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## Criminal Law and Procedure

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The longest legislative session in state history resulted in no major overhauls in the field of criminal law and procedure, but it did reach into many different areas and produced some significant changes. Perhaps the most important legislation concerned the death penalty, with the General Assembly sparing mentally retarded people from the death penalty and allowing prosecutors greater discretion to choose between seeking life imprisonment or death as the punishment for first-degree murder.

### Capital Cases

#### Prosecutorial Discretion

One of the most significant criminal law bills of the session, S.L. 2001-81 (H 1117), was also one of the shortest. It gives prosecutors the discretion to try a first-degree murder case noncapitally—that is, to seek life imprisonment rather than death—regardless of whether any aggravating circumstances exist that might support a death sentence. The act overrides North Carolina Supreme Court decisions holding that prosecutors had to seek the death penalty for first-degree murder if any aggravating circumstances existed. *See* Robert L. Farb, *North Carolina Capital Case Law Handbook* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina, 1996), 22. Under these rulings a prosecutor could reduce a first-degree murder charge to second-degree murder but could not enter into a plea agreement in which the defendant pled guilty to first-degree murder and was sentenced to life imprisonment. New G.S. 15A-2004 gives prosecutors the discretion to accept such a plea, allowing agreement to a sentence of life imprisonment at any time during prosecution of the case.

Under the new statute, if the state wishes to seek the death penalty, it must give notice of its intent to do so by the later of arraignment or the Rule 24 conference (the pretrial conference

required by the General Rules of Practice for the Superior and District Courts). If the state does not give such notice by then, the case may only be tried noncapitally.

The act applies to cases pending on or after July 1, 2001, except that the requirement of giving notice of intent to seek the death penalty does not apply to capital cases in which the defendant was indicted before July 1.

### **Mental Retardation**

**Background.** In another significant bill concerning the death penalty, the General Assembly prohibited the execution of people who are mentally retarded. New G.S. 15A-2005, enacted by S.L. 2001-346 (S 173), provides that “no defendant who is mentally retarded shall be sentenced to death.”

Bills prohibiting such executions have come before the General Assembly previously and have failed. The act’s passage this session was no doubt aided by the U.S. Supreme Court’s decision to review *McCarver v. North Carolina*, a case raising the constitutionality of executing mentally retarded people. After S.L. 2001-346 passed, the Court vacated its decision to review the case, but it remains concerned about this issue. The same day the Court decided not to hear *McCarver*, it granted review of a Virginia case raising the constitutionality of executing mentally retarded people. *See Atkins v. Virginia*, 122 S. Ct. 24 (2001).

**Effective date.** S.L. 2001-346 establishes procedures for litigating the issue of mental retardation before, during, and after trial. The provisions governing pretrial and trial proceedings apply to trials docketed to begin on or after October 1, 2001. The provisions governing post-conviction proceedings, which essentially cover defendants who did not have the opportunity to utilize the new pretrial and trial provisions, are effective October 1, 2001, and expire October 1, 2002.

**Definition.** G.S. 15A-2005(a) places the burden of proving mental retardation on the defendant. He or she must show (1) significantly subaverage general intellectual functioning, defined as an IQ of 70 or less; (2) significant limitations in adaptive functioning in two or more adaptive skill areas, such as communication and self-care; and (3) the existence of both concurrently before the age of eighteen.

**Pretrial proceedings.** G.S. 15A-2005(c) provides that, on motion of the defendant supported by appropriate affidavits, the court may order a pretrial hearing to determine whether the defendant is mentally retarded. If the state consents, the court must hold a hearing. At this pretrial stage, the defendant has the burden of proving mental retardation by clear and convincing evidence. If the court determines that the defendant is mentally retarded, it must declare the case to be noncapital.

**Trial procedure.** If the court does not declare the case to be noncapital before trial, the defendant has the right to present the issue of mental retardation to the jury at trial. If the defendant presents evidence of mental retardation as defined by the statute, the court must submit a special instruction on the issue to the jury at sentencing. At that stage of the proceedings, the defendant need only prove mental retardation by a preponderance of the evidence. If the jury finds the defendant to be mentally retarded, the court must impose a sentence of life imprisonment.

If the jury finds that the defendant is not mentally retarded, it then must consider, as under prior law, the existence of aggravating and mitigating circumstances. In making this determination, the jury may consider any evidence of mental retardation even though it may have found that the defendant was not mentally retarded within the meaning of the new statute.

**Effect of jury deadlock.** If presented with the issue, the jury must decide, one way or the other, whether the defendant is mentally retarded or, more precisely, whether the defendant has met his or her burden of proof on that issue. *See* G.S. 15A-2000(e) (issue of mental retardation must be considered and answered by jury prior to consideration of aggravating and mitigating factors); *see also* *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995) (any issue that is outcome-determinative as to sentence capital defendant will receive must be answered unanimously by jury). What happens if the jury cannot agree? There are two possibilities. If general criminal law principles apply, the court must declare a mistrial with respect to the capital

sentencing proceeding, allowing the state to seek the death penalty at a new capital sentencing hearing. If North Carolina's capital sentencing rules apply, the court must impose a sentence of life imprisonment.

As a general rule, if a jury deadlocks on an issue, the result is a mistrial regardless of whether the state or the defendant bears the burden of proof on the issue. Thus the state may retry a defendant for an offense when the jury deadlocks on whether the state has proved the offense beyond a reasonable doubt. So, too, the defendant is entitled to a retrial if the jury is unable to agree on whether the defendant has proved an affirmative defense for which the defendant has the burden.<sup>1</sup> North Carolina and many other states have modified this rule for capital sentencing proceedings, requiring the court to impose a sentence of life imprisonment when the jury cannot unanimously agree on life or death. G.S. 15A-2000(b) states that “[i]f the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment.” It is unclear whether this rule holds true for the issue of mental retardation. On the one hand, the requirement that the jury be instructed on mental retardation appears in G.S. 15A-2000(b), which continues to provide for a sentence of life imprisonment if the jury cannot unanimously agree on its sentence recommendation. The language and structure of the statute thus lend support to the argument that, consistent with other capital sentencing issues, a deadlocked jury on the issue of mental retardation results in a sentence of life imprisonment. On the other hand, the following provision appeared in the fifth edition of the act but was omitted from later versions: “If the jury cannot, within a reasonable time, unanimously agree as to whether the defendant is mentally retarded, as defined in G.S. 15A-2004, the judge shall impose a sentence of life imprisonment.” (All of the editions of the act can be found on the General Assembly's Web site, <http://www.ncleg.net>.) On the basis of this deletion, one could argue that the General Assembly did not intend to enact the policy reflected in the provision. However, to the extent it is appropriate to use legislative history to interpret statutory language (itself a subject of continuing debate), “rejected-proposal” evidence can be problematic because the reasons for rejection are not always clear. *See generally* William N. Eskridge, Jr., et al., *Legislation and Statutory Interpretation* (2000), 305–7, (“rejected-proposal” evidence tends to be less authoritative than other types of legislative history). In this instance, one could argue that the deleted provision was unnecessary because G.S. 15A-2000(b) already provided for life imprisonment if the jury deadlocked.

**Post-conviction proceedings.** New G.S. 15A-2006 allows a defendant to file a motion for appropriate relief to seek relief from a death sentence on the ground that the defendant was mentally retarded at the time of the crime. For defendants sentenced to death before October 1, 2001, the motion must be filed on or before January 31, 2001. For trials that were in progress on October 1, 2001, the motion must be filed within 120 days of imposition of a death sentence. The procedures for hearing the motion are in accordance with the procedures for motions for appropriate relief generally. Thus the act gives those currently on death row an opportunity for a hearing before a judge on the issue of mental retardation but does not require a sentencing proceeding before a jury.

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1. *See* *People v. Hernandez*, 994 P.2d 354 (Cal. 2000) (trial court erred in sentencing defendant for offense where jury found that state had proved defendant's guilt but deadlocked on whether defendant was insane, an affirmative defense for which defendant had burden of proof; court finds that, when evidence is sufficient to raise jury question, trial court has no authority to enter equivalent of directed verdict for state); *State v. Daniels*, 542 A.2d 306 (Conn. 1988) (in absence of statutory provision requiring life sentence when jury does not unanimously agree on death, new sentencing proceeding was required when jury unanimously found aggravating factor in capital sentencing proceeding but deadlocked on mitigating factors; court holds that jury's inability to agree on mitigating factors was not equivalent of finding that mitigating factors did not exist).

## Training and Experience Standards

Effective August 26, 2001, S.L. 2001-392 (S 109) requests the North Carolina Supreme Court to establish minimum standards of training and experience in capital cases for judges, prosecutors, and defense attorneys appointed at state expense. The act suggests that the standards should specify a minimum number of years of legal experience and a minimum amount of felony experience. The rules also may require specialized training in capital case litigation. The act apparently was prompted by growing publicity about the fairness of some capital trials and the caliber of legal representation received by capital defendants.

S.L. 2001-392 also amends G.S. 7A-498.5(c), a part of the Indigent Defense Services Act enacted in 2000, under which the new Commission on Indigent Defense Services is charged with developing standards for improving the quality of legal representation for indigent criminal defendants, including qualification and performance standards for defense counsel in capital cases. The act requires that the qualification and performance standards for capital cases be consistent with any rules adopted by the North Carolina Supreme Court. The commission has already adopted qualification standards (Rules of the Commission on Indigent Defense Services: Part 2, Rules for Providing Legal Representation in Capital Cases), which may be viewed on the Internet at [http://www.aoc.state.nc.us/www/public/html/ids\\_commission.htm](http://www.aoc.state.nc.us/www/public/html/ids_commission.htm). The North Carolina Supreme Court has not adopted any rules of its own yet.

## Criminal Offenses

### Generally

**Terrorism offenses.** In the wake of the events of September 11, 2001, the General Assembly created several new offenses, with stiff punishments, for acts of terrorism. Effective for offenses committed on or after November 28, 2001, S.L. 2001-470 (H 1468) adds new article 36B to G.S. Ch. 14 to address nuclear, biological, and chemical weapons of mass destruction (defined in new G.S. 14-288.21).<sup>2</sup> The act deletes poison gas and radioactive material from current G.S. 14-288.8, which addresses weapons of mass death or destruction in general and provides for lesser punishment.

Under the new article, it is

- a Class B1 felony to knowingly manufacture, possess, transport, sell, purchase, offer to sell or purchase, or deliver such weapons unless the person falls within one of several listed categories (G.S. 14-288.21);
- a Class A felony, punishable by life imprisonment without parole, to injure another through the use of such weapons [G.S. 14-288.22(a)];
- a Class B1 felony to attempt, solicit another, or conspire to injure another by the use of such weapons [G.S. 14-288.22(b)];
- a Class B1 felony to deliver or attempt to deliver such weapons through the mail or through private delivery services [G.S. 14-288.22(c)];
- a Class D felony to make a report, knowing or having reason to know the report is false, that causes any person to reasonably believe that such weapons are located in any place or structure [G.S. 14-288.23(a)]; and
- a Class D felony to conceal, place, or display, with the intent to perpetrate a hoax, any device, object, machine, instrument, or artifact so as to cause any person to reasonably believe that it is such a weapon [G.S. 14-288.24(a)].

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2. A companion act, S.L. 2001-469 (H 1472), requires registration of certain biological agents, such as microorganisms shown to produce disease, with the North Carolina Department of Health and Human Services. Effective January 1, 2002, the failure to register such agents is subject to a civil penalty of \$1,000 per day. *See* G.S. 130A-149.

Upon conviction of one of the last two offenses (false report or hoax), the court may order the defendant to pay restitution, including costs and consequential damages from the disruption of normal activities.

The act also amends G.S. 14-17 to make murder caused by the use of such weapons first-degree murder. The amended statute classifies murder by the use of such weapons with murder perpetrated by poison, lying in wait, imprisonment, starvation, or torture.<sup>3</sup>

**School bus offenses.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-26 (S 45) increases the penalty for certain offenses involving school buses and creates additional offenses. Revised G.S. 14-132.2(b) and (c) make it a Class 1 misdemeanor, rather than a Class 2 misdemeanor, to enter a school bus after being forbidden to do so or to refuse to leave a school bus on demand. New G.S. 14-132.2(c1) makes it a Class 1 misdemeanor to

- stop, impede, delay, or detain
- any public school bus or public school activity bus
- being operated for public school purposes.

Last, new G.S. 14-288.4(a)(6a) makes it a disorderly-conduct offense, punishable as a Class 2 misdemeanor, to engage in conduct that disturbs the peace, order, or discipline on any public school bus or public school activity bus. The language of this new subsection is parallel to the subsection on disturbing the peace, order, or discipline of a school, G.S. 14-288.4(a)(6), which has been interpreted as requiring more than garden-variety disobedience or misconduct by a student. For a violation to occur, the behavior must have resulted in “substantial interference” with the school’s operation. *See In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992).

**Larceny of gasoline.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-352 (S 278) adds new G.S. 14-72.5 creating a new offense of larceny of motor fuel. This offense was created to deal with “drive-aways”—that is, people who fill up their cars at the gas pump and drive away without paying. A person is guilty of a Class 1 misdemeanor under the new statute if he or she

- takes and carries away
- motor fuel
- valued at less than \$1,000
- from an establishment where motor fuel is offered for retail sale
- with the intent to steal the motor fuel.

The criminal consequences of the new offense track the criminal consequences of regular misdemeanor larceny under current G.S. 14-72, also a Class 1 misdemeanor. A person who steals motor fuel valued at \$1,000 or more is not covered under the new statute but would be guilty of regular felony larceny, a Class H felony under G.S. 14-72. The real impact of the new statute lies in the license consequences for committing the offense, which do not apply to regular larceny. Under new G.S. 20-17(a) and 20-19(g2), a second conviction within seven years results in a ninety-day driver’s license revocation; a third or subsequent conviction within seven years results in a six-month revocation. Under new G.S. 20-16(e2), a judge may issue the person a limited driving privilege for the duration of the revocation.

**Emitting of bodily fluids by prisoner.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-360 (S 1081) dramatically increases the punishment for certain conduct by in-custody individuals. Under new G.S. 14-258.4, a person is guilty of a Class F felony if he or she

- while in the custody of the Department of Correction, Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility
- knowingly and willfully
- throws, emits, or causes to be used as a projectile
- bodily fluids or excrement

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3. Another act, S.L. 2001-500 (S 990), provides that a board of education or superintendent may suspend a student for up to 365 days for engaging in certain conduct related to terrorism, such as threatening an act of terrorism or perpetrating a hoax relating to terrorism.

- at a person who is a state or local government employee
- while the employee is in the performance of his or her duties.

The statute provides that it applies to violations committed inside or outside of a prison, jail, or other confinement facility as long as the person is in custody at the time of the incident.

Creation of this offense was apparently prompted by concerns about the possible transmission of AIDS and other dangerous diseases. Previously, the described conduct could be punished as a simple assault (a Class 2 misdemeanor)—and possibly a more serious assault if the prisoner had a disease that could, in fact, be transmitted by his or her actions. Under the new statute, proof of the dangerousness of the prisoner’s conduct is not required. Thus, although unlikely to transmit a disease such as AIDS, spitting may violate the new statute because saliva may be considered a bodily fluid.

Inadvertent conduct is not covered under the new statute since the prisoner must act knowingly and willfully. Nor is intentional conduct by a prisoner toward another prisoner since the statute requires that the conduct be directed at a state or local government employee.

**Assaulting law enforcement or assistance animal.** G.S. 14-163.1 has made it a Class I felony to seriously injure or kill a law enforcement animal. Effective for offenses committed on or after December 1, 2001, S.L. 2001-411 (S 646) expands the possible offenses against law enforcement animals and adds to the statute’s coverage “assistance animals” (animals trained to provide assistance to a handicapped person).

The revised statute contains three offense classes. A person commits a Class I felony if he or she

- knows or has reason to know that an animal is a law enforcement agency or assistance animal and
- willfully
- causes or attempts to cause serious physical harm to the animal.

A person commits a Class 1 misdemeanor if he or she satisfies the first two of the above elements and causes or attempts to cause physical harm (as distinguished from serious physical harm) to the animal. A person commits a Class 2 misdemeanor if he or she satisfies the first two elements and harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duties as a law enforcement or assistance animal.

As under the previous version of the statute, self-defense is a defense to a violation, although the revised statute refers to it as an “affirmative defense.” The General Assembly may have intended by this change to shift to the defendant the burden of proving self-defense. Such an interpretation would mean, however, that the defendant would have a greater burden in cases involving animals than in cases involving self-defense against another person or even a law enforcement officer. *See* John Rubin, *The Law of Self-Defense in North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1996), 184–85 (burden is on state in assault and homicide cases to prove that defendant did not act in self-defense). It may even be inappropriate to place the burden of proof on the defendant in cases in which the animal was acting under the handler’s direction or control. In those circumstances, the state would seem to have the burden of proving that the defendant did not act in self-defense with respect to both the handler and the animal as the handler’s instrumentality. If the statute is interpreted as placing the burden of proof on the defendant, the standard would likely be proof to the jury’s satisfaction, the standard used in other contexts in which the defendant has the burden of proof. *See* John Rubin, *The Entrapment Defense in North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2001), 78.

**Restraining dog in cruel manner.** Several statutes address cruelty to animals. The principal statute, G.S. 14-360, forbids cruelty to animals generally. Other statutes deal with specific practices, such as dogfighting (*see* G.S. 14-362.2) and conveying animals in a cruel manner (*see* G.S. 14-363). Effective for offenses committed on or after December 1, 2001, S.L. 2001-411 adds a new animal cruelty statute, G.S. 14-362.3, that makes it a Class 1 misdemeanor for a person to maliciously restrain a dog with a chain or wire grossly in excess of the size necessary to restrain

the dog safely. A person acts “maliciously” if he or she “impose[s] the restraint intentionally and with malice or bad motive.”

**Infant abandonment.** Effective for acts on or after July 19, 2001, S.L. 2001-291 (H 275) adds new G.S. 14-322.3 to provide that a person may not be prosecuted for infant abandonment for voluntarily delivering an infant under seven days of age to a person designated under G.S. 7B-500, such as a health care provider, social worker, or law enforcement officer. The act also amends two child abuse statutes in light of this change. Amended G.S. 14-318.2 provides that a parent who abandons an infant pursuant to new G.S. 14-322.3 may not be prosecuted for misdemeanor child abuse for any conduct related to the care of the infant. Amended G.S. 14-318.4 provides that abandonment pursuant to new G.S. 14-322.3 may be treated as a mitigating factor in sentencing if the person is convicted of felony child abuse.

## Frauds

**Fraudulent identification.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-461 (S 833), as amended by Section 42 of S.L. 2001-487 (H 338), adds new G.S. 14-100.1 to make the possession or manufacture of a fraudulent identification a Class 1 misdemeanor. A person is guilty of this offense if he or she

- knowingly possesses or manufactures
- a false or fraudulent form of identification (such as a military identification or a picture identification issued by the government)
- for the purpose of deception, fraud, or other criminal conduct.

The new statute also makes it a Class 1 misdemeanor for a person knowingly to obtain a form of identification by the use of false information.

The new statute does not cover the use of false information to obtain a driver’s license or learner’s permit, which continues to be governed by G.S. 20-30(5). The act amends that statute, however, to raise a violation from a Class 2 to a Class 1 misdemeanor, the same class of offense as a violation of new G.S. 14-100.1.

The act also amends G.S. 18B-302(e) to make it unlawful for a person under age twenty-one to enter or attempt to enter a place where alcoholic beverages are sold or consumed by using a fraudulent identification document or an identification document issued to another person. Previously the statute only prohibited an underage person from obtaining or attempting to obtain alcoholic beverages. A violation is a Class 1 misdemeanor pursuant to G.S. 18B-102(b).

Last, the act adds new G.S. 20-37.02 directing the Department of Motor Vehicles (DMV) to establish a system to allow ABC licensees to verify electronically the validity of identifications issued by the DMV. The ABC licensee may use this information only to the extent necessary to verify the validity of the DMV identification. A licensee or employee of a licensee commits a Class 2 misdemeanor by using the information for other purposes or by transferring the information to a third party. The electronic verification system is to be implemented as funds become available.

**Fraudulent filings.** Under the Uniform Commercial Code (UCC), a person may record a security agreement with the secretary of state reflecting that he or she has a security interest in goods in the possession of another. For example, a company that sells appliances might record a security agreement on a refrigerator on which the buyer is making payments. In recent years individuals and groups with no grounds for filing such security agreements have sought to file them against public officials, such as judges, for purported violations of the individual’s or group’s constitutional rights. S.L. 2001-231 (S 257) adds new G.S. 14-401.19 to make it a Class 2 misdemeanor to present for filing a false security agreement under the UCC. A person is guilty of this new offense if he or she

- presents a record for filing under the UCC
- with knowledge that the record is not related to a valid security agreement or with the intention that the record be filed for an improper purpose, such as to hinder or harass.

The act applies to documents presented for filing on or after December 1, 2001.

A second act, S.L. 2001-495 (S 912), makes it a Class 1 misdemeanor, under new G.S. 44A-12.1, to present for filing to the clerk of court a false claim of lien on real property. That act applies to offenses committed on or after January 1, 2002.

## Drug Offenses

**Playgrounds and child care centers.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-307 (H 1174) and S.L. 2001-332 (S 751) amend G.S. 90-95(e) to provide for increased penalties for violations of G.S. 90-95(a)(1)—which prohibits the manufacture, sale, or delivery of a controlled substance or possession with intent to manufacture, sell, or deliver—in or near a playground in a public park or in or near a child care center.

S.L. 2001-307 adds new G.S. 90-95(e)(10), which makes it a Class E felony for a person twenty-one years of age or older to violate G.S. 90-95(a)(1) on property that is a playground in a public park or within three hundred feet of such property. *Playground* is defined as an outdoor facility intended for recreation and open to the public and having three or more separate apparatuses for the recreation of children, such as swings and slides. The new subsection includes the proviso, contained in other parts of Chapter 90, that the transfer of less than five grams of marijuana for no remuneration does not constitute a delivery in violation of G.S. 90-95(a)(1). Under that proviso, the involved parties are guilty of possession only [under G.S. 90-95(a)(3)] and therefore are not subject to the new enhanced punishment for violations of G.S. 90-95(a)(1) at or near playgrounds.

S.L. 2001-332 amends G.S. 90-95(e)(8), which has made it a class E felony for a person twenty-one years of age or older to violate G.S. 90-95(a)(1) on property used for an elementary or secondary school or within three hundred feet of such property. The amended subsection extends this prohibition to violations at or near licensed child care centers [as defined in G.S. 110-86(3)a.]. The subsection continues to exclude from the definition of delivery a transfer of less than five grams of marijuana for no remuneration.

**Changes to controlled substance schedules.** Effective June 21, 2001, S.L. 2001-233 (S 543) makes the following changes to the controlled substance schedules in Chapter 90 of the General Statutes. It amends:

- G.S. 90-90(1) to add dihydroetorphine as a Schedule II opiate;
- G.S. 90-90 and 90-91 to shift dronabinol (also known by the trade name Marinol) from Schedule II to Schedule III;
- G.S. 90-91(b) to identify ketamine (sometimes referred to as Special K, a date rape drug) as a Schedule III depressant (ketamine has been a Schedule III controlled substance but has not been identified as a depressant);
- G.S. 90-92(a)(1) to add zaleplon (also known by the trade name Sonata) as a Schedule IV depressant; and
- G.S. 90-92(a)(3) to add modafinil (also known by the trade name Provigil) as a Schedule IV stimulant.

## Regulatory Offenses

**Taking of sea oats.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-93 (S 30) amends G.S. 14-129.2 to make it a Class 3 misdemeanor, punishable by a fine of \$25 to \$200, to dig up, pull up, or take sea oats (*uniola paniculata*) from any public domain or from private land without the consent of the landowner. The act deletes sea oats from the coverage of G.S. 14-129, which had made taking sea oats a Class 3 misdemeanor punishable by a smaller fine (\$10 to \$50) in certain counties only.<sup>4</sup>

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4. S.L. 2001-487 (H 338), Section 43, also deletes ginseng from the coverage of G.S. 14-129, effective December 1, 2001. Stealing ginseng remains a crime under G.S. 14-79 (larceny of ginseng), and digging up of ginseng remains unlawful to the extent prohibited by G.S. 106-202.19(a).

**Littering.** G.S. 14-399 has made it a crime for a person to intentionally or recklessly litter, with the punishment dependent on the amount of material involved. Effective for offenses committed on or after March 1, 2002, S.L. 2001-512 (S 1014) amends the statute to create a separate set of littering offenses that do not require proof of intent or recklessness. All are punishable as infractions rather than as crimes. Thus a person who inadvertently spills or scatters litter is guilty of an infraction unless he or she comes within one of the listed exceptions (for example, accidentally spilling an insignificant amount of material during garbage pickup).

The new littering offenses are punishable as follows:

- if the amount does not exceed fifteen pounds, by up to a \$100 fine and twelve hours of community service and by up to a \$200 fine and twenty-four hours of community service for a subsequent violation;
- if the amount is more than fifteen and less than five hundred pounds, by up to a \$200 fine and twenty-four hours of community service;
- if the amount is more than five hundred pounds, by up to a \$300 fine and community service of not less than sixteen and not more than fifty hours.

**Locksmith services.** S.L. 2001-369 (H 942) creates a new Chapter 74F in the General Statutes establishing a licensing scheme for people performing locksmith services. As part of these new licensing requirements, the act makes it a Class 3 misdemeanor under new G.S. 74F-3 to perform or offer to perform locksmith services without a license, effective for offenses committed on or after July 1, 2002.

**Dispensing prescription drugs.** Effective January 1, 2002, S.L. 2001-375 (S 446) amends G.S. 90-85.40(a) and (c) to clarify that it is not a crime for a person who is a pharmacy technician or pharmacy student to dispense or compound prescription drugs if the person is enrolled in an approved pharmacy school and is working under the supervision of a pharmacist.

**Mortgage lending.** Effective July 1, 2002, S.L. 2001-393 (S 904) repeals Article 19 of G.S. Chapter 53 and replaces it with new Article 19A, which creates a licensing scheme for mortgage brokers and mortgage bankers. New G.S. 53-243.14 makes it a Class I felony to perform mortgage services without a license, with each unlicensed transaction a separate offense.

**Unsolicited checks.** Effective October 1, 2001, S.L. 2001-391 (S 723) adds new G.S. 75-20 to regulate the distribution of unsolicited checks that, when cashed, obligate the person to repay the amount of the check plus interest and fees. The new statute imposes various requirements on the senders of such checks—for example, the sender must include certain disclosures with the check and must give the recipient the right to cancel the loan by repaying the amount of the check within ten days of cashing it. Violation of the statutory requirements is not a crime but is an unfair trade practice under G.S. 75-1.1, subject to the enforcement and penalty provisions for unfair trade practices.

**Conflict-of-interest crimes.** S.L. 2001-409 (H 115), as amended by Sections 44-45 of S.L. 2001-487, clarifies and updates several criminal statutes prohibiting public officials from benefiting from contracts with public agencies. The act repeals G.S. 14-236 and 14-237 and incorporates their essential provisions into revised G.S. 14-234. (For a detailed discussion of these provisions, see Chapter 21, “Purchasing and Contracting.”) A violation of the conflict-of-interest provisions remains a Class 1 misdemeanor. The principal parts of the act apply to actions taken and offenses committed on or after July 1, 2002.

**Money transmission.** Effective November 1, 2001, S.L. 2001-443 (S 890) repeals Article 16 of G.S. Chapter 53 and replaces it with new Article 16A, which creates a licensing scheme for businesses engaged in receiving and transmitting money by wire, facsimile, electronic transfer, or other means. Knowingly and willfully engaging in the business of money transmission without a license is a Class 1 misdemeanor under new G.S. 53-208.26.

## Local Bills

**Collecting worthless checks without prosecution.** Effective May 10, 2001, S.L. 2001-61 (H 7) authorizes district attorneys that have set up programs to collect worthless checks without

criminal prosecution (pursuant to G.S. 14-107.2) to include in such programs acts that would constitute felonies (the highest of which is a Class I felony) as well as misdemeanor offenses. The counties that now have such programs are Bladen, Brunswick, Columbus, Cumberland, Durham, Edgecombe, Nash, New Hanover, Onslow, Pender, Rockingham, Wake, and Wilson.

**Fraudulently or unnecessarily obtaining ambulance services.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-106 (S 336) adds several more counties to G.S. 14-111.2, which makes it a Class 2 misdemeanor to obtain ambulance services without intending to pay for them, and to G.S. 14-111.3, which makes it a Class 3 misdemeanor to make unneeded requests for ambulance services. The counties added to G.S. 14-111.2, creating a total of fifty counties covered by the statute, are Alamance, Cabarrus, Carteret, Halifax, New Hanover, Onslow, and Pender. Those counties, plus Rockingham County, are added to G.S. 14-111.3, creating a total of twenty-eight counties covered.

**Hunting under the influence.** S.L. 2001-165 (H 931), effective June 4, 2001, authorizes Orange County to restrict or prohibit hunting with firearms by people who are under the influence of alcohol or other impairing substances or who have any alcohol in their systems. The act also authorizes Orange County to restrict or prohibit hunting within 150 yards of any federal, state, or local government buildings, including those owned by local boards of education. A violation of an ordinance enacted under this authority is a Class 3 misdemeanor and is punishable as provided in G.S. 14-4, which governs the punishment for ordinance violations.

## Criminal Procedure

### DNA Testing

In the wake of several cases around the country in which DNA tests have exonerated people who were wrongly convicted, the General Assembly passed S.L. 2001-282 (H 884), which deals with several issues relating to DNA testing, including: (1) access to tests and samples, (2) pretrial testing, (3) preservation of samples, (4) post-conviction procedures, and (5) expunction of records. The changes in the first two categories became effective July 13, 2001, and apply to charges brought on or after that date. The changes in the third through fifth categories became effective October 1, 2001, and apply to evidence, records, and samples in the government's possession on or after that date.

**Access to tests and samples.** New G.S. 15A-267(a) gives criminal defendants the right before trial to DNA analyses performed in connection with the case and to biological material found in certain locations that has not yet been tested. The statute provides that the usual discovery and motion procedures, in G.S. 15A-902 and 15A-952, govern requests for such evidence. The act also amends G.S. 15A-903 to give the defendant the right to obtain certain DNA lab reports.

**Pretrial testing.** New G.S. 15A-267(c) provides that the court may order the State Bureau of Investigation (SBI) to perform DNA tests and make DNA comparisons before trial if the defendant shows that the biological material to be tested is relevant, that it has not yet been DNA tested, and that testing is material to the defense. The defendant must bear the test costs unless the court has determined that the defendant is indigent.

**Preservation of samples.** New G.S. 15A-268 requires that, in felony cases, evidence containing DNA material must be preserved. Subsection (a) states that a governmental entity that collects such samples must preserve the evidence as long as a defendant convicted of a felony is incarcerated. Subsection (b) allows the governmental entity to dispose of the samples before the end of that time period pursuant to specified procedures. Among other things, the entity must notify the district attorney of its intent to dispose of the samples, who then must notify the defendant (through the superintendent of the correctional facility where the defendant is housed), the Office of Indigent Defense Services, and the Attorney General. Within ninety days of receiving the notice, the defendant may request, for the reasons specified in the statute, that the material not be destroyed.

What are the consequences if the government fails to preserve biological material as required? Under the U.S. Constitution, the court may dismiss the charges if the defendant shows, among other things, that the government acted in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). In light of the statute's strict new requirements, the defendant may not need to show bad faith to obtain relief for a statutory violation.

**Post-conviction procedures.** New G.S. 15A-269 provides that after conviction a defendant may make a motion to the trial court that entered the judgment for DNA testing of biological evidence. To prevail on the motion, the defendant must show among other things that there is a reasonable probability the verdict would have been more favorable to the defendant if the testing had been conducted. If the defendant is indigent, the court must appoint counsel for a defendant who brings such a motion.

New G.S. 15A-270 requires the court to hold a hearing to evaluate the results of any test ordered under G.S. 15A-269. The statute provides that if the results are favorable to the defendant, the court may vacate the judgment of conviction, discharge the defendant from custody, resentence the defendant, or order a new trial.

**Expunction of records.** G.S. 15A-146 allows for expunction of records in certain circumstances when charges against a defendant are dismissed or the defendant is found not guilty. That statute is amended to provide that a person entitled to such an expunction is also entitled to expunction of any DNA records or profiles in the state's DNA database (subject to limited exceptions).

New G.S. 15A-148 provides that a defendant is also entitled to expunction of DNA records following (1) a final order of an appellate court reversing and dismissing a conviction for which a DNA analysis was done or (2) receipt of a pardon of innocence.

S.L. 2001-282 also repeals G.S. 15A-266.10, which formerly governed expunction of DNA records.

## Other Criminal Procedure Changes

**Pretrial release conditions after failure to appear.** Effective December 16, 2001, Section 46.5 of S.L. 2001-487 adds new G.S. 15A-534(d1) limiting the discretion of judicial officials who initially set a person's pretrial release conditions after the person has failed to appear in court as required. The new subsection replaces G.S. 15A-540(c), which the act repeals. The old subsection only applied to surrenders by sureties and not to arrests after failures to appear.

Under the new subsection, the judicial official (usually a magistrate) who sets conditions after an arrest or surrender for a failure to appear must impose any conditions recommended by the court in the order for arrest. If the issuing court has not recommended any conditions, the magistrate must set a secured bond that is twice the amount of the previous bond; if no bond amount was previously set, the magistrate must impose at least a \$500 secured bond. The magistrate also must indicate on the release order that the defendant was arrested or surrendered after failing to appear. If the magistrate learns that the defendant has failed to appear on the charges two or more times, he or she must indicate that fact as well.

**Warrantless inspections for contagious animal diseases.** S.L. 2001-12 (S 779) gives the State Veterinarian and staff greater authority to conduct inspections for contagious animal diseases. The concerns prompting the act's passage are reflected in its caption—an act “to prevent and control an outbreak of foot and mouth disease,” a condition that plagued the cattle industry in Great Britain in early 2001. The act became effective April 4, 2001, and expires April 1, 2003.

Together, new G.S. 106-399.5, revised G.S. 106-401(b), and new G.S. 106-402.1 permit the State Veterinarian to conduct a warrantless inspection of individuals, motor vehicles, and property if the State Veterinarian and Governor determine that there is an imminent threat of a contagious animal disease that has the potential for very serious and rapid spread, is of serious socioeconomic and public health consequence, or is of major importance in the international trade of animals and animal products. The grounds justifying an inspection vary with the subject and purpose of the inspection. For example, if a person or vehicle is traveling within the state, an authorized representative of the State Veterinarian may conduct a warrantless inspection if probable cause

exists to believe that the individual or vehicle is carrying an animal or article capable of introducing or spreading the types of contagious diseases described above. *See* G.S. 106-399.5(3).

**Bail bondsmen clarifications.** Effective October 1, 2001, S.L. 2001-269 (H 356) modifies several sections of G.S. Chapter 58 to conform it to changes made last year to the bail bondsman provisions in G.S. Chapter 15A. It also revises the definition of accommodation bondsman in G.S. 58-71-1(1) to delete the requirement that such bondsmen be North Carolina residents. This change appears to have no effect, however, because G.S. 15A-531 still imposes residency as a requirement to be an accommodation bondsman, and G.S. 58-71-195 provides that Chapter 15A controls in the event of a statutory conflict.

S.L. 2001-269 also amends: G.S. 58-71-40 to clarify that bail bondsmen may hire unlicensed personnel to perform normal office duties—that is, duties that do not include acting as a bail bondsman or runner; G.S. 58-71-100 to allow, with the approval of the Insurance Commissioner, bail bondsmen who operate from the same location to establish a shared trust account for collateral security that they have received; G.S. 58-71-140 to require professional bondsmen, surety bondsmen, and runners to file an affidavit with the clerk regarding the amount of any premium or collateral security received by the bondsman; and G.S. 58-71-160 to authorize the Insurance Commissioner to deny a license to a professional bondsman who has not complied with a notice of deficiency—that is, a notice that the bondsman’s security deposits with the commissioner have fallen below the required value.

**Admissibility of copies of ESC records.** S.L. 2001-115 (H 342) amends G.S. 8-45.3 to provide that copies of Employment Security Commission (ESC) records, when certified as true and correct by the commission, are as admissible in evidence as the originals would have been. The act applies to actions pending on or after December 1, 2001.

## Victims’ Rights

Effective October 1, 2001, S.L. 2001-433 (H 1154) makes miscellaneous changes to the Crime Victims’ Rights Act (G.S. 15A-830 through 15A-841) and other provisions concerning crime victims.

1. The act expands the definition of custodial agency in G.S. 15A-830(a)(3) to include facilities designated under G.S. 122C-252 for the custody and treatment of people who have been involuntarily committed. As a result of this change, crime victims may request notification from such facilities of the matters described in G.S. 15A-836—for example, notification of the defendant’s release date.

2. Revised G.S. 15A-831 clarifies that only the investigating law enforcement agency need notify the victim of the defendant’s status during the pretrial process. Other entities bear this responsibility thereafter.

3. New G.S. 15A-832.1 requires judicial officials, upon issuing an arrest warrant in certain circumstances, to record and transmit to the clerk of superior court the defendant’s name and the victim’s name, address, and telephone number. The clerk then must transmit this information to the district attorney’s office. This requirement primarily affects magistrates. It applies only when (1) the arrest warrant is for a misdemeanor subject to G.S. 15A-830(a)(7)g (certain domestic violence offenses) and (2) the warrant was based on testimony from the complaining witness rather than from a law enforcement officer. The new requirement does not apply in cases in which a law enforcement officer makes the arrest; in these cases the arresting agency is already responsible for providing the identifying information to the district attorney. The Administrative Office of the Courts (AOC) is required to provide forms for magistrates’ use in discharging this responsibility.

4. G.S. 15A-833 has given victims the right to offer evidence of a crime’s impact if the evidence is otherwise admissible. Amended G.S. 15A-833 allows a law enforcement officer or representative of the district attorney’s office to present such evidence at the request of the victim and with the consent of the defendant.

5. Amended G.S. 15A-835 requires the district attorney's office to provide to the victim, within thirty days of the conclusion of the trial court proceedings, the telephone number of the office to contact in the event the defendant fails to pay any required restitution.

6. Revised G.S. 15A-836 provides that, if the defendant has threatened the victim, the agency that has custody of the defendant must notify the victim of the defendant's escape within twenty-four, rather than seventy-two, hours. The amended statute also requires notice of the defendant's capture, regardless of whether any threats were made, within twenty-four, rather than seventy-two, hours.

7. The act also deals with two provisions that concern victims but are not contained in the Victims' Rights Act. G.S. 148-10.2 has provided that the policy of the Department of Correction (DOC) is to prohibit death row inmates from contacting victims' family members without the family members' written consent. The amended statute requires DOC, at the request of the victim or victim's family, to prohibit an inmate convicted of an offense subject to the Victims' Rights Act [listed in G.S. 15A-830(a)(7)] from contacting the requesting party. The amended statute also directs DOC to develop and impose sanctions against any inmate who violates the no-contact provisions.

The act also adds new G.S. 148-5.1, which directs DOC to make reasonable efforts to house inmates at an out-of-county facility if the victim or an immediate family member requests such confinement for the safety of the victim or family member.

Another act passed this session, S.L. 2001-302 (H 1286), affects crime victims as well. Effective July 21, 2001, it repeals G.S. 15A-835(e), which had required the Conference of District Attorneys to maintain a repository of victims' names, addresses, and other information for use by agencies with responsibilities under the Crime Victims' Rights Act.

## Domestic Violence

**Domestic violence privilege.** S.L. 2001-277 (H 643) creates a new evidentiary privilege for communications involving domestic violence and rape crisis centers, effective for communications made on or after December 1, 2001.<sup>5</sup> The act and the procedures it contains were apparently adopted in response to efforts by those accused of domestic abuse to obtain information provided by their alleged victims to such centers.

Under new G.S. 8-53.12, communications between a domestic violence or sexual assault victim and an agent of a domestic violence or rape crisis center are privileged. (The new statute defines victim, agent, and center.) No agent may be required to disclose privileged information unless the victim waives the privilege or the court orders disclosure. The privilege terminates on the death of the victim; thus, it would not bar disclosure in homicide cases.

The statute sets forth the circumstances in which a judge may override the privilege and order disclosure. In criminal cases a resident or presiding judge in the district in which the case is pending may order disclosure if the evidence is

1. relevant, material, and exculpatory;
2. not sought for character impeachment purposes; and
3. not merely cumulative of other evidence available to or already obtained by the party seeking disclosure.

The first condition may be difficult for the state to satisfy in cases in which it wants information obtained by the center but the alleged victim is unwilling to waive the privilege—for

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5. Two other acts affect evidentiary privileges that may arise in domestic situations. S.L. 2001-487, Section 40, clarifies that the privilege in G.S. 8-53.5 covers licensed marriage and family therapists and that the privilege in G.S. 8-53.7 applies to licensed or certified social workers. S.L. 2001-152 (S 739) expands G.S. 8-53.6 to cover marital counseling by licensed psychological associates, licensed clinical social workers, and licensed marriage and family therapists. The latter privilege applies only in alimony and divorce actions, however, and not in criminal proceedings.

example, in prosecutions for domestic violence in which the alleged victim is no longer willing to cooperate. The evidence the state wants may be *inculpatory*, but the statute requires that the evidence be *exculpatory* for the court to override the victim's privilege.

The second condition may run afoul of a criminal defendant's constitutional right to exculpatory evidence. The U.S. Supreme Court has consistently held that a defendant's right to exculpatory evidence includes evidence that can be used to impeach a witness's character. *See* *Kyles v. Whitley*, 514 U.S. 419 (1995) (exculpatory evidence includes impeachment evidence); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (defendant has right to exculpatory evidence in possession of third party that is otherwise confidential).

The statute sets forth a procedure for determining whether these conditions have been met. Before requiring a center to produce the records for the court's review, the court must find that the party seeking disclosure has made a sufficient showing that the records are likely to contain information that satisfies the statutory conditions. If the party has made such a showing, the court then must order that the records be produced for an *in camera* review—that is, a review in chambers. After the review, the court may order disclosure of those portions of the records that meet the statutory conditions.

**Stalking definition and punishment.** S.L. 2001-518 (S 346) broadens the definition of and increases the punishment for stalking under G.S. 14-277.3. Effective for offenses occurring on or after March 1, 2002, a person is guilty of stalking if he or she

- willfully
- on more than one occasion
- follows, is in the presence of, or otherwise harasses
- another person
- without legal purpose and
- with the intent either to
  - place the person in reasonable fear for that person's safety or the safety of that person's immediate family or close personal associates, or
  - cause the person substantial emotional distress by placing the person in fear of death, bodily injury, or continued harassment, which in fact causes the person substantial emotional distress.

This definition expands the types of prohibited conduct. Previously, the statute covered following another or being in his or her presence; the revised statute covers harassment as well. *Harassment* is defined as knowing conduct directed at a specific person that torments, terrorizes, or terrifies the person and serves no legitimate purpose. Such conduct may include oral communications (such as telephone calls or voice mail messages), printed communications, and electronic communications (such as faxes or e-mails).

The intent element of the offense is also broader under the revised statute. Previously, a person could be convicted of stalking only if he or she intended to cause death or bodily injury to the other person or intended to cause that person to suffer emotional distress by placing him or her in fear of death or great bodily injury.

A first stalking offense is increased from a Class 1 to a Class A1 misdemeanor. A stalking offense while a court order is in effect prohibiting similar behavior is increased from a Class A1 misdemeanor to a Class H felony. And a second stalking offense is increased from a Class I to a Class F felony, and the time limit on prior convictions is removed.<sup>6</sup>

**Interference with emergency communication.** Effective for offenses committed on or after December 1, 2001, S.L. 2001-148 (S 1004) modifies the offense of interfering with an emergency

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6. Effective the same date as the stalking changes, S.L. 2001-518 (S 346) also amends G.S. 50B-1(a), which lists the grounds on which a person may obtain a civil domestic violence protective order. The revised statute includes as a ground for obtaining such an order *continued harassment* as defined in G.S. 14-277.3, the stalking law. In addition, the act revises G.S. 50B-2(c1) to delete the seventy-two-hour limit on the effectiveness of an *ex parte* protective order issued by a magistrate. The revised statute provides that such an order remains in effect until the end of the next day in which district court is in session.

communication. This offense sometimes arises during incidents of domestic violence, although it is not limited to that context. For example, one party may interfere with another party's efforts to call for help. The amended section, G.S. 14-286.2, increases a violation to a Class A1 misdemeanor; previously, the offense was a Class 1 or 2 misdemeanor depending on the damage or injury caused. The amended section also clarifies that a person who interferes with a communications instrument or other emergency equipment with the intent to prevent an emergency communication—for example, a person rips the phone out of the wall before the other person is able to place an emergency call—is guilty of violating the section. This section, as amended, also includes a more detailed definition of *emergency communication* and a new definition of *intentional interference*.

**Confidentiality of voter records.** Effective December 1, 2001, S.L. 2001-396 (H 1188) amends G.S. 163-82.10 to allow a registered voter to keep confidential his or her address if the person is protected by a domestic violence protective order. The voter must present a copy of the protective order to the county board of elections with a signed statement that the voter has good reason to believe that the safety of the voter or a member of the voter's family who resides with the voter would be jeopardized if the voter's address were open to public inspection. The voter's address and the signed statement must be kept confidential as long as the protective order remains in effect; however, the voter's name, precinct, and other data in the voter's registration record remain public.

**Expansion of 48-hour law to other offenses.** Generally, when a person is arrested for a crime in North Carolina, he or she is taken before a magistrate, who sets pretrial release conditions for the person (for example, a secured or unsecured bond). In cases involving certain domestic violence offenses, however, G.S. 15A-534.1 provides that only a judge may set pretrial release conditions within the first forty-eight hours of a person's arrest. Effective for offenses committed on or after March 1, 2002, S.L. 2001-518 adds several offenses to what has become known as the "48-hour law." The revised statute includes any felony in Chapter 14, Articles 7A (rape and other sex offenses), 8 (assaults), 10 (kidnapping and abduction), and 15 (arson and other burnings). As with the offenses already covered by the statute, the defendant must be charged with having committed one of these offenses against his or her spouse or former spouse or against a person with whom the defendant lives or has lived as if married.

By adding these offenses to the 48-hour law, the act may subject them to the strictures of *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998). In *Thompson* the defendant was held in custody for forty-eight hours without having pretrial release conditions set, even though court was in session and judges were available to set conditions before forty-eight hours had expired. The court held that this detention violated the defendant's due process rights and that the charges against the defendant had to be dismissed. The only distinction between the offenses dismissed in *Thompson* and the offenses added by the act to the 48-hour law is their relative seriousness—the former were all misdemeanors, the latter all felonies.

**Increased punishment for certain violations of DVPOs.** G.S. 50B-4.1 has made it a crime, punishable as a Class A1 misdemeanor, for a person to knowingly violate a valid domestic violence protective order (DVPO). Effective for offenses committed on or after March 1, 2002, S.L. 2001-518 revises the statute to increase such a violation to a Class H felony if the person has previously been convicted of three offenses under Chapter 50B.

The revised statute also provides that a person who commits a felony when he or she knows the behavior is prohibited by a valid DVPO is guilty of an offense one class higher than the felony committed. The enhanced punishment does not apply to a person charged with a Class A or B1 felony or a repeat violator charged with the new Class H felony discussed above. The revised statute also provides that for the enhanced punishment to be imposed, the indictment or information charging the felony must allege and a finding must be made that the person knowingly violated the DVPO in the course of committing the felony.

## Law Enforcement

**Collection of traffic stop statistics.** Concerned about possible racial profiling in the stopping of vehicles—that is, the stopping of vehicles based on the race or ethnicity of the drivers or passengers—the 1999 General Assembly amended G.S. 114-10 to require the Division of Criminal Statistics (the Division) to collect information on traffic stops made by state law enforcement officers, such as the North Carolina State Highway Patrol. *See* S.L. 1999-26 (S 76). The 2000 General Assembly amended the statute further, requiring the Division to keep additional information, such as the identity of the officer making the stop, the date the stop was made, the location of the stop, and the agency making the stop. *See* Section 17.2 of S.L. 2000-67 (H 1840).

This session, in Section 23.7 of S.L. 2001-424 (S 1005), the General Assembly again amended G.S. 114-10, requiring the Division to collect the same type of statistics on stops made by local law enforcement officers employed by county sheriffs or county police departments, police departments in municipalities with a population of 10,000 or more, and police departments in municipalities employing five or more full-time sworn officers for every 1,000 people. The changes apply to law enforcement actions occurring on or after January 1, 2002. Another act, S.L. 2001-513 (H 231), Section 9, authorizes the Department of Justice to create up to three positions to implement the new record-keeping requirements.

**Release of personnel information.** Effective April 16, 2001, S.L. 2001-20 (H 423) creates a limited exception, in the City of Greensboro only, to the confidentiality of disciplinary charges against police officers, a personnel matter that ordinarily must be held in confidence under G.S. 160A-168(c). The act states that the city manager or chief of police may release information about the disposition of disciplinary charges to the Human Relations Commission Complaint Subcommittee and to the person alleged to have been aggrieved by the officer's actions or that person's survivor. The act requires that commission members keep the information in confidence.

**Special police officers at mental health hospitals.** Effective May 25, 2001, S.L. 2001-125 (S 370) enacts two statutes, G.S. 122C-430A and 122C-430B, authorizing the Secretary of the Department of Health and Human Services to designate one or more special police officers to act as law enforcement officers at Cherry Hospital in Wayne County and Dorothea Dix Hospital in Wake County. These special police officers may arrest a person outside the confines of Cherry and Dix hospitals but within the counties in which the hospitals are located when (1) the person has committed an offense at the hospital for which the officer could have arrested the person and (2) the arrest is made during the person's immediate and continuous flight from the hospital.

**Campus law enforcement jurisdiction.** Effective August 30, 2001, S.L. 2001-397 (H 972) amends G.S. 116-40.5 to allow the board of trustees of any constituent institution of the University of North Carolina to enter into agreements with boards of other constituent institutions to extend the authority of campus police officers into each other's jurisdiction.

The act also amends the jurisdiction of campus police officers to cover any public road or highway passing through campus property *or* adjoining it. Previously, the statute provided that the road had to pass through *and* adjoin campus property.

## Collateral Consequences

### Sex Offender Registration

S.L. 2001-373 (S 936) makes several changes to the sex offender registration requirements. Most importantly it creates two new categories of sex offenders and subjects them to the toughest registration requirements, previously reserved for offenders found to be sexually violent predators.

**Federal genesis.** As with many parts of North Carolina's sex offender registration law, the current changes were prompted by changes in federal law—specifically, the adoption of the Pam Lynchner Sexual Offender Tracking and Identification Act of 1996, which amended the Jacob Wettlering Crimes Against Children and Sexually Violent Offender Registration Act, codified at

42 U.S.C. § 14071. States that fail to implement the minimum federal requirements are subject to a 10 percent reduction in Byrne Formula Grant funds, of which North Carolina receives several million dollars annually. Because federal law underlies the most recent changes, it provides a potential source for interpreting any ambiguities and helps explain the lack of congruence with state law. [For a detailed discussion of the federal provisions, see Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (hereinafter Final Guidelines), as Amended, 64 Fed. Reg. 572 (Jan. 5, 1999).]

**New categories.** The two new sex offender categories are

- offenders convicted of an “aggravated offense” and
- “recidivists.”

G.S. 14-208.6 defines an *aggravated offense* as any criminal offense in which the sexual act involves vaginal, anal, or oral penetration (1) by use of force or the threat of serious violence against a victim of any age or (2) with a victim who is less than twelve years old. The interplay between these provisions and other aspects of North Carolina's criminal law is not entirely clear. For example, penetration is a requirement for both subcategories of aggravated offense. Penetration is an element of rape under North Carolina law, which involves vaginal intercourse, but it is not an element of some of the acts required for conviction of sexual offense, which involves oral and certain other sex acts. See Robert L. Farb, *North Carolina Crimes: A Guidebook on the Elements of Crime*, 5th ed. (Chapel Hill, N.C.: Institute of Government, The University of North Carolina, 2001), 151. The meaning of *force* or *threat of serious violence* under the first subcategory of aggravated offense is also unclear. Does a conviction of second-degree forcible rape or sex offense, of which force is ordinarily an element, automatically satisfy that requirement? Or, must the defendant be convicted of first-degree rape or sex offense, requiring proof of both force and an aggravating condition such as the use or display of a dangerous weapon? See Final Guidelines, 64 Fed. Reg. 572 [aggravated offense category, and resulting requirement of lifetime registration (discussed below), apply only to “perpetrators of particularly serious offenses,” those comparable to federal offense of aggravated sexual abuse under 18 U.S.C. § 2241 but not offense of sexual abuse under 18 U.S.C. § 2242]. The second subcategory of aggravated offense, which applies only if the victim is under twelve years of age, also does not track North Carolina's crimes of statutory rape and sex offense, which involve victims who are thirteen, fourteen, or fifteen years of age or who are under age thirteen.

*Recidivist* is defined as a person who has a prior “reportable conviction”—that is, any conviction subject to the registration requirements. Thus a person with a prior conviction for indecent liberties would be considered a recidivist if convicted again of indecent liberties or any other offense subject to the registration requirements. (Crime against nature remains one of the few sexually related offenses that is not subject to any registration requirement.)

**Registration requirements.** A person who is convicted of an aggravated offense or is a recidivist, as defined above, is subject to the same registration requirements as a person found to be a sexually violent predator. He or she must register for life after being released from prison. If the person fails to comply with the registration requirements, including verifying his or her address every ninety days, the person commits a Class F felony. The registration requirements terminate only if the conviction requiring registration is reversed, vacated, or set aside, or the person receives an unconditional pardon of innocence.

S.L. 2001-373 repeals the additional method of terminating registration previously available to a person found to be a sexually violent predator. Previously, the registration requirement could be terminated after ten years if a court found that the person no longer suffered from a mental abnormality or personality disorder.

The act also modifies the procedure for finding a person to be a sexually violent predator. G.S. 14-208.20 continues to require a study, by a board of experts selected by DOC, of a person alleged to be a sexually violent predator. It also continues to require that two of the board members be experts in the behavior and treatment of sexual offenders. The revised section also provides, however, that one of the board members must be a victims' rights advocate and another

must be a law enforcement representative. No special expertise appears to be required of these additional members.

**Other registration changes.** The act adds two other categories of individuals subject to registration requirements: nonresident students and nonresident workers. New G.S. 14-208.7(a1) provides that if such a person has a reportable conviction in this state or in his or her state of residence, this person must register with the sheriff of the North Carolina county in which he or she works or attends school.

The act also requires that a person who moves to another state must, within ten days of the move, notify the sheriff of the North Carolina county in which he or she last registered. The sheriff must forward the change of address information to the Division of Criminal Information, which must inform the appropriate state official in the other state of the person's new address.

**Effective date.** S.L. 2001-373 became effective October 1, 2001, and applies to offenses committed on or after that date. Thus the changes do not apply to individuals already subject to the registration requirements before that date.

### **Other Collateral Consequences**

**Expunction of criminal record.** In 1999 the General Assembly enacted G.S. 14-113.20 through 14-113.23, which created the offense of financial identity fraud—that is, the use of another person's identification for the purpose of making financial transactions in the other person's name. This session, S.L. 2001-108 (S 262) creates a new section, G.S. 15A-147, providing for the expunction of the record of arrest, charge, and trial of individuals whose identity has been misused under that law or in other circumstances. A person has a right to an expunction under this new statute if (1) the person was named in a criminal charge as the result of another person using the identity of the named person without permission and (2) the charge against the named person is dismissed, a finding of not guilty is entered, or the conviction is set aside. The right to expunction applies whether the charged offense was an infraction, misdemeanor, or felony.

A person may apply for an expunction to the court where the charge was last pending, on a form prepared by the AOC and available from the clerk of court. The district attorney's office is entitled to notice of the application.

If the court grants the application, it must order expunction of the records of the court and all law enforcement agencies and other state and local agencies. The clerk of court must forward a certified copy of the order to the charging law enforcement agency, which must notify the SBI. The SBI, in turn, must notify the Federal Bureau of Investigation. The petitioner is not responsible for the costs of expunging the records. The Division of Motor Vehicles, licensing boards, and insurance companies also must rescind any administrative actions based on the criminal charge, such as any license revocation or insurance points.

S.L. 2001-108 also amends G.S. 15A-146(a), which has authorized a one-time expunction if a charge is dismissed or a finding of not guilty entered. The amended section provides that a person may obtain an expunction if he or she has not previously obtained an expunction (1) under G.S. 15A-146; (2) under G.S. 15A-145, which authorizes expunction of first offenses if committed by youthful offenders; or (3) under G.S. 90-96, which allows expunction of certain drug offenses if the offender successfully completes probation. The effect of this change is to make it clear that a person is entitled to an expunction under G.S. 15A-146 no matter how many expunctions he or she may have received under new G.S. 15A-147, discussed above. Apparently an additional effect is to bar an expunction in other cases following a dismissal or finding of not guilty if the person has already received an expunction under G.S. 15A-145 or G.S. 90-96.

The act became effective October 1, 2001, and applies to charges filed before, on, or after that date.

**Criminal history checks.** Several acts this session deal with criminal record checks by employers and continue the trend of expanding criminal record checks of applicants for employment. (In response to the expansion that has taken place in previous years, Section 21.2 of

this year's budget act, S.L. 2001-424, requires the Department of Health and Human Services to centralize all record-checking activities related to that department.)

Effective January 1, 2002, S.L. 2001-371 (S 195) adds new G.S. 114-19.11, which allows the North Carolina Board of Nursing to obtain from the Department of Justice the criminal history of any applicant for licensure as a registered nurse or licensed practical nurse. The act also adds new G.S. 90-171.48 requiring such applicants to consent to a criminal history check. Refusing to do so may be grounds for denying a license to an applicant. If the applicant has any convictions, the Board of Nursing may but is not required to deny a license to the applicant after considering certain factors.

G.S. 122C-80(b) has required area mental health authorities to conduct criminal history checks of certain applicants for employment. To do so, area authorities have had to submit a request to the state's Department of Justice. Effective May 31, 2001, S.L. 2001-155 (H 857) amends G.S. 122C-80(b) to allow counties that have access to the Division of Criminal Information data bank to conduct the required criminal history record checks on behalf of area mental health authorities.

Effective for offenses on or after August 17, 2001, S.L. 2001-376 (S 778) adds new G.S. 115C-332 making it a Class A1 misdemeanor for an applicant for public school employment to willfully give false information on an employment application that is the basis for a criminal history check.

This session's only contraction in criminal history checks resulted from a change in federal law. The federal budget act of 1999 (Pub. L. No. 105-277) provided in 28 U.S.C. § 534 that a nursing facility or home health care agency could request the U.S. Attorney General to conduct a criminal history check of job applicants if the job involved direct patient care. In light of this provision, S.L. 2001-465 (S 826) suspends until January 1, 2003, those North Carolina provisions purportedly authorizing greater access to national criminal history information. Effective November 16, 2001, the act provides that, notwithstanding G.S. 131E-265, nursing homes and home care agencies are not required to conduct national criminal history checks for jobs other than those involving direct patient care; and notwithstanding G.S. 131E-265(a1), 131D-40, and 122C-80, contract agencies of nursing homes and home care agencies, adult care homes and their contract agencies, and area mental health authorities are not required to conduct national criminal history checks. The act also directs the Legislative Research Commission to study how federal law affects access to national criminal history information for these entities.

## Sentencing and Corrections

Most of the changes in the corrections field appear in the budget act, S.L. 2001-424. Unless otherwise noted, all references are to that act.

**Earned time credit for medically and physically unfit inmates.** Effective September 26, 2001, Section 25.1 of the budget act adds new G.S. 15A-1355 to allow inmates who are medically or physically unable to engage in work release or other rehabilitative activities to earn credit based on good behavior or other criteria determined by DOC. The amount of credit that such inmates may receive remains subject to structured sentencing rules on maximum possible sentence reductions.

**Rate of reimbursement to counties.** Section 25.4 of the budget act establishes a rate of \$40 per day as the reimbursement rate to counties for fiscal year 2001–2002 for the cost of housing convicted inmates, parolees, and post-release supervisees awaiting transfer to the state prison system.

**Place of confinement for palliative care.** G.S. 148-4 has authorized the Secretary of Correction to allow an inmate to leave his or her place of confinement, unaccompanied by a custodian, in specified circumstances—for example, to participate in a training program in the community or to secure a suitable residence for when he or she is released. Effective September 26, 2001, Section 25.9 of the budget act amends G.S. 148-4 to further authorize the

Secretary of Correction to allow an inmate to leave his or her place of confinement to receive palliative care if the inmate is terminally ill or permanently and totally disabled [as defined in new subsection G.S. 148-4(8)] and the secretary finds that the inmate no longer poses a threat to society. Before approving such an arrangement, the secretary must consult with the victim or victim's family.

**Compensation for erroneously convicted person.** Effective for individuals granted a pardon of innocence on or after January 1, 2001, Section 25.12 of the budget act amends G.S. 148-84 to increase the amount payable to a person who has been granted a pardon of innocence. The act increases the amount payable from \$10,000 to \$20,000 for each year of imprisonment, including pretrial confinement, and increases from \$150,000 to \$500,000 the total amount that may be paid.

**Staff reduction at Post-Release Supervision and Parole Commission.** Section 25.17 of the budget act directs the Post-Release Supervision and Parole Commission to report to the General Assembly on its staff reduction plans for the 2001–2003 biennium, including its plans for 2002–2003 to reduce at least 10 percent of the staff employed in 2001–2002. The commission must report these plans to the General Assembly by March 1 of each year of the biennium.

**Inpatient substance abuse facilities.** Effective September 26, 2001, Section 25.19 of the budget act amends G.S. 148-19.1 to exempt from licensure under G.S. Chapter 122C and certificate-of-need requirements under G.S. Chapter 131E inpatient chemical dependency or substance abuse facilities that provide services exclusively to inmates of DOC. If a facility serves both inmates and members of the general public, the portion of the facility that serves inmates is exempt from licensure. If a facility is built without a certificate of need, it may not admit anyone other than inmates until a certificate of need is obtained. The act makes conforming changes to G.S. 122C-22(a) and G.S. 131E-184.

**Elimination of IMPACT.** Section 25.22(c) of the budget act states that it is the intent of the General Assembly to eliminate the IMPACT boot camp program by June 30, 2003, and that alternative residential programs for offenders be established in the current IMPACT locations. The alternative programs may include youth development centers (formerly called training schools), residential facilities for juveniles, or residential programs for adult offenders under the supervision of the Division of Community Corrections or the Division of Alcohol and Chemical Dependency. The Secretary of Correction and Secretary of Juvenile Justice and Delinquency Prevention must report to the General Assembly by May 1, 2002, on the programs proposed to take the place of IMPACT.

**New prison construction.** Section 25.24 of the budget act authorizes the construction of three new close-custody prisons in Anson, Alexander, and Scotland counties.

**Jail credit for GED classes.** G.S. 15A-1340.20(d) has allowed a person convicted of a misdemeanor to earn up to four days of credit per month of imprisonment, to be awarded by DOC if the person is in prison or by the local jail's custodian (sheriff or jail administrator) if the person is housed in a local jail. Effective June 14, 2001, S.L. 2001-200 (S 397) adds new G.S. 162-59.1, which authorizes the custodian of a local jail to allow a person convicted of a misdemeanor to participate in a general education development diploma program (GED program) or other education, rehabilitation, or training program. Amended G.S. 162-60 provides that those who participate in such programs are entitled to a reduction of four days in their term of imprisonment for each thirty days of classes attended. As under prior law, the total amount of credit that a person convicted of a misdemeanor may receive is four days per month of incarceration.

**Use of force by private correctional officers.** S.L. 2001-378 (S 137) authorizes correctional officers at private correctional facilities in North Carolina operated pursuant to contract with the Federal Bureau of Prisons to use necessary force and make arrests consistent with the laws governing officers employed by DOC. To exercise this authority, private correctional officers must have been certified as correctional officers under G.S. Chapter 17C and must have completed a training program that DOC has determined meets North Carolina standards. The employment policies of the private correctional facility also must meet the minimum standards and practices of DOC. The act is effective August 18, 2001, and expires two years thereafter.

## Studies

S.L. 2001-491 (S 166), this year's studies act, authorizes various studies related to criminal law and procedure. The act authorizes the North Carolina Sentencing and Policy Advisory Commission (Sentencing Commission) to study:

- whether the state's habitual felon law needs to be changed;
- whether the penalties for detonation of explosive devices within courthouses and other public buildings should be increased;
- whether the penalties for incest offenses are consistent with the penalties for other sex offenses;
- the state's arson laws and any conforming changes to the medical reporting requirements for burn injuries that result from a criminal act; and
- sentencing for drug offenses.

Pursuant to Section 25.8 of S.L. 2001-424, the Sentencing Commission is also directed to review the state's sentencing laws in view of the projected growth in the prison population by 2010. The Sentencing Commission must report its findings to the General Assembly no later than the convening of the 2002 regular session.

The Studies Act authorizes the Legislative Research Commission to study:

- in the field of criminal law and procedure, consolidation of law enforcement agencies and the authority and regulation of bail bondsmen;
- in the area of domestic violence, confidentiality programs for victims of domestic violence and the establishment of a domestic violence fatality review team; and
- in the juvenile field, procedures for juveniles who lack the capacity to proceed and juvenile commitment procedures.

The Studies Act also sets up a separate study commission, the Underage Drinking Study Commission, to study underage alcohol consumption issues.

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