The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume VII, Issue 2, June 2007

NCPLS Access

Establishing Excessive Force in Civil Rights Litigation

By: Senior Staff Attorney Michele Luecking-Sunman and Sharon G. Robertson, ACP

A common request for assistance that NCPLS reviews involves a claim of an excessive use of force against a prisoner. Let's examine the following incident to see if it would meet the standards required to win a federal lawsuit based on a claim of excessive use of force.

John Doe has been held for the past year and a half at the Anywhere Jail waiting to go to trial. At first, Doe and Officer Rambo began joking with each other. Then Officer Rambo made a joking comment about an envelope Doe received from his wife. Doe did not appreciate Officer Rambo's comment and complained to shift supervisor Sgt. Right who made Officer Rambo apologize to Doe. Following the apology, Officer Rambo began writing Doe up for small or imagined infractions, causing Doe to accumulate several disciplinary infractions. On Nov. 13, Doe was playing cards with three other inmates when Officer Rambo came by and told only Doe to go back to his cell. Doe stood up, started walking towards Officer Rambo and asked in a rather loud voice why Officer Rambo was picking on him. Officer Rambo and Doe began name calling (with some four letter words) as Doe walked past Officer Rambo and toward his cell. Just before reaching his cell, Doe says Officer Rambo shoved him face first into the wall and began hitting him in the ribs. Officer Rambo says Doe gave him a shoulder as he walked by and Officer Rambo just defended himself by pushing Doe. Sgt. Right, who was just entering the cellblock, heard the commotion and came to Officer Rambo's aid. The officers took Doe to the ground where he was handcuffed behind his back and removed from the cellblock to a holding cell. While riding in the elevator to the holding cell, Doe says Officer Rambo continued to hit him in his back and rib area while Sgt. Right and Officer Doolittle watched. The whole incident in the elevator was captured on video surveillance. Doe was taken to the medical unit so the nurse could examine his bleeding nose, cut lip, sore ribs, sore back, and swollen right wrist. The nurse found some bruises around his ribs, treated his cut lip, and gave Doe two Tylenol tablets for pain. Doe's medical records show that he received

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In 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 38,600 prisoners and 14,000 pretrial detainees (with about 250,000 annual admissions), 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.

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

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

ESTABLISHING EXCESSIVE FORCE (CONTINUED)

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follow-up treatment for his nose and cut lip. A few days later, Doe was examined by the jail doctor who told him his nose and wrist were not broken, and he did not need any x-rays. Doe stopped signing up for sick call right after seeing the jail doctor because he didn't like being charged $10 just to see the nurse or doctor, and wanted to spend the little money he had for canteen items. Doe says he is still experiencing lower back pain and has problems with his wrist six months after the incident.

The Legal Standard

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects pretrial detainees from excessive force while in jail. *United States v. Cobb,* 905 F.2d 784 (4th Cir. 1990), *cert denied*, 498 U.S. 1049 (1991). (The Eighth Amendment applies to convicted prisoners, but for all practical purposes, the legal standard is the same. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (rights of pretrial detainees under 14th Amnd. are at least as great as those of convicted prisoners under 8th Amnd.) The Fourteenth Amendment basically states that pre-trial detainees may not be punished in any way without due process. Any use of force against a pre-trial detainee that was punitive in nature, would therefore violate the Constitution. Of course, law enforcement officers have the right to use force in most circumstances, as long as that force is not used solely as a form of punishment or to compel some illegal and dangerous act. *Jackson v. Allen*, 376 F. Supp. 1393, 1395 (E.D. Ark. 1974).

A four-part test has been developed to determine whether an incident involving the use of force was lawful. *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert denied*, 414 U.S. 1033 (1973). The court will consider the following factors:

1) the need for application of force;
2) the amount of force used;
3) the extent of injury inflicted; and
4) whether the force used was applied in good faith to maintain or restore discipline, or maliciously and sadistically for the *very purpose of causing harm.*

Accord, *King v. Blankenship*, 636 F.2d 70, 73 (4th Cir. 1980); *see also*, for example, *Whitley v. Albers*, 475 U.S. 312 (1986).

It is difficult to prove the factors listed above, but there is another obstacle to overcome in an excessive use of force lawsuit. The plaintiff must have suffered a serious injury as a result of the illegal conduct. *See* the Prison Litigation Reform Act at 42 U.S.C. §1997e ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physi-

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Establishing Excessive Force (Continued)

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cal injury"). "The Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force . . .." *Estelle v. Gamble*, 429 U.S. 97 at 106 (1976).

Does Doe Have Grounds for a Successful Lawsuit?

Have you made a decision on whether our John Doe has a chance of winning a lawsuit alleging the use of excessive force? Let's look again at our facts based in light of the legal standard outlined above.

As you can see, the test to determine whether force was used illegally poses a difficult burden of proof. It is always hard to convince a jury that officers acted maliciously and with the specific intent to cause harm. In such cases, law enforcement officials often testify that the inmate provoked the use of force by unruly or assaultive conduct and that the officer was simply using the force necessary to control the situation or enforce a lawful order. Officers often swear (and believe) that the inmate was accidentally injured during the fray, or that the inmate injured himself. Juries are all too willing to accept these accounts, despite an inmate's testimony to the contrary. In our case, Officer Rambo will likely say that Doe was willfully disobeying a direct order to return to his cell; that Doe assaulted him by striking him on his shoulder; and that Rambo was defending himself when he pushed Doe into the wall. Sgt. Right may well corroborate Officer Rambo's version of the incident. In the absence of strong, supportive testimony from others who witnessed the event, it is unlikely that Doe will prevail.

But remember, a second incident occurred in the elevator when Doe, who was in restraints, was struck repeatedly in the ribs by Officer Rambo. If the video tape confirms Doe's account of the events, it would seem that Officer Rambo's actions were malicious and sadistic, intended to cause harm.

All right, perhaps Doe can satisfy the legal standard as to whether excessive or unnecessary force was used. Now let's look at the nature of Doe's injuries to answer the question of whether they were constitutionally significant (and not *de minimis*). The medical records show that Doe suffered a cut lip that required no stitches, a bloody nose (not broken), a swollen wrist (not broken), bruising around the ribs (but again, no fractured ribs), and a sore back. Doe continues to complain about back pain and pain in his wrist; however, we have no documentation (through medical records) to prove these claims because Doe became discouraged and did not request follow-up medical care.

As stated above, a showing of "significant injury" is necessary to establish a valid claim and to convince a jury that Doe should recover a significant amount of money in compensation for the wrong he suffered. Juries are often reluctant to force an officer to pay money to an inmate. A verdict for Doe will depend upon strong evidence that Officer Rambo acted illegally and that, as a result, Doe suffered a serious injury, such as broken bones, cuts that required stitches, or the infliction of unjustifiable and severe pain. In such a case, the medical records that document plaintiff's injuries are very important evidence.

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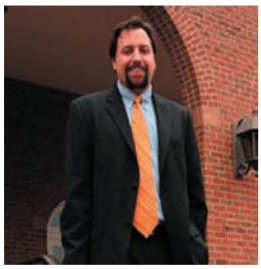
FIVE VOLUNTEERS STRENGTHEN NCPLS BOARD

During the last three months, NCPLS has had the good fortune to recruit five distinguished lawyers to help provide guidance and leadership on its Board of Directors.

J. Bryan Boyd and Johnny Criscoe are professors of law at the Norman Adrian Wiggins School of Law, Campbell University. Mr. Criscoe has served as faculty supervisor for two student programs that provide assistance to prisoners. Professor Boyd teaches legal research, legal and judicial writing, and appellate advocacy.



J. Bryan Boyd

Johnny Criscoe

Attorney Arnita M. Dula serves as a staff attorney for the city of Hickory, NC. Ms. Dula was selected for that position because of her demonstrated leadership in education and her legal experience, both of which will enhance her contributions on the Board.

Arnita M. Dula

From the University of North Carolina Hospitals hails Associate General Counsel Paul Meggett. Having clerked for former Chief Justice Burley Mitchell, Mr. Meggett is active in the NC Bar Association where he served as Co-Chair of the Minorities in the Profession Committee, as well as the Chair of the Momentum 2010 Joint Diversity Task Force.

Paul Meggett

Theresa A. Newman is the Associate Dean for Academic Affairs at Duke University School of Law. Dean Newman teaches Wrongful Convictions, a course that explores the causes of wrongful convictions and leads students in investigations of North Carolina prisoners' claims of actual innocence. She also serves as the President of the North Carolina Center on Actual Innocence (a non-profit organization dedicated to investigating prisoners' claims of innocence), and is a member of the North Carolina Chief Justice's Commission on Actual Innocence, which is studying the causes of wrongful convictions and making recommendations to prevent them. At the Law School, Dean Newman serves as faculty adviser to the Law School's student-led Innocence Project.

Theresa A. Newman

Each of these distinguished individuals will bring education, experience, and expertise to the NCPLS Board of Directors which will continue to infuse the organization with energy and enthusiasm as they set policy and provide guidance for the organization. We are grateful for their involvement, just as we appreciate the leadership and long service of President Fred Williams, Vice-President Susan O. Olive, Dean Ronald Steven Douglas, Treasurer, Immediate Past President Gary Presnell, Attorney James Crouch, Barry Nakell, Esq., Professor Ronald F. Wright, and Jim Blackburn. NCPLS depends upon this group of hard-working volunteers for the leadership they provide.

NC Prisoners Unreasonably Denied Access to Publications

By: NCPLS Staff Attorney Dawn Ducoste

Imprisonment strips inmates of most basic liberties. Along with physical constraints, prisoners have a limited right to make their own medical care decisions, no right to choose where they are housed or how they are classified, and no right to vote, to name just a few restrictions. The Supreme Court, however, has held that prisoners do not surrender all constitutional rights at the prison gate. *See, e.g., Wolf v. McDonnell*, 418 U.S. 539 (1974). Under the 1st Amendment, one of the protections prisoners retain is the right to receive reading materials directly from publishers, subject to censorship by prison officials only if the publication poses a threat to prison security, order, or inmate rehabilitation. *Thornburgh v. Abbott*, 490 U.S. 401(1989). Prisoners are also entitled to a "minimal level" of due process when this fundamental right is withheld. *Procunier v. Martinez*, 416 U.S. 396 (1974), overruled on other grounds by *Thornburg*, *id.* at 413.

The N.C. Division of Prisons Policy & Procedures Manual, Chapter D.0100 and following sections describe the process and criteria for censoring incoming publications. In summary, when a publication arrives at a facility, it is screened to determine whether it is deemed to pose a security threat. If that initial determination is made, the inmate is to be notified and given the option to forward the publication, have the publication destroyed, or appeal the decision to the DOC Publication Review Committee (PRC). If the PRC determines that the publication poses a threat, the inmate is to be notified, and that specific publication is then listed on a "Master List of Disapproved Publications," which is to be available for all inmates' review.

On their face, these rules appear to clearly define an established procedure which comports with the law. However, in practice, the policies are often arbitrarily and inconsistently applied. Many prisoners have written NCPLS complaining that their publications have been denied without notice, without explanation, and without an opportunity to appeal. Reported problems also include inconsistent publication rejections, magazines being rejected on wholesale basis, and after rejection, magazines not being forwarded as requested. Prisoners have been denied seemingly innocuous publications such as religious periodicals, music magazines, books by and about Malcolm X, books with gay and lesbian themes, Sports Illustrated, and even Oprah Winfrey's "O Magazine." NCPLS has spent the last two years negotiating with the DOC to improve the inconsistently applied procedures and the lengthy delays of the PRC without success.

A *pro se* lawsuit was filed this year against the DOC, and NCPLS has agreed to undertake representation. We are considering whether to seek the certification of a class so that any ruling would generally apply to all North Carolina prisoners, enforcing their right to receive publications without unreasonable or arbitrary constraints. With so few privileges, the right of prisoners to expose themselves to ideas and information from the outside world is of particular importance. When such ideas or information pose no threat to prison security, there is no legal reason to withhold such literature. Ffundamental rights afforded constitutional protection must be accorded deference and respect. The name of the case is *Urbaniak v. Beck, et al*., (5:06-CT-3135-FL) (EDNC 2007).

Program Audit of NCPLS Complete

As many readers of ***Access*** will remember, the N.C. General Assembly transferred contract responsibility for North Carolina Prisoner Legal Services (NCPLS) from the N.C. Department of Correction (DOC) to the Office of Indigent Defense Services (IDS) in 2005. The General Assembly also asked IDS to evaluate NCPLS and to report its findings to the Legislature (S.L. 2005-276, §14.9(b)). IDS contracted with the University of North Carolina's School of Government to conduct the evaluation. The evaluation report was published and submitted to the General Assembly on May 1, 2007.

The evaluation had three main objectives:

1. To understand and document NCPLS's case-management process;

2. To determine the extent to which NCPLS is providing appropriate, quality responses to inmates in light of the requirements of the contract, the standards prescribed by the Rules of Professional Conduct, NCPLS's case acceptance priorities, and peer reviewers' views of the needs and interests of the prison population; and

3. To review select cases that IDS had received written complaints from NCPLS clients with respect to the appropriateness and quality of NCPLS's response in light of the requirements of the contract, standards prescribed by the Rules of Professional Conduct, and auditors' views of the needs and interests of the prison population.

The evaluation had three major parts. First, each major step in NCPLS's case management process was documented. Second, NCPLS cases from each major practice area were selected for review by 16 different attorney auditors — lawyer volunteers with at least some legal background in the particular area of law to be reviewed.

The case sample included 110 randomly selected case files (50 intake files, 30 post-conviction files, 20 jail credit files, and 10 civil files), 20 semi-random litigation files (10 post-conviction and 10 civil litigation files), and 19 files specifically identified by IDS. With the exception of the jail credit files, the file for each selected case was examined by three separate auditors.

Finally, to provide context for the evaluation, members of NCPLS's leadership team (the executive director, administrative officer, team leaders, and the executive assistant were interviewed).

Based on a 5-point scale, NCPLS achieved an overall ranking of 4.19.

NCPLS is grateful to the Office of Indigent Defense Services and the UNC School of Government for conducting a comprehensive evaluation of program operations and services. In a planning process that extended over at least three months and an audit that extended over an 18-month period, that evaluation was comprehensive.

NCPLS is also grateful to the fine, public-spirited attorneys who served as evaluators, devoting three full business days to participate in the audit of NCPLS. That service was a realization of the highest aspirations of the legal profession, providing *pro bono* public service. Many of the auditors possessed specialized knowledge and were familiar with the law governing the rights of prisoners, the rules and regulations of the DOC, and the challenges posed by prisoner litigation. It would have been difficult or impossible to have assembled a more qualified, competent team from members of the North Carolina Bar. NCPLS is deeply grateful for their service.

As is always the case, many of the factors that were part of this evaluation are not controlled by NCPLS. For instance, NCPLS has no control over the growth of the prison population or the number of prisoner requests for legal assistance that are received on any given day, or over the course of time. Further, program resources are almost entirely derived from the "Bounds" contract, which has historically provided compensation for attorney and paralegal hours, but no funding for support staff such as a financial officer, a bookkeeper or investigators.

Regarding post-conviction work, NCPLS depends upon the offices of clerks of court around the state to provide the documents necessary to assess possible grounds to collaterally challenge the convictions and/or sentences of our clients. (It is not possible for NCPLS to

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Program Audit of NCPLS Complete (Continued)

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routinely travel the 100 counties of the state to copy these materials, and clerks of court are often short-staffed and overburdened. Thus, responses to our document requests are often delayed, sometimes for months.)

As many of our readers know, the law governing the rights of prisoners provides little protection and imposes a morass of administrative and procedural complexities, as well as heightened legal standards. For example, prisoners must exhaust all available administrative remedies before they may institute federal litigation. *Porter v. Nussle*, 534 U.S. 516 (26 Feb. 2002). Failure to comply any prison procedural rule bars federal action. *Woodford v. Ngo*, 126 S.Ct. 2378, 165 L.Ed.2d 368, 74 USLW 4404 (2006). Prison officials may freely impinge upon the constitutional rights of prisoners when there is a "legitimate penological" reason for doing so. *Turner v. Safley*, 482 U.S. 78 (1987). And other laws impose broad constraints on a prisoner's hope for relief through the courts. See, for example, the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) (AEDPA); 28 U.S.C. §1244(d)(1) (one-year statute of limitation for filing a petition for writ of habeas corpus in federal court); the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-73, as amended, 42 U.S.C. §1997e(a) (1994 ed., Supp. V) (precluding suit where there has been no physical injury, requiring exhaustion of all available administrative remedies, and requiring an indigent prisoner proceeding *in forma pauperis* to pay the full costs of the litigation, unlike any other class of indigent litigants). All of this raises special challenges in prisoner litigation.

The peer review of NCPLS case files constitutes an objective assessment of the quality of our work. The review of hundreds of files across a number of substantive areas of law during a three-day period resulted in an overall average rating by the Audit Team that exceeded 4 points on a 5-point scale. The Audit Team thus concluded that NCPLS functions at a high level. This ranking demonstrates the commitment of our staff to fulfill the program's mission, to provide high quality legal services to prisoners, and thereby to satisfy the state's constitutional obligation to provide prisoners meaningful access to the courts.

NCPLS provided information, advice, and administrative advocacy in 2005 in some 13,000 requests for assistance. NCPLS has been able to obtain relief for many of our clients administratively or through means other than litigation. For example, in the seven months prior to the report, our advocates obtained jail credit totaling 20,477 days (more than 57 years of freedom) for North Carolina inmates. The $1,401,650.65 savings to North Carolina taxpayers (calculated by multiplying the total number of days credited by the average daily cost of incarceration - $68.45) is another tangible benefit of this work.

Overall, NCPLS feels that the process employed in developing and conducting the audit was fair and open. We were generously provided an opportunity to offer our suggestions to improve the process (some of which were accepted), and we were permitted to participate in the selection of the Audit Team. Because the audit presented a realistic chance to gain insight and advice for improving program operations and the services

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Am I Entitled to More Jail Credit?

By: NCPLS Staff Members Patricia Sanders, CLA, & Beth McNeill, Esq.

NCPLS receives thousands of requests every year to assist inmates in obtaining the sentence reduction credit (jail credit) they are due for time spent in jail on a charge for which they were ultimately convicted. Our Jail Credit Team consists of six full-time paralegals (working under the supervision of an attorney) whose sole job is to investigate inmates' claims that they are entitled to additional jail credit. After reviewing the following basic information regarding what qualifies as jail credit, if you believe you are entitled to additional jail credit, we encourage you to write to NCPLS and request that we investigate the matter for you.

In North Carolina, there are two main statutes that govern jail credit: N.C. Gen. Stat. 15-196-1 and N.C. Gen. Stat. 15-196.2. North Carolina Gen. Stat. 15-196.1 explains what time shall be counted to reduce time to be spent in prison. This statute states:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

Case law defines confinement – *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In *Morrissey*, the U.S. Supreme Court pointed out that a person who does not have their liberty restricted, who may be gainfully employed, is free to be with family and friends, and may function in society as a responsible, self-reliant person is not "confined." *Id*. at 482.

N.C. Gen. Stat. 15-196.1 also states that to receive jail credit on an active sentence a defendant must have been confined on that particular charge. This statute does not allow defendants to receive credit for the time they spend in a county jail waiting to be admitted to the DOC after they are convicted. Many inmates are not aware of this. An active sentence usually begins the day a judge enters the judgment against the defendant. Once an active sentence starts, regardless of where you are housed, you are no longer entitled to receive credit for the time you spend in a county jail waiting to be admitted to the DOC because your active sentence has already begun and the duration of the sentence is being diminished day-by-day.

There are exceptions to the rule that an active sentence begins the day the judge enters the judgment – a suspended sentence (probation) and a split sentence. A suspended sentence allows the defendant to remain in the community on probation, subject to certain requirements imposed by the court (such as reporting to a probation officer routinely). The second situation is one in which a short term of imprisonment begins immediately, known as a "split sentence," followed by a period of probation. A judge sometimes has the discretion to impose a portion of an active sentence, followed by release on probation for a specified period. In such cases, the defendant serves a portion of his sentence in the Department of Correction (DOC) or a county jail, and

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Am I Entitled to More Jail Credit? (Continued)

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is then placed on probation. When a judge imposes a split sentence, the judge has the option to apply any jail credit to which a defendant may be entitled, either to the term of imprisonment *or* the suspended portion of the sentence. N.C. Gen. Stat. 15A-1351(a). Again, many inmates are not aware of this statute. If you are serving a split sentence, before writing to inquire about your jail credit, you should first check your "Judgment Suspending Sentence – Felony, Imposing an Intermediate Punishment, Imposing a Community Punishment (Structured Sentencing)." There is a specific place on this form where the judge has the option to give credit toward the sentence imposed, which is the suspended portion (the probation), or the imprisonment required for special probation (the active term). If a judge marks the box by "the sentence imposed above," the defendant is not entitled to that credit unless or until his probation is revoked and and he is returned to prison.

Inmates often write to NCPLS asking about credit for time spent on house arrest or on probation. Inmates are not entitled to credit for time spent on either house arrest or probation. In *State v. Jarman*, 140 N.C. App. 198, 535 S.E.2d 875 (2000), the North Carolina Court of Appeals determined that when an individual is on house arrest, he is not considered to be confined as defined by case law. Therefore, defendants are not entitled to any credit for the time spent on house arrest. In *Hall v. Bostic*, 529 F.2d 990 (4th Cir. 1975), *cert. denied*, 425 U.S. 954, 96 S.Ct. 1733, 48 L.Ed.2d 199 (1976), the court determined that there is nothing unusual in the denial by North Carolina law of credit for time spent on probation or parole against a prison sentence. It is common in both state and federal probation and parole systems, and the validity of such denial has been consistently recognized both in federal and state decisions.

N.C. Gen. Stat. 16-196.2 explains how jail credit is applied to multiple sentences:

> In the event time creditable under this section shall have been spent in custody as a result of more than one pending charge, resulting in imprisonment for more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent.

As this statute explains (rather unclearly), jail credit is treated differently when a defendant receives more than one conviction, depending on whether the sentences are ordered to run concurrently (together) or consecutively (one after the other, also known as "boxcarred"). If a defendant receives two or more sentences on the same day *and was in jail on any of the charges for the entire time*, then sentence reduction credit should be applied to all concurrent sentences.

Keep in mind that this statute works hand-in-hand with N.C. Gen. Stat. 15-196.1. If a person is arrested and incarcerated on a charge on February 1 (for example), and a second charge is served on March 2, it is uncertain whether or how much jail time will be awarded on the second charge. The calculation of jail credit in this circumstance can be complex and the correct calculation of credit for specific sentences will likely require review by one of our jail credit paralegals.

If a defendant is in jail on more than one charge, is convicted on all charges, receives more than one sentence, and the sentences are run consecutively, then N.C. Gen. Stat. 15-196.2 applies. Again, the way it applies is not entirely clear. The calculation of jail credit under these circumstances can also be murky and uncertain. The assistance of our advocates may be very useful in such instances.

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Am I Entitled to More Jail Credit? (Continued)

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Case law explains the proper calculation of jail credit. In *State v. Richardson*, 295 N.C. 309, 295 S.E.2d 754; 1978 N.C. LEXIS 885, the Supreme Court of North Carolina determined the proper way to calculate jail credit. The Court held that jail credit is computed by excluding the first day and including the last. This means that when jail credit is calculated, you do not count the first day you are in the jail, but you do count the day you were transferred or released. In other words, you do not count both days. However, many jails and clerks still count both days.

When a defendant receives a suspended sentence but is ordered to participate in the Drug Alcohol Recovery Treatment (DART) program, the North Carolina Court of Appeals determined in *State v. Lutz*, 628 S.E. 2d 34, (N.C. Ct. App. 2006), that he is entitled to credit for time spent participating in DART. There are two DART programs. The first is the DART-Cherry program which a defendant participates in as part of the terms of special probation. There is also the DART program in which inmates can participate while in custody of the DOC. Day-for-day credit should be received when a defendant participates in the DART-Cherry program. However, in the DOC DART program, merit or earned time credit is usually given as an incentive for the inmate to participate. The merit or earned time will be less than day-for-day.

In the past, NCPLS also represented prisoners in cases seeking credit for the time they spent in IMPACT (Intensive Motivational Program of Alternative Correctional Treatment). That question was settled in *State v. Hearst*, 356 N.C. 132, 567 S.E. 2d 124 (August, 2002), The North Carolina Supreme Court ruled that anyone who spent time in the IMPACT program was entitled to receive credit against their activated sentence for that particular conviction. However, the IMPACT program was discontinued in 2002.

Inmates also write to us about credit for time spent in a jail in another state. This usually happens when a defendant on probation leaves the State of North Carolina and is picked up in another state. If the defendant is picked up in another state simply because a North Carolina fugitive warrant is issued, then the defendant is entitled to credit for all the time spent in the other state's custody, plus the amount of time it took for the defendant to be transported back to North Carolina. That is because the prisoner is being held on the North Carolina charge and N.C. Gen. Stat. 15–196.1 still applies. However, if the defendant is picked up in another state on a criminal charge in that state, then the question becomes more complex. Many factors must be taken into account before a determination can be made.

NCPLS jail credit paralegals investigate all kinds of questions regarding sentence reduction credits, including jail time. If you believe that you have not received all of the jail credit to which you are legally entitled, we encourage you to write NCPLS with a complete factual account. The more detail you can provide in your letter, the easier it will be for the paralegal to determine whether your jail credit has been properly calculated.

Meeting the Challenges of Re-Entry

By: Staff Attorney Michael G. Avery

According to the Department of Correction, over 26,000 inmates are projected to be released from North Carolina prisons in 2007. Furthermore, a study done by the Bureau of Justice Statistics indicates that the national recidivism rate (the rate at which released prisoners relapse into criminal behavior) is greater than sixty percent. Of those, almost fifty percent were re-convicted within three years of their release. See Patrick A. Langan, Ph.D. & David J. Levin, Ph.D., *Bureau of Justice Statistics Special Report*, June 2002, NCJ 193427.

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North Carolina Sentencing and Policy Advisory Commission Update

By: Billy Sanders, Commissioner & NCPLS Office Administrator

The North Carolina Sentencing and Policy Advisory Commission has a statutory duty to review all proposed legislation that creates a new criminal offense, changes the classification of an offense, or changes the range of punishment or dispositional level for a particular classification. The Commission then makes recommendations to the General Assembly regarding the proposed legislation. The Commission recently reviewed approximately 90 such felony bills drafted during the current legislative session.

The Commission can take three possible actions by majority vote: 1) find the bill is consistent with the Structured Sentencing Offense Classification Criteria; 2) find the bill is inconsistent with the Offense Classification Criteria; or 3) find that the Offense Classification Criteria are not applicable. (The Offense Classification Criteria do not apply to homicide offenses or drug trafficking offenses.)

The Classification Criteria are standards developed by the original Commission to decide if the punishment proposed fits the harm the bill is intended to deter. As an example, the Offense Classification Criteria for a Class G felony is "serious property loss from the person or the person's dwelling." Class G felonies are reserved for losses caused by property losses of this type because there is greater risk of danger to public safety in those situations. If the bill creates a Class G offense and the crime does not involve "serious property loss from the person or the person's dwelling," the Commission will ordinarily find that the punishment in the bill is not consistent with the Offense Classification Criteria. In many cases, the Commission will include a note that explains why a punishment was found to be inconsistent with the Offense Classification Criteria.

Proponents of new crime legislation have occasionally submitted bills that are inconsistent with the principles of Structured Sentencing in a different way – they contain recidivist (repeated offenses) principles which are already accounted for within Structured Sentencing itself. As an example, a recent bill proposed criminal punishment for the operation of a "Chop Shop," an illegal enterprise which salvages stolen cars for parts and sells them on the market. The bill proposed that a first offense be punished under Class G – which was itself problematic based on the above criterion – and a Class F offense for the second offense.

Under Structured Sentencing, prior criminal convictions are used to determine the range of punishments within a Felony Class. For example, a person convicted of a Class G offense receives Four Prior Record level points. On a second conviction of any felony, the range of possible punishments increases by application of the Prior Record Level. In the case of the "Chop Shop" bill, not only was punishment of the crime inconsistent with the Offense Classification Criteria, it created a recidivist statute which is inconsistent with the principles of Structured Sentencing and one that can have a disproportionate effect on prison resources. Predictability in cost and prison housing needs were among the primary rationales for adoption of the Structured Sentencing Act.

An earlier example of the Sentencing and Policy Advisory Commission's work was its analysis and report related to an issue regarding Youthful Offenders. The Commission's report was submitted to the General Assembly prior to this year's legislative session and recommended that youths should not be tried as adults until they attain the age of eighteen. (At present,

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Sentencing and Policy Advisory Commission Update (Continued)

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North Carolina is in the minority of states that allow youths to be tried as adults at the age of 16).

As a result, a bill was introduced into the House of Representatives which adopted the Commission's recommendation. House Bill 492 can be accessed at *www.ncleg.net/Sessions/2007/Bills/House/HTML/H492v1.html*, or by writing to:

Legislative Library
N.C. General Assembly
16 West Jones Street
Raleigh, NC 27601

The bill has a long list of sponsors, led by former NCPLS Board Member Alice Bordsen.

A recent study conducted by the Centers for Disease Control - Prevention Task Force on Community Preventive Services - concludes that the treatment of youthful offenders under age 18 as adults is counterproductive. A summary of the study can be found at: *www.edjj.org/focus/TransitionAfterCare/CDC%20task%20force%20one%20pager%204.20.07.pdf*, or by writing to:

Robert A. Hahn, Ph.D., M.P.H.
Coordinating Scientist
National Center on Education,
Disability, and Juvenile Justice
University of Maryland
1224 Benjamin Building
College Park, MD 20742

You can request the "Effects on Violence of Laws and Policy Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System," published in the American Journal of Preventive Medicine (April 2007).

Should the legislation become law, fewer young people would be going to prison in North Carolina, and instead would receive the types of educational and other services available to juveniles elsewhere.

Of course, after the Commission conducts its reviews and makes its recommendations, the General Assembly can choose to follow, modify, or ignore the Commission's recommendations. However, in the overwhelming majority of cases the recommendations of the Commission receive favorable attention and are generally acted on by legislators.

Meeting the Challenges of Re-Entry (Continued)

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Many challenges confront those re-entering civilian life, including employment and housing, family reunification issues, drug and alcohol treatment, health care services, and transition for special populations such as sex offenders, domestic violence offenders and youthful offenders. Recently, the Department of Correction's Office of Transition Services (OTS) held its annual conference to address some of these issues. The focus of this year's conference was "Shaping the Future of Transition" by exploring different approaches which have proven effective in assisting people to make successful transitions and avoiding recidivism.

Prior to an offender's release, OTS provides services "designed to help an inmate who is pending release to live independently, to work, to secure and maintain a residence, to maintain health, to assume family responsibilities, to participate in community-based spiritual activities and to engage in a law-abiding, responsible lifestyle." See *www.doc.state.nc.us/rap/OTS.htm; and www.doc.state.nc.us/transition/index.htm*. Some of these services include the Going Home Initiative, Job Start, the Inmate Construction program, and a variety of apprenticeship and vocational program options.

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The ADA & How it Relates to Prisoners

By: Staff Attorney Michael G. Avery

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability by public entities. 42 U.S.C. §12101. Title II of the ADA provides that a disabled person shall not be denied the benefits of, excluded from participation in, or subjected to discrimination under any program, services, or activity conducted by city, county or state governmental entities. 42 U.S.C. §§12111-117.

The ADA prohibits discrimination against people with disabilities. A person who suffers from a disability is one who has, or is regarded as having: (1) "a physical or mental impairment" that (2) "substantially limits" (3) one or more "major life activities." *See* 42 U.S.C. §12102(2).

A "mental impairment" is "any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional and mental illness, and specific learning disabilities." 28 C.F.R. §36.104.

The ADA is designed to prohibit discrimination against *qualified persons with disabilities*. The statute defines a "qualified person with a disability" as:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.A. §12131(2). (The Rehabilitation Act, 29 U.S.C. §794, also prohibits discrimination against the disabled.)

The ADA contains three titles which prohibit discrimination in: employment (Title I, §§12111-12117); public services (Title II, §§12131-12182 12165); and public accommodations (Title III, §§12181-12189). This article focuses on Title III, which prohibits discrimination by public accommodations. Specifically, Title III provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. §12182(a).

In 1998, the U.S. Supreme Court unanimously determined that the ADA extends to state prisons. *PA Dept. of Correction v. Yeskey*, 524 U.S. 206 (1998). According to the Court, the ADA applies to medical services, education and vocation programs, library access, and visiting and recreational activities, among other things. *Id.*

Under either statute (the ADA or the Rehabilitation Act), the state is only required to make "reasonable modifications" in its programs, services, or accommodations to avoid discrimination. 28 C.F.R. §35.130(b)(7). What constitutes a "reasonable modification" must take into consideration the needs of the prison environment for order, security, management, etc. Courts traditionally pay great deference to the decisions of prison administrators in determining how prisons should be run. *See*, 28 C.F.R. 35, App. A at 466 (1995). Predominate issues in prison ADA-related litigation cases include physical accessibility issues and accommodations for deaf or blind prisoners. See *Love v. Westville Correction Center*, 103 F.3d 558 (7th Cir. 1996) and *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997).

The Prison Litigation Reform Act (PLRA), which bars prisoners' claims for mental and emotional damages without a prior showing of physical injury (42 U.S.C. §1997e(e)), has been applied to

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The ADA & How it Relates to Prisoners (Continued)

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ADA claims. *See Cassidy v. Indiana Dept. of Corr.*, 199 F. 3d 374 (7th Cir. 2000). Furthermore, the administrative exhaustion requirement of the PLRA, 42 U.S.C. §1997e(a), applies to claims brought under the Rehabilitation Act, as well. *See Porter v. Nussle*, 534 U.S. 516 (2002).

The Preamble to those regulations, however, explains that a substantial limitation occurs "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. Pt. 36, App. B, 600-601 (1997). Similarly, under Title I, "substantially limits" is defined as "significantly restricts as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity." 29 C.F.R. §1630.2(j)(1)(ii). Substantial limitations need not rise to the level of utter inabilities. *See Bragdon v. Abbott*, 118 S.Ct. 2196, 2206 (1998); *Taylor v. Phoenixville Sch. District*, 184 F.3d 296, 307 (3rd Cir. 1999). EEOC guidelines under Title I state that whether an impairment substantially limits a major life activity is determined in light of: 1) the nature and severity of the impairment, 2) its duration or expected duration, and 3) its permanent or expected permanent or long term impact. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995).

The Seventh Circuit has observed that in some cases the terms "substantially limited" and "major life activity" (discussed in the next section) are interrelated and should not be treated as two separate criteria. *See United States v. Happy Time Day Care Center*, 6 F. Supp. 2d 1073, 1080 (W.D. Wis. 1998). This is particularly the case when the major life activity implicated encompasses a broad range of lesser activities. For example, as will be discussed below, caring for one's self is a major life activity that includes a wide range of lesser activities. Therefore, a determination as to whether an individual is substantially limited in caring for one's self requires a determination based upon the cumulative effect of overall impairment. *See id.* at 1081; *see also Vande Zande v. Wisconsin Department of Administration*, 44 F. 3d 538, 544 (7th Cir. 1995).

Major Life Activities

The Department of Justice's regulations do not expressly define "major life activities," but they do provide a list of illustrative, but not exhaustive, examples of major life activities: "major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. §36.104. The range of activities Congress sought to include in this definition is extremely broad: as one court of appeals reasoned, the "plain meaning of the word 'major' denotes comparative importance" or "significance," and the term "life" is "notable for its breadth." *Abbott v. Bragdon*, 107 F.3d 934, 939-40 (1st Cir. 1997), *cert. granted*, 118 S. Ct. 554 (1997); *see also Doe v. Kohn, Nast & Graf*, 862 F.Supp. 1310,1320 (E.D. Pa. 1994) (holding that "the term 'major life activities' *** encompasses a lot [and includes] the various major activities embraced within the full scope of one's life"). **See next edition**.

Meeting the Challenges of Re-Entry (Continued)

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There is also a multitude of public and private organizations providing supportive services for those inmates already released from prison or jail. As many of these organizations focus their efforts on individual communities, the variety of options available varies from community to community. A fairly comprehensive list of these resources organized by county can be obtained by writing to NCPLS.

Establishing Excessive Force (Continued)

(Continued from Page 3)

Unfortunately, while Doe may have been able to prove a claim of excessive force for the elevator incident, the court would probably dismiss the case on defendants' motion for summary judgment because Doe's injuries would likely be seen as *de minimis*.

This is the kind of analysis that a legal professional uses to assess a case and the chance of success in litigation. Decisive factors include the extent of the injury suffered and witnesses, documents, or other evidence that can corroborate an account of improper or illegal conduct. For this reason, it can be critical that you document the incident as best you can. This will help lay the groundwork if you should decide to file a lawsuit. In this regard, witness statements can be especially helpful.

To be of use in court, a sworn statement must (1) be made on personal knowledge, (2) set forth such facts as would be admissible in evidence, and (3) show that the declarant is competent to testify to the matters stated in the declaration. Additionally, the declaration must be signed and dated. For use in state court, such a document must be notarized. In federal court, however, it is enough (1) that the declaration contain the following language: "I declare under penalty of perjury that this statement is true and correct to the best of my knowledge;" and (2) the declaration must be signed and dated by the witness. Finally, in order that the witness may be located if his testimony should be needed in the future, it is important that a permanent address be given (either that of the witness, a spouse or a family member through whom the witness can be located). For this reason, a prison identification number and/or a date of birth can often be helpful.

Finally, there are a great many things to think about before filing a lawsuit – the time and cost of litigation, the chance of winning the lawsuit, and the amount of any potential recovery. But one of the most important things to be aware of is the statute of limitation. A statute of limitation is a law that sets a time-limit for filing a lawsuit, and there are different time-limits for filing different kinds of lawsuits. Usually, a case alleging a violation of constitutional rights may be filed within three years of the incident upon which the suit is based. Failure to file a lawsuit within the time allowed by the statute of limitation will ordinarily prevent the injured party (plaintiff) from ever getting the case into court.

Program Audit of NCPLS Complete (Continued)

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we deliver to our clients, we were happy to work with IDS and SOG, fully cooperating in the process to provide assistance and support at every juncture. The objective findings of the Audit Team, rating NCPLS operations and services at 4.19 on a 5-point scale, we believe to be reasonably accurate. Although we are proud of that ranking, we can never be satisfied with anything less that perfection in serving our clients. We will continue striving to improve those services.

We respect and appreciate the manner in which IDS conceived and fulfilled the mandate of the General Assembly throughout the course of the program review. We especially appreciate the leadership of IDS Executive Director Malcolm Ray "Tye" Hunter, Jr., and Assistant Director Danielle M. Carmen. We are grateful to Dr. Maureen Berner, Associate Professor at the School of Government, who was largely responsible for the conception, design, and execution of the audit plan. Finally, we thank Joe Gavrilovich, MPA, John Rubin, Professor, UNC School of Government and Virginia L. Hebert, Legal Associate, Office of Indigent Defense Services, for their assistance in planning and conducting the audit.

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