

**NCPLS**



**ACCESS**

# NCPLS wins reversal of life sentence

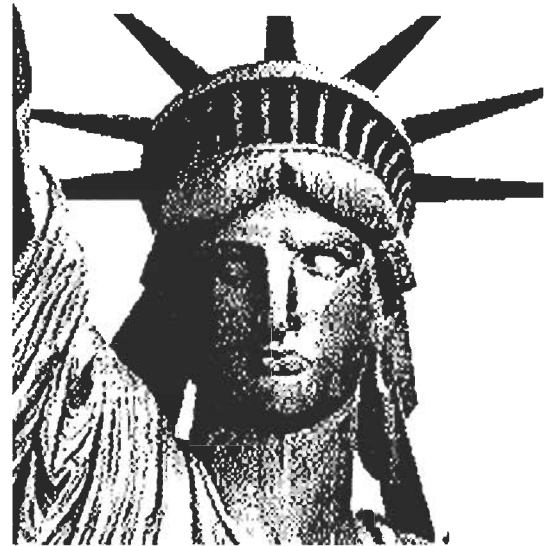
In *State v. Stewart*, 353 N.C. 516, 546 S.E.2d 568 (2001), the North Carolina Supreme Court reversed our client's conviction and sentence of life in prison. The high court ruled on June 8, 2001, that the trial judge should have dismissed the case because the variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him "of an opportunity to adequately present his defense." *State v. Stewart*, 353 N.C. 516, 546 S.E.2d 568 (2001). The indictment alleged that the offense occurred during a 31-day period, but the prosecution's evidence spanned 2 ½ years. The Supreme Court ruled that the variance put Stewart at a disadvantage because he based his alibi defense evidence on the 31 day period alleged in the indictment. "I was very pleased with the Court's decision," said Susan H. Pollitt, Senior Staff Attorney with North Carolina Prisoner Legal Services, Inc., who argued the case in the Supreme Court.

Stewart had first been charged with the felony in a juvenile petition in 1991. The case was bound over to Superior Court for trial. When he was convicted in 1994, he was given the mandatory sentence of life in prison. The Court of Appeals upheld his con-

viction in 1994. NCPLS Attorney Kathryn Vandenburg filed a Petition for the Writ of Certiorari with the N.C. Supreme Court in 1999, because of the variance between the date alleged in the indictment and the evidence offered by the state.

### Parental Rights Restored

*In re: Bullis*, 00 J 139 (3 October 2001). Our client wrote us requesting assistance in arranging visitation with her daughter, a minor in custody of our client's ex-husband. Even though there was a consent order in force that allowed visitation every other weekend, the ex-husband refused to bring the child to visit or let anyone else do so. He also refused to allow our client to speak with her daughter by telephone. NCPLS filed a motion to allow visitation and learned through the court that our client's parental rights had been terminated in an earlier proceeding. When we discovered that our client did not have notice of that proceeding, we asked the court to strike the order terminating parental rights. NCPLS argued that the ex-husband had not used due diligence to give our client notice of the earlier proceeding. The judge ruled in our favor and



the order was stricken. But the ex-husband filed a new motion to terminate parental rights based on our client's alleged abandonment and neglect of the child. However, there was ample evidence that our client had not abandoned or neglected her child. She had tried

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

NCPLS serves a population of more than 32,500 prisoners and 10,000 pre-trial detainees, providing information and advice concerning legal rights and responsibilities, discouraging frivolous litigation, working toward administrative resolutions of legitimate problems, and providing representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

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## Parental Rights Restored

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to provide for child support, she sent cards and letters, made phone calls, and even put an ad in the local newspaper in the hope that her child would see it. After numerous delays, that evidence was presented at a hearing and the judge ruled in our client's favor and declined to terminate her parental rights. The previous consent order is still in effect, and the court ordered supervised visitation every other weekend. That order culminated four years of advocacy on behalf of our client by NCPLS Staff Attorney Ellie Kinnaird and Paralegal Kady McDonald, Certified Legal Assistant.

### UNITED STATES SUPREME COURT DENIES PETITION

In an earlier edition of *ACCESS* we reported that the Fourth Circuit Court of Appeals denied a habeas petition in *Bell v. Jarvis*, 236 F.3d 149 (4<sup>th</sup> Cir., 29 December 2000). At trial, our client was accused of sexual crimes. The district attorney asked that everyone except the families of the prosecution witnesses be excluded from the courtroom, including our client's wife. The defense attorney objected to this closure on the grounds that it would violate the right to a public trial, but the trial court allowed the motion and only the people the district attorney identified were allowed to be present in the courtroom when the prosecuting witness testified.

In ruling upon defendant's objection to closure, the trial court failed to follow the procedures that the

Supreme Court set up to ensure that such closures only occurred when absolutely necessary. Under *Waller v. Georgia*, 467 U.S. 39 (1984), the court must identify an overriding interest that would be protected by closure, consider alternatives to the closure to protect that interest, narrowly tailor the closure, and enter findings that a reviewing court can assess to determine if the closure was justified. Our client's trial judge did none of these things.

Although defendant's counsel objected at trial, and even though the appellate attorney assigned the closure as error, the issue was not briefed and was therefore waived on direct appeal. The appellate court affirmed the conviction.

NCPLS filed a Motion for Appropriate Relief based on a claim of ineffective assistance of appellate counsel, which the trial court dismissed as failing to state a claim and the court of appeals upheld that ruling. Neither of the state courts entered an opinion explaining the dismissal. NCPLS then filed a petition for a writ of habeas corpus in federal district court. The district court denied the petition, but on appeal, a three-judge Fourth Circuit panel reversed and ordered a new appeal. However, the State asked that the case be considered by the entire court. That motion was granted, and on rehearing, the full court overturned the panel decision and upheld the district court. Three members of the court joined in a dissenting opinion.

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# 11 September 2001

by Michael Hamden, *Executive Director, NCPLS*

On September 11<sup>th</sup>, the world witnessed in horror a series of events that had catastrophic consequences. It now appears that 19 men hi-jacked four commercial airliners. With crew and passengers still aboard, the men steered the airplanes toward national landmarks.

Two of the planes collided into the twin towers of the World Trade Center, a third crashed into the Pentagon, and the fourth, which was en route to Washington, D.C., went down in a rural part of Pennsylvania. Within a few short moments after the crash, the twin towers collapsed into a pile of rubble, bringing down other nearby structures, and killing thousands of people.

In little more than an hour, 6,000 people lost their lives. Our country, and indeed, the entire world, awoke to the profound threat

posed by a small group of people committed to a course of violence and destruction.

The immediate response was one of courage and self-sacrifice. Emergency teams were on the scene within minutes. Literally hundreds of firemen and policemen lost their lives in an effort to save others. Later, people everywhere donated blood and sent donations to help survivors and the families of the victims. Expressions of sympathy and solidarity have been sent from all over the world.

In the aftermath, our government has announced an intention to bring to justice the people responsible for the attack. Support for that effort is coming from governments around the globe.

At home, there are lingering questions and concerns. While there

can be no justification for the taking of innocent lives, has the U.S. government done something to cause such hatred? Can anything be done to prevent similar cataclysmic acts in the future? What will preventative measures mean to our freedom and the values that are central to our way of life?

Will our courts protect civil rights, or allow them to be compromised to accommodate the perceived need for a greater degree of governmental control?

Although there are at present no clear answers to these and other questions, our search for answers should be guided by the principles upon which this country was founded.

We judge people, not because they are members of a particular ethnic group or members of any particular religion, but based upon their behavior. All religions teach that we should love God and (at least) respect each other.

If we want peace, we must work for justice. To achieve these objectives, we will need the depth of conviction and commitment demonstrated by those who gave their lives to save others.

Each of us is involved in this struggle. Working together with sustained determination, justice and peace will be realized.



# Technology Impacts NCPLS Law Practice

In recent years, the practice of law has changed in many ways. Perhaps the biggest change has been the increasing reliance on the computer by legal professionals.

Computer technology has increased productivity in the workplace, and law offices are no exception.

Legal research, document preparation, case tracking, time keeping, and many other facets of the law practice of NCPLS have been affected by the advances in computer technology.

## Computer Research

In the "good old days," attorneys would spend countless hours in a law library, looking for that dusty old decision that might make a difference in their case. Now attorneys can go online, enter a few search terms, and

"bingo," they have their case.

North Carolina Prisoner Legal Services has access to a comprehensive computer library through LEXIS-NEXIS. This library contains all state and federal appellate decisions, including all North Carolina decisions. It also contains an exhaustive selection of other materials such as law journals, legal treatises, and legal indices such as American Jurisprudence.

This database allows attorneys and paralegals to conduct extensive legal research quickly. NCPLS has a broad-bandwidth Internet connection that allows searches to be conducted in seconds, based on the entry of key words or phrases. Searches can be confined to North Carolina appellate deci-

sions, the United States Fourth Circuit Court of Appeals, or virtually any combination of state and federal courts.

Computerized legal research greatly reduces the time that was previously spent in this activity, contributing greatly to efficiency in the law office.

## Case Tracking

Computer technology has paid other dividends for North Carolina Prisoner Legal Services. NCPLS maintains a file for every client who has requested legal assistance. Over the years, we've developed quite an extensive file collection. Of course, it takes a lot of time to manage all of those files, and all of that information.

Case information is now entered into NCPLS's case-tracking program. That program records information such as the subject matter of the file, identifying information about the inmate, the time spent by NCPLS advocates on that matter, the file status, and other information related to the file.

When an inmate writes to our office, our staff can quickly identify whether he or she has a file opened in our office on that matter, whether the inmate has ever written to our office before about the same or a different matter,

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## Technology Impacts NCPLS *continued from page 5*

and what advocate is assigned to that case.

This automated case-tracking system greatly reduces the time our staff must spend searching for this information. It also allows better management of individual advocate caseloads and provides other reporting capabilities that help manage our work.

### Department of Correction Web Resources

The North Carolina Department of Correction has developed a web site that allows a user to search DOC records for information about individual prisoners. The entire population of inmates committed to DOC custody can be searched with either a name or an OPUS number. The web site contains fundamental information such as current location, sentence information, projected release dates, disciplinary record, arrest record, and other valuable information that also increases efficiency in our office. Access to this data allows us to respond more promptly to client requests for routine information.

### Institute of Government Resources

Our office also holds licenses from the Institute of Government for their "*North Carolina Crimes, Fifth Edition*" law collection on CD-ROM. In addition to comprehensive information about the elements of offenses, statutory interpretations from appellate courts, and other information about criminal offenses

in North Carolina, the CD-ROM also contains an interactive Structured Sentencing calculator that takes the guess-work out of evaluating claims that prisoners were assigned an incorrect Prior Record Level under Structured Sentencing. NCPLS advocates can access this information from their desks.

### Word Processing

Computer software has made many other tasks simpler. In many large law offices, the practice of dictation was the norm, and in many cases still is. With dictation, a lawyer's words were recorded (either manually, with shorthand, or electronically, by tape recorder), and were transcribed later. In our office, most advocates produce their own letters and documents on word processing software located on their computers.

In the near future, we will be installing voice dictation software, which will allow an advocate to dictate a document directly into the computer's software for immediate transcription. This change in office technology has reduced costs and resulted in time savings.

Other computer software in our office allows advocates to access an electronic calendar, maintain contact information in electronic format, and to save and store documents for future reference.

### Internet and Intranet Resources

NCPLS also maintains an Intranet site within our office. This site allows ready access to training materials and manuals developed by our office, office forms and information, links to helpful Internet sites, and other valuable resources that can be accessed by our advocates quickly and easily.

The Internet itself has proven to be a valuable resource for our advocates. Search engines on the World Wide Web allow advocates to gain access to governmental agencies, medical resources, other prisoner legal resources, information about pending legislation in the North Carolina General Assembly, and a wealth of other information.

This resources now makes it possible to get information online that previously might have taken days or weeks to obtain through conventional sources.

### Electronic Mail

Electronic mail, or "email" as it is now universally known, can be a boon to a law practice as well, both within and outside the office. Advocates find it an efficient means of transmitting requests and communicating information to other staff members, as well as to the world at large.

NCPLS constantly looks for ways to increase efficiency and deliver better services to our clients. Computer technology has helped us to do that.

# Legislative Developments - 2001 General Assembly

## Changes in Time Credit for Medically or Physically Unfit Inmates

In the 2001 session of the North Carolina General Assembly, the law was amended to provide:

“Earned Time Credit for Medically and Physically Unfit Inmates:”

(d) Earned Time Credit for Medically and Physically Unfit Inmates. - Inmates in the custody of the Department of Correction who suffer from medical conditions or physical disabilities that prevent their assignment to work release or other rehabilitative activities may, consistent with rules of the Department of Correction, earn credit based upon good behavior or other criteria determined by the Department that may be used to reduce their maximum term of imprisonment as provided in G.S. 15A-1340.13(d) for felony sentences and in G.S. 15A-1340.20(d) for misdemeanor sentences.”

G.S. 15A-1355.

Under the new law, DOC may revise

its policies to allow gain time to be awarded to physically impaired inmates under some circumstances. Further information may soon be available from your case worker.

## Boot Camps phased out?

In other developments, it appears that Boot Camps will be phased-out over the next couple of years. It is the intent of the General Assembly that the IMPACT boot camp program be eliminated by June 30, 2003, and that alternative residential programs for offenders be established in the current IMPACT locations.

## Structured Sentencing Study

**SECTION 25.8.(a)** In exercising its statutory responsibility under Article 4 of Chapter 164 of the General Statutes to monitor and review the criminal justice and corrections system, the North Carolina Sentencing and Policy Advisory Commission shall study and review the State’s sentencing laws in view of the projected growth in the prison population by 2010. Areas of review may include the classification of offenses and offenders, the relationship of the sentence and the sentence length to the offense, and the sentence dispositions available to judges. The Commission shall also analyze the parole-eligible population in terms of offense committed, sentence, and time served in comparison to inmates sentenced under structured sentencing. The Commission shall develop alternatives for consideration by the General Assembly. The

alternatives presented by the Commission should ensure that sentencing laws appropriately penalize offenders for the nature and degree of harm caused by the offense while identifying inconsistencies in the structured sentencing law or in its application. The Commission’s alternatives shall be consistent with the purposes of sentencing as stated in G.S. 15A-1340.12.

Many inmates have written to our office because they have heard about this measure. Rumors are constant in the prison system that this means the sentences of inmates currently incarcerated will be reduced.

Though the Sentencing and Policy Advisory Commission could provide an alternative to the General Assembly which would provide for a reduction in sentences already being served, it is unlikely it will do so, and the General Assembly would be unlikely to adopt it.

One of the primary motivations for the enactment of the Structured Sentencing Act was to provide “truth in sentencing.” Under the former Fair Sentencing Act, some inmates were eligible for parole after serving one-eighth of their sentence. Therefore, a person sentenced to 80 years in prison could, under some circumstances, be eligible for release after serving 10 years. The public perception was that the sentences actually received for crimes held no meaning.

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## 2001 Legislative Developments

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The Structured Sentencing Act changed that. A person convicted of a felony receives a minimum sentence, and must serve 100% of that sentence. The "truth in sentencing" component of Structured Sentencing would be compromised if current sentences were modified, and the General Assembly is unlikely to take a measure that drastic.

The prison population is projected to increase by approximately 10,000 inmates over the next 10 years. If it does, by 2011 DOC will be housing more than 40,000 people. This session of the General Assembly approved construction of three new prisons, which will add 2,500 new prison beds to the system.

### Report on Parole Eligible Inmates Required

**SECTION 25.21.** The Post-Release Supervision and Parole Commission shall provide quarterly reports to the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on inmates eligible for parole. These reports shall include at least the following:

(1) The total number of Fair Sentencing and Pre-Fair Sentencing inmates that were parole-eligible during the previous quarter and the total number of those inmates that were paroled. The report should group these inmates by offense type

and custody classification;

(2) A list of all those inmates paroled or released by category of parole or release, including each inmate's offense and custody classification at the time of the parole or release;

(3) The average time served, by offense class, of Fair Sentencing and Pre-Fair Sentencing inmates compared to inmates sentenced under Structured Sentencing;

(4) The projected number of parole-eligible inmates to be paroled or released by the end of the

### High Court denies Certiorari Petition

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The crucial issue in the appeal was the effect of the *Anti-Terrorism and Effective Death Penalty Act* (AEDPA) on the power of the federal court to review state court dismissals of a defendant's claims of a constitutional violation. Under the new law, a federal court cannot grant a writ of habeas corpus unless it finds that the state court's ruling was "contrary to, or an unreasonable application of, established Supreme Court precedent." The Fourth Circuit ruled that, although the state courts did not explain why they were dismissing the case, the federal courts were required by AEDPA to defer to the state courts' decisions if the result were reasonable. The Fourth Circuit decided the result was reasonable because the Supreme Court has never specifically held that the requirements set out in the *Waller* Case apply to child sex cases, and so the North

2001-2002 fiscal year and by the end of the 2002-2003 fiscal year.

These two measures clearly indicate that the General Assembly is concerned about the increase in the projected prison population. NCPLS will continue to monitor developments in the law of sentencing and parole.

[Editorial Note: Commissioner Billy Sanders serves on the North Carolina Sentencing and Policy Advisory Commission. Sanders, who is employed by NCPLS as a Certified Legal Assistant Specialist, also edits *ACCESS*.]

Carolina courts could have decided that appellate counsel could reasonably have determined that *Waller* did not apply to our client's case.

The decision of the Fourth Circuit conflicted with decisions by other circuit courts of appeals. In a petition for *certiorari* to the United States Supreme Court, we pointed out the inconsistencies and asked the court to resolve the question. We argued that, in the absence of an explanation by the state court, a federal habeas court must decide how federal law applies to the case, since there is no basis for a determination that the state court ruling was "contrary to, or an unreasonable application of, established Supreme Court precedent."

On October 3, the Supreme Court denied our petition without comment.

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

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### NCPLS Staff Developments

Staff Attorney and Senator Ellie Kinnaird has been honored by the North Carolina Academy of Trial Lawyers. Senator Kinnaird was presented with the *Outstanding Legislator Award* and recognized as “the best in the legal profession as related to public service”

Sharon G. Robertson, CLAS, was presented with the National Association of Legal Assistants (NALA) *2001 Affiliates Award* in recognition of her “outstanding contribution and dedication to the advancement of the legal assistant profession through volunteer service . . .” Sharon, who has served as President, as Chair and Director at Large

of the North Carolina Paralegal Association, and as Liaison to the North Carolina State Bar, was recently elected to the Office of Secretary for NALA’s Affiliated Associations.

NCPLS Certified Legal Assistant Yvonne P. Lewis has been appointed to the Council governing the Constitutional Rights & Responsibilities Section of the North Carolina Bar Association.

The American Bar Association’s Board of Governors reappointed Michael Hamden as liaison to the American Correctional Association and as the ABA’s representative to the ACA’s Commission

on Accreditation for Corrections. The American Correctional Association is a national, multi-disciplinary organization of professionals representing all levels and facets of corrections and criminal justice.

ACA establishes standards governing corrections practices and operations, and accredits institutions that comply with those standards. For the past four years, Hamden has served on the Commission on Accreditation for Corrections and on the Standards Committee.