

# NCPLS ACCESS

Serving North Carolina's Inmates

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## Conditions of Confinement

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When looking at prisoners' allegations that their conditions of confinement are unconstitutional, the Supreme Court has firmly established that "[p]rison officials have a duty under the Eighth Amendment to provide humane conditions of confinement."<sup>1</sup> The Court has further held that inmates are entitled to "adequate food, clothing, shelter, and medical care, and must protect prisoners from violence at the hands of other prisoners. However, a constitutional violation occurs only where the deprivation alleged is, objectively, "sufficiently serious,"<sup>2</sup> and the official has acted with "deliberate indifference" to inmate health or safety."<sup>3</sup> The Supreme Court has also made it clear that "[t]he Constitution does not mandate

comfortable prisons."<sup>4</sup> This means that any lawsuit alleging a conditions of confinement claim must be: 1) sufficiently serious, as defined by the case law; and 2) conducted with "deliberate indifference," which means that prison officials are actually aware of some risk and deliberately fail to correct it, not merely that they *should* have known of some risk.<sup>5</sup> If a risk is sufficiently obvious, knowledge, in some cases, may be assumed.<sup>6</sup>

Although prison conditions can sometimes collectively create a constitutional violation, a violation only occurs when conditions combine to deprive the inmate of a single, identifiable, and constitutionally protected necessity.

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<sup>1</sup> *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

<sup>2</sup> *Id.*

<sup>3</sup> *Farmer v. Brennan*, 511 U.S. 825, 825-826 (1994).

<sup>4</sup> *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

<sup>5</sup> *Farmer*, 511 U.S. at 839-43.

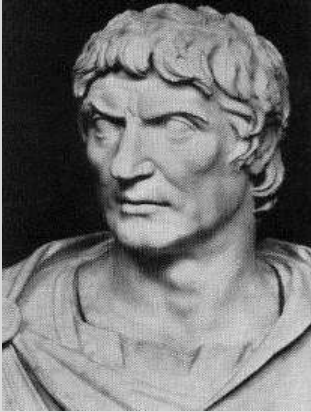
<sup>6</sup> *Hope v. Pelzer*, 536 U.S. 730, 738 n.8 (2002).

North Carolina  
Prisoner Legal Services, Inc.



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This issue is dedicated to Lucius Cornelius Sulla, 138 B.C.E. - 78 B.C.E. Though sometimes regarded as a ruthless dictator, he is attributed with sweeping progressive legal reforms during the later Roman Republic. Believing in a person's inherent worth, regardless of his or her current situation, Sulla allowed slaves and convicted individuals to work humanely to earn their freedom. Against the prevailing public opinion, he insisted that these individuals were to be treated as though they were free, sharing in all rights, while they worked.

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Established in 1978, NCPLS is a non-profit, public service organization. The program is governed by a Board of Directors whose members are designated by various organizations and institutions, including the North Carolina Bar Association, the North Carolina Advocates for Justice, the ACLU of North Carolina, and the Office of Indigent Defense Services.

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

Articles, ideas, and suggestions are welcome.

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The Supreme Court has clarified, however, that, “[n]othing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.”<sup>7</sup>

The Fourth Circuit, whose case law governs federal courts in North Carolina, has held that for a deprivation to meet the Supreme Court’s requirement of a “sufficiently serious” deprivation, the plaintiff must prove a *serious or significant physical or emotional injury*<sup>8</sup> or must “demonstrate a *substantial risk of such serious harm* resulting from the prisoner's unwilling exposure to the challenged conditions.”<sup>9</sup> Although the Supreme Court did not expressly require an actual physical injury, the Fourth Circuit has erected a high bar for such claims, holding that the plaintiff must be able to establish the “requisite seriousness of the pertinent deprivation,” and in *Hall v. Williams*, the court held that the plaintiff “did not produce any evidence tending to satisfy the objective component of his claim” and so his claim was dismissed.<sup>10</sup>

The Fourth Circuit cases are almost uniformly hostile to condition of confinement claims, which makes bringing such a claim in North Carolina difficult.

<sup>7</sup> *Wilson*, 501 U.S. at 305.

<sup>8</sup> *Strickler v. Waters*, 989 F.2d 1375 (4th Cir. 1993).

<sup>9</sup> *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995).

<sup>10</sup> *Hall v. Williams*, 1995 WL 148990, 1 (4th Cir. 1995).

In *Shrader v. White*, for example, the Circuit Court held that seven inmate murders, fifty-four stabbings, and twenty-four other serious inmate-on-inmate assaults at Virginia State Prison in the five years preceding trial did not create unsafe conditions, noting that “acts of violence by inmates against inmates are inevitable, [and] [n]o amount of money and no increase in the number of prison officers is going to completely eradicate inmate violence.”<sup>11</sup>

Although there are no clear rules on when a particular condition of confinement is so bad as to rise to the level of a constitutional violation for which relief may be sought, the courts have offered some guidance.

First, the Supreme Court has held that the constitutionality of crowding is determined by circumstances and consequences and that even very crowded conditions are not actionable when the facility itself is in good condition and there is adequate security, shelter, and programming available.<sup>12</sup>

Second, another common complaint from prisoners is that the prison food is so bad as to be cruel and unusual punishment. The courts have held, however, that prisoners do not have a constitutional right to good food or appetizing food, the only requirement is that the food is

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<sup>11</sup> 761 F.2d 975, 980 (4th Cir. 1985).

<sup>12</sup> *Rhodes v. Chapman*, 452 U.S. 337 (1981).

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nutritionally adequate, meaning of a sufficient quantity and providing the nutrients necessary for health. The Fourth Circuit has held that allegations that the quantity of food offered was deficient were sufficient to survive an initial review.<sup>13</sup> In that case, the Fourth Circuit also cited case law from other circuits with approval.<sup>14</sup>



Third, prisoners are constitutionally entitled to be housed in “reasonable safety” through the Eighth Amendment prohibition against cruel and

unusual punishment.<sup>15</sup> The Supreme Court has held generally that deliberate indifference to “excessive risks to inmate health or safety” violate the Eighth Amendment.<sup>16</sup>



Fourth, prisoners should be provided with protection from extremes of heat and cold and also to have “reasonably adequate ventilation.”<sup>17</sup> Although the Fourth Circuit, which covers North Carolina, has not articulated a clear standard on when heat or cold is so extreme as to be excessive, the bar would probably be high and would require some

showing of harm. The Fourth Circuit held that officials have immunity when there is nothing in the record that suggests the kind of “obduracy and wantonness” in dictating conditions of confinement that would implicate the Eighth Amendment.<sup>18</sup> The court held that “speculative affidavit testimony” that cell temperatures could rise 11 to 23 degrees above even outdoor temperatures was not sufficient, when there was no “serious medical and emotional deterioration.”<sup>19</sup>

Although a lawsuit based on conditions of confinement is only possible in a small group of cases, if you believe that you have been harmed by the conditions at the facility at which you are housed, we encourage you to write to our office to explain both the problematic condition and how it has personally caused you harm.



<sup>13</sup> *King v. Lewis*, 358 Fed.Appx. 459, 460, 2009 WL 5175297, 1 (4th Cir., 2009) (per curiam).

<sup>14</sup> See also *Berry v. Brady*, 192 F.3d 504, 508 (5th Cir.1999) (suggesting that to state Eighth Amendment claim inmate must allege “he lost weight or suffered other adverse physical effects or was denied a nutritionally and calorically adequate diet”); *Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir.1996) (prisoner stated a cause of action under the Eighth Amendment by claiming “not just ‘ransid food’ [sic], but also a ‘nutritionally deficient’ diet”); *Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir.1992) (holding that prisoners have the right to nutritionally adequate food); *Rust v. Grammer*, 858 F.2d 411, 414 (8th Cir.1988) (diet without fruits and vegetables might violate Eighth Amendment if it were regular prison diet).

<sup>15</sup> *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

<sup>16</sup> *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (addressing risk of inmate-inmate assault); see *Helling*, 509 U.S. at 33 (holding risks of future harm actionable in case involving environmental tobacco smoke).

<sup>17</sup> *Gates v. Cook*, 376 F.3d 323, 339-40 (5th Cir. 2004) (affirming finding of unconstitutional heat); *But see Chandler v. Crosby*, 379 F.3d 1278, 1295-98 (11th Cir. 2004) (holding that a showing of “severe discomfort” does not meet the constitutional standard, and subsection to temperatures that only exceeded 90 degrees nine percent of the time during the summer and exceeded 95 degrees only seven times during the summer, with an effectively functioning ventilation system, was not unconstitutional.)

<sup>18</sup> *Lopez v. Robinson*, 914 F.2d 486, 491 (4th Cir., 1990).

<sup>19</sup> *Id.*

## Drug testing and Paruresis (Shy Bladder Syndrome)

*Julie Solms, NCPLS Staff Attorney*

Inmates occasionally write to NCPLS describing problems arising out of their inability to produce the required amount of urine during a drug test. Often, disciplinary action is taken as a result, even though an inmate might maintain that the inability to produce urine was due to a medical condition rather than a willful attempt to evade the drug test. While NCPLS understands the frustration that comes with being unfairly punished for something beyond one's control, we are rarely able to assist prisoners in challenging their custody classification or disciplinary infraction. In this article, we will give you information on how you may be tested for shy bladder syndrome, or paruresis, and explain the reason for our frequent decisions not to assist prisoners in challenging disciplinary measures taken against individuals with paruresis.

### Testing for Shy Bladder

Shy bladder is a condition which causes a psychogenic and non-volitional inability to produce a urine sample while being watched. If you believe that you may suffer from this condition, you may request a referral to mental health by completing a DC-540 form, per NCDOC Policy

& Procedure Manual §F.2603(d). After submitting your DC-540 form, you should be seen by psychology and evaluated for shy bladder by way of psychometric testing in order to detect evidence of malingering symptoms, interview, and chart review. If you are diagnosed with shy bladder syndrome, your diagnosis should be documented in OPUS in order to notify prison personnel that an alternative method for urine collection should be used for you.



Inmates diagnosed with shy bladder will be escorted to a secure dry cell for drug testing. The cell will be searched immediately before the inmate enters, and the inmate will be told to wash his/her hands before entering the cell. The inmate will then be strip searched by a member of the same sex in order to search for contraband that could be used to alter the urine sample. Custody staff should then offer the inmate sixteen ounces of water in order to further assist the inmate in giving a sample. The inmate will receive a specimen cup and an order

to produce a urine sample of at least thirty milliliters. The inmate will not be directly observed at this point, but custody staff will ensure that the inmate has no contact with any other inmates during this time. If the inmate still cannot produce an adequate sample, he/she will be given an additional sixteen ounces of water every two hours until a sample is produced.

### Changes in Custody Classification

The courts have held that the classification of inmates is an administrative function that is generally left to the discretion of prison administrators.<sup>20</sup> Because classification decisions are largely *discretionary*, there is no enforceable legal right to a particular custody or control level.<sup>21</sup> (*continued on page 5*)

<sup>20</sup> O'Bar v. Pinion, 953 F.2d 74, 84 (4th Cir. 1991) ("Transfers, administrative segregation and reclassification . . . are . . . discretionary administrative acts in which an inmate obtains no liberty interest under North Carolina law. . . . The classification and transfer of inmates among authorized institutions is peculiarly an administrative function fully within the discretion given to prison officials.") (citing Gaston v. Taylor, 946 F.2d 340, 343 (4th Cir.1991)).

<sup>21</sup> See Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979) ("to obtain a protectible [sic] right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must,

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The DOC decides inmate classification issues by applying a point system. All felony inmates are automatically assigned 9 points. From that starting level, points are added or subtracted, based on a number of distinct case factors. The resulting total usually determines an inmate's custody level. However, prison officials retain the authority to override case-factor points when they believe a different level is appropriate.

Generally, the DOC uses *control status* assignments to house inmates that are deemed to require closer control than lower custody levels. Both custody level and control status placements are reviewed at six-month intervals. To the extent that continuation on any particular control status gives rise to a constitutionally protected right, this bi-annual review appears to satisfy the governing law.<sup>22</sup>

Even though prison officials have a great deal of discretion to classify inmates, there are still some limited restrictions on the

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instead, have a legitimate claim of entitlement to it.” (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1979)); *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994), *cert. denied*, 514 U.S. 1022 (1995) (“Prisoners have no right under the Constitution to be held in either protective or minimum custody”) (citing *Hewitt v. Helms*, 459 U.S. 460, 468 (1983); *O’Bar*, 953 F.2d at 83).

<sup>22</sup> See *Beverati v. Smith*, 120 F.3d 500, 503 (4<sup>th</sup> Cir. 1997) (finding that six-month stay in administrative segregation for violation of prison rules did not constitute an atypical hardship).

exercise of that discretion. For example, an inmate cannot be demoted in custody in retaliation for exercising a protected constitutional right, such as filing a lawsuit.<sup>23</sup> However, claims of retaliation are often difficult to prove. A plaintiff must show that he was punished in retaliation for an action that is protected by federal law. Ordinarily, success in such litigation hinges on evidence that supports the plaintiff's allegations. Nor can a classification decision be made upon characteristics such as race, religion, or national origin, without showing that such classification is reasonably related to a legitimate penological interest.<sup>24</sup> If you believe you have been classified on the basis of some legally protected activity or characteristic, we encourage you to file a grievance.



<sup>23</sup> See *Adams*, 40 F.3d at 75 (4th Cir. 1994), *cert. denied*, 514 U.S. 1022 (1995).

<sup>24</sup> *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (“[W]hile a prisoner does not forfeit his constitutional right to equal protection by the fact he has been convicted of a crime and imprisoned, prisoner claims under the equal protection clause, including those based upon a racial classification, must still be analyzed in light of the special security and management concerns in the prison system. . . . An inmate’s constitutional right to be protected from racial discrimination may be subject to restrictions that are reasonably related to a legitimate penological interest.” (internal citations omitted)).

## Disciplinary Infractions

Our office receives many letters from inmates who believe that they have been wrongfully charged with infractions, that their hearing rights have been violated, or that they have unfairly been assigned to a higher custody status. While we do not take these matters lightly, it has been our experience that prison disciplinary decisions are rarely overturned. Furthermore, as the years have gone by, the courts have raised ever higher barriers to litigating these claims. This has increased the amount of effort that would have to be spent in pursuing such a claim, while it has decreased the chances for ultimate success. As we have limited resources and receive thousands of letters from inmates all across the state, we must put our efforts towards the claims with the best chance of recovery. In our experience, disciplinary infraction complaints generally do not present the requisite likelihood of success.

Despite the foregoing information, we still encourage inmates to write to us with any problem that you believe requires a legal remedy. Even if we are not able to represent you in a legal action, we are generally able to provide useful information that may assist you in pursuing a claim on your own, should you choose to do so.

# The Spread of Infectious Diseases through Inmate Shared-Shaving

*Tod M. Leaven, NCPLS Staff Attorney*

There has been growing concern regarding the Department of Correction's ("DOC") shaving policy and the possibility of the shared razors spreading infectious diseases. The hygiene component of the DOC's shaving policy, if followed correctly, appears to be in compliance with both North Carolina state law and the rules promulgated by the North Carolina State Board of Barber Examiners ("Board"); however, this detailed component only covers close-custody facilities. It is important that each facility's Barber Assistants, regardless of its custody classification, follow the rules and regulations described in this article in order to minimize the spread of infectious diseases.

There are four bodies of rules and regulations which govern the hygiene requirements of barbering: (1) North Carolina General Statute § 86A-15,<sup>25</sup> (2) North Carolina Administrative Code, Title 21, Chapter 06L, §§ .0113-0120,<sup>26</sup> (3) DOC Policy & Procedures E .2107-.2108, and (4) each individual facility's Standard

<sup>25</sup> N.C. General Statute § 86A-15 governs the sanitary rules and regulations for the practice of barbering, including inside the DOC. The practice of barbering specifically includes "[s]having or trimming the beard, or cutting the hair." N.C. Gen. Stat. § 86A-2.

<sup>26</sup> N.C. General Statute § 86A-5 grants the Board the authority to promulgate rules governing the practice of barbering in North Carolina.

Operating Procedure ("SOP"). It is important to understand that the North Carolina statutes ("Statutes") take precedence over the Board's rules and that both the Statutes and the Board's rules take precedence over DOC Policy & Procedures.<sup>27</sup> Individual facility SOPs carry the least authority and are subject to the DOC Policy & Procedures.



## North Carolina Statutes

The Statutes mandate that the area (walls, floor, and fixtures) where barber services are rendered

<sup>27</sup> N.C. General Statute § 86A-14 is an exhaustive list of all entities exempt from the barbering statutes, and neither the DOC nor any other penal institutions are listed. Certain actions performed inside of DOC facilities may be exempted if they are performed by medical personnel acting in the proper discharge of their duties, or by a person performing funerary or mortuary services. N.C. Gen. Stat. § 86A-14. The only exceptions for penal institutions listed in the Board rules are that penal institutions do not need to comply with the requirements for toilette facilities and tool cabinets. 21 NCAC 06F .0121.

must be kept sanitary.<sup>28</sup> Barber Assistants, or anyone else engaged in the practice of barbering, must sterilize all razors, tweezers, and combs prior to each use "by immersing them in a solution of fifty percent (50%) alcohol, five percent (5%) carbolic acid, twenty percent (20%) formaldehyde, or ten percent (10%) lysol or other product or solution that the Board may approve."<sup>29</sup> Anyone serving as a barber must "thoroughly cleanse his or her hands immediately before serving each patron"<sup>30</sup> and if a towel is used, he or she must use a clean towel for each person served.<sup>31</sup> "No barber shall serve any person who has an infectious or communicable disease."<sup>32</sup>

## North Carolina Administrative Code

The Board rules state that the area used for barbering must be free of any visible signs of rodents, vermin, insects, mold, mildew, or water damage.<sup>33</sup> The Board rules also forbid a barber or Barber Assistant from serving anyone "with an open sore or sores, exhibiting symptoms of an

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<sup>28</sup> N.C. Gen. Stat. § 86A-15(a)(1)(c).

<sup>29</sup> N.C. Gen. Stat. § 86A-15(a)(2)(a). The sterilizing agent that the DOC uses is H-42, which is approved by the Board.

<sup>30</sup> N.C. Gen. Stat. § 86A-15(a)(3)(a).

<sup>31</sup> N.C. Gen. Stat. § 86A-15(a)(2)(d).

<sup>32</sup> N.C. Gen. Stat. § 86A-15(a)(3)(3).

<sup>33</sup> 21 NCAC 06L .0117.

*(continued from page 6)*

infectious dermatologic disease or disorder or parasitic infestations of the skin or hair or a communicable disease.”<sup>34</sup> No one who knowingly has “an infectious dermatologic disease, infectious disease with open sore or sores on the hand or hands, or parasitic infestation of the skin or hair in a communicable stage or any other communicable disease shall provide barber service[s].”<sup>35</sup>



### **DOC Policy & Procedures and Facility SOP**

The only sections of the DOC Policy & Procedures that detail actual hygiene protocol are E .2108(a)(2)(E) and E .2108(a)(3)(C-F). These sections specifically state that they govern close-custody facilities.<sup>36</sup> The only section which governs minimum and medium custody facilities states that “[e]ach facility

shall provide hair care services to the inmates it houses, and . . . hair should be cut under sanitary conditions and in an area that permits observation by staff.”<sup>37</sup>

The housing units in closed custody facilities are required to maintain three blades for every shaver.<sup>38</sup> These blades must be rotated after every use as follows: Blade number one is used to shave an inmate while blade number two is in reserve and blade number three is disinfecting in H-42<sup>39</sup> solution.<sup>40</sup> After blade number one is finished shaving, it is placed in the H-42 disinfectant while blade number two used for the next shave and blade number three is moved to the reserve.<sup>41</sup> After blade number two is finished shaving, it is moved into the disinfectant while blade number three is used for shaving and blade number one is moved to the reserve.<sup>42</sup> This ensures that each inmate receives his shave from a

clean and disinfected razor. Barber Assistants must be trained on cleaning the equipment, washing hands, and bloodborne pathogens prior to beginning their assignments.<sup>43</sup> The Barber Assistant must maintain a clean environment at all time and is “responsible for cleaning the shaving equipment after every facial shave with H-42 disinfectant.”<sup>44</sup> It is “the responsibility of the custody staff to supervise the barber assistants and the operation of the system in its entirety.”<sup>45</sup> If the custody staff sanitize and clean the rechargeable shaver for inmates assigned to control or segregation, the procedures for such cleaning must be developed by each facility. Information regarding each facility’s shaving program will be provided at orientation.<sup>46</sup>



*(continued on page 8)*

<sup>34</sup> 21 NCAC 06L .0113(a).

<sup>35</sup> 21 NCAC 06L .0113(b).

<sup>36</sup> DOC Policy & Procedures E .2108 (included under the heading of “CLOSE CUSTODY FACILITY SHAVING SYSTEMS & BATTERY OPERATED RAZORS” is “It is the policy of the Division of Prisons to provide all inmates with a safe and sanitary shaving process. The inmate electric shaving and battery operated systems are to be used to shave facial hair and is currently available at all male Close custody facilities.”)

<sup>37</sup> DOC Policy & Procedures E .2107.

<sup>38</sup> DOC Policy & Procedures E .2108(a)(2)(E).

<sup>39</sup> According to the brochure produced by the manufacturers of H-42, Hampton Mfg. Inc., H-42 will eliminate Hepatitis B & C, Herpes Simplex 1 & 2, HIV-1 (AIDS), Human Corona Virus, Influenza A, Respiratory Syncytial Virus, Pox Virus, Ringworm, Athlete’s Foot, Pseudomonas aeruginosa & capacia, Staphylococcus Aureus (including MRSA), Salmonella choleraeacuis & schottmuelleri, E. coli, Serratia marcescens, Klebsiella pneumonia, Enterbacter aerogenes, Streptococcus faecalls, Shigella dysenteriae, and Brevibacterium ammoniagenes. [www.h42products.com](http://www.h42products.com).

<sup>40</sup> DOC Policy & Procedures E .2108(a)(2)(E).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> DOC Policy & Procedures E .2108(a)(3)(D).

<sup>44</sup> DOC Policy & Procedures E .2108(a)(3)(E-F).

<sup>45</sup> DOC Policy & Procedures E .2108(a)(3)(C).

<sup>46</sup> “Each facility will include in its inmate orientation, information on the electric shave program and information about purchasing battery operated razors from the canteen.” DOC Policy & Procedures E .2108(a)(1)(H).

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### How to Apply These Rules and Regulations

In close-custody facilities, all staff, Barber Assistants, and patrons need to be concerned about is that their individual facility's SOP matches the DOC Policy & Procedures as described above. If the SOP does not match, or if the SOP does match but it is not being followed, then you need to bring it to the attention of the

facility. The statute and the Board's rules do add additional requirements which must be met, namely that the area must be sanitary and that Barbers Assistants cannot serve anyone with open sores, dermatological diseases, infectious parasites of the skin and hair, or any communicable disease.

In minimal and medium facilities, you must rely upon the Statutes, the Board's rules, and any facility SOP. Remember that

the hygiene standards are set by the Statutes and the Board's rules and that they do not distinguish between custody classifications, so they apply to all.

If you choose to file a grievance, please keep the issue focused and the writing clear and concise. Only grieve your concerns about the shaving procedures observed and not anything else. Do not cite case law and, as always, do not use profanity.

## DOC Policy and the Constitution on Legal Mail Issues in Prisons

*Julie Solms, NCPLS Staff Attorney, and  
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### Legal Mail and the Constitution

Despite being deprived of many rights upon incarceration, prisoners retain certain constitutional protections.<sup>47</sup> However, a prison regulation interfering with these protections is still valid as long as it is "reasonably related to legitimate penological interests."<sup>48</sup>



For example, an inmate has a constitutional right under the First

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asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* The final inquiry is whether there are any ready alternatives. *Id.* Rather than being a "least restrictive alternative" test in which prison officials must 'set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint' . . . the existence of a ready alternative can be cited as evidence that the government's regulation is not reasonably related to a legitimate penological interest." *U.S. v. Stotts*, 925 F.2d 83, 89 (4th Cir. 1991) (citing *Turner* at 91) (internal citation removed)."

Amendment to the "free flow of incoming and outgoing mail," yet many regulations, such as inspections for contraband, are placed on incoming and outgoing mail.<sup>49</sup> As a general rule, incoming legal mail "may not be opened outside the presence of the prisoner-addressee."<sup>50</sup>

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<sup>47</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

<sup>48</sup> *Turner v. Safely*, 482 U.S. 78, 89 (1987). In *Turner*, the U.S. Supreme Court articulated a four-part test for determining the constitutionality of prison regulations. The first part asks "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives." *Id.* at 87. Secondly, *Turner* asks "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. The third issue is "the impact accommodation of the

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<sup>49</sup> JOHN BOSTON, OVERVIEW OF PRISONER'S RIGHTS 54 (Prepared for Legal Aid Society Pro Bono Training, February 26, 2010) [http://www.ctd.uscourts.gov/PDF%20Documents/pro\\_bono\\_prisoner\\_litigation\\_resources.pdf](http://www.ctd.uscourts.gov/PDF%20Documents/pro_bono_prisoner_litigation_resources.pdf) (citing *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003)).

<sup>50</sup> *Rinehart v. Beck*, 2011 WL 52360 (E.D.N.C.) \*4 (citing *Wolff*, 418 U.S. at 575); see also *Morgan v. Deer*, 2010 WL 3239063 (E.D.N.C.). See also *Stotts v. Quinlan*, 1989 WL 158869 (holding that the Director of the Bureau of Prisons could no longer open mail outside the inmate-recipient's presence or read any

(continued from page 8)

When incoming legal mail has been opened and read, prisoners have argued that a number of constitutional amendments are violated when their legal mail is read, including the First, Fourth, Sixth, and Fourteenth amendments. Should an inmate's incoming legal mail be opened and read, "a plaintiff must show actual injury by the opening" of plaintiff's legal mail in order "to state a claim for a constitutional violation."<sup>51</sup> This requirement attempts to ensure that plaintiff establishes that "a nonfrivolous legal claim had been frustrated or

incoming mail to him if it was clear if it had an apparently genuine address from attorney, law firm, court official, or government official).

<sup>51</sup> Rinehart v. Beck, 2011 WL 52360 (E.D.N.C.) \*4 (citing Lewis v. Casey, 518 U.S. 343, 352-54 (1996)); see also Morgan v. Deer, 2010 WL 3239063 (E.D.N.C.); Petersen v. Rawls, 2003 WL 24069843 (E.D.N.C.) (dismissed as frivolous) (citing Buie v. Jones, 717 F.2d 925, 926 (4<sup>th</sup> Cir.1983) (occasional accidental opening of legal mail does not state of claim of the denial of one's right to the access of court)); Lee v. Bennett, 2003 WL 23521252 (E.D.N.C.) (claim was dismissed as frivolous) "This single incident of alleged 'tampering' with Plaintiff's legal mail fails to give rise to a constitutional violation."; Flores v. Henderson County Detention Center, 2007 WL 1062973 (W.D.N.C.) ("an isolated instance of opening a prisoner's legal mail with no alleged prejudice, simply do[es] not rise to the level of constitutional violations."); Pulley v. Pinion, 2006 WL 2788206 (M.D.N.C. 2006) (citing Gardner v. Howard, 109 F.3d 427, 431 (8<sup>th</sup> Cir.1997)) ("It is well settled that allegation of a single and isolated instance of opening of an inmate's legal mail outside his presence does not state a claim of constitutional dimension."); Yarrell v. Buchanan, 2001 WL 34610460 (W.D.N.C.).

impeded."<sup>52</sup> Without demonstrating that the interference with a prisoner's legal mail had a negative effect in his case, the inmate cannot prove that his constitutional rights were violated.<sup>53</sup>



### Legal Mail Policy

Generally, an inmate's incoming legal mail is given greater protection than incoming non-legal mail.<sup>54</sup> As determined by the United States Supreme Court in *Wolff v. McDonnell*, incoming legal mail may be opened by prison officials to inspect the mail for contraband only in the presence of the inmate-recipient.<sup>55</sup> However, in *Wolff*, the Supreme Court approved of a prison regulation whereby mail had to be "specially marked as originating from an attorney" in

<sup>52</sup> Lewis v. Casey, 518 U.S. 343, 353 (1996). See also Morgan v. Deer, 2010 WL 3239063 (E.D.N.C.).

<sup>53</sup> Yarrell v. Buchanan, 2001 WL 34610460 (W.D.N.C.) (dismissed for failure to state a constitutional claim for relief) (citing White v. White, 886 F.2d 721 (4<sup>th</sup> Cir.1989); Morgan v. Montanye, 516 F.2d 1367 (2d Cir.1975) (holding that one interference with plaintiff's mail did not state a violation of his constitutional rights)).

<sup>54</sup> BOSTON, *supra* note 3, at 54 (citing Evans v. Vare, 402 F.Supp.2d 1188, 1194-96 (D.Nev. 2005)).

<sup>55</sup> *Wolff*, 418 U.S. at 575.

order to be considered privileged mail that could not be opened outside the presence of the inmate.<sup>56</sup> Further, the Court did not see a problem with a more stringent prison regulation whereby each attorney wishing to correspond with an inmate would first be required to contact prison officials in order to ensure that privileged mail was indeed from an attorney.<sup>57</sup>

The North Carolina Department of Corrections policy concerning legal mail is generous to inmates compared to the policy in *Wolff*. NCDOC policy requires that incoming legal mail be opened by prison officials "in the presence of the inmate unless waived in writing by the inmate, or in circumstances which may indicate contamination," and prison officials are permitted to read incoming legal mail to the extent needed to determine that the mail is actually "legal correspondence from the person whose name and return address appears on the outside of the envelope or package."<sup>58</sup> However, it does not require that each piece of legal mail be clearly marked as such, nor does it insist that members of the bar identify themselves to a prison prior to sending privileged mail. Instead, it identifies legal mail as "[m]ail to and from attorneys, state and federal courts, the Attorney General of the United

*(continued on page 10)*

<sup>56</sup> *Id.* at 576—57.

<sup>57</sup> *Id.* at 577.

<sup>58</sup> North Carolina Department of Correction Policy & Procedure Manual §D.0310 (b)(3-4) (hereinafter DOC Manual).

(continued from page 9)

States or the Attorney General of North Carolina, the judiciary, the Industrial Commission, consular officials, or legal aid services or a paralegal.”<sup>59</sup>

### Discrepancies as to What Constitutes Legal Mail

Notwithstanding definitions of the term “legal mail” such as that in the NCDOC Policy & Procedure Manual, there are discrepancies as to what is considered to be legal mail. For example, courts are split as to whether mail from government agencies to a prisoner constitutes legal mail. In *Muhammad v. Pitcher*, the Sixth Circuit determined that mail to an inmate from an attorney general, an official of a government agency, is included in the definition of legal mail, stating that “courts have consistently recognized that ‘legal mail’ includes correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general. We can find no case that reaches a contrary conclusion.”<sup>60</sup> However, there is also an abundance of case law asserting that not all correspondence of prisoners with government agencies need be considered legal mail. In *Prows v.*

*Department of Justice*, the court denied a request to enlarge the scope of legal mail to include mail from any government agency or official, asserting that “no authority supports such broad relief.”<sup>61</sup>

An attorney has a First Amendment right to send mail to potential inmate clients. There has also been a question as to whether this type of correspondence is covered under the definition of legal mail. In this situation, because the attorney has had no previous contact with the inmate and the inmate has not asked for the attorney’s representation or advice, the attorney and inmate do not yet have an attorney-client relationship.<sup>62</sup> According to *Denius v. Dunlap*, “[t]he right to hire and consult an attorney is protected by the First Amendment’s guarantee of freedom of speech, association, and petition....[T]he state cannot impede an individual’s ability to consult with counsel on legal matters....Furthermore, the right to obtain legal advice does not depend on the purpose for which the advice was sought....In sum, the First Amendment protects the

right of an individual or group to consult with an attorney on any legal matter.”<sup>63</sup> *Denius* suggests that any attorney-client communication is protected under the First Amendment, whether the communication takes place during the litigation process or simply leads to later litigation.



In addition, *Procurier v. Martinez* states that “prisoners are entitled to unobstructed and confidential communication with courts and with attorneys and their assistants.”<sup>64</sup> Furthermore, the Court in *Ruiz v. Estelle* explained that the right of an inmate to communicate with courts and attorneys “is not limited to those already represented by an attorney, but extends equally to prisoners seeking any form of legal advice or assistance.”<sup>65</sup>

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<sup>59</sup> *Id.* at §D.0308(b)(1).

<sup>60</sup> *Muhammad v. Pitcher*, 35 F.3d 1081, 1083 (6<sup>th</sup> Cir. 1994); *see also* *Sallier v. Brooks*, 35 F.3d 1081; 343 F.3d 868, 879 (6<sup>th</sup> Cir. 2003) (stating “other courts have consistently recognized that ‘legal mail’ includes correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general).

<sup>61</sup> *Prows v. Department of Justice*, 1993 U.S. App. LEXIS 12545 (citing *United States v. Stotts*, 925 F.2d 83 (4<sup>th</sup> Cir. 1991) (reversing district court order requiring BOP to treat as legal mail all correspondence from, among others, any government official)); *see also* *Crosby v. Keating*, 2009 U.S. Dist. LEXIS 102012 (stating Plaintiff is advised that, in contrast to mail from a prisoner’s attorney, mail from a public agency, a public official, recognized civil rights groups, etc. is not ‘legal mail.’).

<sup>62</sup> Posting to Prisoners’ Rights list serve, April 20, 2011 (on file with NCPLS).

<sup>63</sup> *Denius v. Dunlap*, 209 F.3d 944, 953-54 (7<sup>th</sup> Cir. 2000).

<sup>64</sup> *Procurier v. Martinez*, 416 U.S. at 419-22 (interviewing privileges must be extended to law students and paralegals employed by attorneys); *Ex parte Hull*, 312 U.S. 546, 549, 61 S.Ct. 640 (1941) (striking down regulation permitting prison officials to screen prisoners’ submissions to court).

<sup>65</sup> *Ruiz v. Estelle*, 503 F.Supp. 1265, 1372 (S.D.Tex. 1980), *aff’d* in pertinent part, *rev’d* on other grounds, 679 F.2d 1115, 1153-55 (5<sup>th</sup> Cir. 1982).

*(continued from page 10)*

Therefore, according to these decisions, any type of correspondence between a prisoner and an attorney

concerning any legal matter is legal mail. As a result, whether a piece of incoming or outgoing mail is considered “legal mail” depends largely on whether an

organization sending or receiving the mail can be characterized as one that engages in litigation as a form of political expression and association.

## **Ban the Box**

### **A Remedy for the Employment Discrimination Faced by People with Criminal Records**

*Daryl V. Atkinson, North Carolina Office of Indigent Defense Services Staff Attorney  
Member of North Carolina Second Chance Alliance*

Over the last thirty years, the United States has experienced an explosion in the number of people who have come in contact with the criminal justice system. Currently in the U.S., there are approximately 1.6 million people in prison, 4 million adults on probation, and over 65 million individuals with a criminal record.<sup>66</sup> In North Carolina the numbers are equally as daunting; for example, approximately 41,000 people are in prison<sup>67</sup>, another 106,000 are on probation<sup>68</sup>, and nearly 1.6 million, 1 in 6 adults over the age of 16, have a criminal record.<sup>69</sup> All of these individuals face significant challenges to gaining employment and becoming productive citizens, irrespective of whether they actually served time in jail or prison. In recent years advocates across the country have sought to improve the employment

outcomes of people with criminal records by promoting the “Ban the Box” movement. In the following article I will explain the Ban the Box policy; why it’s important to our communities; and how the policy would work.



#### **What is Ban the Box?**

People with criminal records suffer from pervasive discrimination in many areas of life, including employment, housing, education, and eligibility for many forms of social service benefits. Ban the Box is a fair hiring campaign that seeks to end the employment discrimination faced by people with criminal records. In the wake of the terrorist attacks on 9/11 the criminal background check

industry has grown tremendously. According to a survey conducted by the Society for Human Resource Management more than 90% percent of companies reported using criminal background checks for their hiring decisions.<sup>70</sup> For many companies, criminal background checks have become the primary screening tool for prospective employees. However, these background checks often uncover information that is inaccurate, outdated, and unrelated from any reasonable perspective to the applicant’s fitness for a particular position. Ban the Box ordinances remove the questions about an applicant’s criminal history from the initial stages of the employment process so the hiring authority can first get an opportunity to learn about the candidate’s experience, skills and personality as they relate to the position to be filled.

Delaying the criminal  
*(continued on page 12)*

<sup>66</sup> Bureau of Justice Assistance, Survey of State Criminal History Information Systems, 2008 (Table 2, 4,7)

<sup>67</sup> <http://www.doc.state.nc.us/>

<sup>68</sup> *Id.*

<sup>69</sup> Bureau of Justice Assistance, Survey of State Criminal History Information Systems, 2008 (Table 7)

<sup>70</sup> Society for Human Resources Management, “Background Checking: Conducting Criminal Background Checks” (January 22, 2010), at 3.

(continued from page 11)  
background check until an applicant has been made a conditional offer of employment has improved the employment outcomes for people with criminal records. For example, Minneapolis passed a Ban the Box ordinance in 2007. Prior to the ordinance, only 6% of people with tarnished records were able to find work.<sup>71</sup> After the Ban the Box measure was passed, this figure jumped to 60%, without any increase in theft or violence in the workplace.<sup>72</sup> No other public policy has been shown to provide this level of improvement in transforming people with criminal records into responsible and productive tax-paying citizens

### **Why is Ban the Box important to our communities?**

Ban the Box is important to our communities because the policy will improve public safety and lower correction expenses. Recidivism is a huge problem in the criminal justice system. Currently in North Carolina, more than 4 out of 10 people released from prison are convicted of a new crime within three years.<sup>73</sup> This level of re-offending has huge public safety implications for our

communities because every time a former offender commits a new crime, there is a new victim. Recent studies have shown that providing individuals with the opportunity for stable employment reduces the chances of repeat offenses. For example, a study done by the Safer Foundation, a reentry service provider in Chicago, found that the 3 year recidivism rate for people released from Illinois prisons was 54%.<sup>74</sup> Whereas, the recidivism rate was 8% for clients who participated in the Safer Foundation's transitional jobs program for over one year.<sup>75</sup> Ban the Box is a public policy proven to improve the employment outcomes of people with criminal records, which lowers their chances of committing crimes in the future, thereby making our communities safer. In addition, Ban the Box will lower the amount of money needed to operate jails and prisons. On the local level, the average cost to hold a person in a county jail is about \$60 per day.



On the state level, North

Carolina ranks in the top fifteen in total prison population at approximately 41,000 inmates, at a cost of approximately \$25,000 per year, per inmate.<sup>76</sup> Mitigating recidivism by removing employment barriers for people with criminal records will curb these costs, thereby freeing those tax dollars to be spent on creating jobs or educating our children.

### **How will Ban the Box work?**

Ban the Box will reduce recidivism, curb corrections costs, and mitigate the employment discrimination faced by people with criminal records by: (1) Prohibiting the use of a criminal record as an automatic bar to employment; (2) Promoting the accurate use and interpretation of a criminal record; (3) Providing a qualified applicant with an opportunity to provide information on rehabilitation; and (4) Requiring the employer to identify the specific conviction(s) that act as disqualifying offenses and to establish a direct relationship between the conviction and the prospective job.

Ban the Box ordinances prohibit the use of a criminal record as an automatic bar to employment. The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for overseeing claims of employment discrimination. In 1987, the EEOC  
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<sup>71</sup>Maurice Emsellem, Local Government Policies Improve Employment Opportunities for People with a Criminal Record: EU and US Policies and Practice for Prisoner Re-Entry Conference (October 2010) at 13.

<sup>72</sup> *Id.*

<sup>73</sup> North Carolina Sentencing and Policy, Correctional Program Evaluation: Offenders Placed on Probation or Released From Prison in Fiscal Year 2005/06, at iii.

<sup>74</sup> According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8 percent of those who were employed for a year committed another crime, compared to the state's 54-percent average recidivism rate. American Correctional Assoc., 135th Congress of Correction, *Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study* (August 8, 2005).

<sup>75</sup> *Id.*

<sup>76</sup> North Carolina Department of Corrections, Annual Statistical Reports (FY 2007-2008). <http://randp.doc.state.nc.us/pubdocs/0007058.PDF>.

*(continued from page 12)*

released policy guidance on the consideration of conviction records in employment decisions.<sup>77</sup> In the guidance, the Commission states that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics.<sup>78</sup> Consequently, the EEOC has held and continues to hold that employment policies or practices that automatically exclude applicants because of a conviction history violate Title VII of 1964 Civil Rights Act.<sup>79</sup> Hence, cities and employers should embrace Ban the Box ordinances because the policy ensures that the hiring practices of these entities do not run afoul of federal law.

Ban the Box ordinances promote the accurate use and interpretation of a criminal record. Once the applicant has been made a conditional offer of employment the employer would then initiate a criminal background check. Next, a discrete group of professionals trained to interpret criminal records within the City's Human Resource Department would review the record. Finally, the applicant would be given the record and provided an opportunity to review the record for accuracy and relevance.

The applicant will have the opportunity to submit evidence of rehabilitation if criminal convictions are uncovered in the criminal background check. This opportunity will take place prior to the revocation of the conditional offer of employment. An applicant's evidence of rehabilitation may include educational or vocational training, substance abuse or anger management treatment, as well as civic and volunteer history.



If the employer intends to make an adverse hiring decision and revoke the conditional offer of employment they must first identify the specific conviction(s) that act as disqualifying offenses and establish a direct relationship between the conviction and the prospective job. Ban the Box ordinances do not seek to eliminate criminal background checks from the hiring process. The policy merely seeks to delay the inquiry so the applicant can be evaluated on all of their qualifications. In some cases an applicant's criminal history may be relevant to the hiring decision. For example, no one would disagree that an applicant convicted of child abuse should be denied employment in a day care center. However, should an

applicant who has been convicted of possession of cocaine be denied employment as a custodian or a stock person in a warehouse? Forcing the employer to identify the conviction(s) that serves as the disqualifying offense mitigates the chances that criminal convictions will act blanket disqualifiers for employment. Moreover, requiring the employer to establish a direct relationship between the conviction and the prospective job encourages the employer not to treat all convictions the same. Some convictions will be more or less relevant than others, depending on the nature of the crime and the duties of the job.

In conclusion, over twenty cities and five states across the country have passed Ban the Box laws. The policy has proven to benefit potential employees, employers, and communities at large. Workers benefit because Ban the Box ordinances remove the chilling effect that questions about criminal records have on job applicants. Moreover, delaying the inquiry into an applicant's criminal history levels the playing field by allowing the applicant to be judged on all of their qualifications and experience, not just their criminal record. Employers benefit from having an increased pool of applicants to choose from and reduced human resource expenses because they are not conducting unnecessary background checks on unqualified applicants. Finally, the community benefits from increased public safety and reduced corrections costs.

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<sup>77</sup> U.S. Equal Employment Opportunity Commission, EEOC Policy Guidance on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq., (1982), (Feb. 4, 1987).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

(continued from page 13)

In sum, Ban the Box is a win-win proposition for people with criminal records, prospective

employers, and society as a whole. Currently, the North Carolina Second Chance Alliance is encouraging the City Councils and

County Commissions in Durham and Raleigh, NC to pass Ban the Box ordinances.

## Medical Co-Payments within the North Carolina Department of Correction

*Tod M. Leaven, NCPLS Staff Attorney*

NCPLS receives many letters expressing concern about the North Carolina Department of Correction (“NCDOC”) and its medical co-payment policy (“the policy”). This brief article will inform you about what the policy is, when and what the DOC can charge you for, and what you should do if you feel you have been charged erroneously.

### The Policy

The DOC has broad statutory authority to establish the medical co-payment policy.<sup>80</sup> Within the

DOC, the policy was formally established by the Director of the Division of Prisons (“DOP”) and within the DOP the Director of the Health Services Section determines which inmate health services will require a co-payment and which services will be exempt.<sup>81</sup>



The policy states that a co-payment fee will only be charged

for *inmate-initiated* (1) sick call, (2) emergency visit services, and (3) routine dental.<sup>82</sup> Inmate initiated is defined as “inmates seeking health care services by: 1) completing and forwarding a sick call request; 2) requesting department staff to assist them in getting routine health care services; 3) reporting to any health care staff member for consultation and/or treatment without having been contacted or scheduled by the health care staff; and 4) when requests are made on behalf of the inmate by those persons representing the interests of the inmate, such as family or attorney.”<sup>83</sup>

### The Fees

Inmate initiated healthcare visits require a co-pay of \$5.00. Inmate initiated emergency visits outside of normal sick call require \$7.00 if there is no true *emergency*.<sup>84</sup> Emergency is defined as “a life/limb-threatening event. It means that immediate treatment is necessary to prevent death, severe or permanent

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<sup>80</sup> N.C. Gen. Stat. §§ 148-5 (The Secretary of Correction shall manage and have charge of all the property and effects of the State prison system, and conduct all its affairs subject to the provisions of this Chapter and the rules and regulations legally adopted for the government thereof), 148-11(a) (The Secretary shall adopt rules for the government of the State prison system. The Secretary shall have the rules that pertain to enforcing discipline read to every prisoner when received in the State prison system and a printed copy of these rules made available to the prisoners), and 148-36 (All facilities established or acquired by the State Department of Correction shall be under the administrative control and direction of the Secretary of Correction, and operated under rules and regulations proposed by the Secretary and adopted by the

Department of Correction as provided in G.S. 148-11. Subject to such rules and regulations, the Secretary shall classify the facilities of the State prison system and develop a variety of programs so as to permit proper segregation and treatment of prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and correctional treatment of persons committed to the Department.)

<sup>81</sup> N.C. Dep’t of Correction, Health Services Policy & Procedure Manual AD III-1 1 (September 2007) (hereinafter DOC P&P Manual).

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 3.

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 disability, uncontrolled bleeding or to maintain an airway.”<sup>85</sup> It is important to realize the very limited scope of *emergency*, because it specifically requires that *immediate* treatment is necessary. All self-inflicted injuries will cost \$7.00 upon treatment.



### Exemptions

Exemptions to this policy are divided into two groups: population exemptions and service exemptions.

Population groups that are completely excluded from the policy are: (1) inmates housed in private substance abuse treatment centers, (2) inmates housed in county jails, (3) safekeepers, (4) inmates in out-of-state housing, and (5) ECO.<sup>86</sup>

Services that are exempt from the policy are: (1) initial procession healthcare examinations; (2) dental examinations *instituted by the DOP*, such as second opinions and consultations; (3) “one inmate initiated sick call visit for the same chief complaint that an inmate has

been seen for within last fourteen calendar days;” (4) Emergency care where an inmate is directed to an emergency room or urgent care provider for evaluation of a potentially life or limb threatening injury, allergy, or illness; (5) Inmates admitted to inpatient medical and mental health facilities; (6) Mandated healthcare encounters, including periodic health assessments, TB testing, immunizations, Hepatitis B vaccine, other treatments instituted by the DOP for public health based reasons; medical examinations or treatment required following use of force, automobile accidents, fire and smoke incidences and others per facility standard operating procedure; (7) Chronic disease *clinic visits* initiated and scheduled by a health care provider - established chronic disease clinics in the DOC are cardiovascular/HTN, pulmonary disease (asthmas, COPD), diabetes, seizures, and HIV/AIDS; (8) custody directed referrals directly given to health care staff or to the inmate when the custody officer deems a medical visit is critical and necessary - not in routine cases and not to take the place of the sick call process; (9) work related incidents, *provided Form DC-193 is completed and submitted at the time of the visit*; (10) health related educational sessions - information on hypertension, cholesterol, etc.; (11) health assessments to qualify inmates for educational programs and/or job assignments; (12) medical examinations or treatment following extraordinary events such as a riot or natural disaster;

and (13) DOP initiated health measures necessary to prevent the spread of specific infectious or contagious diseases.<sup>87</sup>

### Challenging the Policy

A number of courts have considered similar policies and upheld them against challenges that the policies either violate the Eighth Amendment’s ban on cruel and unusual punishment, or that they deprive inmates of property without due process of law.<sup>88</sup> The DOC policy provides that inmates will not be denied necessary medical care due to a lack of funds, and it allows an inmate who believes that he has been improperly assessed a co-payment charge to submit an administrative grievance. These factors are probably sufficient to allow DOC to prevail in a legal challenge.

### Wrongful Deductions

If you believe a medical co-payment has been deducted from your trust account in error, you must submit a Trust Fund Inquiry form. The DOC Policy & Procedure Manual states that “[i]t shall be the responsibility of the trust fund staff to verify the validity of the co-payment charge with the facility health services staff.” Upon reviewing the trust fund staff’s response, if you believe money was deducted in error, you might consider filing a grievance.

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<sup>85</sup> *Id.* at 1.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Id.* at 4-5.

<sup>88</sup> *Bobbett v. Angelone*, 942 F. Supp. 251 (W.D. Va. 1996), *aff’d*, 121 F.3d 697 (4th Cir. 1997).

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Remember to limit your complaint to only one topic. Do not grieve inadequate medical treatment and a wrongful co-payment charge in the same grievance.

### Key Points

- (1) Sick call visits for a chronic disease are not included in the policy as being exempt.
- (2) Emergency sick calls are only exempt when it is a recognized

emergency, which includes a very small set of circumstances.

- (3) You must first address any possibly erroneous charges with the facility trust fund staff before you can file a grievance.

## Possible Mail Delays at NCPLS

*Michele Luecking-Sunman, NCPLS Staff Attorney*

NCPLS receives over five hundred letters every week. Some weeks that number climbs even higher. Because we respond to each letter we receive, we also send out mail in large volume, often reaching five hundred letters per week. All of that outgoing mail means we pay a hefty premium in postage. As we seek to serve more prisoners, we also must continue to reduce costs. In line with these goals we have implemented some changes in the way that we send out mail.

We operate as a non-profit and we have the option of sending out mail in bulk at a reduced rate. By utilizing systems already available to us at the post office, we have cut the amount of money we spend

on postage by half, and by even more on some items.



In exchange for this huge savings in postage our mail takes a bit longer to reach its destination. Sometimes the delay from the time a letter leaves our office until it arrives at a prison is only a few days, sometime it takes up to two weeks. We are mindful of these delivery times and, when a letter must arrive at its destination more

quickly, send the mail using standard postage rates. When you receive a letter from us with a date that is a week or so earlier than the date you received it, you will know that we have used the reduced postage system available to us.

By saving money on postage we are able to better utilize our funds to serve our clients. We have more resources available for quickly reviewing correspondence, advocating on behalf of our clients, and litigating their cases. We seek to use our resources as responsibly and effectively as possible. Our new mail system allows us to do just that.

## The Incarcerated Youth Advocacy Project

*Wendy Greene, Incarcerated Youth Advocacy Project Director*

North Carolina Prisoner Legal Services, Inc., a non-profit law firm that advocates for prisoners in both civil and post-conviction litigation, is expanding its work into advocacy for North Carolina's

incarcerated youth. In 2009 there were 365 youth committed to youth development centers, with an average daily population of 429 youth. In the same year there were 4342 youth confined in local

detention centers. Before implementation of the Incarcerated Youth Advocacy Project, these children had no readily available access to

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attorneys to examine potential sentencing errors or to investigate constitutionally deficient conditions of confinement. Like other legal services of NCPLS, representation is free of charge and available statewide.

Incarcerated youth need access to the courts. A 2009 study by the United States Department of Justice cited several North Carolina Youth Development Centers as having unacceptable rates of sexual abuse. A 2009 study by the North Carolina Office of the Juvenile Defender found an unacceptably high rate of sentencing errors that could be corrected by a court. In addition to investigating claims relating to conditions of confinement and representing youth whose sentences may have been wrongfully imposed, the Project

will also document the ongoing need to provide youth access to the court by assembling relevant information for policy makers. Project attorneys will work with the Office of the Juvenile Defender and with other stakeholders in and outside of state government to ensure that incarcerated youth are treated fairly, safely, and humanely.

NCPLS is grateful to the Z. Smith Reynolds Foundation for funding the Incarcerated Youth Advocacy Project. The Foundation funds projects in all 100 of North Carolina's counties that involve issues related to community economic development, the environment, democracy and civic engagement, pre-collegiate education, and social justice and equity.

The Incarcerated Youth

Advocacy Project is directed by Wendy Greene, who returns to NCPLS after a nine year absence during which she represented various State agencies as an Assistant Attorney General and as in-house counsel. Ms. Greene also brings significant public service experience, having worked for almost 10 years on grassroots community based projects involving youth.



### Contact

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## Everyone Deserves a Second Chance! First Annual "I'm for Second Chances" Lobby Day

*April Giancola, NCPLS Post Conviction Managing Attorney*

On April 26, 2011, the community came together to witness the first ever "I'm for Second Chances" Lobby Day at the North Carolina Legislature. Led by Community Success Initiatives and the NC Justice Center, the day began with a gathering in the Legislature's auditorium of over 200 people who care about the issues facing the formerly incarcerated population in our State. People from Asheville, Greensboro, Winston Salem, Wilmington and

the Triangle gathered to hear stories and testimonials as to why they were all there: to break down the barriers facing people coming out of prison and jail so they can successfully reintegrate back into our communities. The audience listened to representatives from Community Success Initiatives, the NC Justice Center, and from State Representatives and Senators. Rev. William Barber from the NC NAACP also spoke and motivated the crowd to stand up and challenge our elected

officials to take these issues seriously.



In addition to the speeches, the audience was educated on how to approach and talk with their elected officials. Most importantly, the message was

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 clear that this day was only the beginning and a lot of work has yet to be done

With over one million people in North Carolina who have criminal records, and over 42,000 incarcerated in the NC DOC, the community must advocate for the removal of barriers that prevent individuals from succeeding.

Currently, there are several bills being considered by the NC Legislature that directly address issues affecting formerly incarcerated people. These bills include better expungement laws, the ability of a person to receive a certificate of rehabilitation, and a movement to “ban the box” on employment applications that delays a criminal background check until a person has been made a conditional offer. We urge

you that once you are released and back in your community, use your voice to contact your elected officials and be heard on these important issues. You should also encourage your families to call and write to their representatives and senators, as these issues not only affect you, but affect the families of formerly incarcerated people too.

## Pending Legislation Affecting Formerly Incarcerated People in NC

*April Giancola, NCPLS Post Conviction Managing Attorney*

Currently, there are several promising bills pending in the North Carolina Legislature that directly affect formerly incarcerated people. Below is a listing of each bill, which elected official is sponsoring the bill, and a summary of the bill itself.

Applies to a person who has no prior criminal history and is currently only facing no more than two (2) charges in one session of Court and the charges are not higher than a G felony. This person may apply for a Certificate of Restoration from the Court of their conviction. The petitioner must show, by a preponderance of the evidence, several things: that it has been at least twelve (12) months since the completion of their sentence, they are currently gainfully employed or seeking employment, they have not committed any new crimes and the granting of the Certificate will not endanger the welfare of the community.

Unless conviction is an outright bar to employment, State hiring authorities shall not make an inquiry regarding a conviction on the initial application for employment and shall only take into consideration a conviction after the applicant has been selected as a finalist for the position.

The format is:

**Name of the Bill**

House Bill # and sponsors  
 Senate Bill # and sponsors

Brief Summary of the bill




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### **Funding for Comprehensive and Local Reentry Plans**

HB276, SB 217 Pierce, M. Alexander, Bryant, & Brandon

Calls for the Governor’s Crime Commission, of Dept. of Crime Control and Public Safety, to increase its efforts to promote funding for nonprofits engaged in ex-offender reintegration services.

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### **Certificate of Restoration of Rights**

HB641 Guice & Floyd  
 SB516 Hartsell

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### **Ban the Box Policy for jobs with the State of NC**

HB275 Bryant, Pierce, M. Alexander, & Brandon  
 SB219 Hartsell, Dannelly, & Jones  
 SB509 D. Berger & McKissick.

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**Department of Correction**  
**Office of Research and Planning**  
 HB33, SB 221 Pierce, Bryant, M. Alexander, & Frye

Calls for the DOC Office of Research and Planning to be in charge of the coordination and

implementation of ex-offender reentry policy initiatives.

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**Improved opportunity for expungement in NC**

HB 273 Bryant, Guice, & Pierce  
 SB Hartsell, Dannelly, & Jones  
 HB 675 Haire & Harrison  
 SB 70 (Kinnaird)  
 SB 96 Kinnaird & McKissick  
 SB 297 Daniel, D. Berger & McKissick.

Bills cover areas of appointing a study to evaluate NC's expungement laws, amending current expunction laws, expunging nonviolent offenses by a minor and prohibiting employers, educational institutions or state agencies from asking an applicant for information about an expunged charge.

## NCPLS Continues Fight for Rights of Sexually Abused Women Prisoners

*Elizabeth Albiston, NCPLS Staff Attorney*

NCPLS attorneys have been busy this last year litigating cases on behalf of women inmates who have been sexually abused by Department of Correction (DOC) employees. As we hear from more and more inmates, we are learning that the problem of staff against inmate sexual abuse is even more widespread than we anticipated. We are working with women prisoners to bring lawsuits in several different courts in order to attack the problem on multiple levels.

On November 18, 2009, NCPLS attorneys filed *Etters v. Bennett*, 5:09-CT-3187-D, a federal lawsuit that seeks class action status on behalf of all present and future female inmates of the DOC who have been, or may become, victims of sexual abuse perpetrated by DOC staff. The goal of the lawsuit is to make the DOC create and properly enforce policies that will substantially decrease the amount

of staff/inmate sexual abuse, as well as compensate survivors of staff/inmate sexual abuse for their suffering.



Ten women inmates filed supporting affidavits in this case describing the extensive sexual abuse they have endured or witnessed, as well as the many barriers inmates have to reporting the abuse. These affidavits gave the court an important insight into the daily struggles that women inmates face. While class certification has not yet been granted in this case, the judge recently issued a ruling that will allow most of the claims for class relief in the case to go forward. Plaintiffs plan to renew their motion for class certification.

In October 2010, NCPLS also filed two lawsuits in Wake County Superior Court on behalf of women who were sexually assaulted by DOC employees at the NCCIW Tag Plant. The cases include claims under the North Carolina Constitution for violation of the plaintiffs' civil rights, as well as claims for gross negligence, battery, and intentional infliction of emotional distress. The cases seek injunctive and monetary relief. Both plaintiffs had victories recently when the judge denied the majority of defendants' motions to dismiss, allowing the most significant parts of the cases to proceed. The hearing was notable as it was our first opportunity to speak with a judge about the DOC's poor handling of sexual abuse in women's prisons.

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In addition to the federal and Superior Court cases, NCPLS also filed a negligent retention and supervision claim in the North Carolina Industrial Commission

on behalf of a woman who was sexually assaulted by a correctional officer at NCCIW.

If you or someone you know has been sexually assaulted, abused, or harassed by a prison

staff member, please write to NCPLS for information about your rights. Together, inmates can make a difference.

## Client Awarded Release by Challenging Unreliable Bullet Lead Evidence

*Hoang Lam, NCPLS Staff Attorney  
Allison Standard, NCPLS Staff Attorney*

In 1997, our client was convicted after a jury trial of first-degree murder for the death of a former girlfriend and sentenced to life without parole. Among the evidence presented by the State was the bullet lead testimony of an FBI agent, who testified about a match between the bullets found in the deceased's body and other bullets purportedly belonging to our client.



NCPLS filed a motion for appropriate relief showing the unreliability of the bullet lead evidence, the FBI's failure to disclose an impeaching study it

had conducted on bullet lead analysis, and other issues. The District Attorney of the county of conviction agreed to the granting of the motion, in exchange to our client's entering an *Alford* plea to second-degree murder. At a hearing on April 4, 2011, the judge approved the agreement, and our client was released the next day.

## Immigration Client Released through NCPLS's Advocacy

*Hoang Lam, NCPLS Staff Attorney*

Our client, a legal permanent resident for over 17 years, pled guilty to possession of drug paraphernalia and received a four-month sentence. The misdemeanor, however, made him deportable. Upon his completion of the sentence in 2010,

immigration officials detained him and sought to have him deported to his country of origin. At an immigration hearing on March 30, 2011, NCPLS presented sympathetic facts about his five young U.S. citizen children, one of whom was suffering from severe

asthma, and their mother's disability. The immigration judge ordered the client released and his permanent resident status restored. The government decided not to appeal the judge's decision, and our client was released the same day.

## ***Bowden* Litigation Update**

*Sarah Jessica Farber, NCPLS Staff Attorney*

NCPLS is working hard on behalf of inmates sentenced to 80 year sentences under N.C. Gen. Stat. § 14-2 for crimes committed between April 8, 1974 and June 30, 1978. You might have first heard about these cases when Mr. Bobby Bowden challenged DOC's policy in the courts a few years ago. NCPLS's position is that these inmates are entitled to have good time, gain time, and merit time sentence reduction credits applied to their release dates. We were successful at the Superior Court level, but the North Carolina Supreme Court did not agree with our position.

In the *Jones v. Keller* and *Brown v. N.C. Dep't of Correction* cases, we asked the Supreme Court of the United States to grant our *petition for writ of certiorari* – our request to have the North Carolina Supreme Court's decision reviewed – with the help of a law firm in Washington, D.C., with expertise in these sorts of petitions. Despite our hard work, the Supreme Court decided not to hear the case. While we are disappointed that the Supreme Court did not grant our petition, this was not an unexpected outcome. The Supreme Court receives over 10,000 requests to review cases each year, and they grant only about 100 of them.

The fight is not over for Mr. Jones or Ms. Brown. We will be filing federal habeas corpus petitions on their behalf shortly.

Other inmates have already filed federal habeas corpus petitions. A third group of inmates has habeas corpus petitions pending in state court. We have had a couple of hearings on state court habeas petitions, and are awaiting the judge's order as to those matters. A victory for any one of these prisoners is a victory for the whole group of affected inmates, and we are pressing on.



### **Bowden Quick Facts**

**Who is affected?** Inmates who were convicted of crimes that occurred between April 8, 1974 and June 30, 1978, and who were given so-called “life” or “natural life” sentences, or who received the death penalty and later had that sentence vacated. It is the date the crime allegedly occurred that matters, not the date when you were sentenced.

**How do I know if I am affected?** If you are not sure whether you are affected by the *Bowden* cases, you can ask your case manager about your sentence. DOC currently calls these sentences “SL80” in OPUS.

**What happens to “SL80” inmates’ sentence reduction credits?** You are still earning sentence reduction credits, but they are not being used to reduce your sentence. DOC is still keeping track of them, though, as they are used to help DOC make custody classification decisions and to calculate your parole eligibility.

**What do I do if I have a “SL80” sentence?** If you have already been corresponding with NCPLS regarding your *Bowden* issue/your “SL80” sentence, you do not need to do anything further. If you have not yet contacted NCPLS, please write to us and mention that you think you have a *Bowden* issue in your case.

**When will affected inmates get their sentence reduction credits applied to their unconditional release dates?** We do not know. This is what we are fighting in court to achieve and it is a slow process.

**What about inmates with life sentences whose crimes were committed before April 8, 1974?** The *Bowden* line of cases has no effect on your sentence or your sentence reduction credits.

**What about inmates sentenced to life whose crimes were committed after June 30, 1978?** The *Bowden* line of cases has no effect on your sentence or your sentence reduction credits.

## The Lowdown on Jail Credit

Chris Nelson, NCPLS Jail Credit Paralegal

Reviewed by April Giancola, Post-Conviction Managing Attorney

Jail credit – the credit awarded against a defendant’s sentence for time spent in jail prior to conviction – sounds easy enough on the surface. Count the days and that’s that, right? As you have probably noticed, nothing is simple when it comes to the law, not even jail credit. At NCPLS we open approximately 150 files per month concerning jail credit alone.



While a defendant 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,”<sup>89</sup> there are a list of conditions that must be met before a period of confinement can be applied as jail credit. Often these conditions relate and, at times, contradict each other. Two of the most misunderstood and confusing aspects of jail credit relate to active and previously imposed sentences.

**Jail credit cannot be applied for confinement while serving an active sentence.**

No period of confinement can be applied as jail credit if you are serving *any* active sentence at the time. This includes any time spent in confinement for non-payment of child support. Most often, this issue appears when an inmate is serving concurrent sentences where he or she is convicted/revoked for Sentence A on one date and convicted/revoked for Sentence B on a later date. For example, John Doe is arrested for Larceny on January 1 and held in the Wake County Detention Center for the Larceny and a probation violation. On January 15, Mr. Doe’s probation is revoked and his 6-8 month sentence is activated. On January 30, Mr. Doe is convicted and given a 6-8 month sentence for the Larceny. In this case, Mr. Doe is eligible for 15 days of jail credit against his sentence for the Larceny for the time he spent in jail from 1/1-1/15 (Unless this credit was applied against his probation violation<sup>90</sup>). He cannot receive jail credit for the time he was in jail from 1/15-1/30, as he was serving an active sentence for the probation violation at that time.

Though not directly related, we also get a large number of letters asking about the time spent in jail *after* sentencing. Many inmates believe this is “dead time” where they are neither eligible for

jail credit nor earning sentence credit. While understandably confusing, this is not true. Unless otherwise specified, your sentence begins running on the date your commitment order is signed by the sentencing judge, even if you are still in the county jail.<sup>91</sup>

**Time used to satisfy a sentence cannot be used as jail credit on any other sentence.**

This is one of the trickiest rules of jail credit. Basically, it means this: jail credit can only be applied *once*. Many times when we are unable to request additional jail credit for a client, it is because the period of confinement in question was applied against a different sentence. For example, William Tell is arrested and confined for Aggravated Assault and a misdemeanor probation violation on January 1. He remains in jail for that charge until his conviction for the Aggravated Assault on June 1. However, on February 1 Mr. Tell’s probation was revoked for his misdemeanor probation violation and he was given a 30 day sentence with Time Served. In this case, only 150, not 180, days of jail credit can be applied against his sentence for the Aggravated Assault, as 30 days of his confinement were applied as jail credit against his probation violation.

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<sup>89</sup> N.C. Gen. Stat. § 15-196.1

<sup>90</sup> See *infra*.

<sup>91</sup> N.C. Gen. Stat. § 15A-1353(a)

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In the case of concurrent sentences, jail credit can be applied against multiple sentences, but only when the inmate was confined before trial for both/all charges that result in the concurrent sentences and the sentences begin on the *same day*. For example, Flem Snopes is arrested and confined for both Driving while License Revoked (DWLR) and Possession of Schedule VI on January 1, and he remains in jail for these two charges until his conviction for both on January 20. He is sentenced to two concurrent sentences. In this case, 20 days of jail credit are to be applied against

both his sentence for the DWLR and Possession.

However, if an inmate is confined for both/all charges that result in concurrent sentences, but he or she is sentenced on *different* days, jail credit does not *have to* be applied against both concurrent sentences, only the first. While jail credit often gets applied to both concurrent sentences - it is not legally required to be. Revisiting Mr. Doe from earlier in this article, Mr. Doe is arrested and confined for Larceny and a probation violation on January 1. He remains in jail. On January 15, his probation is revoked and he receives 15 days of jail credit against his probation violation. On January 30 Mr. Doe is convicted for his Larceny charge. In this case, the court is not legally required to apply 15 days of jail credit against his sentence resulting from the Larceny charge, as that credit was “previously

applied” [used] against his sentence for the probation violation.

There is a gray area surrounding the “previously imposed” issue, and that is the issue of “fundamental fairness.” In the case *Williams v. Hayes*, 846 F.2d 6 (4th Cir. 1988), the court ruled that if an inmate is confined for two charges and receives concurrent sentences *in the same court [county] during the same court week* that jail credit should be applied to the longer of the two sentences so that the inmate may derive some benefit from his or her pre-trial confinement. However, *Williams v. Hayes* is not considered to have set precedent, and while NCPLS often requests jail credit under the scope of fundamental fairness, we rarely have legal recourse to challenge the court when such a request is denied.

## Frequently Asked Questions about Post-Conviction Relief

Allison Standard, NCPLS Staff Attorney

### How can I get my consecutive (or “box-carred”) sentences to be run concurrently?

North Carolina does not have a standard legal procedure for reducing a valid sentence or having consecutive sentences changed to concurrent. The court will not reduce or change a sentence because an inmate believes that he received too much time, or that he has demonstrated a

positive prison record, or that incarceration works a hardship on his family. If there is a problem with the plea agreement, the prior record level, or some other part of your plea, the eventual result of litigating these issues may be a new sentence. Otherwise, the remaining possibility is to file a petition with the Governor’s office requesting a commutation.



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**Can the court use convictions from before I was 18 years old against me?**

In North Carolina, any conviction received in the adult court system is considered a prior conviction. Our juvenile court system is only for offenses committed before the defendant turned 16 years old, and adjudications of delinquency from juvenile court cannot be used in a prior record level. Juvenile cases that are transferred to the adult court system are considered adult convictions. However, if more than one conviction from younger than age 18 was used against you in a habitual felon indictment, you may be able to get relief.

**Is there a right to appeal my case even though I plead guilty?**

When you plead guilty, you have the right to a direct appeal on the following issues only: a sentence that is not in the presumptive range; an incorrect prior record level; an unlawful sentence, the duration or type of which is not authorized by law; the denial of a motion to withdraw

a guilty plea; and a denial of a motion to suppress evidence. N.C. Gen. Stat. §§ 15A-1444, 15A-979(b).



**Have changes been made to the habitual felon laws for non-violent crimes?**

We receive many letters asking if changes have been made for those sentenced as habitual felons using non-violent felonies as the prior convictions in the habitual felon indictment. While changes to the habitual felon law have been proposed in the past, these changes have not been passed by the North Carolina General Assembly.

**The court used the old Structured Sentencing chart against me, and I think they should have used the new chart.**

There are two sentencing grids for inmates sentenced under the Structured Sentencing Act. The grid was amended in 2009 to make the increases between prior record levels more proportionate. If the date of offense was before December 1, 2009, the older grid should have been used, even if the conviction was on or after December 1, 2009. The new grid applies only to offenses committed on or after December 1, 2009.

**I never got a copy of my discovery from my trial attorney.**

Unless we are actively representing you, our office does not have access to the discovery materials pertaining to your case. The attorney who represented you at trial may have obtained discovery materials from the State in the course of handling your case, and these materials may still be in his or her files. You should contact your trial attorney and let him or her know that you would like a copy of those materials. You have a right to receive one copy of the file.

## Frequently Asked Questions about Habitual Felon Status

*Lindsay Bass, NCPLS Staff Attorney*

Habitual felon status is complicated and confusing. The consequences of attaining habitual felon status are often severe, so it's an important issue to understand. Here are some facts

about habitual felon status to help answer some common questions:

**What does it mean to be a habitual felon?**

N.C. General Statute section 14-7.1 defines a habitual felon as “[a]ny person who has been

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convicted of or pled guilty to three felony offenses in any federal court or state court in the United States...” Once you have been convicted of three felonies at three different times, your fourth felony conviction triggers habitual felon status.<sup>92</sup>

### **Is it a crime to be a habitual felon?**

Not exactly. North Carolina cases state that being a habitual felon is a status, not a crime. It is not against the law to have three separate felony convictions. You could go the rest of your life with three separate felony convictions and never have any more legal problems. However, once you have those three previous felonies, you are at risk of increased punishment upon your fourth felony conviction.

### **How do you get to be a habitual felon?**

It takes a least three convictions on three different offense dates and conviction dates. That means that the offense date of the second felony must be after the conviction of the first felony. And the offense date of the third felony must be after the conviction of the second felony. Put another way, it must happen like this: first

<sup>92</sup> In this article I am using the term “previous felony” to mean the prior conviction that leads to attaining habitual felon status (that’s the first three felonies). I use the term “substantive felony” to mean the new offense that triggers the habitual felon charge (that’s the new charge).

offense date, first conviction date, second offense date, second conviction date, third offense date, third conviction date. Then the fourth felony conviction is when you can be indicted as a habitual felon.

### **What does it mean exactly to have a habitual felon charge?**

It means that all of your felonies from now on, with the exceptions of A, B1, and B2 felonies, are now Class C felonies. So what once was a Class I felony, like forging a check, with a maximum term of 15 months, is now a Class C, with a possible maximum of 261 months. Class A, B1, and B2 felonies will be punished with a sentence that corresponds to the felony class level.



### **Is there a way not to be a habitual felon anymore? Like after a lot of time has gone by?**

Not as the law is now. Once you attain habitual felon status, you are always a habitual felon. You could be habitual at age 22, not get in trouble for the next 50 years, and still be habitual at age 77.

### **If I got a new charge and got convicted of habitual felon, too, would I still be habitual when I got out, or can they just use those three felonies one time?**

You are still habitual. The felonies aren’t “used up” on one habitual felon indictment. Once attaining habitual felon status, you are always a habitual felon.

### **What does the indictment have to look like?**

It should include enough description to let you know exactly which felonies the State is using to make you habitual. It does not have to be perfect; North Carolina cases have found no problems with indictments where the dates or other details are wrong as long as it was enough to give you notice about which previous felonies were being used to support the habitual felon indictment. The State can use a separate indictment charging you with habitual felon status or put the habitual felon charge on the same indictment as the new felony.

### **How does the habitual felon status change my prior record level?**

The same prior conviction cannot be used both to establish habitual felon status and to calculate a defendant’s prior record level. For example, if you have four prior felonies and three are used to make you habitual, only one can be used to calculate your prior record level.

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Note that many time prosecutors will take the lowest class felonies to make you habitual so that the higher class felonies will be used to make you prior record level higher.

### **What if a jury finds me not guilty of being a habitual felon?**

If you are acquitted of a charge of habitual felon, you cannot later be indicted as a habitual felon on the same previous felonies; but be advised that if there are three different previous felonies, the State can bring a new habitual felon charge. Also, if the State dismisses the charge of habitual felon, that is not the same as an acquittal.



### **The prosecutor threatened me with habitual felon status if I**

### **didn't plead guilty. Is that legal?**

Prosecutors often indict or threaten to indict defendants with habitual felon status, but then offer to dismiss the charge if you plead guilty to the triggering felony. This is not considered coercion. It does not violate any constitutional principle for a prosecutor to threaten prosecution on additional criminal charges if a plea agreement is rejected.

### **Will NC House Bill 1360 help me?**

Probably not. HB1360 was filed in the House of Representatives on April 8, 2009. It is currently in a legislative committee for further study. It is not a law. If it passes, it would require the State to use only Class G (or higher) felony convictions to charge a person with habitual felon status. It would also change the punishment for habitual felon status to one class higher than the underlying felony for which the person is convicted, unless he or she is convicted of a Class A, B1, or B2 crime. Since this is just a

bill, it is not a law, and it does not affect anyone currently incarcerated.

### **A Personal Story**

A prisoner recently wrote to NCPLS and explained his severe sentence based on misdemeanor criminal conduct. The State charged him with 2 counts of habitual misdemeanor assault. Habitual misdemeanor assault is a Class H felony. He had 3 felonies on his record already, so the State charged him with attaining habitual felon status when he was charged with habitual misdemeanor assault. He was convicted of the crimes and was found to be a habitual felon. He was given 2 consecutive sentences of 108-139 months in prison. He was shocked to get such a severe sentence based on misdemeanor criminal conduct. This prisoner wanted others to know of the danger of this situation, because his sentence was greatly bumped up once he had attained habitual felon status. The law is unclear on this issue, and the case is now on appeal. We will track its progress.

## **Frequently Asked Questions about Civil Litigation**

*Sharon Robertson, NCPLS Civil Team Paralegal  
Reviewed by Tod M. Leaven, Staff Attorney*

### **Why do I have to file a grievance?**

You must file a grievance in order to exhaust all of your available

administrative remedies prior to filing a federal lawsuit.<sup>93</sup>

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<sup>93</sup> 42 U.S.C. §1997(e)(a); *Porter v. Nussle*, 534 U.S. 516 (2002) (The Prison Litigation Reform Act of 1995 (PLRA)

requires prisoners to exhaust all available administrative remedies in accordance with grievance procedural rules before they can file a federal lawsuit.).

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### **How long do I have to file a lawsuit?**

Laws setting deadlines, called Statute of Limitations, tell you the amount of time after the events which the source of the claims occur within which you must take legal action to enforce your rights. In North Carolina, the personal injury statute of limitations is three years from the date in which the action arose.<sup>94</sup> The U.S. Supreme Court concluded that the most appropriate statute of limitations for §1983 actions is the personal injury statute of limitations of the state whose law is to be applied.<sup>95</sup> All this means that, if you intend to go forward with a §1983 federal lawsuit, you must file suit within 3 years, measured from the date upon which the matter you are challenging occurred.



### **Why should I file a tort claim?**

Under the State Tort Claims Act, the North Carolina Industrial Commission has jurisdiction to hear claims against state departments, institutions and agencies for personal injuries or damages sustained by any person as a result of the negligence of a state officer, agent or employee who is acting within the scope of

his or her employment.<sup>96</sup> You cannot file a Tort Claim lawsuit against a city police department, sheriff, or a county jail.

### **What is contributory negligence and how does that affect my lawsuit?**

The doctrine of contributory negligence is a defense to a claim of negligence. This doctrine allows defendants to argue that the plaintiff, too, was negligent, and that his negligence contributed to the injury. Under the doctrine of contributory negligence, even if the defendants were negligent, they would not have to pay any money if the plaintiff were negligent in any way himself.<sup>97</sup> The North Carolina General Assembly is currently considering legislation that would eliminate the doctrine of contributory negligence and substitute a comparative fault system. However, that has not yet become law.

### **Do I need a medical expert to file a malpractice lawsuit?**

Actions for medical malpractice require that you prove that you were injured when medical personnel violated the accepted standards of professional care.<sup>98</sup> In order to prove

negligence on the part of the DOC medical staff, you would have to obtain testimony from a medical expert that the care you received for a particular condition violated the accepted standard of care.<sup>99</sup> The Industrial Commission routinely dismisses inmate medical claims for lack of an expert witness.



### **What is a frivolity review?**

A lawsuit will be dismissed following the initial review by a Judge if it is found to be frivolous. A lawsuit is frivolous if it “lacks a basis in law or a basis in fact.”<sup>100</sup> The legal term, “basis in law” simply means that your claim and request for relief is supported and recognized by existing law. In other words, the actions about which you complain must have violated existing principles of law.

### **Do I have a right to a court-appointed lawyer in a civil action?**

You have no right to appointed counsel in a civil lawsuit. The court possesses the discretion to request an attorney to represent you in civil litigation.

<sup>94</sup> See N.C.G.S. §1-52(16).

<sup>95</sup> See *Wilson v. Garcia*, 471 U.S. 261 (1985).

<sup>96</sup> *Frazier v. Murray*, 135 N.C. App. 43, 519 S.E.2d 525, 528 (N.C. App. 1999).

<sup>97</sup> See *Cobo v. Raba*, 347 N.C. 541, 495 S.E.2d 362, 365 (1998) (In this state, a plaintiff's right to recover in a personal injury action is barred upon a finding of contributory negligence).

<sup>98</sup> *Weatherford v. Glassman*, 129 N.C.App. 618, 500 S.E.2d 466, 468 (1998).

<sup>99</sup> N.C. Gen. Stat. §90-21.12.

<sup>100</sup> *Neitzke v. Williams*, 490 U.S. 319 (1989).

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