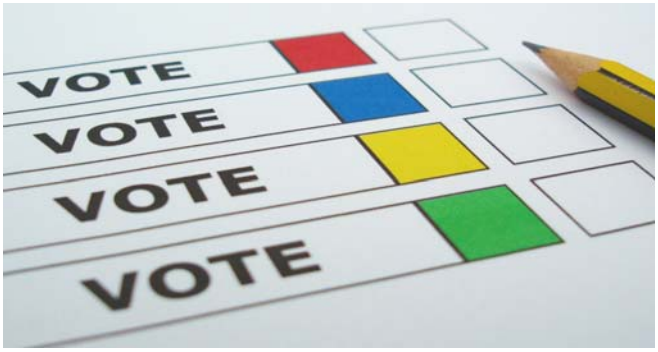
The Newsletter of North Carolina Prisoner Legal Services, Inc. Volume VIII, Issue 3, October 2008

NCPLS Access

The Facts Regarding a Convicted Felon's Voting Rights in North Carolina

By NCPLS Staff Attorney Michael G. Avery

There are many myths and misunderstandings surrounding a convicted felon's right to vote. Unfortunately, many believe that having a felony record absolutely prohibits one from participation in the electoral process. Considering the historic presidential race currently taking place, it is of the utmost importance that those with a felony record understand the differences between fact and fiction.



The U.S. Constitution is silent with regard to whether a person convicted of a felony loses the right to vote. As a result, the decision is left up to the individual States as to whether and to what extent a felon's right to vote is restricted. The differences can range from a lifetime prohibition to no restrictions whatsoever, including granting felons the right to vote while incarcerated, all depending upon which State one resides. Source: Legal Action Center. "After Prison: Roadblocks to Re-Entry—A Report on State Legal Barriers Facing People with Criminal Records." New York, NY: Legal Action Center, 2004 North Carolina is one of eighteen states which prohibits people from voting while they are incarcerated, on parole, or serving probationary sentences. North Carolina General Statute §163-59 specifically provides that "any person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, [shall not be allowed to vote] unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

In order to have one's citizenship rights restored, North Carolina General Statute §13-1 provides that any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the . . . unconditional discharge of an inmate by the State Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction; or of a defendant under a suspended sentence by the court.

Although a convicted felon does lose his or her right to vote in North Carolina, the loss is only temporary and is automatically restored upon the completion of incarceration, probation or parole. Other than registering to vote, a responsibility which all citizens must do in order to vote, there is no specific process to endure or paperwork to complete to have one's voting rights restored.

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 Academy of Trial Lawyers, the ACLU of North Carolina, and the Office of Indigent Defense Services.

NCPLS serves a population of more than 38,600 prisoners and 14,000 pretrial detainees (with about 250,000 annual admissions), providing information, advice, and representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

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

Articles, ideas and suggestions are welcome.
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NCPLS Welcomes New Board of Directors

The Board of Directors for NCPLS has recently been reconstituted, following discussions between the Office of Indigent Defense Services (IDS) and the managing staff of NCPLS. NCPLS is pleased to recognize the following individuals who have offered to give their time and service to our program by acting as Directors:

Ronald Steven Douglas, Assistant Dean NCCU School of Law. Dean Douglas is the current Chairman of the Board of Directors.

Keith Faulkner - Mr. Faulker is the Executive Associate Dean for Administrative and Academic Affairs Norman Adrian Wiggins School of Law at Campbell University. He was appointed by the North Carolina Bar Association as its representative to the Board.

Katherine Parker – Ms. Parker is the Executive Director of the ACLU of North Carolina. She is also the Chair of the Civil Rights Section of the N.C. Advocates for Justice (formerly the North Carolina Academy of Trial Lawyers). She serves as the ACLU's representative on the Board.

Brad Bannon – Mr. Bannon is an attorney in Raleigh with the firm of Cheshire, Parker, Schneider, Bryan & Vitale and a 1997 graduate of the Campbell Law School. He is perhaps best known for his recent success as one of the defense attorneys in the Duke Lacrosse case.

Maitri "Mike" Klinkosum – Mr. Klinkosum is an Assistant Public Defender for Wake County. He is a 1995 graduate of the University of Miami School of Law. Mr. Klinkosum is an active participant in the N.C. Advocates for Justice and is the author of the *North Carolina Criminal Defense Motions Manual*.

Carlos Mahoney – Mr. Mahoney is an attorney in Durham with the firm of Glenn, Mills, Fisher and Mahoney. He is a 1999 graduate of the UNC School of Law. He most recently served as counsel for Erick Daniels who was wrongfully convicted in Durham for armed robbery. On September 20, 2008, after hearing evidence presented by Mr. Mahoney, Judge Orlando Hudson threw out Mr. Daniels' conviction and ordered his release from prison.

Elaine M. Gordon – Ms. Gordon is a staff attorney for the N.C. Center for Death Penalty Litigation. The CDPL is a non-profit law firm located in Durham, N.C., which provides both direct representation to inmates on North Carolina's death row, and consultation to attorneys working in the field of capital punishment litigation.

Darryl Hunt – Mr. Hunt was convicted for a 1984 rape/murder in Winston-Salem, N.C. He spent nearly 20 years in prison before finally being exonerated and freed. Following his release, he founded the Darryl Hunt Project for Freedom and Justice. He speaks around the country on issues related to wrongful convictions and offender

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The Safe and Humane Jails Project Receives Grant and Completes Mental Health Information Manual

By NCPLS Staff Attorney Michele Luecking-Sunman

The Safe and Humane Jails Project is continually searching for new ways to ensure that North Carolina's jails are safer and more humane. In 2007 the Project applied for and received a grant from the North Carolina Bar Foundation to write a manual to instruct Jail Administrators and their staff on the law and best practices in dealing with men and women who have mental illnesses in jails. The manual, *Identifying and Treating People with Mental Illness in North Carolina's Jails: A Practical Approach*, was completed this summer and was mailed to every Jail Administrator in the state.

As we prepared to write the manual we traveled the state and spoke with jail administrators, nurses, mental health professionals and inmates. We reached out to organizations both similar to and different from our own and made countless phone calls to people who might have an idea about how to confront one of the most daunting problems facing jails today, how to identify and treat people with mental illness who come to be housed in a corrections setting.

The problems surrounding this issue are large. Beginning in the early 1960s, states began to downsize and close their public mental health hospitals in response to social and legal reforms. Between 1955 and 1998, the rate of persons in mental hospitals declined from 339 to 29 per one hundred thousand persons.[1] Following this "deinstitutionalization," the federal government did not provide ongoing funding for community services, and while states cut their budgets for mental hospitals, they did not make commensurate increases in their budgets for community-based mental health services. The share of state spending devoted to mental health actually dropped by 15 percent from 1990 to 1997.[2]

Because of the problems plaguing community mental health systems and the limitations on public funding for mental health services,[3] many people who need publicly financed mental health services cannot obtain them until they are in an acute psychotic state and are deemed to be a danger to themselves or others.[4] Persons with mental illness who have prior criminal records or histories of violence have exceptional difficulty getting access to treatment, as many mental health programs simply will not accept them.

To confront these issues we endeavored to make the manual as brief and as user friendly as possible. It is comprised of seven chapters and includes information about how jails have come to house those with mental illnesses, the legal requirements jails must meet in treating mental illness, the law that is specific to North Carolina, programs in North Carolina, model projects across the country, specific warning signs for suicide, funding opportunities and contact information for local and national organizations that deal with mental health issues.

This manual is the beginning of what we hope will be a continuing conversation in identifying and treating those with mental illness in jails. In October we will attend the North Carolina Jail Administrator's Conference to discuss the manual with the attendees and continue the dialogue. We hope the manual will assist officials in carrying out their duties and ultimately benefit men and women housed in county jails who need access to mental health services.

(Footnotes)

[1] Richard Lamb and Linda Weinberger, "Persons With Severe Mental Illness in Jails and Prisons: A Review," *Psychiatric Services*, vol. 49, pp. 483-492, 1998. In Richard Lamb and Leona Bachrach, "Some Perspectives on Deinstitutionalization," *Psychiatric Services*, August 2001, vol. 52, no. 8, the authors estimated the number of occupied state hospital beds had fallen as low as 21 per 100,000.

[2] Bazelon Center for Mental Health Law. *Under Court Order: What the Community Integration Mandate Means for People with Mental Illnesses* (1999). See American Bar Association, Section of Criminal Justice, *Report to the House of Delegates*, p.3.

[3] For example, federal funding of community-based mental health services is greatly diffused, spread across numerous mandatory and discretionary programs. Within Medicaid, community-based mental health services run through more than six separate optional service categories. Moreover, the complicated federal scheme relies on numerous state and local funding streams. The inevitable result is a complex, confusing patchwork of programs, with fragmented services at the community level - a system that is especially difficult for Medicaid recipients with mental illness. See NAMI, Medicaid

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The Safe and Humane Jails Project Receives Grant and Completes Mental Health Information Manual (Continued)

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Funding of Mental Illness Treatment, http://www.nami.org/Content/ContentGroups/Policy/Issues_Spotlights/Medicaid_Funding_of_Mental_illness_Treatment1.htm, accessed on January 4, 2008.

[4] Because of the restricted access to community services, the phenomenon of "mercy arrests" has arisen in which police officers arrest manifestly psychotic individuals because they know that it is easier to channel them into treatment once they enter the criminal justice system than it is to find them hospital space, or even counseling at a community service institution.

What *North Carolina Bar v. Nifong* Was Not

By Katherine E. Jean

Since the trial of North Carolina State Bar v. Nifong in June of 2007, the Office of Counsel has received scores of letters from convicted criminal defendants claiming they were "Nifonged" and demanding that the State Bar secure their immediate release from prison.

One such complaint came from a man who was arrested while committing a robbery which was captured on videotape. He was prosecuted many years ago in far western North Carolina by someone other than Mike Nifong. The prosecutor made no statements to the media. DNA did not play a role in his trial. There was no allegation of discovery abuses or lying to the court. So how was he "Nifonged?" Just like the Duke lacrosse defendants, he said, he is innocent.

We also receive complaints from inmates who say they were "Nifonged" because the prosecutor "withheld evidence." When we look behind this allegation, it often turns out the inmate is not complaining that the prosecutor failed to turn over discoverable evidence. He is complaining that the prosecutor "withheld" evidence by not presenting the defendant's alibi evidence or the defendant's side of the story to the jury.

We also receive complaints from inmates saying they were "Nifonged" because the prosecutor had an improper motive to prosecute them.

These are just a few of the ways in which the Nifong case is invoked in support of propositions for which it does not stand. Nifong was not about whether there was sufficient evidence to justify prosecuting the Duke lacrosse defendants. When we filed the complaint on December 28, 2006, and the amended complaint on January 24, 2007, we had no way of knowing what the evidence at an eventual criminal trial might be. The attorney general did not declare the lacrosse defendants innocent until April 11, 2007, two months before the disciplinary trial began. We were not, as so many erroneously believe, asking the Disciplinary Hearing Commission to interpose its judgment for that of a judge who might allow the criminal case to go to a jury.

Nor were we asking the DHC to substitute its judgment for that of a jury that might have found guilt beyond a reasonable doubt. Nifong was not charged with failure to present both sides of the case to a jury. There was never an occasion in the criminal case to present evidence to a finder of fact. Furthermore, the Rules of Professional Conduct do not require a prosecutor to present a defendant's alibi evidence or other story to the jury. The defendant can do that by presenting his own witnesses or testifying in his own behalf.

The State Bar did not charge Nifong with having an improper motive for the prosecution. Certainly, the State Bar presented substantial evidence that Nifong's motive for pursuing charges against the Duke lacrosse defendants was to bolster his prospects in a close election. However, that evidence was not offered to prove a separate rule violation; it was offered to explain why Nifong engaged in conduct that otherwise seemed inexplicable.

After a five day trial, the DHC found

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State Habeas Petition Challenging Nonexistent Charge Wins Client's Release

On September 22, 2008, the N.C. Court of Appeals allowed the petition for writ of habeas corpus filed by NCPLS staff attorney Hoang Lam on behalf of inmate Sammie Love. Moreover, the appellate court ordered Mr. Love's immediate release from custody.

Mr. Love had been indicted on July 8, 1996 of several drug charges based on allegations that a minor had sold cocaine for him. On October 24, 1996, he stood trial, without counsel, and testified that he was innocent. He was convicted by a jury of a misdemeanor and the following three felonies: (1) trafficking, (2) conspiracy to traffic, and (3) employing a minor to traffick by possession. He received three consecutive sentences: 35 to 42 months for trafficking, 35 to 42 months for the felony conspiracy and the misdemeanor charge, and 90 to 117 months for the third felony, employing a minor to traffick by possession. He was unsuccessful in attempting to obtain relief through direct appeal, motions for appropriate relief, petitions to the state appellate courts, through federal habeas relief.

When he wrote to NCPLS this year asking for review of his case, he had served more than 11 years and was serving his last sentence of 90 to 117 months. Upon review of the case, NCPLS attorneys concluded that the applicable law did not criminalize the act of employing a minor to traffick in cocaine by possession, thus making his last sentence unlawful. N.C. Gen. Stat. § 90-95.4. The illegality of his conviction and sentence had not previously been raised in his prior appeal, motions, and petitions.

Although the State filed a response opposing the habeas petition by NCPLS and Mr. Love, the State did not appeal the court's order allowing the petition and mandating his release. As a result, Mr. Love was immediately released.

Proof of Citizenship Gains Release for NCPLS Clients & Cancellation of Detainer

By NCPLS Staff Attorney Hoang Lam

Through NCPLS representation, two North Carolina inmates were recently able to prove their U.S. citizenship, acquired through their parents. In one case, an inmate who completed his North Carolina sentence had been placed in immigration detention in Georgia for two months, and was scheduled for deportation to Germany where he had been born out-of-wedlock. Unbeknownst to the immigration authorities, the inmate's father is a U.S. citizen and legitimated the inmate through a subsequent marriage to the inmate's mother. Upon receiving that inmate's request for assistance, we collected documents from his parents, drafted affidavits, and presented the case to Immigration and Customs Enforcement (ICE). Within one day of our communication with ICE, the client was released and his pending deportation proceedings were later terminated.

In the second case, the inmate was born in Canada to a U.S. citizen mother. However, ICE placed an immigration detainer on the inmate. Although the inmate was eligible for parole and had entered a MAPP contract, the N.C. Department of Correction revoked the contract because of the immigration detainer. We again presented the case to ICE with supporting documents, and the detainer was cancelled. As a result, the client now has the chance to work out another MAPP contract, under which he might eventually secure his release.

NCPLS Secures Compensation for Injured Inmates

NCPLS staff attorneys recently succeeded in obtaining financial compensation for two clients. In July we were able to settle a case alleging the use of excessive force case against an inmate. Our client suffered a broken leg after force was used against him by prison guards. The case had previously gone to trial in the Eastern District Federal Court and resulted in a mistrial with one juror holding out for our client. We were able to mediate the case after the mistrial and our client settled his case for $12,000.

In August we received word that we were successful in an appeal to the Full Commission of the North Carolina Industrial Commission. Our client suffered stab wounds after two unauthorized inmates were let into his cell and assaulted him. The client was awarded $5,000 by the Industrial Commission.

NCPLS Welcomes New Board of Directors (Continued)

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re-entry. His case was the subject of an award winning film "The Trials of Darryl Hunt."

Christine Mumma – Ms. Mumma is the Executive Director of the North Carolina Center on Actual Innocence. She represented former DOC inmate Dwayne Dail in obtaining exoneration and release from a rape conviction for which he had spent 18 years in prison. She has been a leading force in seeking to reduce wrongful convictions in North Carolina and was named the News & Observer's 2007 Tar Heel of the Year.

What *North Carolina Bar v. Nifong* Was Not (Continued)

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and concluded that Nifong violated multiple Rules of Professional Conduct by making improper statements to the media, failing to comply with obligations imposed on him by statute and court order to provide discovery, and lying to the court. For this misconduct, Nifong was disbarred. That is what *North Carolina State Bar v. Nifong* was about.

Katherine Jean is counsel and assistant executive director of the North Carolina State Bar. This article originally appeared in the Fall 2008 issue of the North Carolina State Bar Journal. It is reprinted here with the permission of the author and the State Bar.

Criminal Conviction and Gun Ownership

By NCPLS Staff Attorney Ken Butler

NCPLS receives many letters from inmates who are concerned about the legal disabilities that they face after release from confinement. One such area concerns restrictions on the ownership or possession of firearms. The ability of a person convicted of criminal offenses to purchase, own, or possess firearms is subject to limitation by both state and federal law. In the past, there were significant differences between the two types of restriction. However, during the past 20 years, North Carolina has been increasingly limiting the rights of offenders to possess firearms to more closely mirror federal restrictions.

Federal Restrictions

The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197 and the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (GCA68) established broad federal regulation of the interstate trade in firearms, particularly handguns. The Gun Control Act established a list of "prohibited persons" for firearm ownership/ possession purposes, stating that:

It shall be unlawful for any person -

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship; or

(8) who is subject to a court order that --

> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §922(g). In addition to these restrictions, 18 U.S.C. § 922(n) provides makes it unlawful for any person currently under indictment for a crime punishable by imprisonment greater than one year to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

State Restrictions

North Carolina's Felony Firearms Act, (NCFFA) became effective on October 1, 1971. The original statute, codified at N.C.G.S. §14-415.2, prohibited possession of a firearm by any person previously convicted of a crime punishable by imprisonment of more than two years, but contained an exception for those felons whose civil rights had been restored. *Britt v. State* 185 N.C.App. 610, 612, 649 S.E.2d 402, 404 (2007). This initial version was repealed in 1975, and the NCFFA was amended and recodified at § 14-415.1, where it remains today.

This second version of the law also did not completely ban firearm ownership by persons previously con-

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Criminal Conviction and Gun Ownership (Continued)

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victed of criminal offenses. First, not all crimes resulted in deprivation of the right of gun ownership. The NCFFA specified that the ban applied to those felonies which fell under certain enumerated section of the General Statutes; common law robbery and maiming; and violations of the laws of other states or the federal government which were substantially similar to the North Carolina laws previously listed and which were punishable by more than two years imprisonment.

Even for persons who fell within the target statutes, the prohibition only banned the purchase, ownership or possession of any "handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c), within five years from the date of such conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later. N.C.G.S. § 14-415.1(a) (1986). Furthermore, the NCFFA stated that "[n]othing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business." *Id.* Violation of this statute was initially a Class I felony. However, by the effective date of the Structured Sentencing Act, October 1, 1994, it had been raised to a Class H felony. N.C.G.S. § 14-415.1 (1994).

One year later, the penalty had again been raised, now to a Class G felony. Furthermore, instead of setting out specific sections of the criminal law which would work a disentitlement, the amended act extended its effect to "[f]elony convictions in North Carolina that occur before, on, or after December 1, 1995," and comparable convictions from other states or the federal government that were punishable by a prison term exceeding one year. N.C. G.S. § 14-415.1 (1995). The 1995 law still focused on possession or ownership of handguns, and other firearms with a barrel less than eighteen inches, or an overall length of less than twenty-six inches. Significantly this version of the NCFFA did not allow for a restoration of gun ownership rights within a five year period after unconditional discharge from imprisonment, parole, or probation. It did, however, retain the right of an individual to keep a gun in his or her home or lawful place of business.

In 2004, the NCFFA was further amended and its restriction of firearm ownership / possession was expanded. Under this version, which took effect December 1, 2004,

> It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer.

N.C.G.S. § 14-415.1(a) (2004). This version eliminated the provision allowing for firearm possession in a home or place of business.

In 2006, the General Assembly further amended the NCFFA to create an exception for the ownership / possession of "antique firearms."

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Criminal Conviction and Gun Ownership (Continued)

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Under the relevant statutes:

a) The term "antique firearm" means any of the following:

(1) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured on or before 1898.
(2) Any replica of any firearm described in subdivision (1) of this subsection if the replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition.
(3) Any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder substitute, and which cannot use fixed ammunition.
(b) For purposes of this section, the term "antique firearm" shall not include any weapon which:
(1) Incorporates a firearm frame or receiver.
(2) Is converted into a muzzle loading weapon.
(3) Is a muzzle loading weapon that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

N.C.G.S. § 14-409.11

The NCFFA has been periodically challenged on a variety of constitutional grounds. These include claims that the act violates equal protection, due process, the protection against *ex post facto* laws, or that it constitutes an impermissible *bill of attainder* (a legislative act which punishes a particular individual or group of persons without a trial.) To date, all such challenges have been unsuccessful. *See State v. Tanner*, 39 N.C. App. 668, 251 S.E.2d 705, *appeal dismissed review denied*, 297 N.C. 303, 254 S.E.2d 924 (1979) (no equal protection violation where there is a reasonable basis for classification); *State v. Johnson*, 169 N.C. App. 301, 610 S.E.2d 739, *appeal dismissed review denied*, 359 N.C. 855, 619 S.E.2d 855 (2005)(challenge to 1995 version of NCFFA. Held that the statute does not violate due process or the prohibitions against *ex post facto* and bills of attainder).

The most recent such challenge has been *Britt v. State of North Carolina,* 185 N.C. App. 610, 649 S.E.2d 402 (2007). Rather than being a criminal prosecution, the *Britt* case was an action for declaratory judgment. The plaintiff had been convicted of possession with intent to sell and deliver a controlled substance in 1979. He had completed his sentence in 1982 and, under the then applicable version of N.C.G.S. § 14-415.1, had his right to possess firearms restored by operation of law. However, the 2004 version of the statute had completely removed this previously restored right. The plaintiff sought to have this version of the statute declared unconstitutional on a variety of grounds, including due process, equal protection, *ex post facto* and as a bill of attainder.

The case was heard before a three-judge panel of the N.C. Court of Appeals. The panel majority concluded that § 14-415.1 was rationally related to a legitimate state interest, namely the protection of the health, safety and welfare of citizens. *Britt*, 185 N.C. App. at 614, 649 S.E. 2d at 406. The majority rejected the plaintiff's contention that the 2004 version of the NCFFA swept too broadly by imposing a permanent and total ban on the possession of any type of firearms, other than antiques. It upheld the statute against plaintiff's claims of due process, equal protection, *ex post facto* and bill of attainder.

Significantly, Judge Elmore dissented and stated that he would find the 2004 amendments to be unconstitutional. Judge Elmore noted that in earlier cases, interpreting prior versions of the NCFFA, the Court of Appeals had held that the statute was a reasonable regulatory measure, as evidenced by the fact that the law focused only on the types of weapons that were easily concealable and therefore posed greater risk to the public. Furthermore, the earlier statutes contained exceptions for the possession of firearms at one's home or business. In Judge Elmore's mind, the newer amendments' total ban crossed the line from permissible regulation into unconstitutional punishment, which would violate *ex post facto* and constitute a bill of attainder. Judge Elmore also found that the new statute's total ban deprived plaintiff of his constitutional right to bear arms without due process where it was not a "reasonable" regulation. *Id.* 185 N.C. App. at 621, 649 S.E. 2d at 410. Because of Judge Elmore's dissent, the plaintiff had a right to

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Criminal Conviction and Gun Ownership (Continued)

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appeal the decision to the North Carolina Supreme Court. The case was appealed, and has been the subject of oral argument. A decision, however, has not yet been handed down by the state Supreme Court.

Conclusion

As can be seen from the preceding discussion, state and federal laws now impose a complete ban on the private ownership or possession of firearms. The 2004 amendments to the NCFFA even encompasses those types of sporting weapons, rifles and shotguns, previously permitted under earlier versions. Unless the North Carolina Supreme Court uses the *Britt* case to limit the scope of N.C.G.S. § 14-415.1, ex-felons should make it a priority to get rid of any firearms that might be considered in their possession. Of course, the *Britt* decision would apply only to North Carolina's state firearms laws and would not affect any liability under federal law.

NCPLS Client Receives Major Sentence Reduction

By NCPLS Staff Attorney Nicholas C. Woomer-Deters

A motion for appropriate relief (MAR) filed by NCPLS in June 2008, has resulted in a major sentence reduction for one of our clients. The client was serving two consecutive sentences totaling 207 to 258 months for Felony Speeding to Elude Arrest, Habitual Impaired Driving, and for having attained Habitual Felon status. However, after the MAR was granted in September his total sentence was reduced to 144 to 177 months. Additionally, one of the client's convictions was reduced to a level one Driving While Impaired (DWI) charge, which makes him eligible for parole.

The MAR filed by NCPLS raised two issues. First, the client's prior record level was incorrectly calculated because offenses used in his habitual felon indictment were also used to enhance his prior record level, which is illegal under North Carolina law. When a defendant is indicted as a habitual felon, he can receive a major sentence enhancement if he it convicted of even a minor felony. A habitual felon indictment needs to list at least three consecutive prior felony convictions of the defendant. Typically, the state will indict a defendant as a habitual felon using *only* three prior felony convictions — this allows the state to use any other prior felony convictions to enhance prior record level. However, in this case, the state used six prior felony convictions to indict the client as an habitual felon; then the state used some of these same prior felony convictions to enhance his prior record level all the way up to level VI (the highest level). In reality, the client should have been sentenced at a prior record level of IV.

The second issue that was raised was the fact that the client was actually innocent of one of the Habitual Impaired Driving counts as a matter of law. To be convicted of Habitual Impaired Driving, a defendant needs to have committed Driving While Impaired while also having been previously convicted of Driving While Impaired three or more times within the last ten years (eight years under older versions of the law). In this case, the client successfully challenged one of the three prior DWI convictions used to establish him as an Habitual Impaired Driver by arguing that his conviction had been obtained without his have had access to an attorney. With one of the three necessary prior DWI convictions vacated, the MAR argued that the client's conviction for Habitual DWI also had to be vacated and that he had to be resentenced for misdemeanor DWI.

Against all expectations, the client's MAR was unopposed by the District Attorney's office in Guilford County and he was resentenced accordingly. Prior to resentencing, the client had a 2017 release date; it is now likely he will be released well before 2010.

FREE LEGAL INFORMATION CLINIC

Sponsored by North Carolina Prisoner Legal Services, Inc.,

SATURDAY OCTOBER 18, 2008
10:00 AM –12:00 PM

North Carolina Prisoner Legal Services
1110 Wake Forest Road
Raleigh, NC
919-856-2200

(Route 1 and 3 CAT Bus Lines)

Free legal consultations about civil legal matters governed by N.C. law will be offered at this clinic for people who have been formerly incarcerated or, for organizations that serve the formerly incarcerated community. Volunteers will be available to provide general information about legal issues or refer you to an agency or organization that can provide the information you need. The volunteers cannot offer to represent you but, if you are eligible, you may be referred to one of the legal or social service agencies in the Raleigh area to seek additional assistance and/or representation.

Please bring all of the documents concerning your legal problem to the Clinic

For additional information and assistance, please visit **www.lawhelp.org/nc.**

The Newsletter of North Carolina Prisoner Legal Services, Inc.

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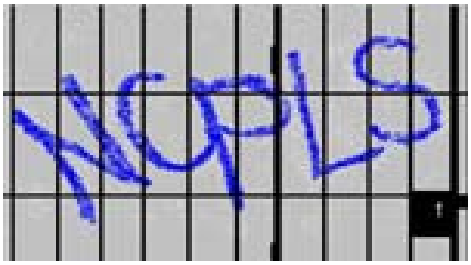

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