The University of North Carolina at Chapel Hill

ADMINISTRATION OF JUSTICE

INSTITUTE of GOVERNMENT

BULLETIN

Number 97/03 November 1997

1997 Legislation Affecting Criminal Law and Procedure

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Although the 1997 legislative session did not bring sweeping changes to the state's criminal law and procedure, the General Assembly did make quite a few revisions. Many (such as changes in punishment for certain offenses) are relatively small, but others (such as more stringent registration requirements for sex offenders) may prove to be quite significant. Continuing a recent trend, the General Assembly put many substantive provisions in the budget act, S.L. 1997-443 (S 352). Rather than give the full reference each time the budget act is mentioned, this bulletin refers only to the pertinent section numbers of the act.

This bulletin begins with a discussion of criminal offenses, criminal procedure, and sentencing in general. It then turns to legislation involving more specialized topics within criminal law, such as sex offender registration and domestic violence. It closes by discussing collateral issues—matters that are not part of but are closely related to criminal proceedings—and issues concerning the administration of the courts.

Each ratified act discussed here is identified by its chapter number in the session laws and by the number of the original bill—for example, S.L. 1997-379 (H 448). When an act creates new sections in the General Statutes (G.S.), the section number is given; however, the codifier

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of statutes may change that number later.

The statutes themselves are not reproduced here. Anyone may obtain a free copy of any bill by writing the Printed Bills Office, State Legislative Building, 16 West Jones Street, Raleigh, NC 27603, or by calling that office at (919) 733-5648. Requests should identify the new law's bill number, not the chapter number.

Some of the materials in this bulletin were drawn from chapters in the forthcoming publication *North Carolina Legislation 1997*, written by members of the Institute of Government faculty. That publication, as well as other bulletins on recent legislation, may be ordered from the Institute's publications office at (919) 966-4119 or 966-4120.

Criminal Offenses

Homicide and Assaults

Voluntary manslaughter. Effective for offenses committed on or after December 1, 1997, section 19.25(q) of the budget act increases the punishment for voluntary manslaughter from a Class E to a Class D felony.

Assault on probation or parole officers. Assaults on law-enforcement officers carry greater punishments than comparable assaults on others. Thus, under G.S. 14-34.5 and 14-34.7, assaulting a law-enforcement officer with a firearm is a Class E felony, and assaulting a law-enforcement officer and inflicting serious bodily injury is a Class F felony. Effective for offenses committed on or after December 1, 1997, sections 19.25(gg) and (hh) of the budget act amend these statutes to apply the same punishments to assaults on probation officers, parole officers, and other employees of a prison or jail. As with assaults on law-enforcement officers, the enhanced punishments apply only if the officer or employee is assaulted while performing his or her duties.

Assault on firefighters and other emergency personnel. G.S. 14-34.6 subdivides assaults on certain emergency personnel into three categories: (1) simple assault, a Class A1 misdemeanor; (2) assault inflicting bodily injury or with a deadly weapon other than a firearm, a Class I felony; and (3) assault with a firearm, a Class F felony. In 1996, the General Assembly sought to create the same three offense classes for assault on a firefighter and also sought to clarify that a person must inflict serious bodily injury, not just bodily injury, to be convicted of the second category of assault. *See* Chapter 18, Sec. 20.14B, 1995 Session Laws (2d Extra Sess. 1996). This legislation did not take effect, however, because it inadvertently referred to G.S. 143-34.6, not G.S. 14-34.6. The General Assembly corrected this error in S.L. 1997-9 (S 86), making these changes effective March 26, 1997.

Stalking. Effective for offenses committed on or after December 1, 1997, S.L. 1997-306 (S 667) makes it easier to prove the offense of stalking and increases the punishment. Amended G.S. 14-277.3 provides that a defendant is guilty of stalking if he or she

- willfully follows or is in the presence of another person
- on more than one occasion
- without legal purpose and
- with the intent to cause death or bodily injury or with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury.

Eliminated are the requirements that the defendant must have engaged in a pattern of conduct and must have been warned or asked to stop. A first offense is a Class 1 instead of a Class 2 misdemeanor, and commission of the offense while a court order is in effect prohibiting similar behavior is a Class A1 instead of a Class 1 misdemeanor. A second conviction within five years of a stalking conviction remains a Class I felony.

Controlled Substances

Punishment for sale of controlled substances. Effective for offenses committed on or after December 1, 1997, section 19.25(b) of the budget act increases the punishment for the sale of a controlled substance. Amended G.S. 90-95(b)(1) makes the sale of a Schedule I or II controlled substance a Class G felony. (The manufacture or delivery of these substances, or possession with intent to manufacture, sell, or deliver them, remain Class H felonies.) Amended G.S. 90-95(b)(2) makes the sale of a Schedule III, IV, V, or VI controlled substance a Class H felony. (The manufacture or delivery of these substances, or possession with intent to manufacture, sell, or deliver them, remain Class I felonies.)

This change in punishment may affect the procedure followed in drug trials. The courts have held that the sale and delivery of the same controlled substance is one offense and that the defendant is subject to one punishment. *See State v. Moore*, 327

N.C. 378, 395 S.E.2d 124 (1990). Although the legislation creates a greater punishment for sale than for delivery, it does not appear to change the single-offense rule. For the greater punishment to apply, however, instructions to the jury probably will have to distinguish between the acts of sale and delivery. Such a requirement ensures that the jury reaches a unanimous verdict on the act to be punished.

Sentence for attempted trafficking. Like other criminal offenses, trafficking offenses are divided into classes (for example, Class C felony). A completed trafficking offense, however, is not subject to the regular structured-sentencing schedule of punishments; it is subject to a far stricter set of mandatory, minimum sentences. Conspiracy to commit a trafficking offense is treated the same as a completed trafficking offense: it is in the same offense class as the completed offense and is subject to the same schedule of mandatory, minimum sentences. Attempted trafficking also is in the same offense class as the completed trafficking offense *but* is subject to the punishments in the regular structured-sentencing schedule. G.S. 90-98, read together with G.S. 90-95(i), have required this result, but have not stated it clearly.

Effective for offenses committed on or after December 1, 1997, S.L. 1997-80 (H 175) revises G.S. 90-98 to clarify the sentence for attempted trafficking. Amended G.S. 90-98 states that, "except as otherwise provided" in the controlled substance statutes, any person who attempts or conspires to commit a controlled substance offense is guilty of an offense that is the same class as the offense that was the object of the attempt or conspiracy and "is punishable as specified for that class of offense and prior record or conviction level in Article 81B of Chapter 15A of the General Statutes" (that is, the structured sentencing statutes). Since no provision requires otherwise, attempted trafficking is in the same offense class as the completed offense but is subject to the regular structured-sentencing punishments. In contrast, conspiracy to commit a trafficking offense is subject to the mandatory, minimum sentences for trafficking because another statute, G.S. 90-95(i), requires that punishment.

Amount required for trafficking in marijuana. Effective for offenses committed on or after December 1, 1997, section 19.25(ii) of the budget act lowers the amount required for conviction of trafficking in marijuana. Amended G.S. 90-95(h) provides that a person who sells, manufactures, delivers, transports, or possesses more than ten and less than fifty pounds of marijuana is guilty of a Class H felony and is subject to the sentencing schedule for trafficking offenses. Previously, trafficking penalties did not apply until the amount of marijuana exceeded fifty pounds. The amended statute also makes it a Class G felony to traffic in marijuana if the amount is fifty or more pounds but less than 2,000 pounds; the threshold for conviction of a Class G felony had been 100 pounds.

Date-rape drugs. Effective for offenses committed on or after December 1, 1997, S.L. 1997-501 (H 1132) creates three new offenses involving "date-rape drugs." First, under new G.S. 14-401.16, a person is guilty of a Class H felony if he or she

- knowingly and with the intent of causing another person to be mentally incapacitated or physically helpless
- contaminates any food, drink, or edible or potable substance
- with a controlled substance (as defined in G.S. 90-87(5))
- that would render a person mentally incapacitated or physically helpless.

No violation occurs if the controlled substance is added to food or drink at the direction of a licensed physician as part of a medical procedure or treatment and with the patient's consent.

Second, a person is guilty of a class G felony if he or she takes the above actions with the intent of committing an offense under G.S. 14-27.3 (second-degree rape) or G.S. 14-27.5 (second-degree sex offense).

Third, a person is guilty of a Class H felony if, for the purpose of violating the new statute, he or she manufactures, sells, delivers, or possesses with the intent to manufacture, sell, or deliver a controlled substance.

The legislation also adds as a Schedule IV controlled substance gamma hydroxybutyric acid, a type of depressant sometimes associated with the offenses described in the new date-rape statute. (Flunitrazepam, whose brand name is rohypnol and street name is "roofie," more commonly is associated with date-rape offenses and currently is on the list of Schedule IV controlled substances.)

Addition of remifentanil as controlled substance. Effective August 11, 1997, S.L. 1997-385 (S 571) amends G.S. 90-90(b) to add remifentanil as a Schedule II controlled substance.

Larceny and Related Offenses

Larceny by employee, embezzlement, and false pretenses. Sections 19.25(c) through (o) of the budget act revise several statutes to increase the punishment for thefts involving $100,000 or more in money, goods, services, and other things of value. Effective for offenses committed on or after December 1, 1997, a violation of the following statutes is a Class C felony if the value of the property is $100,000 or more:

- G.S. 14-74 (larceny by employee)
- G.S. 14-90 through 14-94 and G.S. 14-97 through 14-99 (embezzlement)
- G.S. 53-129 (embezzlement by bank officer or employee)
- G.S. 58-2-162 (embezzlement by insurance agent, broker, or administrator)
- G.S. 90-210.70(a) (embezzlement of funeral funds)

For offenses involving less than $100,000, the punishments under the above statutes are as previously stated in those statutes.

Pine straw crimes. Effective for offenses committed on or after December 1, 1997, sections 19.25(z), (aa), and (b) of the budget act create a new set of offenses involving pine straw. Under new G.S. 14-79.1, a person is guilty of larceny of pine straw, a Class H felony, if he or she

- takes and carries away
- any pine needles or pine straw
- being produced on another's land
- upon which notices prohibiting the raking or removal of pine needles and pine straw have been posted in accordance with G.S. 14-159.7
- with the intent to steal the pine needles or pine straw.

When these elements are present, the larceny is a felony regardless of the value of the pine straw taken. In contrast, under the general larceny statute (G.S. 14-72), larceny of property of $1,000 or less is a Class 1 misdemeanor only.

Under new G.S. 14-159.6, a person is guilty of trespassing to remove pine straw, a Class 1 misdemeanor, if he or she

- willfully goes on "posted" land
- for the purpose of raking or removing pine needles or pine straw
- without the written consent of the owner or owner's agent.

In contrast, under the general trespass statutes (G.S. 14-159.12, 14-159.13), first-degree trespass is a Class 2 misdemeanor and second-degree trespass is a Class 3 misdemeanor.

The legislation repeals Chapter 601 of the 1995 Sessions Laws (Reg. Sess. 1996), which had created similar penalties for pine straw crimes in Montgomery County only.

Shoplifting changes. G.S. 14-72.1 classifies shoplifting offenses according to the number of the defendant's prior shoplifting convictions. A first offense is a Class 3 misdemeanor, a second offense within three years is a Class 2 misdemeanor, and a third offense within five years is a Class 1 misdemeanor. Effective December 1, 1997, section 19.25(ff) of the budget act revises G.S. 14-72.1 to make shoplifting a Class H felony regardless of the number of prior shoplifting convictions *if* the person uses a lead-lined or aluminum-lined bag, a lead-lined or aluminum-lined article of clothing, or a similar device to prevent the activation of an anti-shoplifting or inventory control device.

G.S. 14-72.1 also has allowed a judge to suspend a term of imprisonment of a person convicted of a third shoplifting offense within five years if the judge imposes a term of imprisonment of at least fourteen days as a condition of special probation. The fourteen-day requirement conflicts with structured sentencing, however, because it exceeds the maximum jail time allowed for special probation for Class 1 misdemeanors when the defendant is in prior conviction level II. Effective for offenses committed on or after December 1, 1997, S.L. 1997-80 (H 175) reduces the mandatory jail time to eleven days, which is consistent with structured sentencing.

Collection of worthless checks without criminal prosecution. Section 18.22 of the budget act establishes a pilot program in Columbus, Durham, and Rockingham counties for collection of worthless checks. To participate in the pilot program, the "check passer" must meet the criteria established by the local

district attorney and must pay a fee of $50. A participating "check passer" may not be prosecuted if he or she makes restitution to the "check taker" for (1) the amount of the check, (2) any service charges imposed by a bank on the check taker for processing the check, and (3) any processing fees imposed by the check taker under G.S. 25-3-506. The legislation is effective October 1, 1997, and expires June 30, 1998.

Processing fee for worthless checks. Effective for checks written on or after October 1, 1997, S.L. 1997-334 (S 562) amends G.S. 25-3-506 to increase from $20 to $25 the amount that may be charged as a processing fee for a returned check. (Under G.S. 14-107, a defendant convicted of writing a worthless check may be required to pay this processing fee.)

Lotteries, Gaming, and Raffles

Pyramid schemes. Effective for offenses committed on or after December 1, 1997, section 19.25(x) of the budget act revises G.S. 14-291.2 to create two different offense classes for pyramid schemes: operating a pyramid scheme, a Class H felony; and participating in or otherwise promoting a pyramid scheme, a Class 2 misdemeanor. Previously, all of these acts were Class 2 misdemeanors.

Maximum prizes for raffles. Effective March 30, 1997, S.L. 1997-10 (H 29) amends G.S. 14-309.15(d) by increasing from $5,000 to $10,000 the maximum cash prize that may be offered in any one raffle and by increasing from $25,000 to $50,000 the maximum fair market value of merchandise that may be offered as a prize. The amended statute also provides that the total cash prizes that may be offered in any calendar year may not exceed $10,000, and the total fair market value of any merchandise may not exceed $50,000.

Prison Offenses

Punishment for escape. Sections 19.25(r) through (t) of the budget act amend three statutes—G.S. 14-255, 14-256, and 148-45—to make the penalties for escape more consistent. Escape from county jail by a prisoner convicted of a misdemeanor has been and remains a Class 1 misdemeanor. Effective for offenses committed on or after December 1, 1997, escape from a county work project by a prisoner is increased from a Class 3 to a Class 1 misdemeanor, and escape from state prison by a prisoner convicted of a misdemeanor is lowered from a Class I felony to a Class 1 misdemeanor. Escape by a prisoner convicted of a felony, whether from a county jail or state prison, is increased from a Class I to a Class H felony. Escape from state prison by a person previously convicted of escaping from state prison is also increased to a Class H felony.

Increased punishment for other prison offenses. Section 19.25(u) of the budget act revises G.S. 90-95(e)(9) to make it a Class H instead of a Class I felony to possess a controlled substance in prison or jail. Section 19.25(v) of the budget act revises G.S. 148-46.1 to make it a Class H instead of a Class I felony for a prisoner in state prison to injure himself or herself to avoid performing assigned work. Both changes apply to offenses committed on or after December 1, 1997.

Regulatory Offenses

Illegal possession or use of food stamps. Effective for offenses committed on or after December 1, 1997, S.L. 1997-497 (H 431) adds two new sets of offenses concerning food stamps. A person violates new G.S. 108A-53.1(a) if he or she

- knowingly
- *buys, sells, distributes, or possesses with the intent to sell or distribute*
- food stamp coupons, authorization cards, or access devices
- in any manner contrary to Part 5 of Article 2 of G.S. Chapter 108A or any regulations thereunder.

This first type of violation is a Class H felony.

A person violates new G.S. 108A-53.1(b) if he or she

- knowingly
- *uses, transfers, acquires, alters, or possesses*
- food stamp coupons, authorization cards, or access devices
- in any manner contrary to Part 5 of Article 2 of G.S. Chapter 108A or any regulations thereunder.

This second type of violation falls into one of four different offense classes depending on the dollar amount involved. A violation is a Class 1 misdemeanor

if the value is less than $100, a Class A1 misdemeanor if the value is at least $100 but less than $500, a Class I felony if the value is at least $500 but less than $1,000, and a Class H felony if the value is $1,000 or more.

Check-cashing businesses. Effective October 1, 1997, S.L. 1997-391 (S 312) creates detailed requirements concerning the licensing and operation of check-cashing businesses. Under new Article 22 of G.S. Chapter 53, no person or entity may engage in the business of cashing checks for consideration (that is, for a fee) without first obtaining a license. The article exempts from this licensing requirement several entities, including banks, credit unions, and retail businesses that occasionally cash checks for a minimal charge. Engaging in a check-cashing business without a license is a Class I felony, and each check-cashing transaction counts as a separate offense.

Telemarketing. Effective October 1, 1997, S.L. 1997-482 (S 253) adds new Article 33 to G.S. Chapter 66 containing detailed requirements for telephonic sellers, more commonly known as telemarketers. The attorney general may bring a civil action to enforce the article, a violation of which is an unfair and deceptive trade practice. The legislation also adds new G.S. 14-401.15 to create new criminal offenses involving telephone sales recovery services, defined as soliciting or requiring payment to recover either money previously given to a telephonic seller or prizes, awards, or other things of value that a telephonic seller agreed to provide. Offering telephone recovery services in violation of G.S. 14-401.15 is a Class 1 misdemeanor; a violation involving the actual collection of money or other consideration from a customer is a Class H felony. Attorneys licensed to practice law in North Carolina and certain others are exempt from the statute's prohibitions.

Violations of Workers Compensation Act. Effective for offenses committed on or after October 1, 1997, S.L. 1997-353 (H 618) increases the criminal penalties for the following violations of the Workers Compensation Act.

Under amended G.S. 97-88.2(a), any person who willfully makes a false statement of a material fact for the purpose of obtaining or denying any benefit or payment is guilty of a Class 1 misdemeanor if the amount is less than $1,000 and a Class H felony if the amount is $1,000 or more.

Under amended G.S. 97-88.2(c), any person who threatens an employee with criminal prosecution for the purpose of coercing the employee into agreeing to or foregoing compensation is guilty of a Class H felony.

Under amended G.S. 97-94(c), any employer who willfully fails to provide the required security for payment of compensation is guilty of a Class H felony, and any employer who negligently fails to provide such security is guilty of a Class 1 misdemeanor.

Under amended G.S. 97-94(d), any person who willfully fails to bring an employer into compliance with the above security requirements is guilty of a Class H felony, and any person who negligently fails to do so is guilty of a Class 1 misdemeanor.

Wildlife and Related Offenses

Wildlife offenses. Effective for offenses committed on or after December 1, 1997, S.L. 1997-326 (H 1061) creates new G.S. 113-297 prohibiting any unauthorized person from knowingly using facilities or participating in activities provided by the Wildlife Resources Commission for disabled sportsmen. A violation is a Class 3 misdemeanor.

Effective for offenses committed on or after December 1, 1997, S.L. 1997-80 (H 175) updates G.S. 113-136(j) by using structured-sentencing terminology for the offense of refusing to stop in obedience to the directions of a marine fisheries inspector or wildlife protector. The amended statute makes this offense a Class 3 misdemeanor and allows a fine of not less than $50.

Dog fighting. Under G.S. 14-362 and 14-362.1, promoting or conducting an exhibition involving animal or cock fighting has been a Class 2 misdemeanor. A second offense involving animal fighting within three years has been a Class I felony. S.L. 1997-78 (H 147) creates a separate, more serious class of offenses for dog fighting. Effective for offenses committed on or after December 1, 1997, new G.S. 14-362.2 makes it a Class H felony to promote, conduct, be employed at, provide a dog for, allow property to be used for, gamble on, profit from, or participate as a spectator at an exhibition featuring dog fighting or baiting. Owning, possessing, or training a dog with the intent of using it at a dog-fighting exhibition is also a Class H felony.

Removal of electronic dog collar. Chapter 699 of the 1993 Session Laws made the intentional removal or destruction of an electronic dog collar a Class 3 misdemeanor in the following counties: Haywood, Jackson, Swain, Macon, Henderson, and Transylvania. A second offense in those counties is a Class 2 misdemeanor. Effective for offenses committed on or after October 1, 1997, S.L. 1997-150 (S 58) extends these penalties to an additional 14 counties: Alamance, Beaufort, Burke, Caldwell, Caswell, Craven, Cumberland, Hyde, McDowell, Orange, Pitt, Rockingham, Union, and Wilkes.

Other Criminal Offenses

Accessory after fact to felony. Effective for offenses committed on or after December 1, 1997, section 19.25(p) of the budget act changes the punishment for accessory after the fact to a felony. G.S. 14-7 has classified the offense as a Class H felony. The amended statute makes the offense punishable two classes lower than the felony committed by the principal felon (except that accessory after the fact to a Class A or B1 felony is a Class C felony, accessory after the fact to a Class B2 felony is a Class D felony, accessory after the fact to a Class H felony is a Class 1 misdemeanor, and accessory after the fact to a Class I felony is a Class 2 misdemeanor).

False bomb threats. G.S. 14-69.1 and 14-69.2 have distinguished between false bomb threats involving hospitals and false bomb threats involving other structures (and vehicles, boats, and airplanes). Effective for offenses committed on or after December 1, 1997, sections 19.25(cc) and (dd) of the budget act amend these statutes to make any false bomb threat a Class H felony regardless of the nature of the structure.

Sale of tobacco products to minors. Effective for offenses committed on or after December 1, 1997, S.L. 1997-434 (S 143) makes several changes to G.S. 14-313, the statute regulating sale of tobacco products to minors.

First, G.S. 14-313 has prohibited sale of tobacco products to a person under age 18, but a seller was guilty of this offense only if he or she knew that the purchaser was under age. As amended, the statute no longer requires knowledge of a purchaser's age. The legislation deletes a similar knowledge requirement in G.S. 14-313(d), which prohibits sending, or aiding or abetting, a person under age 18 to obtain tobacco products. These changes bring the tobacco statutes more in line with the statutes regulating the sale of alcohol, which have not required knowledge of age for conviction. *See* G.S. 18B-302.

Second, G.S. 14-313 has allowed as a defense that the seller demanded and reasonably relied on proof of age presented by the purchaser. The legislation narrows this defense somewhat by requiring that retailers of tobacco products demand some form of photographic identification. (The alcohol statutes, in contrast, allow this defense only if the seller demands a driver's license, special identification card issued by the Division of Motor Vehicles, military identification, or passport.)

Third, G.S. 14-313 has made it a separate offense for a seller of tobacco products to fail to demand proof of age. The failure to demand proof of age remains an offense but only if the purchaser in fact is under age 18.

Fourth, certain violations of G.S. 14-313 have been misdemeanors and others have been infractions only (noncriminal violations of the law punishable by a small monetary penalty). The legislation creates a new subsection stating that a person charged with a misdemeanor "shall be qualified" for deferred prosecution if he or she has not previously been on probation for violation of the tobacco statute. Ordinarily, the decision whether to defer prosecution is within the prosecutor's discretion. *See* G.S. 15A-1341(a1).

The legislation makes the following additional changes. It makes it a Class 2 misdemeanor, instead of an infraction, for a person under age 18 to purchase tobacco products or present a false proof of age for the purpose of purchasing tobacco products. It punishes as an infraction the failure of a retailer to post a notice at the point of sale stating that North Carolina law prohibits the purchase of tobacco products by anyone under age 18. And it outlaws vending machines that contain tobacco products but allows establishments that meet certain requirements to continue using such machines.

Punishment for littering. Effective for offenses committed on or after December 1, 1997, S.L. 1997-518 (H 1140) amends G.S. 14-399 to allow judges to impose community service as a punishment for littering. Under the amended statute, a judge may require the performance of community service, including the picking up of litter, according to the following formula:

- 8 to 24 hours of community service for an offense involving 15 pounds of litter or less;
- 16 to 50 hours of community service for a second or subsequent littering offense within three years of a prior littering offense; and
- 24 to 100 hours of community service for an offense involving 15 to 500 pounds of litter.

Trespassing with motorized all-terrain vehicle. Effective for offenses committed on or after December 1, 1997, S.L. 1997-487 (H 1087) (as amended by section 56.8 of S.L. 1997-456 (H 115)) creates a new trespassing offense. Under new G.S. 14-159.3, a person is guilty of a Class 2 misdemeanor if he or she

- operates a motorized all-terrain vehicle (as defined in the statute)

- on private property not owned by the operator of the vehicle or within the banks of any stream or waterway (other than a sound or the Atlantic Ocean), the adjacent lands of which are not owned by the operator,

- without the owner's consent or outside the restrictions imposed by the owner.

Intimidation to influence legislator. Effective for offenses committed on or after December 1, 1997, section 19.27 of the budget act amends G.S. 120-86 to make it a Class F felony for any person to threaten another person economically in order to compel the threatened person to attempt to influence a legislator in the discharge of his or her legislative duties.

Criminal Procedure

Pretrial and Trial Procedure

Written notice of voluntary dismissal. A prosecutor may take a voluntary dismissal of criminal charges by entering an oral dismissal in open court or by filing a written dismissal with the clerk. Effective December 1, 1997, S.L. 1997-228 (H 465) amends G.S. 15A-931 to require the prosecutor to give written notice of a voluntary dismissal to the attorney for the defendant or to the defendant if he or she is not represented. The prosecutor is excused from this requirement if the defendant's attorney or defendant is otherwise notified (such as when they are present in the courtroom at the time of dismissal). Whenever the defendant is in custody at the time of a dismissal, the prosecutor also must give written notice of the dismissal to the prison or jail.

Initial appearance by audio-video transmission. In 1993, the General Assembly authorized judicial officials to set pretrial release conditions and conduct first appearances and arraignments in noncapital cases by means of two-way audio and video transmissions between the judicial official and defendant. *See* G.S. 15A-532, 15A-601, and 15A-941. Effective July 3, 1997, S.L. 1997-268 (H 221) amends G.S. 15A-511 to allow judicial officials (usually magistrates) to conduct initial appearances in the same manner if approved by the senior resident superior court judge, chief district court judge, and Administrative Office of the Courts.

Admissibility of evidence in trial of drug cases. G.S. 90-95(g) governs the admissibility of a chemical analysis of a controlled substance performed by the SBI laboratory and certain other facilities. It has allowed the prosecution (or defense) to introduce in *district court* the report of a chemical analysis without calling the chemical analyst to testify. Effective for offenses committed on or after December 1, 1997, S.L. 1997-304 (H 1122) amends G.S. 90-95 to allow the prosecution to introduce such a report in *superior court* if

- the prosecution notifies the defendant at least fifteen days before trial of its intent to introduce the report into evidence;

- the prosecution provides a copy of the report to the defendant at least fifteen days before trial; and

- the defendant fails to notify the prosecution at least five days before trial that he or she objects to introduction of the report.

As amended, G.S. 90-95(g) also requires that the above procedure be followed when the prosecution seeks to introduce a chemical analyst's report in *juvenile proceedings in district court.*

The legislation creates a similar procedure for establishing chain of custody for a substance that has been tested or analyzed to determine whether it is a controlled substance. Under new G.S. 90-95(g1), a written statement is prima facie evidence of chain of custody if the statement is signed by each person in the chain of custody and attests to the facts required by the statute. The prosecution also must satisfy the notification requirements that apply to introduction of a chemical analyst's report, described above. The procedure for establishing chain of custody appears to be the same in all cases since the new statute does not differentiate between district and superior court.

Both G.S. 90-95(g) and (g1) recognize that when a report of chemical analysis or chain-of-custody affidavit is used, either party may call witnesses and introduce evidence to support or contradict the document.

Creation of optometrist-patient privilege. Effective May 22, 1997, S.L. 1997-75 (H 527) (as amended by S.L. 1997-304 (H 1122)) adds a new G.S. 8-53.9 creating an evidentiary privilege for communications between an optometrist and patient. As with other privileges concerning medical information, a court may require disclosure of the

communication if necessary to the proper administration of justice and not prohibited by other laws.

Arrest, Search, and Investigation

Issuance of arrest warrant based on audio-video transmission. Effective July 3, 1997, S.L. 1997-268 (H 221) amends G.S. 15A-304(d) to allow judicial officials to issue arrest warrants based on the oral testimony of law-enforcement officers presented by means of two-way audio and video transmissions. Before officials in a judicial district may issue warrants in this manner, the Administrative Office of the Courts must approve the district's proposed procedures and equipment.

Electronic surveillance. Effective August 28, 1997, S.L. 1997-435 (S 897) makes minor changes to North Carolina's electronic surveillance law (enacted in 1995). G.S. 15A-294(d) has provided that a person subject to an electronic surveillance order must be notified of the order within a certain period of time. The act adds new G.S. 15A-294(d1) to allow delayed notification if there is probable cause to believe that notification would substantially jeopardize the success of an electronic surveillance or a criminal investigation. The act also amends G.S. 15A-286(21) to clarify that the term "wireless communication" includes all cordless telephone communications. This change brings North Carolina law into compliance with federal law by prohibiting the interception of all cordless telephone communications except when permitted under the electronic surveillance law. Last, the act amends G.S. 15A-291 and 15A-298 to permit designees of the attorney general, chief justice, and SBI director to take the actions authorized by those statutes.

Discontinuation of telecommunications services. Effective for offenses committed on or after December 1, 1997, S.L. 1997-372 (S 919) authorizes a district court judge, upon application of the district attorney or attorney general, to order the discontinuation of telecommunications services if the customer is using the services to violate state or federal criminal law. The district court judge apparently may enter this order before or after initiation of formal criminal charges. The procedure for obtaining such an order is in new G.S. 15A-299.

Technical changes to conform to structured sentencing. Effective for offenses committed on or after December 1, 1997, S.L. 1997-80 (H 175) updates several criminal-procedure statutes to conform to the terminology of structured sentencing. For example, G.S. 15A-273 currently allows a judge to issue a nontestimonial identification order when there is probable cause to believe that an offense punishable by imprisonment for more than one year has been committed. The legislation amends G.S. 15A-273 to allow a judge to issue a nontestimonial identification order when the offense is a felony, Class A1 misdemeanor, or Class 1 misdemeanor. The legislation makes similar changes to the following statutes: G.S. 7A-598 (nontestimonial identification order against juvenile for offense that would be felony if committed by adult); G.S. 7A-600 (nontestimonial identification order at juvenile's request for offense that would be felony if committed by adult); G.S. 15A-263 (order for pen register for felony or Class A1 or Class 1 misdemeanor); G.S. 15A-281 (nontestimonial identification order at defendant's request for felony or Class A1 or Class 1 misdemeanor).

Sentencing

Felony Sentencing

Calculating a defendant's sentence for a felony under structured sentencing involves several steps. This session's legislation affects the application of two of those steps: the determination of prior record level and aggravating factors.

Prior record level: use of impaired-driving convictions. Effective for offenses committed on or after December 1, 1997, S.L. 1997-486 (H 183) amends G.S. 15A-1340.14(b)(5) to allow misdemeanor impaired-driving convictions to be used in calculating a defendant's prior record level in felony sentencing. Under the amended statute, each conviction of impaired driving under G.S. 20-138.1 and commercial impaired driving under G.S. 20-138.2 counts one point in felony sentencing. Previously, no points were assessed for misdemeanor offenses under G.S. Chapter 20 except for misdemeanor death by vehicle (which continues to be worth one point).

Prior record level: extra points. Effective for offenses committed on or after December 1, 1997, S.L. 1997-80 (H 175) amends the portions of G.S. 15A-1340.14(b) that allow points to be assessed for matters other than a prior conviction. Currently, one point is assessed if all of the elements of the present offense are included in a prior offense for which the defendant was convicted. The legislation provides that this point is assessed whether or not the prior offense is used in determining prior record level. The legislation also

provides that one point is assessed if the defendant committed the present offense while on supervised *or* unsupervised probation.

Aggravating factors: assisting "criminal street gang." Under structured sentencing, a court may increase the sentence of a person found guilty of a felony upon finding the existence of one or more aggravating factors listed in G.S. 15A-1340.16(d). Effective for offenses committed on or after December 1, 1997, section 19.25(ee) of the budget act creates a new aggravating factor involving "criminal street gangs." The legislation defines a "criminal street gang" as

- an ongoing organization, association, or group
- of three or more individuals
- having as one of its primary activities the commission of felonies, violent misdemeanors, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and
- having a common name, sign, colors, or symbols.

To enhance a sentence based on this aggravating factor, a judge must find that

- the offense was committed for the benefit or at the direction of a criminal street gang,
- the defendant acted with the specific intent to promote criminal conduct by gang members, and
- the defendant was not charged with conspiracy.

Aggravating factors: other changes. G.S. 15A-1340.16(d) has included as an aggravating factor that the offense was committed against a present or former law-enforcement officer, jailer, judge, and certain others. Effective December 1, 1997, section 19.25(w) of the budget act revises this aggravating factor to include any offense that was committed against, *or proximately caused serious injury to,* these personnel.

Misdemeanor Sentencing

Prior conviction level. For the purpose of determining prior record level in felony cases, the points assigned to a prior conviction depend on the *current* classification of the offense, not on the classification of the offense at the time it was committed. *See* G.S. 15A-1340.14(c). Effective for offenses committed on or after December 1, 1997, S.L. 1997-80 (H 175) amends G.S. 15A-1340.21(b) to clarify that the same approach must be followed in misdemeanor sentencing. A prior offense may be counted as a conviction only if the offense is classified as a felony or misdemeanor at the time the defendant committed the current offense. Thus, if an offense has been converted from a misdemeanor to an infraction, a prior conviction for that offense would not count in misdemeanor sentencing.

Credit for time served. When a defendant spends time in confinement while awaiting trial, G.S. 15-196.1 requires that this time be credited toward any active term of imprisonment ultimately imposed. It is a common practice, particularly in cases involving relatively minor offenses, for judges to impose an active sentence equal to the time the offender has already spent in jail awaiting trial ("credit for time served"). Under structured sentencing, however, an active sentence is not authorized in many misdemeanor cases (for example, active time cannot be imposed for a Class 1 misdemeanor when the defendant has no prior convictions). Effective May 22, 1997, S.L. 1997-79 (H 174) amends G.S. 15A-1340.20 to clarify that a sentence of "credit for time served" may be imposed for *any* misdemeanor. The sentence may not exceed the total amount of time that the defendant has spent in confinement as a result of the charge that culminates in the sentence.

Probation and Post-Release Supervision

Delegation of authority to probation officers. G.S. 15A-1343.2(e) and (f) give the sentencing court the discretion to delegate to the probation officer the authority to require a probationer to comply with certain conditions, such as submitting to drug testing, performing community service, and other conditions in the statute. Effective for offenses committed on or after December 1, 1997, S.L. 1997-57 (S 16) takes this delegation a step further, providing that the officer has the delegated authority unless the court states in the judgment that delegation is not appropriate. As before, a probationer who objects to the conditions imposed by a probation officer has the right to obtain court review of the conditions.

Requirements of intensive probation. Effective for offenses committed on or after December 1, 1997, S.L. 1997-57 (S 16) amends G.S. 15A-1340.11(5) and

15A-1343(b1) to establish certain requirements for intensive probation, also called the intensive supervision program. The act provides that unless otherwise ordered by the court, intensive supervision requires multiple contacts by a probation officer per week, a specific period each day when the probationer must be at his or her residence, and suitable employment or pursuit of a course of study or training that will equip the probationer for suitable employment. A probationer also must comply with rules adopted by the Department of Correction for the intensive supervision program.

Electronic house arrest. Effective for offenses committed on or after December 1, 1997, S.L. 1997-57 (S 16) rewrites the current definition of electronic house arrest in G.S. 15A-1340.11 and 15A-1343(b1). The primary effect of the revision is to make clear that probation officers as well as judges have the authority to allow a probationer placed on electronic house arrest to leave his or her residence for the purpose of employment, counseling, and certain other purposes.

IMPACT. Under G.S. 15A-1343(b1)(2a) and 15A-1343.1, a probationer may be ordered to participate in IMPACT (Intensive Motivational Program of Alternative Correctional Treatment, also called "boot camp") for 90 to 120 days as part of the confinement period of special probation. To be eligible for the program, the probationer must be between 16 and 30 years old, be convicted of a felony or a Class A1 or 1 misdemeanor, and be certified as medically fit. Effective July 1, 1997, section 19.11 of the budget act amends G.S. 15A-1343(b1)(2a) to provide that the boot camp confinement may be in any facility operated by the Department of Correction. Previously, confinement had to be in a facility for youthful offenders. This condition of probation also may include a period of supervision, including counseling and substance abuse treatment, after the probationer has completed boot camp.

Community penalties. Under G.S. 7A-771 and 7A-773, community penalties programs have been required to concentrate their efforts on "targeted offenders," defined as people "convicted of misdemeanors or felonies" who are eligible to receive an intermediate punishment under structured sentencing and who face a substantial threat of imprisonment. Effective for offenses committed on or after December 1, 1997, S.L. 1997-57 (S 16) revises the definition of "targeted offenders" to include people *charged with* misdemeanors or felonies as well as those convicted of them.

Post-release supervision. Effective for offenses committed on or after December 1, 1997, S.L. 1997-237 (H 195) makes several changes to the provisions on post-release supervision. The act amends G.S. 15A-1368(a)(5) to provide that in determining the maximum term of imprisonment for purposes of determining when an inmate is to receive supervised release, DOC must compute the sum of all maximum terms "imposed in the court judgment *or judgments*" (new language in italics).

The act also amends G.S. 15A-1368.4(e) to allow two additional "controlling conditions" to be imposed during post-release supervision: that the supervisee remain in a specified place at a specified time, with compliance monitored by an electronic device; and that the supervisee submit to supervision by officers of the intensive post-release supervision program, which is similar to the intensive supervision program for probationers. A violation of controlling conditions may result in revocation of supervised release. (Effective for offenses committed on or after December 1, 1997, S.L. 1997-57 (S 16) also adds new G.S. 15A-1368.4(e1) forbidding the imposition of community service as a condition of post-release supervision.)

Last, S.L. 1997-237 clarifies the time of a hearing on revocation of supervised release. G.S. 15A-1368.6(e) has required that the hearing be held within 45 days of the supervisee's reconfinement on an alleged violation of release conditions. The act amends this statute to provide that the 45 days begins on the earlier of the following: (1) the preliminary hearing required by G.S. 15A-1368.6(b) is held or waived; or (2) seven working days have passed since the supervisee's arrest.

Motor Vehicles

Impaired Driving

S.L. 1997-379 (H 448) makes many changes in the law on impaired driving. Some changes also appear in S.L. 1997-234 (S 393), S.L. 1997-456 (H 115), and S.L. 1997-486 (H 183). Unless noted otherwise, all changes are in S.L. 1997-379 and apply to offenses committed on or after December 1, 1997.

Punishment for impaired driving. G.S. 20-179, which sets forth the punishment for impaired driving under G.S. 20-138.1, is amended in the following respects.

The minimum active term of imprisonment for a *Level 1 punishment* is raised from 14 to 30 days, and the provision allowing a defendant to serve four

consecutive days of the minimum term and twice the remainder on house arrest is deleted.

The minimum active term of imprisonment for a *Level 2 punishment* remains the same, but the provision allowing service of the minimum term under the house arrest procedure is deleted.

Amended G.S. 20-179(i), (j), and (k) permit, although do not require, a judge to impose an active term of imprisonment for a *Level 3, 4, or 5 punishment.* Previously, a judge was required to suspend the term of imprisonment for those punishment levels.

G.S. 20-179(k1) has allowed a judge to order that a term of imprisonment imposed as a condition of special probation be served at a *residential treatment facility* operated or licensed by the state. As amended, the statute continues to allow this alternative for any punishment level and provides further that the trial judge may order that the costs be absorbed by the state. The amended statute also eliminates the provision that prohibited a judge from crediting inpatient treatment against a term of imprisonment more than once during the seven-year period preceding the date of the offense.

Parole for impaired driving continues to be allowed but is restricted. (Impaired driving is one of the few offenses not subject to structured sentencing, which eliminated parole and replaced it with post-release supervision.) To be released on parole, a defendant must (1) have served any mandatory minimum period of imprisonment, (2) otherwise be eligible for parole, *and* (3) have obtained a substance abuse assessment and completed any recommended treatment or education or be paroled into a residential treatment program.

If the defendant is placed on *probation for any level,* the judge must require that the defendant obtain a substance abuse assessment and treatment.

In cases involving a Level 3, 4, or 5 punishment, G.S. 20-179(r) has allowed a judge to place the defendant on *supervised probation* but has discouraged it. As amended, the statute permits, although does not require, a judge to impose supervised probation if the defendant has not obtained a substance abuse assessment and completed treatment or education.

Punishment for habitual impaired driving. G.S. 20-138.5 is amended to increase habitual impaired driving from a Class G to a Class F felony and to require a person convicted of this offense to serve a term of imprisonment of at least 12 months. Although structured sentencing (which applies to habitual impaired driving) sometimes allows a suspended sentence for a Class F felony, this minimum term of imprisonment may not be suspended.

Pretrial revocation of driver's license. G.S. 20-16.5, which requires pretrial revocation of a driver's license of a person who fails or refuses to submit to a chemical analysis, is amended in the following respects.

The *period of revocation* is extended from 10 to 30 days for most defendants. The period of revocation is extended from 30 to 45 days when a pick-up order has been issued and the person fails to respond in a timely manner.

A person may obtain a *limited driving privilege* after 10 days of a 30-day revocation and after 30 days of a 45-day revocation. A privilege may be issued if the person meets certain conditions, including obtaining an assessment and agreeing to treatment or education.

Effective July 1, 1998 (note later effective date), S.L. 1997-486 (H 183) amends G.S. 20-16.5 to require an *indefinite pretrial revocation* if at the time of the current offense the defendant has a pending charge that resulted in a pretrial revocation. In those cases, the revocation remains in effect until the new and pending charge are resolved. (The revocation must remain in effect a minimum of 30 days.) A person whose license is revoked indefinitely may obtain a limited driving privilege after 30 days (and, in certain cases involving pick-up orders, after 45 days) if the privilege is necessary to overcome undue hardship and certain other conditions are satisfied.

One-year revocation for refusal. G.S. 20-16.2 has imposed a one-year license revocation if a person refuses to submit to a chemical analysis for an implied-consent offense. That statute continues to allow a person to obtain a limited driving privilege after six months but is amended to require that the person first obtain an assessment and complete training and education.

Revocation for failure to perform community service. G.S. 20-179.4 has required the court to revoke a limited driving privilege of a person who receives a Level 3, 4, or 5 punishment for impaired driving if the person is ordered to perform community service and the person willfully fails to comply. S.L. 1997-234 (S 393) amends that statute to provide that the revocation lasts until the community service requirement is met. The act also amends G.S. 20-17(b) to require DMV to revoke the driver's license of any person "who has willfully failed to complete court-ordered community service and a court has issued a revocation order." The

license revocation lasts until DMV receives notice from the court clerk that the community service requirement has been completed.[1]

Revised G.S. 20-17(b) is somewhat unclear because it does not specify the offenses to which it applies. At its extreme, the statute could be read as authorizing DMV to revoke a driver's license whenever the court issues an order that a person has willfully failed to perform community service—whether in motor vehicle cases or criminal cases in general. More likely, the General Assembly intended to require revocation of a driver's license only when a court has revoked a limited driving privilege under G.S. 20-179.4, which applies in impaired-driving cases. The revisions to G.S. 20-17 appear in the same act as the revisions to G.S. 20-179.4. Further, amended G.S. 20-17(b) authorizes DMV to revoke a driver's license only when a court has issued a "revocation order" for failure to perform community service. Only G.S. 20-179.4 requires the court to issue a revocation order for such conduct. (G.S. 20-179.3(i) authorizes, but does not require, a court to revoke a limited driving privilege in other motor vehicles cases, such as speeding cases; thus, if the court revokes a limited driving privilege in a speeding case for the failure to perform community service, the court's "revocation order" might be construed as requiring DMV to revoke the driver's license as well.)

S.L. 1997-234 is effective October 1, 1997, and applies to any person hired or any person notified of a hearing to determine if the person has willfully failed to perform community service on or after October 1, 1997.

Drug testing. G.S. 20-4.01 and 20-139.1 are amended to rewrite the definition of chemical analysis. The revised statutes allow a chemical analysis not only of breath or blood but also of other bodily fluids and substances. They also provide that the analysis may be for the purpose of detecting impairing substances other than alcohol. An officer may request that a person submit to a test of blood or other bodily fluids or substances in addition to (or in lieu) of a chemical analysis of breath. The person must be advised of his or her implied-consent rights before each test (this last requirement was added by S.L. 1997-456 (H 115)). A refusal to submit to an analysis of bodily fluids or substances is considered a willful refusal under G.S. 20-16.2. The presence of an impairing substance in the person's body, as shown by a chemical analysis, is admissible in a prosecution for an implied-consent offense; however, drug tests generally indicate a drug's presence, not its concentration, and the law contains no concentration levels at which a person is deemed impaired by drugs.

Screening tests for zero per se offenses. G.S. 20-138.3, which makes it unlawful for a person under age 21 to drive while any alcohol or drugs remain in his or her system, is amended to provide as follows: (1) the odor of alcohol is not itself sufficient to prove beyond a reasonable doubt that alcohol was remaining in the driver's system unless an alcohol screening test or chemical analysis was offered and refused; and (2) an alcohol screening test is admissible only if the device is one approved by the Commission for Health Services and the test is conducted in accordance with commission rules. These provisions are the same as the provisions on alcohol screening tests in G.S. 20-138.7, which prohibit a driver of any age from having any alcohol or drugs in his or her system while an open container of alcohol is in the vehicle.

Forfeiture of Motor Vehicles

S.L. 1997-379 (H 448) significantly revises the provisions on forfeiture of motor vehicles involved in impaired-driving offenses. Effective for offenses committed on or after December 1, 1997, the act amends current G.S. 20-28.2 and adds several new sections immediately after that section.

Offenses covered by forfeiture provisions. A vehicle is subject to forfeiture if two conditions are present. First, the driver must have violated G.S. 20-138.1 (impaired driving) or G.S. 20-138.5 (habitual impaired driving). Conviction of felony death by vehicle or other motor vehicle offenses does not trigger the forfeiture provisions.

Second, at the time of the violation the license of the driver of the vehicle must have been revoked as a result of a prior impaired driver's license revocation as defined in G.S. 20-28.2(a). That section includes revocations based on the following: zero per se offenses, impaired driving on military bases, willful

1. Although not spelled out in the act, revocations under G.S. 20-179.4 and 20-17(b) probably last until the person meets the community service requirement or the court revokes the person's probation, which terminates any community service requirement. If community service is a condition of probation in a felony case—and the defendant willfully fails to comply and has his or her probation revoked—the defendant's license may be subject to forfeiture under another statute, G.S. 15A-1331A. *See generally* STEVENS H. CLARKE, LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA at 18–19 (2d ed. 1997, Institute of Government) (discussing application of forfeiture statute, including questions about statute's validity under state constitution).

refusals, impaired driving convictions, probation conditions in impaired driving cases that prohibit driving, convictions in other states for impaired driving, a second or subsequent conviction for transporting an open container of alcohol under G.S. 20-138.7, involuntary manslaughter, and felony death by vehicle. It also includes pretrial revocations. It does not include revocations for habitual impaired driving, impaired instruction, or convictions in federal court for impaired driving.

Seizure of vehicle. If probable cause exists to believe that the defendant committed the offense of impaired or habitual impaired driving while his or her license was revoked within the meaning of G.S. 20-28.2(a), the charging officer must seize the vehicle at the time of the arrest. The officer must file an affidavit with the magistrate indicating the basis for the seizure and, if a magistrate determines that the vehicle is subject to forfeiture, he or she must order the vehicle held.

The officer must cause notice of the impoundment to be given to any owner of the vehicle who was not operating or present in the vehicle at the time of the offense. The notice must be in writing and sent by first-class mail to the last address in DMV's records. The officer also must notify DMV and any lienholders of the seizure; the notice to lienholders must be given within 72 hours of the seizure. The vehicle is stored pending trial (unless released pursuant to the procedures described below) at a location chosen by the county school board. If held on property owned or leased by the school board, no fee may be assessed for storage. If the school board contracts with a commercial facility for storage, a fee of no more than five dollars a day may be charged.

Release of vehicle pending trial. An owner of the vehicle or a lienholder (if other than the driver) may apply to the superior court clerk for return of the vehicle pending trial. The clerk must release the vehicle if certain conditions are met (described in new G.S. 20-28.3). Among other things, the applicant must post a bond equal to twice the value of the seized vehicle. If the applicant is an owner of the vehicle, he or she also must file an acknowledgement with the clerk meeting the requirements of new G.S. 20-28.2(a1). The acknowledgment must state, among other things, that the owner recognizes that lack of knowledge of or consent to the operation of the vehicle by the defendant will not be a defense in the future unless the owner immediately reports to the police any unauthorized use by the defendant. (G.S. 20-28.4 also states that a petition for release of a vehicle may be filed with a judge, but whether this procedure is available apart from the hearing on forfeiture, discussed next, remains unclear.)

Hearing procedure. At least 14 days before any hearing on forfeiture, the prosecutor must notify the defendant, each vehicle owner, and each lienholder that the vehicle may be forfeited and that each has the right to intervene at the hearing. If notice has been timely given, the hearing on forfeiture may be held at the same time as any sentencing hearing on the offense with which the defendant is charged. If notice has not been given in time, the judge must continue the hearing on forfeiture but still may go forward with the sentencing hearing on the offense.

If the defendant is not convicted of either impaired driving or habitual impaired driving, the judge must order the vehicle released to the owner. Likewise, if the defendant is convicted of one of those offenses, but at the time of the offense his or her license was not revoked as a result of a prior impaired-driving revocation, the judge must order the vehicle released to the owner. New G.S. 20-28.4 also states that the judge must order the vehicle released if probable cause did not exist to seize the motor vehicle.

If the defendant is convicted of a covered offense while his or her license was revoked for a covered reason, the judge must order the vehicle forfeited unless a vehicle owner is entitled to return of the vehicle. The judge must order the vehicle returned to a vehicle owner on proof by the greater weight of the evidence that the owner was an "innocent party" and meets the other conditions described in G.S. 20-28.2(e). The judge also must order a forfeited vehicle released to a lienholder on proof by the greater weight of the evidence that the lienholder's interest is equal to or greater than the fair market value of the vehicle and the lienholder meets the other conditions described in G.S. 20-28.2(f).

Under G.S. 20-28.4, a defendant, vehicle owner, or lienholder who paid towing or storage fees to obtain release of the vehicle is entitled in some circumstances to recover those fees.

If the vehicle is ordered to be forfeited, the county school board either may sell the vehicle by judicial sale or may retain the vehicle for its own use (after satisfying any liens).

Right to appeal. New G.S. 20-28.5(e) deals with appeal of forfeiture orders. It states that an order of forfeiture is stayed pending appeal of a conviction that is the basis of the order. Upon appeal of such a conviction from district to superior court, the issue of forfeiture is heard de novo. Appeals from superior court forfeiture orders are to the court of appeals.

It is not clear from the statute whether the issue of

forfeiture is reheard on the defendant's appeal of a conviction if the lower court has not ordered the vehicle forfeited. The statute also does not address the right of an owner or lienholder to appeal an adverse forfeiture decision if the defendant does not appeal the conviction.

Revocation of vehicle registration. New G.S. 20-28.6 provides for revocation of registration rights when a person is convicted of impaired driving while his or her license is revoked. (The definition of an impaired driving conviction and a license revocation are the same as for forfeiture of a vehicle.) The defendant forfeits the right to register in his or her name *any vehicle,* not just the vehicle that the defendant was driving, until his or her driver's license is restored; the judge must order this forfeiture at the time of sentencing. A nondriving owner who is not an innocent party within the meaning of G.S. 20-28.2 forfeits the right to register the *seized vehicle* for the period that the driver's license of the defendant is revoked; the judge apparently determines whether the owner is an innocent party for registration purposes at the time the hearing on vehicle forfeiture is held.

Other Motor Vehicle Offenses

Eluding arrest with motor vehicle. Effective for offenses committed on or after December 1, 1997, section 19.26 of the budget act creates the offense of using a motor vehicle to elude arrest. The legislation repeals G.S. 20-141(j), which had made it a misdemeanor to use a motor vehicle to elude arrest but only if the defendant exceeded certain speeds, and replaces it with G.S. 20-141.5. Under the new statute, it is a Class 1 misdemeanor to

- operate a motor vehicle
- on a street, highway, or public vehicular area
- while fleeing or attempting to elude a law-enforcement officer
- who is in the lawful performance of his or her duties.

The offense is raised to a Class H felony if two or more aggravating factors are present. The statute lists eight possible aggravating factors, including speeding in excess of fifteen miles over the speed limit, driving while grossly impaired (as defined in the new statute), reckless driving, and driving while license revoked. The act also amends G.S. 20-179(d) to make conviction under the new statute an aggravating factor in sentencing for impaired driving (as conviction under repealed G.S. 20-141(j) was an aggravating factor).

The statute imposes the following driver's license consequences upon conviction.

- If a person is convicted of the misdemeanor version of the offense, DMV may suspend his or her license for up to one year.
- If a person is convicted of the felony version of the offense based on the presence of *two* aggravating factors, DMV must revoke his or her license for two years; however, on a first felony conviction for eluding arrest, the person may apply to the sentencing court for a limited driving privilege after twelve months.
- If a person is convicted of the felony version of the offense based on the presence of *three* aggravating factors, DMV must revoke his or her license for three years.

The legislation also requires every law-enforcement agency to adopt a policy governing pursuit of fleeing motorists and requires the attorney general to develop a model policy. The policies must include factors that an officer should consider in deciding when to break off a chase.

One other part of new G.S. 20-141.5, the "prima facie" evidence rule, deserves discussion. The new statute states that in any court or administrative hearing "it shall be prima facie evidence that the vehicle was operated by the person in whose name the vehicle was registered at the time of the violation." If the vehicle is rented, then proof of the rental is prima facie evidence that the vehicle was operated by the renter. (The statute also states that when a law-enforcement officer relies on the "prima facie" evidence rule as a basis for probable cause to arrest, the officer must make a reasonable effort to contact the registered owner of the vehicle before initiating criminal process.)

The "prima facie" evidence rule creates a form of presumption, an evidentiary device with constitutional implications. A presumption allows a judge or jury to presume the existence of an element of an offense (in this instance, the presumed, or "elemental," fact would be that the defendant was the driver of the vehicle) based on proof of another fact (in this instance, the preliminary, or "basic," fact would be that the defendant owned or rented the vehicle). In criminal cases, presumptions come in essentially two forms, mandatory and permissive. A presumption is considered mandatory, and is subject to close

constitutional scrutiny, if it is irrebuttable *or* it shifts to the defendant any burden to rebut the presumption.[2] G.S. 20-141.5 does not appear to create a mandatory presumption: it neither *requires* a judge or jury to find that the owner or renter of a vehicle was the driver nor *requires* the defendant to offer any evidence that he or she was not driving.

The statute creates a permissive presumption, however, as it *permits* a judge or jury to find that the defendant was driving based on proof of ownership or rental. The constitutionality of a permissive presumption, also called a permissive inference, depends largely on the evidence presented in each case. First, there must be a rational connection between the basic fact (ownership or rental) and the elemental fact (driving) such that, upon proof of the basic fact, the elemental fact is more likely than not to exist. Second, the evidence must be sufficient for a jury (or judge in a district court case) to find the elemental fact beyond a reasonable doubt. Thus, if the state relies solely on the permissive inference in G.S. 20-141.5, then a conviction is constitutionally acceptable only if proof of ownership or rental is considered sufficient by itself to establish beyond a reasonable doubt that the defendant was driving—a difficult conclusion to draw. If the state relies on the statutory inference as well as other evidence to establish driving, the inference and evidence taken together still must be sufficient to establish guilt beyond a reasonable doubt.[3]

Forgery of inspection stickers. G.S. 20-183.8(c) has made it a Class I felony to forge an inspection sticker. Effective for offenses committed on or after November 1, 1997, S.L. 1997-29 (S 260) makes it a Class I felony to do any of the following:

- forge an inspection sticker;
- buy, sell, or possess a forged inspection sticker; or
- buy, sell, or possess an inspection sticker other than in the course of an inspection business or after having a vehicle pass inspection or receive a waiver.

Speeding in work zones and on or near school property. Effective for violations that occur on or after October 1, 1997, S.L. 1997-488 (S 30) amends G.S. 20-141(j2) to make speeding in a work zone punishable by a minimum $100 and a maximum $250 penalty. Effective July 25, 1997, S.L. 1997-341 (S 625) amends G.S. 20-141 to allow cities and counties to set reduced speed limits on public and private school property if so requested by the school. A violation of the speed limit is an infraction with a minimum penalty of $25. S.L. 1997-341 also amends G.S. 20-141.1 to impose a minimum $25 penalty for speeding in an area near a school (a school zone).

Other Driver's License Issues

Graduated driver's licenses. S.L. 1997-16 (H 248) amends G.S. 20-11 to establish a graduated licensing system for drivers under age 18. The act becomes effective December 1, 1997, but does not apply to any person who holds a learner's permit or driver's license issued before that date. The three levels of the graduated licensing system are as follows.

A person may obtain a *level 1 limited learner's permit* if the person is at least 15 years old, passes a driver education course, and passes a written examination administered by DMV. A person with a level 1 permit may drive only if a supervising driver (parent, guardian, or person who signed the application for the permit) is in the front seat; and for the first six months after issuance of the permit he or she may drive between the hours of 5:00 a.m. and 9:00 p.m. only. After the first six months, the person may drive at any time with a supervising driver present.

A person may obtain a *level 2 limited provisional license* if the person is at least 16 years old, has had a limited learner's permit for at least 12 months, has not been convicted of a moving violation or found responsible for a seat belt infraction for the preceding six months, and passes a road test administered by DMV. A person with a level 2 license may drive with supervision at any time, without supervision from 5:00 a.m. to 9:00 p.m., and without supervision outside those hours when driving to or from work or volunteer fire or rescue squad duty.

A person may obtain a *level 3 full provisional license* if the person is at least 16 years old, has had a level 2 license for at least six months, and has not been

2. *See* County Court of Ulster County v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979); State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980). Burden-shifting presumptions can be further divided into two subcategories: (1) those that shift the burden of persuasion to the defendant; and (2) those that shift a burden of production to the defendant. The latter require the defendant to come forward with some evidence to rebut the presumption, after which the ultimate burden of persuasion returns to the prosecution. Both types of burden-shifting presumptions are considered mandatory presumptions.

3. *Id.*

convicted of a moving violation or found responsible for a seat belt infraction for the preceding six months. A person with a level 3 license is not subject to the restrictions on level 1 and 2 licensees.

Failure to comply with a restriction concerning the time of driving or the presence of a supervising driver constitutes operating a motor vehicle without a license. Failure to comply with other restrictions, such as seating and passenger limitations, is an infraction.

The act (as amended by S.L. 1997-456 (H 115)) also revises G.S. 20-7 to limit the operation of motorcycles by individuals under age 18.

Requirement of high school diploma or driving eligibility certificate. S.L. 1997-507 (H 769) amends the graduated license provisions, summarized above, by adding a further requirement for issuance of a level 1, 2, or 3 license. As amended, G.S. 20-11 requires that a person under age 18 have a high school diploma, its equivalent, or a "driving eligibility certificate" issued by the school in which the person is enrolled. A school may issue a driving eligibility certificate when one of the following conditions is present: (1) the person is enrolled in school and is making progress toward obtaining a high school diploma or its equivalent; (2) a substantial hardship would be placed on the person or the person's family if the person does not receive a certificate; or (3) the person cannot make progress toward obtaining a high school diploma or its equivalent. The act also amends G.S. 20-13.2 to require revocation of a level 1, 2, or 3 license if the school notifies DMV that the person no longer meets the requirements for a driving eligibility certificate. The revocation ends when the person obtains a high school diploma, its equivalent, or another driving eligibility certificate.

The act provides that a person may appeal the denial of a driving eligibility certificate to the appropriate educational authority. The act also requires the state education board and other educational governing bodies to promulgate rules and procedures governing the issuance of driving eligibility certificates.

The act applies to students at public schools, private schools, charter schools, home schools, and community colleges. It becomes effective August 1, 1998, but does not apply to drivers who received a learner's permit or driver's license before December 1, 1997.

Disclosure of otherwise confidential medical information. Effective September 1, 1997, S.L. 1997-464 (H 231) adds new G.S. 20-9.1 to allow physicians and psychologists to disclose otherwise confidential information to DMV. The new statute allows, although does not require, a physician or psychologist to disclose to DMV information about a patient who has a mental or physical disability that may affect the patient's ability to safely operate a motor vehicle. The statute allows this disclosure notwithstanding the physician-patient privilege in G.S. 8-53, the psychologist-patient privilege in G.S. 8-53.3, and any other state laws relating to confidentiality of patient communications. The physician or psychologist first must consult with the patient, and any disclosure is limited to the patient's name, address, date of birth, and diagnosis. The act contains similar provisions (under new G.S. 90-21.20A) allowing disclosure of information to licensing agencies concerning pilots and applicants for a pilot's license.

Sex Offender Registration

S.L. 1997-516 (S 676) makes several significant changes to North Carolina's sex offender registration law, contained in Article 27A of G.S. Chapter 14. The act establishes three different registration programs: one program (referred to here as the regular registration program) for individuals who have a "reportable conviction," which the General Assembly created in 1995 and which this act revises; a new program for those classified as "sexually violent predators"; and a new program for juveniles who have been adjudicated delinquent of certain offenses.

The changes to North Carolina's registration law are drawn partly from federal law, which provides that states that fail to implement certain minimum registration requirements are subject to a ten percent reduction in Byrne Formula Grant funds. (North Carolina received approximately $12 million under that program for the 1996–97 fiscal year.) Some of the provisions in S.L. 1997-516 concerning adult offenders (such as Internet access to registration information, discussed below) are not mandated by federal law. Nor does federal law condition grant money on adoption of a juvenile registration program. *See* 42 U.S.C. 14071; Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39009 (1997).

Note on effective dates for adult registration programs. S.L. 1997-516 gives April 1, 1998, as the effective date for both the revisions to the regular registration program and the new predator registration program. (The juvenile registration program, discussed further below, has an effective date of October 1, 1999.) The legislation is silent, however, on whether and how the changes apply to events that occurred before April 1, 1998. The legislation contains so many

different kinds of provisions that there may be no single answer. Comparing the effective-date language used in S.L. 1997-516 with other registration legislation may provide some guidance in interpreting the General Assembly's intent. *See* Chapter 543 of 1995 Session Laws (original registration act states that it applies to individuals convicted or released from penal institution on or after January 1, 1996, thus expressing intent for provisions to apply to some offenses and convictions that occurred before effective date); S.L. 1997-15 (H 139) (other registration act passed this session, discussed further below, states that it applies to individuals convicted or released from penal institution on or after April 3, 1997). Some guidance also may be found in recent litigation over the effective date of federal habeas corpus changes enacted by Congress in 1996. *See Lindh v. Murphy,* 521 U.S. ___, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997) (finding that Congress intended for some changes to apply to cases pending on or after effective date and for others to apply only to cases filed on or after effective date); *see also Landgraf v. USI Film Products,* 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (discussing general rules for interpreting statutes that would have retroactive effect).

Regular registration program. In the original registration law, enacted in 1995, the General Assembly required people with a "reportable conviction" to register with the sheriff in the county where they reside. S.L. 1997-516 continues this registration program, but makes several changes, effective April 1, 1998. The most significant are discussed here.

First, the legislation expands the list of offenses requiring registration. An individual has been required to register if convicted of certain sex offenses, including rape, sexual offense, and taking indecent liberties with a child. Although the legislation does not add any offenses to this category (which it renames as "sexually violent offenses"), it creates a new category of reportable offenses called "offenses against minors." (A "minor" is a person under age 18.) The only offenses in this latter category are: kidnapping under G.S. 14-39, abduction of a child under G.S. 14-41, and felonious restraint under G.S. 14-43.3 *if* the person who committed the offense was not the minor's parent or legal custodian. The legislation also requires that a person register if he or she is convicted of an attempt to commit a "sexually violent offense" or an "offense against a minor."

Second, the legislation expands the public's access to information on file with the sheriff, called the "county registry." Amended G.S. 14-208.10 makes specified information in the county registry a public record and available for public inspection, including the home addresses and photographs of the people required to register. (The identity of the victim is not public.) A copy of the public portion of the county registry may be obtained by submitting a written request to the sheriff and paying reasonable copying costs. The legislation also provides that the Division of Criminal Statistics must establish a central, statewide sex offender registry consisting of the registration information in the county registry. The division must provide free public access to the registry via the Internet to the extent the information is a public record under G.S. 14-208.10.

Third, the legislation significantly increases the penalties for failing to register. A first offense of failing to register has been a Class 3 misdemeanor, and a second offense has been a Class I felony. Amended G.S. 14-208.11 provides that an individual is guilty of a *Class F felony* if he or she does any of the following:

- fails to register,
- fails to notify the last registering sheriff of a change of address,
- fails to return an annual form verifying the individual's registration information, or
- forges or submits under false pretenses any of the required information or verification forms.

Fourth, the legislation provides that every person with a reportable conviction must register for a period of ten years from the date of initial registration, which begins when a person is released from prison or placed on probation. The legislation repeals a person's right under present law to petition the superior court for an exemption from the registration requirements.

Registration program for "sexually violent predators." Effective April 1, 1998, the legislation creates a new, more stringent set of registration requirements for people classified as "sexually violent predators." New G.S. 14-208.6 defines a "sexually violent predator" as one who

- has been convicted of a "sexually violent offense" (not just an "offense against a minor") and
- suffers from a mental abnormality or personality disorder (as defined in G.S. 14-208.6) that makes the person likely to engage in sexually violent offenses against strangers or against a person with whom a relationship

has been established or promoted for the primary purpose of victimization.

The procedure for classifying a person as a predator appears in new G.S. 14-208.20. When an indictment or information charges a person with a sexually violent offense, the district attorney must decide whether to seek to have the person classified as a predator and must give notice of intent to seek that classification within the time allowed. If a person is found guilty of a sexually violent offense, the court must order a presentence investigation by a board of experts selected by the Department of Correction. After receipt of the presentence report, the court must hold a sentencing hearing and issue a written decision on whether to classify the defendant as a predator.

What makes the registration program for sexually violent predators more stringent than the regular registration program is the frequency and length of registration. People subject to the regular registration requirements must verify their registration information annually, and the registration requirements automatically terminate after ten years. Individuals classified as predators must verify their registration information *every 90 days,* and the registration requirements do *not* have a definite termination date. After ten years from the date of initial registration, a person may petition a superior court judge to remove the predator designation. The registration requirements terminate only if the judge finds that the person no longer suffers from a mental abnormality or personality disorder that would make him or her likely to engage in a predatory offense.

In a number of other respects, the registration programs are similar. Information on sexually violent predators is public to the same extent as other registry information. And a person classified as a predator is guilty of a Class F felony if he or she fails to comply with the registration requirements.

Registration program for juveniles. Effective October 1, 1999 (note the later effective date), the legislation creates a juvenile registration program. A juvenile is subject to this program if

- the juvenile was adjudicated delinquent of first- or second-degree rape or sexual offense or attempted rape or sexual offense,
- the juvenile was at least eleven years old at the time of the offense, and
- the court determines that the juvenile is a danger to the community and should be required to register.

This program does not apply to juveniles transferred to superior court for trial as an adult, who are subject to the adult registration programs (including the program for sexually violent predators) if convicted of an offense requiring registration.

The principal features of the juvenile registration program are: (1) the juvenile's court counselor, not the juvenile, is responsible for filing the registration information with the appropriate sheriff, and no criminal penalties are specified for violation of the registration requirements; (2) the registration information, although not open to the public, is available to law-enforcement agencies; and (3) the registration requirements terminate when the juvenile turns eighteen or the jurisdiction of the juvenile court over the juvenile ends, whichever occurs first.

The legislation also requires the Department of Crime Control and Public Safety to appoint a committee to study whether juveniles should be required to register and, if so, for which offenses and under what procedures. The committee must report its findings and recommendations no later than the convening of the 1999 legislative session, thus giving the General Assembly an opportunity to revisit the program before it takes effect.

Other changes to registration requirements. S.L. 1997-15 (H 139) makes smaller changes to the sex offender registration law. The legislation expands the definition of "reportable conviction" contained in G.S. 14-208.6(4) by including a final conviction in federal court that is substantially similar to a reportable conviction in North Carolina. (Only those with a "reportable conviction" must register.) The legislation also amends the definition of "penal institution" contained in G.S. 14-208.6(2) by including prisons and jails operated by other states and the federal government. (Registration for those serving a term of imprisonment is tied in part to their release date from a "penal institution." *See* G.S. 14-208.7.) The legislation states that it applies to individuals convicted or released from a penal institution on or after April 3, 1997.

Capital Cases

Scheduling of execution date. In 1996, the General Assembly modified the procedure for scheduling executions in North Carolina. Chapter 719 of the 1995 Session Laws (Reg. Sess. 1996) revised G.S. 15-194 to provide that the warden has the responsibility for scheduling the execution date upon receiving notice of one of the events listed in the statute, such as the failure of the defendant to file a timely motion for

post-conviction relief. The legislation did not specify, however, who was to notify the warden of the occurrence of a triggering event. Effective July 10, 1997, S.L. 1997-289 (S 885) amends G.S. 15-194 to provide that the attorney general or the district attorney who prosecuted the case must give written notice of a triggering event to the warden. As before, the warden must serve notice of the execution date on the defendant and his or her attorney.

Presence at execution. G.S. 15-190 has allowed six "respectable" citizens to attend executions. Effective May 22, 1997, S.L. 1997-70 (H 336) amends this statute to specify that two members of the victim's family and four respectable citizens may be present. The legislation also clarifies that the defendant may request the presence of a minister, member of the clergy, or other religious leader of the defendant's choosing.

Domestic Violence

Violations of domestic violence protective orders. Effective for offenses committed on or after December 1, 1997, S.L. 1997-471 (S 627) creates a new crime of violating a domestic violence protective order. New G.S. 50B-4A states: "A person who knowingly violates a valid protective order entered pursuant to this Chapter shall be guilty of a Class A1 misdemeanor." The new statute does not contain any language that limits this criminal sanction to any particular kind of violation. (Protective orders may contain a range of provisions, including requirements that the defendant pay temporary custody and support as well as prohibitions on assaulting or threatening the plaintiff).

Conduct that violates a domestic violence protective order also may support the issuance of other criminal charges or the issuance of an order to show cause why the person should not be held in criminal contempt for violating the protective order. *See* G.S. 50B-4(a) (describing order-to-show-cause procedure); G.S. 5A-12 (setting punishment for criminal contempt). Whether a person may be punished more than once based on the same conduct, however, may implicate double jeopardy concerns. *See* United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) (recognizing that double jeopardy protections apply in some circumstances to criminal contempt proceedings for violation of civil protection order).

Eligibility for protective order. G.S. 50B-1 has provided that a plaintiff is eligible for a domestic violence protective order if he or she has or has had a "familial relationship" with the defendant. S.L. 1997-471 (S 627) amends G.S. 50B-1 by replacing the term "familial relationship" with the term "personal relationship" and expanding the categories of qualifying relationships. Under the amended statute, the plaintiff and defendant must

- be current or former spouses;
- be persons of the opposite sex who live together or have lived together;
- be related as parent and child, including one acting in loco parentis to a minor child, or as grandparent and grandchild (but for purposes of this subsection a person may not obtain a protective order against a child or grandchild under age 16);
- have a child in common;
- be current or former household members; or
- be persons of the opposite sex who are or have been in a "dating relationship" as defined in the amended statute.

The legislation states that it applies to "offenses" (which likely would be interpreted as "acts") committed on or after December 1, 1997.

Issuance of ex parte orders by magistrates. G.S. 50B-2(c1) presently provides that a magistrate has the authority to issue a domestic violence protective order *ex parte* if (1) the chief district court judge has so authorized the magistrate, (2) the district court is not in session, (3) a district court judge is not available and will not be available for four or more hours, and (4) the clerk of superior court is not available. Effective for "offenses" committed on or after December 1, 1997, S.L. 1997-471 (S 627) amends this statute to eliminate the last requirement—unavailability of the superior court clerk—but retains the first three requirements as preconditions for issuance of an *ex parte* protective order by a magistrate.

Correction of statute numbers for warrantless arrests. G.S. 15A-401(b) has allowed an officer to make an arrest without a warrant for certain misdemeanors committed outside the officer's presence, including certain domestic violence offenses. Thus, the statute has allowed an officer to make a warrantless arrest for a violation of G.S. 14-33(a) (simple assault), G.S. 14-33(b)(1) (assault with a deadly weapon and assault inflicting serious injury), and G.S. 14-33(b)(2) (assault on a female) if the relationship between the assailant and victim meet

certain requirements. In 1995, the General Assembly repealed G.S. 14-33(b)(1) and (b)(2) and renumbered the offenses in those statutes as G.S. 14-33(c)(1) and (c)(2), but did not revise the statutory references in G.S. 15A-401(b). Some confusion therefore may have existed over whether an officer could make a warrantless arrest for these offenses. Effective August 29, 1997, section 3 of S.L. 1997-456 (H 115) amends G.S. 15A-401(b) to refer to the correct statute numbers.

Juveniles

Sharing of information in abuse, neglect, and dependency cases. G.S. 7A-675 generally requires that records in juvenile cases be kept confidential. G.S. 7A-675(h) has provided a general exception to this rule, stating that "nothing in this section shall preclude the necessary sharing of information among authorized agencies." S.L. 1997-459 (H 949) retains this language in G.S. 7A-675(h) but amends the statute to be more specific about when agencies may share information in abuse, neglect, and dependency cases.

Effective October 1, 1997, the amended statute requires chief district court judges to designate by standing order "agencies authorized to share information." The designated agencies must share with each other, upon request, information that is relevant to any case in which an abuse, neglect, or dependency petition has been filed, and they must do so for as long as the juvenile is subject to the juvenile court's jurisdiction. The statute specifies the agencies that the chief judge may designate, including local mental health facilities, local health departments, county departments of social services, local law-enforcement agencies, local school administrative units, and the Division of Juvenile Services and Office of Guardian ad Litem Services of the Administrative Office of the Courts. The list also includes the district attorney's office, but that office is not required to *disclose* information in its possession. Thus, designation of the district attorney's office as an "agency authorized to share information" would enable that office to obtain information from other agencies but would not require that office to provide information to other agencies.

Information shared pursuant to the amended statute remains confidential and may be used only for the juvenile's protection. As is the case with any state legislation, the amended statute does not supersede any federal restrictions on the release of confidential information.

Disclosure of information in child fatality cases. Effective October 1, 1997, S.L. 1997-459 (H 949) adds new G.S. 7A-675.1 requiring public agencies to disclose to the public, on request, information related to a child fatality or near fatality caused by abuse, neglect, or maltreatment. The new statute requires disclosure if: (1) a person is criminally charged with having caused the fatality or near fatality; or (2) the district attorney certifies that a person would have been charged but for the person's death. The new statute identifies the information that agencies must disclose (in essence, a written summary describing the agency's investigation), information not subject to disclosure (for example, information likely to jeopardize the criminal prosecution or the defendant's right to a fair trial), and the procedure for seeking review of the denial of a request for information. The disclosure requirements do not apply to a law-enforcement agency's criminal investigative reports and criminal intelligence information, which are governed by the public record provisions in G.S. 132-1.4. Nor do the disclosure requirements apply to information in the district attorney's possession.

Authorization for curfews. Effective June 18, 1997, S.L. 1997-189 (H 406) amends G.S. 160A-198 and 153A-142 to allow cities and counties to enact ordinances that impose a curfew for people under age 18.

Notice to school of juvenile delinquency charge against student. Effective November 1, 1997, section 8.29(e) of the budget act amends the Juvenile Code to require juvenile court counselors to notify the principal of a juvenile's school when a juvenile has been alleged delinquent of an offense that would be a felony if committed by an adult (except for motor vehicle offenses under G.S. Chapter 20). Under new G.S. 7A-675.2, the court counselor must notify the principal of the following events in a delinquency matter: (1) filing of the petition, (2) dismissal of the petition, (3) transfer of the juvenile's case to superior court for trial, (4) entry of a dispositional order, including a probation order requiring school attendance, and (5) modification or vacation of the dispositional order. If one of these events occurs, the court counselor must notify the principal in person or by telephone before the beginning of the next school day. The court counselor also must deliver written notice to the principal, in person or by certified mail, within five days of the event. The notification must describe the nature of the offense, the judge's action, and any requirements imposed by the judge.

Section 8.29(f) of the budget act adds new G.S. 115C-404 requiring the principal to keep these notifications confidential and allowing disclosure to other school personnel under limited circumstances. Upon the occurrence of certain events, the principal

either must destroy any documents he or she has received (such as when a delinquency petition is dismissed) or must return the documents to the court counselor (such as on the student's graduation).

The act applies to juveniles attending any public or private school authorized under G.S. Chapter 115C.

Notice to school of felony charge against student. Effective November 1, 1997, section 8.29(g) of the budget act amends G.S. 15A-505 to place similar notification responsibilities on law-enforcement officers and prosecutors when a student in primary or secondary school is charged with a felony (other than a motor vehicle offense under G.S. Chapter 20). These provisions, rather than those in the Juvenile Code, apply when the person charged is at least 16 years of age or is under 16 but is married, emancipated, or in the armed services (and thus no longer subject to the Juvenile Code). Within five days of charging a student with a felony, the charging officer must notify the student's principal of the charge. If the student is taken into custody, the officer or officer's immediate supervisor must give written notice to the student's principal within five days of the arrest. The district attorney's office must give the principal written notice of the outcome of the proceedings within five days of disposition.

Reporting of illegal acts on school grounds to law enforcement. G.S. 115C-288(g) has required school principals to report to law enforcement when the principal has a reasonable belief that a person (adult or juvenile) has committed any of a list of offenses on school property. Effective November 1, 1997, section 8.29(t) of the budget act amends this statute to require reporting when the principal has personal knowledge or actual notice from school personnel of the one of the listed acts. It also makes failure to report a Class 3 misdemeanor.

Enrollment of student convicted of felony. Section 8.29(d) of the budget act amends G.S. 115C-366, which governs enrollment in school. Effective November 1, 1997, when a student transfers into a public school, the local school board must require the student's parent, guardian, or custodian to state whether the student has been convicted of a felony or is under suspension or expulsion from another school. The school board may deny or place reasonable conditions on the admission of a student who has been convicted of a felony; a student denied admission for conviction of a felony may request reconsideration in accordance with G.S. 115C-391(d). The amended statute gives the school board similar authority in the case of certain suspensions and expulsions.

Firearms

Carrying of firearms by law-enforcement officers. Several statutes prohibit the carrying of weapons in public places. The main prohibition appears in G.S. 14-269, which bans the carrying of concealed weapons. Subsection (b) of that statute exempts several categories of personnel from the ban, such as on-duty officers acting in the performance of their duties and off-duty officers authorized to carry a concealed weapon by written regulations of their local law-enforcement unit. (Chapter 398 of the 1995 Session Laws amended G.S. 14-269(b) to expand the right of off-duty officers to carry concealed weapons. Before that change, off-duty officers could carry concealed firearms in their own jurisdiction only.)

The General Assembly passed three bills this session—S.L. 1997-238 (H 958), S.L. 1997-274 (H 433), and S.L. 1997-441 (S 561)—that expanded the circumstances in which law-enforcement officers may carry firearms and other weapons. The legislation affects on-duty and off-duty law-enforcement officers, retired officers, and company police.

First, the General Assembly amended G.S. 14-269.2, 14-269.4, and 14-277.2, which prohibit the carrying of weapons (openly or concealed) on school property, in courthouses and certain state buildings, and at parades, demonstrations, and similar functions. These statutes have exempted several types of personnel from the ban, such as on-duty officers acting in the performance of their duties, but have not exempted off-duty officers. Effective June 27, 1997, S.L. 1997-238 amends each of these statutes to provide that they do not apply to a person who lawfully may carry a concealed weapon pursuant to G.S. 14-269(b). The principal effect of this change is to give off-duty officers the right to carry weapons in the areas designated in the statutes.

Second, the General Assembly amended G.S. Chapter 74E, which gives "company police" the power to make arrests in their territorial jurisdiction (such as real property owned or controlled by their employer). Company police officers include personnel employed by public or private schools or hospitals, state institutions, and corporations engaged in providing on-site security personnel. Effective August 28, 1997, S.L. 1997-441 amends G.S. 74E-6(c) to provide that off-duty company police officers have the authority to carry concealed weapons to the extent allowed by G.S. 14-269(b)(5), the section authorizing off-duty law-enforcement officers to carry concealed weapons. In addition to allowing off-duty company police to carry

concealed weapons, this change also may have the effect of exempting off-duty company police from the statutes prohibiting weapons in schools, courthouses, and certain other areas. As discussed above, S.L. 1997-238 amended those statutes to exempt anyone covered by G.S. 14-269(b).

Third, the General Assembly amended the portion of the concealed-handgun permit law that allows local governments, businesses, and other entities to prohibit the carrying of concealed handguns on their premises. Effective June 27, 1997, S.L. 1997-238 added the following language to G.S. 14-415.22:

> A person who may lawfully carry a concealed weapon or handgun pursuant to G.S. 14-269(b) shall not be prohibited from carrying the concealed weapon or handgun on property on which a notice is posted prohibiting the carrying of a concealed handgun, unless otherwise prohibited by statute.

The rights of officers and others covered by G.S. 14-269(b) are not entirely clear from this language. The language appears to give them the right to enter property while carrying a concealed handgun notwithstanding a notice that generally prohibits entry of anyone who has such a weapon. The General Assembly probably did not intend, however, to take away entirely the right of property owners to decide who may and who may not enter their property. Thus, if the property owner gives more specific notice—for example, asks the person to leave—the above language probably does not give the person the right to disregard the request. (In some circumstances, an officer would have the right to remain, such as when the officer is executing a warrant.)

Fourth, S.L. 1997-274 and S.L. 1997-441 amend the training requirements for obtaining a concealed-handgun permit. Under G.S. 14-415.12(a)(4), an applicant for a concealed-handgun permit ordinarily must complete an approved firearms safety and training course to obtain a permit. Effective December 1, 1997, new G.S. 14-415.12A exempts "qualified" local, state, company, and retired officers from this requirement. The definition of "qualified" officer appears in amended G.S. 14-415.10.

Disposition of weapons. G.S. 14-269.1 governs the disposition of a deadly weapon upon a defendant's conviction involving use of the weapon. The statute has authorized a judge to order the weapon destroyed by the sheriff, returned to its rightful owner, or turned over to the SBI Crime Laboratory or North Carolina Justice Academy. Effective August 1, 1997, S.L. 1997-356 (H 523) amends G.S. 14-269.1 to allow a judge to turn over a confiscated weapon to any law-enforcement agency in the county of trial for that agency's use. The weapon must have legible and unique identification; the head of the agency must make a written request for the weapon; and the agency must keep a record of any weapons it receives.

Concealed handguns at rest stops. The concealed-handgun law prohibits a person with a concealed-handgun permit from carrying a concealed handgun in the areas designated in G.S. 14-415.11(c), including buildings housing only state offices. Effective June 27, 1997, S.L. 1997-238 (H 958) amends this statute by allowing a person with a concealed-handgun permit to carry a concealed handgun at state-owned rest areas or state-owned rest stops along the highway.

Other changes to concealed-handgun permit law. S.L. 1997-441 (S 561) clarifies the grounds for denying a concealed-handgun permit based on mental illness or lack of mental capacity. It amends G.S. 14-415.12(b)(6) to provide that a permit must be denied only if a court, or a governmental agency whose decisions are subject to judicial review, has adjudicated the applicant to be mentally ill or lacking mental capacity. It also provides that receipt of consultative services or outpatient treatment alone does not disqualify an applicant from receiving a permit. These changes apply to applications made at any time.

Protection for shooting ranges. S.L. 1997-465 (H 1012) adds a new article 53C to G.S. Chapter 14 shielding a shooting range from criminal prosecution for noise violations and from civil liability and nuisance actions relating to noise if the range was in operation at least three years before the effective date of the act and was in compliance with any noise control laws or ordinances at the time the range began operation. The act is effective September 1, 1997, but does not apply to pending litigation.

Collateral Proceedings

Victims' rights. S.L. 1997-227 (H 374) amends the crime victims compensation act to increase the amount of compensation available to crime victims, effective for claims arising from criminal conduct that occurred on or after April 1, 1997. The legislation amends G.S. 15B-2 to

- increase from $2,000 to $3,500 the compensation available for funeral, cremation, and burial expenses;
- authorize compensation to the victim of a hit-and-run accident under G.S. 20-166 if the

victim was a pedestrian, was operating a vehicle moved solely by human power (such as a bicycle), or was operating a mobility-impairment device (such as a wheelchair); and

- authorize compensation to the victim of certain acts of terrorism.

The legislation also amends G.S. 15B-11 to provide that the existence of a collateral source (such as insurance) that would pay funeral, cremation, and burial expenses "shall not constitute grounds for denial or reduction of an award of compensation."

Proposed legislation to implement the state constitutional amendment on victims' rights is discussed below under Court Administration, Studies.

Criminal history checks. Continuing a recent trend, the General Assembly revised several statutes to require criminal history checks of employees and other individuals. Based on these record checks, the employing or licensing entity may have grounds to terminate employment, deny license applications, and take other actions.

Effective June 4, 1997, S.L. 1997-140 (S 207) amends G.S. 131D-10.3A to require a criminal history check of *any individual 18 years of age or older who resides in a foster home.* Previously, record checks were limited to foster parents and individuals applying to be foster parents.

Effective January 1, 1998, S.L. 1997-125 (S 876) amends G.S. 131D-40 and 131E-265 to require *contract agencies of adult care homes, nursing homes, and home care agencies* to conduct criminal history checks of applicants for positions that do not require an occupational license. The amended statutes also provide that if any of these entities denies employment based on a criminal history check, they may disclose to the applicant the information on which they based their decision but may not provide the applicant with a copy of the record check itself.

Effective June 4, 1997, S.L. 1997-140 (S 207) amends G.S. 131E-265(a) to require *home care agencies* to conduct criminal history checks on applicants for jobs that involve entering a patient's home.

Effective October 1, 1997, S.L. 1997-260 (S 924) adds new G.S. 114-19.6 to authorize criminal history checks of people employed by or applying for employment with the *Department of Health and Human Services* (formerly, the Department of Human Resources) if the job involves direct care of a client, patient, student, resident, or ward of the department. The new statute is intended to take the place of an executive order containing similar provisions. *See* Executive Order No. 169, 1991 Sess. Laws at 1329–33 (Reg. Sess. 1992).

Effective August 22, 1997, S.L. 1997-430 (S 297) adds new G.S. 115C-238.29K to require the State Board of Education to adopt a policy on criminal history checks of school personnel employed by or under contract with *charter schools.*

Effective March 1, 1998, for *new family and nonlicensed child care homes,* S.L. 1997-506 (S 929) amends G.S. 110-90.2 to require a criminal history check of any member of the household who is over 15 years old and is present when children are in care.

Expungement of certain infractions. Effective June 4, 1997, S.L. 1997-138 (H 402) amends G.S. 15A-146(a) to allow expungement of an infraction under G.S. 18B-302(i) (purchase or possession of beer or wine by person age 19 or 20) if the charge has been dismissed or a finding of not responsible entered.

Excise tax on illicit alcohol. Effective October 1, 1997, S.L. 1997-292 (H 754) amends the controlled substance tax, contained in Article 2D of G.S. Chapter 105, by imposing an excise tax on any person who possesses mash, or illicit spirituous liquor and mixed beverages for sale, in violation of G.S. Chapter 18B. Amended G.S. 105-113.106 defines each substance, and amended G.S. 105-113.107 sets forth the tax rates.

Compensation for erroneously convicted defendants. S.L. 1997-388 (H 611) increases the amount of compensation available to erroneously convicted defendants. The maximum compensation has been five hundred dollars. Under amended G.S. 148-84, a person who meets the criteria described below is entitled to $10,000 for each year of imprisonment up to a maximum of $150,000.

Under amended G.S. 148-82, an individual is eligible for compensation if he or she

- has been convicted of a felony,
- has been imprisoned in state prison,
- has received a pardon of innocence from the governor, and
- applies for compensation within five years of the granting of the pardon.

The legislation also amends G.S. 148-83 and 148-84 to give the Industrial Commission responsibility for hearings on compensation claims. Previously, the Department of Correction scheduled the hearing, and the Parole Commission held it. Last, the legislation amends G.S. 105-134.6(b) to exempt compensation

awards from state taxes, effective for taxable years beginning on or after January 1, 1997. Except for this tax provision, the legislation applies to individuals pardoned on or after July 1, 1995.

Court Administration

Increase in court fees. Effective September 4, 1997, S.L. 1997-475 (S 727) amends G.S. 7A-304 to increase the General Court of Justice fee (the portion of the criminal court costs that goes to the state for support of the courts) from $46 to $61 in district court cases and from $53 to $68 in superior court cases, which makes the new criminal court costs $80 in district court and $105 in superior court.

Personnel. The budget act creates several new positions in the court system. This year, as last year, district attorney offices received the largest share of new personnel: 54 new full-time assistant district attorneys; 60 new assistants for administrative and victim and witness services (formerly called victim and witness assistants); and three investigators (in districts 6B, 24, and 27B). Funds also were placed in reserve for 45 more assistants for administrative and victim and witness services in the event legislation passes implementing the victims' rights amendment (discussed further below).

The budget act (as amended by S.L. 1997-456, sec. 56.7 (H 115)) creates several other new positions, including:

- 100 deputy clerks of court (to be allocated by the Administrative Office of the Courts);
- nine magistrates (in Columbus, Cumberland, Davidson, Durham, Edgecombe, Franklin, Gaston, Wayne, and Wilson);
- six district court judgeships (in districts 3B, 13, 15B, 20, 22, and 24), a judicial assistant to the district court judges in Davidson county, and a legal assistant to the chief district court judge in district 9A;
- 25 juvenile court counselors;
- eight superior court reporters; and
- eight assistant public defender positions (to be funded from the indigent persons' attorney fee fund).

Programs. The programs operated by the Administrative Office of the Courts should expand with funding provided this session. The community penalties program received enough funds to expand to all districts in the state. Pilot or local projects were funded in districts 24 and 30 for alternative sentencing programs for juveniles, in Cumberland county for a juvenile assessment project, and in Rockingham, Durham, and Columbus counties for a program to collect bad checks without criminal prosecution.

The technology programs of the court system also received substantial funding in two categories: to replace worn equipment, $3.6 million was appropriated; and for new or expansion of existing programs, $4.3 million was appropriated. Projects that could be funded by the latter appropriation include expansion of an automated case management system for district attorneys and public defenders and a new magistrate criminal information system.

Studies. S.L. 1997-483 (S 32) directs the Legislative Research Commission to study several issues relating to the courts. One study concerns the recommendations of the Commission for the Future of Justice and the Courts in North Carolina ("Futures Commission"). In its 1996 report, "Without Favor, Denial, or Delay: a Court System for the 21st Century," the Futures Commission recommended comprehensive changes to the structure of the courts. Bills to implement these recommendations were introduced in both chambers this session (H 741 and 742, S 834 and 835), and special committees were established in both chambers to consider the bills; however, although both committees met and discussed the bills, no action was taken.

Another study concerns legislation to implement the victims' right amendment (Art. 1, Sec. 37 of the North Carolina Constitution). The constitutional amendment articulates specific rights of victims of crimes but leaves to the General Assembly the task of passing legislation to implement those rights. (G.S. 15A-825 currently contains some provisions intended to assure fair treatment for victims and witnesses.) H 665 and S 763 were introduced this session to implement the amendment, and the House considered H 665 in several committees and made numerous changes to the original bill; however, the bill was still in committee in the House when the session adjourned.

The Legislative Research Commission also is directed to study the effectiveness of current laws and services in addressing domestic violence. Two bills, S 753 and H 909, called for a special study commission on domestic violence and, although neither bill passed,

the Legislative Research Commission is directed to study the same issues. The Governor's Crime Commission also is directed to study domestic violence issues.

Last, S.L. 1997-390 (H 896) (as amended by S.L. 1997-483, section 3.1) creates an ongoing legislative study commission on children and youth to evaluate the delivery of services to juveniles in North Carolina. New Article 24 of G.S. Chapter 120 creates the commission, specifies its membership and duties, requires it to report to the governor and General Assembly, and authorizes it to obtain information from state officers, agencies, and departments as if it were a committee of the General Assembly. This commission is separate from the Governor's Commission on Juvenile Crime and Justice, whose charge is to review juvenile code procedures concerning delinquent and undisciplined juveniles and make recommendations to the governor by spring 1998.

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