importance of this issue to many of our clients, NCPLS agreed. With the permission of the North Carolina Supreme Court, NCPLS Attorneys Susan Pollitt and Kari Hamel filed a brief in the case, and Ms. Hamel argued the case on May 15. Ms. Hamel urged the Court to overturn the appellate opinion based on N.C. Gen. Stat. §15-196.1, which requires that a defendant's sentence be reduced by the amount of time the defendant spent "in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence." IMPACT is a State institution, and the Legislature's decision to call IMPACT a residential program did not change its restrictive character or the constitutional and statutory principles that govern sentence reduction credits.

The Court is expected to rule on the case in the near future. The outcome will be reported in a future edition of ***Access***.

*North Carolina Supreme Court Building, Raleigh, North Carolina*

# *Hamilton v. NC Dept. of Correction*

96-CVS-6321

In recent editions of ***Access***, we have reported on the progress of the *Hamilton* Case through the courts. In *Hamilton*, Attorney Winifred H. Dillon challenged the practice of DOC to alter judgment and commitment orders that did not conform to state law. (There are 10 categories of crimes in which consecutive sentences are required by law: 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. In cases where concurrent sentences were imposed rather than statutorily mandated consecutive sentences, DOC disregarded the judgment and entered the sentence on their records as consecutive. Similarly, in cases where CYO status was granted contrary to statute, the DOC refused to afford the inmate the benefits of CYO status.)

Readers may recall that on 3 July 2000, the Superior Court found DOC's practice was illegal. The decision was appealed, and on 20 November 2001, the Court of Appeals affirmed the lower court. The State then asked the North Carolina Supreme Court to review the case. On 7 March 2002, the State Supreme Court dismissed the appeal. Consequently, the opinion of the Court of Appeals is the final word. "[T]he Department of Correction has no authority to record a defendant-inmate's clearly erroneous sentence in a manner which makes the sentence conform to state statute . . .." "A defendant-inmate's sentence must be recorded in his combined record as specifically stated in the judgment and commitment." "[W]e hold that the [trial court's] order . . . directs DOC to provide appropriate relief to all affected inmates, present and future." *Hamilton, et al. v. Theodis Beck and Judy Sills (Formerly Franklin Freeman and Hazel Keith)*, COA00-1470, slip op. pp. 6 & 7.

It has been difficult to identify all of the inmates who will benefit from this ruling because the Department of Correction did not keep records of the sentences that were altered. Last year, NCPLS worked with DOC to identify approximately 3,000 inmates who might have been affected. A notice was sent to each inmate, describing the problem and how to correct it. NCPLS received more than 500 inquiries from inmates and responded to each by providing further information and advice, as well as legal representation to all inmates who had meritorious cases.

DOC is now engaged in a more comprehensive effort to identify every affected inmate, and NCPLS stands ready to provide legal advice and assistance to all those affected.

# Eight Inmates Dead in Jail Fire

On Friday evening, May 3, smoke began billowing from a storage shed connected to the Mitchell County Jail in Bakersville, North Carolina. At 10:05 p.m., the jailer on duty dialed 911. "Get the fire department here right away! The jail's on fire! Hurry!" The jailer managed to release nine inmates confined on the ground floor. Unfortunately, she could not reach one man in a holding cell next to the storage room, or seven others confined in a cell on the upper level of the jail.

By 10:48, responding paramedics had pronounced the eight inmates dead. The apparent cause was smoke inhalation. A defective heater is the suspected cause of the fire. It has been sent to a private laboratory for analysis.

The two-story jail was constructed in the mid-50's and passed an inspection in November 2001. The jail reportedly complied with all fire safety regulations, but manual locks on the cell doors made it impossible to release inmates from a remote location, such as a control booth or the front desk.

The sorrowful event left the community in a state of shock. On Saturday, in memory of those who died, family and neighbors returned to the site to leave flowers with those placed the night before by a firefighter. The dead included Edmond Banks, Jason Jack Boston, Jessie Allen Davis, Joey Robert Grindstaff, Danny Mark Johnson, Tywain Neal, Jeremiah Presnell, and Mark Halen Thomas.

# Getting What you Pay For

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from NCPLS. These services are without cost to people in custody of the Department of Correction. NCPLS provides information, legal advice, and in meritorious cases, representation in court, all without charging you or your family a fee.

Sometimes our clients want second opinions, and others simply prefer to hire a lawyer. If you are interested in paying for legal services, it's a good idea to ask friends and family for recommendations. Ask what kind of work the lawyer does, how well the lawyer communicated with the client, and what kinds of results the lawyer achieved. It should go without saying that you will need a lawyer who is licensed to practice in North Carolina, and one that is in good standing with the North Carolina State Bar. (You can check with the State Bar about such matters.)

When looking for a lawyer, be cautious when someone promises a good result. In legal proceedings, little is certain. There's an old saying: "If something sounds to good to be true, it probably is."

Once you decide to hire a lawyer, insist on a written agreement that sets out the work the lawyer will do for you, when the work will be done, and how much it will cost. (The scope of employment and the fee should be discussed with the lawyer directly and not with the lawyer's staff.) The agreement should be written in a clear manner, using words you understand. It should be organized and captioned so it is easy to read. If you do not understand the agreement, don't sign it. Instead, ask the lawyer to revise it, or revise it yourself to reflect the reason you've hired the lawyer and the terms of the agreement. Both parties must initial all hand-written changes to a typed agreement. Don't be talked out of a written agreement. If the lawyer doesn't deliver and you want to complain or get your money back, you have the burden of proving the specific details. That will be much simpler if you have the agreement in writing.

A little care in selecting a lawyer can make a big difference, so take the time to make a good decision. It's always easier to keep your money in your own pocket than to try to get it out of someone else's.

# Sentence Reduction Credits

*By James W. Carter, Managing Attorney*

In the November 2001 issue of ***Access***, we reported that the General Assembly amended N.C. Gen. Stat. §15A-1355 allowing the DOC to award credits to reduce the sentences of inmates who suffer from medical conditions or physical disabilities that prevent their assignment to work or program activities.

Under earlier law and regulations, credit can be earned to reduce the maximum term of felony sentences (N.C. Gen. Stat. §15A-1340.13(d)) and misdemeanor sentences (N.C. Gen. Stat. §15A-1340.20). The new law, which took effect on September 26, 2001, broadens DOC's authority to award sentence reduction credits. Under the new law, DOC may develop rules about how the credit will be awarded to inmates who are medically or physically impaired, and what they must do to receive the credit. (However, the law does not *require* DOC to award such credits.)

We checked with DOC officials, who report that rules are being developed. However, officials were unable to tell us when the process will be completed. Once the rules are finalized and we have reviewed them, we will know who will be covered and how such credit can be earned.

In the meantime, if you believe you can perform a job or participate in a rehabilitation program to earn sentence reduction credits, we suggest that you work with your case manager. We will continue to monitor the DOC rule-making process and report any additional information we learn in future editions of ***Access***.

# State Budget Cuts: Prisons and Criminal Justice

*By Billy Sanders, CLAS**

Governor Michael Easley has proposed a budget to the General Assembly that includes numerous proposals impacting the state's justice system. Several of those proposals would result in an increase in the prison population, according to a study conducted by the North Carolina Sentencing and Policy Advisory Commission.

The proposed budgets cuts eliminate electronic house arrest, the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), and the Criminal Justice Partnership Act, all of which provide important services that allow judges to impose intermediate sanctions that divert offenders from prison.

Under Structured Sentencing, felony convictions can be punished in three ways; community sanctions, intermediate sanctions, and active punishment (imprisonment).

(There are sixty "cells" in the sentencing grid, nineteen of which authorize a judge to impose an intermediate sanction. Eligibility for a sanction short of imprisonment depends on the seriousness of the felony (designated by offense class) and the offenders' criminal history (prior record level). The proposed budget cuts would eliminate three of the five programs that can be utilized as a part of an intermediate punishment. The only remaining intermediate punishments would be intensive probation and special probation.

Special probation (also referred to as a "split sentence") requires an offender spend up to six months of his sentence in custody. The remainder of the sentence is suspended and is served on probation. Intensive probation involves close supervision of a probationer by a team consisting of an Intensive Case Officer and a Surveillance Officer. A person on intensive probation is typically subject to a mandatory curfew (usually 7:00 p.m. to 6:00 a.m., although hours may vary for employment, treatment, and/or school schedules), and a combination of other requirements and restrictions, such as warrantless searches, substance abuse screening and treatment, electronic monitoring, and vocational training.

*The North Carolina General Assembly*

If the Governor's budget proposals are adopted, the five existing intermediate sentencing alternatives

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# State Budget Cuts

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would be reduced to only these two sanctions. Judges would have to decide whether to impose special probation (a "split sentence") or intensive probation. In many cases, such limited options might result in a decision to move away from an intermediate sanction in favor of an active prison sentence. The strain placed on already taxed intensive supervision teams will often make incarceration more likely.

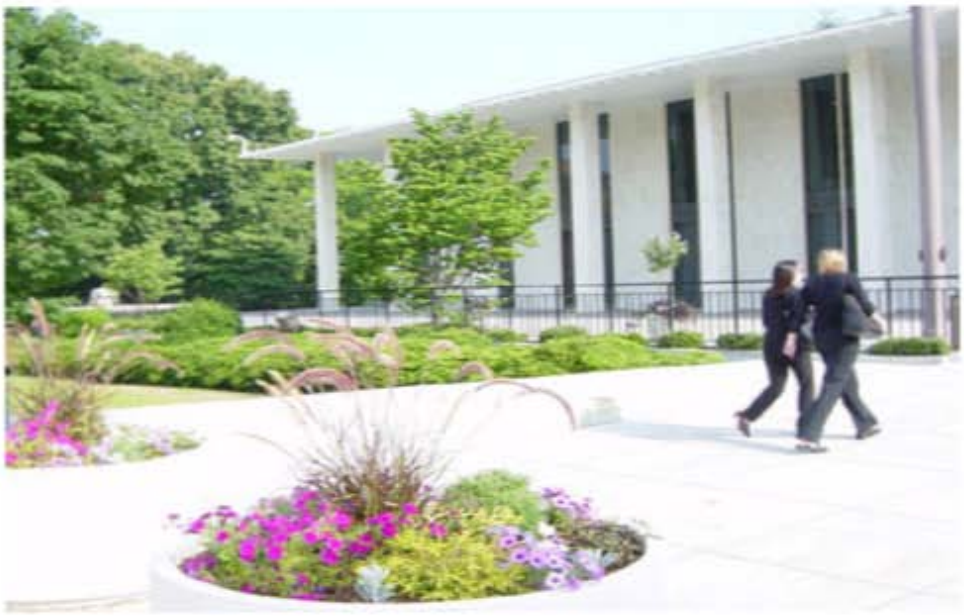
There are presently 361 intensive supervision teams. (In November 2001, state budget cuts eliminated two intensive supervision teams.) While the optimum workload is 25 cases per team, teams presently average 27 cases. However, the proposed budget makes no provision for any additional officers, although the availability of only one other intermediate sanction means that the number of people sentenced to intensive probation will almost certainly increase significantly.

Though the judicial response to such changes is difficult to predict, it is probable that more offenders will be sentenced to active incarceration, spending time in county jails and the state prison system.

But no matter how judges respond, the proposed budget cuts will increase the prison population. The Sentencing and Policy Advisory Commission (Sentencing Commission) prepared two models to measure how the changes might impact prison population. Both models were premised on statistics for fiscal year 2000/2001. One model assumed that offenders who were eligible for intermediate sanctions received active sentences instead. Under this scenario, the prison population would have increased by 1,070. In the second year, 1,372 prison beds would have been required. At an average daily cost of $65.29 per inmate, this represents an increased cost of $89,577.88. Compare that amount to the amount the state would expend for intensive probation ($12.69 per offender, per day, for a total of $17,410.68), or for house arrest ($7.16 per offender, per day, for a total of $9,823.52).

The Sentencing Commission also considered a model premised on the assumption that the targeted intermediate sanctions were un-availble during 2000/2001. A further assumption was that the two remaining intermediate sanctions (special probation and intensive probation) would have been im-posed with the same frequency and in the same circumstances, based on offense class and prior record level. (This second assumption seems somewhat dubious -- the absence of other alternatives can be expected to result in more frequent imposition of split sentences or active terms of imprisonment, both would result in higher rates of incarceration and a growing prison population.) Under this scenario, only a portion of those who were eligible for intermediate sanctions would have been sent to prison, but the prison population would have increased by 335 inmates the first year, and 411 the second year.

Although costs vary depending on custody level and other factors, the DOC estimates the average annual cost of incarceration at about $23,830 per inmate. Some studies have the cost as high as $75,000 per year.



*The North Carolina General Assembly*

The Sentencing and Policy Advisory Commission's report on the impact of these budget cuts suggests that, at a minimum, the savings generated by the proposed cuts

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# State Budget Cuts

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will be less than the costs of incarcerating the additional criminal defendants who might otherwise have been placed on intermediate punishment. In other ways, the cost could be much greater to the state of North Carolina.

In the late 1980's and early 1990's, the prison population in North Carolina had spiraled out of control, necessitating numerous legislative emergency responses that resulted in a "revolving door" prison system in which many inmates served only a fraction of the sentence originally imposed. NCPLS litigated several cases challenging overcrowded prison conditions. State officials enacted a "cap" to limit the prison population in hopes of avoiding a federal takeover of portions of the prison system. After embarking on an expensive campaign to construct additional prisons, and with the enactment of the Structured Sentencing Act in 1994, the Legislature brought the problem under control. Structured Sentencing is a model for criminal justice that has been recognized and replicated all over the United States.

The proposed budget cuts, if adopted, would depict a serious backward step that could return the state of North Carolina to a costly prison system that is unconstituionally overcrowded, and a criminal justice system in which the public lacks confidence. Structured Sentencing establishes a system for the rational use of correctional re-sources, punishng crime in light of the seriousness of the offense and criminal history of the offender. Without effecive community and intermediate punishments, greater reliance will be placed upon incarceration, even when a lesser sanction may be more productive (for the people of North Carolina, the victims of crimes, and for offenders). As a result, the Structured Sentencing initiative will fail and the system will collapse under the weight of over-reliance on incarceration.

Many agencies of government, and many valuable and important government services may fall to the budget axe this year. However, few cuts would have a more profound adverse impact on public policy, and fewer still would be so costly to North Carolina's citizens. The elimination of community and intermediate sanctions threatens the viability of Structured Sentencing and will inevitably result in additional costly prison construction. While these cuts may seem to improve budgetary projections in the short-term, they simply defer expenses that will be more costly and less efficacious when the bill comes due (beginning early in the next fiscal year). These proposed budget cuts may be penny-wise, but they are pound-foolish. Ultimately, it is the taxpayers of the state of North Carolina who will have to pay the bill.

** [Editor's Note: Billy Sanders serves as a Commissioner on the Sentencing Commission and is employed by NCPLS as a Certified Legal Assistant Specialist.]*

# Ex-Post Facto Laws

*By James W. Carter, Managing Attorney*

A question many of our clients ask is whether their sentences or convictions violate the constitutional protections against *ex-post facto* laws. The purpose of this article is to provide some general information about the prohibition against *ex post facto* laws found in both the United States and North Carolina Constitutions. United States Constitution, Art. I. §§9 and 10; North Carolina Constitution, Art. I §16.

People generally assume the prohibition against *ex post facto* laws only protects against the infliction of punishment for an act that was not defined as a crime when it was committed. However, the U.S. Supreme Court has held that the protection of the *ex post facto* clauses extends to laws that:

1) punish conduct which was not defined as a crime at the time;

2) make a crime more serious than it was when committed;

3) inflict a greater punishment than the law allowed when the crime was committed; and

4) changes the rules of evidence so less proof is required to convict the defendant than was required when the offense was committed

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# VOTE!

Through the electoral process, citizens choose their political representatives and shape governmental policy on many issues. Voting is perhaps the single most important responsibility of citizenship.

## Pre-Trial Detainees & Misdemeanants

In North Carolina, being convicted of a misdemeanor does not mean you lose your right to vote. You can even vote while serving your sentence. Follow these steps and you can vote in the next election.

Step 1 - Register to Vote

* If you're not already registered to vote, you can register by mail. Write or call your County Board of Elections and request a mail-in voter registration form.

* When completing the registration form, you can use your home address (if you know where you'll be living after serving your sentence) or the prison address as your permanent address. You should use the prison address for your mailing address.

* You'll receive information in the mail telling you which precinct you vote in and where to go to vote.

* Mail the completed form to the local County Board of Elections. It must ***be received 25 days before the election***.

Step 2 - Vote

* If you'll be released before election day, you vote at your assigned polling place or by absentee ballot. If you're still incarcerated elecion day, you vote by absentee ballot.

* You can register to vote and request an absentee ballot at the same time. If you do, be sure both are mailed early enough to arrive at the County Board of Elections no later than 25 days before the election.

*Sculpture of George Washington by Antonio Canova, NC State Capitol*

* To vote by absentee ballot, you must send a signed, written request to the County Board of Elections 50 days before election day. Written requests must be received ***no later than the Tuesday before election day***.

The request must be signed by you or a near relative. It must include your name and address as they appear on the registration records, and the address where the ballot is to be mailed. It is helpful to include your birth date, your near relative's address, and their relationship to you.

* If the Board of Elections determines you are qualified to vote, they'll mail a ballot to you after they receive your written request.

* After you receive the ballot and mark your votes, mail it back to the County Board of Elections. ***The County Board of Elections must receive your ballot 5:00 p.m. the day before election day in order to be counted.***

## Former Felons

People convicted of a felony in North Carolina lose their citizenship rights, including the right to vote. However, these rights are automatically restored when a person completes his sentence (including parole), is unconditionally pardoned, or completes the conditions of a conditional pardon.

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# VOTE!

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If your felony sentence is completed, or you have been pardoned, you're eligible to vote in this state. In order to vote in North Carolina elections, follow the steps below:

Step 1 - Register to Vote

* *Former convicted felons must register to vote even if you were registered before your conviction*. You can register at any time after completing your sentence.

* You can register by writing or calling your County Board of Elections to request a mail-in voter registration form.

* For the address section of the registration form, use your permanent home address.

* Mail the completed form to your local County Board of Elections ***at least 25 days before the election***.

* You'll receive information from the County Board of Elections telling you which precinct you vote in and where to go to vote.

Step 2 - Vote

* You can vote at your designated polling place or by absentee ballot.

* For directions on how to vote by absentee ballot, see Step 2 above.

For additional information on voter registration, absentee ballots, or locating your County Board of Elections, contact:

**State Board of Elections**
**P.O. Box 27255**
**Raleigh, NC 27611-7255**
**(919) 733-7173**

*http:/www.sboe.state.nc.us*

You may contact NCPLS for advice and legal assistance regarding your right to vote, as well as any other matters that arise in connection with the conditions in which you are incarcerated.

## *ALABAMA V. SHELTON*

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*Alabama v. Shelton* leaves a few unanswered questions. For example, although the Court ruled that the suspended sentence imposed in this case could not be activated, it did not reverse the conviction. One would assume that the conviction was invalid, but the Court left the question open. For that reason, it is unclear whether uncounseled prior convictions in which a term of imprisonment was imposed may be used to prove an element of a subsequently charged offense, to impeach a defendant at trial, or to calculate prior record levels under structured sentencing schemes. There are also questions about whether the Court announced a new rule of constitutional law in *Shelton*, or whether the case will be given retroactive application to invalidate prior misdemeanor convictions obtained without counsel.

# Ex-Post Facto Laws

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*Rogers v. Tennessee*, 532 U.S. 451, 456 (2001), *citing, Calder v. Bull*, 3 Dallas 386, 390 (1978) (*seriatim* opinion of Chase, J).

In determining if a law is *ex post facto*, the U.S. Supreme Court has stated that two critical elements must be present. First, the law must be retrospective, that is, it must apply to an offense that occurred before the law was enacted. And second, the law must disadvantage the defendant. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

A common question is whether the Structured Sentencing Act (SSA), which superceded the Fair Sentencing Act (FSA), was a violation of the constitutional protection against *ex post facto* laws. The question arises in two forms.

First, consider the inmate who committed a felony breaking and entering (a Class H felony) on January 1, 1994, and convicted on January 1, 1995. The inmate was sentenced under the FSA and received the maximum sentence of 10 years. On October 1, 1994, the SSA took effect and provided that the maximum sentence for felony breaking and entering was 25 to 30 months (2 years and one month, to 2 years and six months). The inmate asks whether his 10-year FSA sentence violates the *ex post facto* clause.

The answer to no. Proof of a violation of the *ex post facto* clause requires a showing that the challenged law was applied to events that occurred before the law was enacted. In the above situation, the FSA was the law in effect at the time the crime was committed, and is the law that must be used for sentencing. This is true, even though the trial was conducted and the inmate was convicted and sentenced after the SSA took effect.

The second way an *ex post facto* question most commonly arises has to do with sentence reduction credits. An inmate convicted under the FSA receives day-for-day good time credit to reduce his sentence. However, an inmate sentenced under the SSA does not receive day-for-day good time credit. Inmates convicted under the SSA often wonder if SSA's elimination of day-for-day good time credit violates the *ex-post facto* clause.

Again, the answer is no. When the offense was committed after SSA became effective, the SSA controls. Because SSA's elimination of good time credit is applied to offenses committed after the law was enacted, it does not violate the *ex post facto* principle.

With all of this, you may be wondering when the *ex post facto* prohibition might ever apply. In the situation above, suppose the facts were the same except that the offense was committed before October 1, 1994, when FSA was the law. Let's assume that the inmate earned day-for-day good time credit on his FSA sentence until SSA was enacted. After SSA was enacted, assume the Department of Correction (DOC) refused to credit any more day-for-day good time credit against the FSA sentence.

In this situation, the inmate would have been subjected to a violation of the *ex post facto* clause. The inmate could show that the new law [the SSA], which eliminated day-for-day good time credit, was being applied to a conviction that occurred before the new law [the SSA] was enacted. Also, the inmate could show that the loss of day-for-day good time credit was a disadvantage to him because he would spend more time in prison. In such a case, the prohibition against *ex post facto* laws would require the DOC to award all of the good time credit to which the inmate is entitled under the FSA.

We hope that this will help you to understand the prohibition against *ex post facto* laws. But, please remember that this is general information and not intended as legal advice in your particular case. If you believe you were sentenced in violation of the *ex post facto* clause, write to us. We will consider your specific situation and let you know whether there is a legal basis to challenge the sentence.

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

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