

6

Criminal Law and Procedure

The General Assembly enacted three major pieces of legislation in the field of criminal law and procedure as well as numerous lesser acts. It significantly expanded the discovery rights of both the defense and prosecution in criminal cases; enacted a package of legislation recommended by the House Select Committee on Domestic Violence, making changes affecting domestic violence prosecutions and criminal law generally; and significantly increased the punishments for offenses involving the controlled substance methamphetamine.

Criminal Discovery

A defendant's right to pretrial discovery in cases within the original jurisdiction of the superior court (that is, felonies and misdemeanors joined with felonies) has been limited to fairly narrow statutory categories. The defendant was entitled to obtain discovery of his or her own statements, statements of codefendants, documents that the state intended to use at trial or that belonged to the defendant, reports of examinations and tests conducted in connection with the case, and statements of witnesses once the witness testified. The defendant's obligation to provide information to the state has also been limited. A defendant had to turn over documents and reports of examinations and tests that he or she intended to introduce at trial but little more. Both sides complained that criminal proceedings amounted to "trial by ambush."

Many district attorneys adopted "open-file" discovery policies, allowing defendants access to investigative and other materials beyond the statutory categories. But the decision to have an open-file policy rested with individual district attorneys' offices. There also was not a uniform understanding of what information a defendant could review under an open-file policy; and, if a prosecutor failed to turn over information covered by the policy but not legally required, a defendant had little, if any, recourse.

To ensure greater openness in the discovery process, S.L. 2004-154 (S 52) revises the statutory discovery rights of both the defense and the prosecution. The procedure for obtaining discovery remains essentially the same, but the categories of discoverable information differ significantly from earlier provisions.

Applicability and Effective Date

G.S. 15A-901 continues to provide that the revised discovery article (Chapter 15A, Article 48) applies only to cases within the original jurisdiction of the superior court. It does not apply to misdemeanors heard initially in district court or appealed for trial de novo to superior court. A defendant does not have the right to discovery in those cases except to the extent guaranteed by the United States and North Carolina constitutions (a defendant has the right to exculpatory evidence) or by other statutes [for example, under G.S. 20-139.1(e), a defendant has the right in impaired driving cases to a copy of the record of the chemical analysis].

The changes became effective October 1, 2004, and apply to cases in which the trial date set pursuant to G.S. 7A-49.4 is on or after October 1, 2004. In other words, in addition to future cases, the new discovery provisions apply to pending cases in which the trial is not set to commence before October 1. Thus, if the trial is set for a date before October 1 but is continued to a date after October 1, the new discovery provisions may not apply. (A broader interpretation of the effective-date language would be that the new discovery provisions apply to cases in which the trial has not actually commenced before October 1.)

What must the parties do to exercise their new discovery rights in pending cases? For cases in which the defendant is represented by counsel and the probable cause hearing has not yet been held or waived, the parties would have to comply with the normal timelines for requesting discovery (for defendants represented by counsel, within ten working days of the probable cause hearing or waiver, and for the prosecution, within ten working days of when it provides discovery in response to the defendant's request). In cases in which those dates have already passed but the trial has not yet occurred, the parties could not have complied with those timelines because they had no right to request the broader discovery until the act's effective date. The legislation does not specify a deadline or procedure to follow to obtain the broader discovery in those cases, and probably the safest course for the parties to take is to make a new discovery request as soon after the act's effective date as possible.

Basic Procedures

With minor revisions, G.S. 15A-902 continues to establish the basic procedure for obtaining discovery. The principal procedural changes expand the circumstances in which a defense request for discovery triggers reciprocal discovery rights by the prosecution, allow the parties to apply ex parte for a protective order limiting disclosure (G.S. 15A-908), modify the standard for obtaining sanctions (G.S. 15A-910), and recognize explicitly that the parties may waive the requirement of a written request for discovery. Additional procedural changes apply to specific categories of discovery (for example, the disclosure of the identity of witnesses). These are discussed below in connection with the particular categories of information.

Defense discovery requests. Under G.S. 15A-902, the defendant ordinarily remains responsible for initiating the discovery process by requesting in writing that the prosecution voluntarily provide discovery. A new provision, discussed below, waives the requirement of a written request if the parties have entered into a written agreement to that effect, but for purposes of this discussion it is assumed there is no written agreement in place. If dissatisfied with the prosecution's response to the discovery request, the defendant may file a motion with the court to compel the requested discovery. If the court orders discovery and the prosecution fails to comply, the defendant may ask the court for sanctions. The time limit for making an initial discovery request is the same as under prior law. If the defendant is represented by counsel, the defendant may, as a matter of right, request discovery no later than the tenth working day after either the probable cause hearing or the date the defendant waives the hearing. (The time limits for unrepresented defendants also remain the same as under prior law.)

G.S. 15A-902 continues to specify that if the prosecution voluntarily provides discovery in response to a written request, the prosecution assumes the obligation to provide discovery as if under order of the court. [Revised G.S. 15A-903(b), which describes the information the prosecution must provide in discovery, reiterates this requirement.] Thus the defendant may

request sanctions for the prosecution's failure to provide discovery without having first obtained a court order compelling discovery.

Prosecution discovery requests. In most respects, the same procedures apply to prosecution discovery requests. The prosecution must make a written request for discovery (unless there is a written agreement waiving the requirement) and, if dissatisfied with the response, must follow up with a motion to compel discovery. If, following a written request, the defendant voluntarily provides discovery or the court orders discovery, the prosecution may seek sanctions for noncompliance. As under prior law, the prosecution must make its discovery request within ten days of when it provides discovery to the defendant.

The prosecution's right to discovery differs in one significant respect from the defendant's rights. At least in principle, the defendant controls whether the prosecution obtains discovery, although in practice most defendants will rarely exercise this right. As under prior law, the prosecution has the right to discovery from the defendant only if the defendant requests discovery of the prosecution and either the prosecution voluntarily furnishes the discovery in response or the court compels discovery. [G.S. 15A-905(c), which sets forth the new categories of information the defendant must provide to the prosecution, reiterates that if the prosecution voluntarily provides discovery in response to a written request, the discovery is deemed to have been made under court order and therefore triggers the prosecution's reciprocal discovery rights; this language does not change existing law, embodied in G.S. 15A-902(b).] Consequently, if the defendant does not make a written request for discovery, the prosecution has no right to discovery from the defendant.

The circumstances in which a defendant opts not to take advantage of discovery from the prosecution should be rare, however. Under the revised statute, the defendant must make an all-or-nothing decision about discovery. If the defendant makes a written request for any statutory discovery and the prosecution voluntarily provides discovery or is ordered to do so by the court, the prosecution gains full discovery rights. Previously, a defendant could pick and choose which discovery rights to afford the prosecution by selecting which categories of discovery it wanted. For example, if the defendant requested all of the discovery categories from the prosecution except reports of examinations and tests, the prosecution had no right to reciprocal discovery of the defendant's reports of examinations and tests. The General Assembly accomplished this change by providing that the prosecution is entitled to the discovery set forth in each subsection of G.S. 15A-905 if the court grants any relief sought by the defendant under G.S. 15A-903, the section giving the defendant discovery rights. Previously, each subsection of G.S. 15A-905 was tied to the corresponding subsection of G.S. 15A-903.

Written agreements. Revised G.S. 15A-902(a) and (b) recognize that a written request for discovery is not required of either party if they have agreed in writing to comply voluntarily with the statutory discovery requirements. A written agreement, in other words, can replace a written request. While the provision allows parties to enter into written agreements on a case-by-case basis, its main purpose is to clarify the enforceability of standing discovery agreements such as the one in Mecklenburg County. There, the district attorney's office and the public defender's office have had an agreement to provide discovery without a written request by the opposing party, reducing the need for form discovery requests by both sides. Because the state is a party in all criminal prosecutions, a district attorney should be able to enter into such an agreement and bind the state in all prosecutions in a particular district. Such an agreement would have a more limited effect on defendants because a public defender can act only on behalf of clients represented by his or her office. In addition, because the defendant is not the same party in each case, a standing agreement would have to give public defender clients the right to opt out if they wanted to forego discovery of the prosecution and avoid triggering reciprocal discovery.

Protective orders. G.S. 15A-908(a) has allowed either party to apply to the court, by written motion, for an order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment. The statute is revised to provide that a party may now apply *ex parte* for such an order. Under the revised provision, if an *ex parte* protective order is granted, the opposing party receives notice of entry of the order but not of the subject matter of the order. The revised section does not specify any further procedures, but the court should maintain under seal

the motion, order, and information protected by the order in the event disclosure is required at trial or the propriety of the order is challenged on appeal.

Sanctions. G.S. 15A-910 has provided that a party may seek sanctions if the responding party has failed to comply with an order for discovery, including voluntary discovery deemed to be made under court order. The revised section adds that the court, before imposing sanctions, must consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply. The extent to which this new requirement changes existing law is not clear.

Continuing duty to disclose. G.S. 15A-907, which imposes a continuing duty to disclose discoverable evidence, was not materially changed.

Defense Discovery Rights

The new legislation completely rewrites G.S. 15A-903, the section giving the defense discovery rights, by deleting all of the former discovery categories and creating three new ones: investigative and prosecutorial files, expert witnesses, and lay witnesses.

Investigative and prosecutorial files. The most significant discovery category is in new G.S. 15A-903(a)(1), which provides that the state must make available to the defendant “the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.” This provision is patterned after G.S. 15A-1415(f), revised in 1996 to give defendants sentenced to death the right to open-file discovery in postconviction proceedings. The pretrial and postconviction provisions differ in one important respect, however. In capital postconviction proceedings the law provides no protection for the prosecuting attorney’s work product (although the state may ask the court in the interests of justice to deny access to some files). *See* State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998). In contrast, revised G.S. 15A-904, discussed below, continues to protect before trial materials containing the prosecuting attorney’s theories, strategies, and other mental processes. The new pretrial discovery provision also differs from the postconviction provision in that the pretrial provision does not specify that the state’s disclosure obligation is “to the extent allowed by law.” Interpreting this qualifying language in the context of capital postconviction proceedings, the North Carolina Supreme Court in *Bates* held that the state is not required to produce information it is prohibited by other laws from disclosing. Because this qualification is not included within the new pretrial discovery provisions, the state would appear to be obligated to disclose all evidence it obtains in the investigation or prosecution of the defendant. (Even under the capital postconviction provision, the extent to which the state is actually prohibited from disclosing information, once the information comes into the state’s possession, is unclear.) There could be some circumstances, however, in which other laws might preempt the statutory discovery requirements.

The new subsection provides a definition of *file*, stating that it includes “the defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.” This definition, particularly the last clause, clarifies that the defendant is not literally entitled to review all of the files of an agency involved in the investigation or prosecution of the defendant; rather, the defendant is entitled to the complete agency files concerning the investigation or prosecution of the defendant. For example, a defendant would be entitled to law enforcement files concerning the investigation of the offenses allegedly committed by the defendant but would not necessarily be entitled to information from other files, such as the investigating officer’s personnel file or the files of investigations of other offenses, unless the investigation or prosecution of the defendant involved that information or other grounds warranted disclosure, such as that the files contained exculpatory evidence.

The definition of *file* repeats some of the categories of information that the prosecution formerly had to provide—the defendant’s statements, codefendants’ statements, and results of tests and examinations. Presumably the defendant (and the prosecution, to the extent it is entitled to discovery of the defendant’s tests and examinations) would be entitled to the data underlying the tests and examinations, as under prior law. *See* State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802

(1992) (interpreting prior discovery statute, which gave defendant right to discover results and reports of tests and examinations, court held that defendant was entitled to underlying data).

The definition also adds new categories of discoverable information. Thus, the prosecution must turn over witness statements in pretrial discovery; previously, the statute required the state to turn over witness statements only after the witness had testified and only if the statement fell within the definition of witness statement in repealed G.S. 15A-903(f)(5) (requiring disclosure only of statements signed or otherwise adopted or approved by the witness, recorded statements, and substantially verbatim transcriptions of statements). The prosecution also must turn over officer notes; previously, the statute required that an officer's notes (as well as officer reports) be turned over only to the extent they contained information within specific statutory discovery categories. The definition includes a catchall requirement that the state turn over any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

As under prior law, the defendant has the right to inspect and obtain copies or photographs of discoverable information and, under appropriate safeguards, to test physical evidence. This language tracks prior law. The subsection also requires that oral statements be in written or recorded form. Previously, only oral statements of defendants and codefendants had to be reduced to writing or recorded. The new provision is not limited to defendants and codefendants, and its reach is unclear.

What agencies' files must the prosecution obtain and make available for the defendant's review? The language of the statute both establishes the prosecution's obligation and limits it, although some questions may remain. The clearest way to consider this issue may be to look at different types of agencies.

1. Obviously, files within the prosecuting district attorney's own office are subject to the new discovery requirements.
2. The files of state and local law enforcement offices (as well as other district attorneys' offices) involved in investigating the defendant are also subject to discovery. Revised G.S. 15A-501 reinforces this obligation, stating that following the arrest of a person for a felony, law enforcement must make available to the prosecutor on a timely and continuing basis all materials and information acquired in the course of the investigation. These requirements are similar to the state's obligations under the prior discovery statute and *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court decision requiring the state to turn over exculpatory evidence. *See* *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutor has duty to learn of favorable evidence known to others acting on government's behalf in case); *State v. Smith*, 337 N.C. 658, 447 S.E.2d 376 (1994) (under *Brady*, prosecution deemed to have knowledge of information in possession of law enforcement); *State v. Pigott*, 320 N.C. 96, 357 S.E.2d 631 (1987) (court holds under prior discovery statute that prosecutor is obligated to turn over discoverable information in possession of those working in conjunction with him or his office; photographs taken by law enforcement officer were subject to discovery).
3. The files of state and local agencies that are not law enforcement or prosecutorial agencies, such as schools and social services departments, would appear to be exempt from the statutory discovery procedures in most circumstances. A defendant may still be entitled to obtain the information in some instances, however. First, the disclosure requirements would apply to materials obtained from other agencies by law enforcement or prosecutorial agencies during the investigation of the defendant. Second, in some circumstances a defendant may have the right to obtain the information directly from the agency possessing it, either by subpoena or motion to the court. *See generally* *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (describing defendant's right to obtain records possessed by third parties). Third, an agency could be involved in a criminal investigation to the extent that it could be considered to be acting in a law enforcement capacity, and the portion of its files pertaining to the investigation could become subject to the statutory disclosure requirements. Whether an agency has crossed this line may be difficult to determine. *See generally* *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147

- (1993) (social worker representing abused child acted as law enforcement agent in interviewing defendant, rendering inadmissible custodial statements made to worker without benefit of *Miranda* warnings); *Martinez v. Wainwright*, 621 F.2d 184, 186–88 (5th Cir. 1980) (in case applying *Brady v. Maryland*, court found that prosecution was obligated to disclose evidence in medical examiner’s possession; although not a law enforcement agency, medical examiner’s office was participating in criminal investigation).
4. Information collected by federal agencies may be subject to disclosure in some circumstances. The prosecution would appear to be obligated to turn over information that it or state or local law enforcement agencies obtained from federal agencies (unless the prosecution obtained a protective order). When state and federal law enforcement agencies are engaged in a joint investigation of the defendant, the prosecution also may have an obligation to request information obtained by the federal agency. Ultimately, however, the prosecution’s obligation to obtain information from non-state agencies would appear to be limited by the willingness of the other agencies to provide it. *See generally* *State v. Crews*, 296 N.C. 607, 252 S.E.2d 745 (1979) (prior discovery law obligated state to produce information in its possession, custody, or control; materials within possession of mental health center and social services department were not subject to statutory discovery where prosecution was denied access to and had no power to obtain information).

Expert witnesses. Under new subsection (a)(2) of G.S. 15A-903, the prosecution must give notice to the defendant of any expert witness that it reasonably expects to call as a witness at trial. Each such witness must prepare, and the prosecution must furnish to the defendant, a report of the results of any examinations or tests, including the expert’s opinion and underlying basis for that opinion. The expert also must provide his or her curriculum vitae. The courts had interpreted the prior discovery provisions as allowing trial courts to require testifying experts for each side to prepare reports of their findings and furnish the reports to the other side. *See* *State v. East*, 345 N.C. 535, 481 S.E.2d 652 (1997). The new provision makes this practice an explicit requirement. The specified information must be produced a reasonable time before trial, as determined by the trial court.

Other witnesses. Subsection (a)(3) of G.S. 15A-903 provides that at the beginning of jury selection, the state must provide to the defendant a list of all other witnesses whom the state reasonably expects to call at trial. Previously, trial judges often pressed the parties to disclose their witnesses before jury selection, which helped expedite the trial. The new subsection makes this practice a requirement, subject to three exceptions. First, the prosecution may omit names if it certifies in writing and under seal to the court that disclosure may subject the witnesses or others to physical or substantial economic harm or coercion or that there is other particularized compelling need. The statute does not explicitly require court approval, but a prudent prosecutor may want to obtain it. The omission of a witness’s name without adequate cause could be grounds for sanctions, including the witness being precluded from testifying. Second, if the prosecution in good faith did not list a witness because it did not reasonably expect to call the witness, the statute does not bar the prosecution from calling the witness. Third, the court has the discretion to permit an undisclosed witness to testify in the interests of justice.

Work product restrictions. The attorney work-product doctrine is “designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client’s case.” *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977). At its broadest the doctrine has been interpreted as protecting information collected by an attorney and his or her agents in preparing a case, including witness statements and other factual information. *See* *Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing doctrine in civil cases). At its core the doctrine is concerned with protecting the attorney’s mental impressions, opinions, conclusions, theories, and strategies. *See* *Hardy*, 293 N.C. at 126, 235 S.E.2d at 841. Former G.S. 15A-904 reflected the broader version of the work-product doctrine, although the statute did not specifically mention the term. *Id.* (discussing statute and doctrine). It allowed the state to withhold from the defendant internal documents made by the prosecutor, law enforcement, or others acting on the state’s behalf in the course of investigating or prosecuting the case unless

the document fell within certain discoverable categories (for example, it contained the defendant's statement). Revised G.S. 15A-904 embodies the narrower version of the doctrine. It continues to protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the state.

The revised statute provides that the state may withhold the following from discovery:

- Written materials, including witness examinations, voir dire questions, opening statements, and closing arguments, drafted by the prosecuting attorney or his or her legal staff for their own use at trial
- Legal research
- Records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or his or her legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or his or her legal staff

Thus, the revised statute no longer protects materials prepared by non-legal staff or by personnel not employed by the prosecutor's office, such as law enforcement officers. It also does not protect evidence or information obtained by a prosecutor's office. For example, interview notes reflecting a witness's statements, whether prepared by a law enforcement officer or a member of the prosecutor's office, would not be protected under the work-product provision; however, notes made by the prosecutor or his or her legal staff reflecting their theories, strategies, and the like remain protected.

Prosecution Discovery Rights

The legislation significantly adds to the prosecution's discovery rights in G.S. 15A-905, retaining the previous two categories of discovery and creating three new ones.

Documents and reports of examinations and tests. G.S. 15A-905(a) has given the state the right to inspect and copy books, papers, photographs, and other tangible objects that the defendant intends to introduce in evidence at trial. G.S. 15A-905(b) has given the state the right to: (1) inspect and copy the results or reports of physical or mental examinations or tests, measurements, or experiments made in connection with the case if the defendant intends to introduce them at trial or they were prepared by and relate to the testimony of a witness whom the defendant intends to call at trial; and (2) test physical evidence, subject to appropriate safeguards, if the defendant intends to offer the evidence or tests or experiments made in connection with the evidence. The new legislation retains these rights. The only change is that if the defendant requests and obtains from the prosecution any discovery authorized by G.S. 15A-903, the prosecution is entitled to seek all of the discovery authorized by G.S. 15A-905, not just the particular category of discovery requested by the defendant (see "Basic Procedures," above).

Notice of defenses. The first of three new categories of prosecution discovery is found in G.S. 15A-905(c)(1). It requires the defendant to give notice of his or her intent to offer at trial any of the following defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, and voluntary intoxication. The defendant must give this notice within twenty working days after the date the case is set for trial pursuant to G.S. 7A-49.4 or within such other time as set by the court. The notice is inadmissible against the defendant at trial.

Conforming changes are made to G.S. 15A-959, which contains a notice requirement for the defense of insanity and the introduction of expert testimony relating to a mental condition that bears on whether the defendant had the mental state required for the offense charged. Under amended G.S. 15A-959(a), if the defendant intends to raise the defense of insanity, he or she must comply with the time limits in revised G.S. 15A-905(c)(1); in cases not subject to G.S. 15A-905(c)(1)—that is, cases in which the defendant has not requested discovery and the prosecution has no reciprocal discovery rights—the defendant must give notice of the defense of insanity within a reasonable time before trial. Likewise, under amended G.S. 15A-959(b), if the case is not subject to G.S. 15A-905(c), the defendant must give notice of the intent to use the indicated expert testimony within a reasonable time before trial; if the prosecution has reciprocal discovery rights

under G.S. 15A-905(c), the defendant must give notice of the defenses listed in subsection (c)(1) and notice of his or her expert witnesses as provided in subsection (c)(2), discussed below.

For the defense of alibi, the court upon motion of the state may order the defendant to disclose the identity of his or her alibi witnesses two weeks before trial. If the state makes the motion and the court orders disclosure, the court must require the state to disclose any rebuttal alibi witnesses no later than one week before trial. The court may set different time limits if the parties agree.

For defenses for which the burden is on the defendant to persuade the jury—namely, duress, entrapment, insanity, automatism, and involuntary intoxication—the revised statute provides that the notice of defense also must contain specific information as to the nature and extent of the defense.

Expert and other witnesses. G.S. 15A-905(c)(2) mirrors G.S. 15A-903(a)(2), discussed above, which gives the defendant the right to discovery of the state’s expert witnesses. It requires the defendant to give notice to the state of the expert witnesses he or she reasonably expects to call at trial and to provide the state a report by each such witness and other supporting information. The defendant must produce the information within a reasonable time before trial, as specified by the trial court.

Likewise, G.S. 15A-905(c)(3) mirrors G.S. 15A-903(a)(3). It provides that at the beginning of jury selection, the defendant must furnish the state a list of all other witnesses he or she reasonably expects to call at trial. The circumstances in which nondisclosure is permitted are the same as those in G.S. 15A-903(a)(3).

Work product restrictions. G.S. 15A-906, which protects the defendant’s “work product,” was not changed. It reflects that the defendant’s discovery obligations, although expanded, remain narrower than the prosecution’s. Thus, under G.S. 15A-905 the defendant must provide certain categories of information to the state, not his or her complete files. G.S. 15A-906 recognizes that internal defense documents outside these categories are not subject to discovery.

Domestic Violence

The General Assembly passed a package of legislation addressing domestic violence and related issues. The principal act, S.L. 2004-186 (H 1354), spans several areas of law, incorporating recommendations made by the House Select Committee on Domestic Violence, created by the General Assembly in 2003. The act is referred to here as the DV Act. Unless otherwise noted, all changes are contained in that act. The discussion here concerns changes involving criminal law and procedure. For civil law matters involving domestic violence, refer to Chapter 3, “Children, Families, and Juvenile Law.”

Criminal Offenses and Sentencing

New strangulation offense. The DV Act creates a new felony offense of strangulation. Effective for offenses committed on or after December 1, 2004, new G.S. 14-32.4(b) makes it a Class H felony to

- assault another person and
- inflict physical injury by
- strangulation.

The new subsection does not define *strangulation* or *physical injury*. (The revised habitual misdemeanor assault offense, discussed below, also makes “physical injury” an element of the offense, but that section does not define the term either.)

Courts in other states, interpreting the term “strangulation” primarily in murder cases in which strangulation was an element of the offense, have looked to dictionaries for guidance. Although the term “strangulation” (or “strangle”) often is used to refer to acts that result in death, it does not always refer to lethal acts, and the General Assembly certainly could not have intended in an assault statute to refer only to actions resulting in death. Webster’s Third New International

Dictionary (3d ed. 1966) gives as one definition “inordinate compression or constriction of a tube or part (as the throat . . .) esp. to a degree that causes a suspension of breathing, circulation, or passage of contents.”

If this or a comparable definition of strangulation is used, the act of strangulation alone could be sufficient to satisfy the element of “physical injury.” Because the statute requires both strangulation and physical injury, however, additional evidence of injury may be necessary to prove the offense. *See generally* State v. Kelly, 580 A.2d 520 (Conn. App. 1990) (offense of assault on peace officer under Connecticut statute required proof of “physical injury,” defined as “impairment of physical condition or pain”; court finds that judo stranglehold that made officer grow faint to the verge of unconsciousness qualified as impairment of physical condition). In comparison to existing assault offenses in North Carolina, the injuries required to prove “physical injury” would certainly not need to be as great as for the Class F felony of assault inflicting “serious bodily injury” under G.S. 14-32.4(a). Injuries inflicted by strangulation may not need to be as great as for the misdemeanor offense of assault inflicting “serious injury” under G.S. 14-33(c). More would appear to be required, however, than is required for the offense of battery under G.S. 14-33(a), which may be proved by mere physical contact. *See* State v. West, 146 N.C. App. 741, 554 S.E.2d 837 (2001) (defining battery as unlawful application of force, however slight). The new strangulation offense could not be established by the threat of physical injury without physical contact, which can be sufficient for assault offenses such as simple assault under G.S. 14-33(a) and assault on a female under G.S. 14-33(c). *See* State v. Wortham, 318 N.C. 669, 351 S.E.2d 294 (1987).

Habitual misdemeanor assault. Under G.S. 14-33.2 a person has been subject to prosecution for habitual misdemeanor assault if he or she (1) violates G.S. 14-33(c) or G.S. 14-34 *and* (2) has five or more prior misdemeanor convictions, two of which were assaults. G.S. 14-33(c) consists of various Class A1 misdemeanor assaults, such as assault on a female and assault with a deadly weapon, and G.S. 14-34 contains the offense of assault by pointing a gun.

Effective for offenses committed on or after December 1, 2004, the DV Act amends both elements of habitual misdemeanor assault. Under amended G.S. 14-33.2 a violation of any subsection of G.S. 14-33 (as well as a violation of G.S. 14-34) satisfies the first element of the offense, but the violation of G.S. 14-33 now must cause “physical injury.” Thus a simple assault in violation of G.S. 14-33(a) would satisfy the first element of habitual misdemeanor assault if it caused physical injury, but an assault that only threatened physical injury would not. Likewise, physical injury is now required for any assault in violation of G.S. 14-33(c), such as assault on a female or assault with a deadly weapon. The possible meaning of *physical injury* is discussed above in connection with the new offense of assault by strangulation.

As for the second element of habitual misdemeanor assault, the defendant must have two or more prior convictions (rather than five convictions) for either misdemeanor or felony assault (rather than misdemeanor assault only). The earlier of the two prior convictions must not have occurred more than fifteen years before the date of the current offense.

The amended statute also provides that a conviction of habitual misdemeanor assault may not be used as a prior conviction for any other habitual offense prosecution, such as a habitual felon prosecution. The amendment reverses North Carolina case law on this issue. *See* State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518 (2000). The amended statute continues to contain no prohibition, however, on the prosecution of a person as a habitual felon when the current felony is habitual misdemeanor assault.

The DV Act explicitly provides that the amendments do not affect prosecutions based on the previous version of the statute for offenses committed on or before December 1, 2004.

Ban on possession of any firearm by a convicted felon. G.S. 14-415.1 has prohibited a person who has been convicted of a felony from possessing a handgun or other firearm of comparable length outside his or her home or business. Thus a convicted felon could possess a handgun inside his or her home or business and a longer firearm, such as a shotgun, in other areas. Prior to 1995 the prohibition was for five years after the person completed his or her sentence, including any period of probation or parole. In 1995 the General Assembly revised the statute to

impose a lifetime ban on the possession of handguns by a convicted felon outside the home or business.

Effective for offenses committed on or after December 1, 2004, the DV Act revises G.S. 14-415.1 to extend the ban to all firearms, regardless of type or length and regardless of where possessed. The DV Act accomplishes this result by deleting from G.S. 14-415.1 the language that limited the prohibition to handguns and other firearms of a certain length and that allowed a convicted felon to possess a firearm in his or her home or business. Presumably a convicted felon would still have a defense to this charge in the rare case in which he or she briefly came into possession of a firearm while defending him- or herself or acting out of some other necessity, such as disarming an attacker. *See, e.g., United States v. Newcomb*, 6 F.3d 1129 (6th Cir. 1993) (defendant produced sufficient evidence to warrant instruction on justification defense); *State v. Boston*, ___ N.C. App. ___, 598 S.E.2d 163 (2004) (evidence did not support claim that defendant was under imminent threat of death or great bodily injury). The DV Act explicitly states that it does not affect prosecutions under the previous version of the statute for offenses committed before December 1, 2004.

Assault in the presence of a minor. In 2003 the General Assembly created new G.S. 14-33(d), providing that a person who committed an assault with a deadly weapon or an assault inflicting serious injury in violation of G.S. 14-33(c)(1) had to be placed on supervised probation in addition to any other punishment if the offense was committed in the presence of a minor and was against a person with whom the defendant had a personal relationship. This language created some uncertainty about the permissible sentence that could be imposed because a defendant cannot be given both supervised probation and an active sentence; therefore one interpretation of the new section was that a judge was precluded from imposing an active sentence. S.L. 2004-199 (S 1225) clears up this uncertainty by revising G.S. 14-33(d) to provide that a defendant *who is sentenced to a community punishment* must be placed on supervised probation in addition to any other punishment; thus, if the court sentences a defendant to active imprisonment, the requirement of supervised probation does not apply. Revised G.S. 14-33(d) also clarifies that assault in the presence of a minor is a distinct offense by designating it a Class A1 misdemeanor. Thus, for the state to rely on the mandatory punishment provisions in G.S. 14-33(d), which also include a minimum active sentence of imprisonment for a second offense, it would have to allege the required elements of the offense and prove them to the fact finder beyond a reasonable doubt.

Revised aggravating factor for felonies. G.S. 15A-1340.16(d) lists aggravating factors that may be considered in determining the sentence to be imposed under structured sentencing. One of the aggravating factors, in G.S. 15A-1340.16(d)(15), has been that the defendant took advantage of a position of trust or confidence. Effective for offenses committed on or after December 1, 2004, the DV Act revises that factor to specify that a position of trust or confidence includes a domestic relationship. *Domestic relationship* is not defined. *Compare* G.S. 50B-1 (for purposes of civil protective orders, statute requires that plaintiff and respondent have or have had “personal relationship”) *with* G.S. 15A-534.1 (for purposes of applying 48-hour pretrial release procedures for domestic violence offenses other than Chapter 50B violations, statute requires that victim be spouse or former spouse of defendant or person with whom defendant lives or has lived as if married) and G.S. 14-134.3 (for purposes of crime of domestic criminal trespass, statute requires that premises have been occupied by present or former spouse or person with whom defendant has lived as if married).

Domestic violence treatment program as part of sentence. G.S. 15A-1343 has allowed courts in imposing probation to impose as a special condition that the defendant attend and complete an abuser treatment program. Effective for offenses committed on or after December 1, 2004, the DV Act amends that statute to make attendance at an abuser treatment program a regular condition of probation if (1) the court finds that the defendant is responsible for acts of domestic violence and (2) a program approved by the Domestic Violence Commission is reasonably available to the defendant. The court retains the discretion not to impose this condition if it finds that doing so would not be in the best interests of justice.

The DV Act also adds new G.S. 143B-262(e) requiring the Department of Correction (DOC) to establish a domestic violence treatment program for defendants sentenced to a term of active

imprisonment in DOC's custody. The new subsection provides that DOC shall ensure that defendants complete the program before their release unless other requirements, deemed critical by DOC, prevent completion.

Additional reporting and sentencing provisions. Article 86 of G.S. Chapter 15A has addressed the reporting of dispositions in criminal cases. The DV Act adds to that article new G.S. 15A-1382.1 containing both reporting and sentencing requirements for certain domestic violence cases. New G.S. 15A-1382.1(a) provides that when a defendant is found guilty of an offense involving assault or communicating a threat, the court must determine whether the defendant and victim had a personal relationship as defined in G.S. 50B-1(b). (*An offense involving assault* is defined as including any offense in which an assault occurred, whether or not the conviction is for an offense under G.S. Chapter 14, Article 8, "Assaults.") If so, the judge must indicate on the form reflecting the judgment that the case involved domestic violence, and the clerk of court must ensure that the official record of the defendant's conviction includes the court's determination.

New G.S. 15A-1382.1(b) deals with sentencing in such cases. (Subsection (b) does not specifically state the types of offenses to which it applies, providing only that the judge must consider the indicated sentencing options upon determining that there was a personal relationship between the defendant and the victim; however, because subsection (a) requires the judge to determine the existence of a personal relationship only if the defendant is convicted of assault or communicating a threat, the General Assembly likely intended for subsection (b) to be limited to those circumstances.) The new subsection provides that if the judge imposes a community punishment, he or she must determine whether the defendant should be required to comply with one or more special conditions of probation under G.S. 15A-1343(b1). The new subsection provides further that the court may impose house arrest under G.S. 15A-1343(b1)(3c), even though such a condition is authorized in other cases only if the court imposes an intermediate punishment. Both the reporting and sentencing changes apply to offenses committed on or after December 1, 2004.

Study of misdemeanor classifications, including assault inflicting serious injury. The DV Act states that the North Carolina Sentencing and Policy Advisory Commission (Sentencing Commission) has developed criteria for classifying felony offenses but has not done so for misdemeanors. The act states further that the misdemeanor offense of assault inflicting serious injury has an element—serious injury to person—that is a type of harm used in distinguishing among felonies and that classifying such an offense as a misdemeanor is inconsistent with the Sentencing Commission's felony classification criteria. The DV Act therefore directs the Sentencing Commission to study and develop a system for classifying misdemeanor offenses, particularly assault offenses, based on their severity. The Sentencing Commission may consider reclassifying existing offenses and creating new offenses to ensure proportionality and consistency. The commission must report its findings and recommendations by the 2005 regular session and make a final report by the 2006 regular session.

Criminal Procedure and Evidence

Warrantless arrest for violation of pretrial release conditions. The DV Act expands the circumstances in which a law enforcement officer may arrest a person before an arrest warrant has been issued. Effective for offenses committed on or after December 1, 2004, new G.S. 15A-401(b)(2)f. provides that an officer may arrest a person without an arrest warrant or order for arrest if the person has violated pretrial release conditions imposed under G.S. 15A-534.1(a)(2). This subsection includes conditions that may be imposed in connection with certain crimes involving domestic violence, such as a condition that the defendant stay away from the alleged victim's home. In other cases involving violations of pretrial release conditions, the appropriate judicial official must issue an order for the person's arrest. Upon making an arrest—whether with a warrant or order for arrest or without one—the law enforcement officer must take the arrested person without unnecessary delay to a magistrate, and the magistrate has the responsibility of setting new pretrial release conditions. *See* G.S. 15A-501 and -511 (describing procedures upon

arrest). If the defendant is also charged with a new domestic violence offense subject to G.S. 15A-534.1, the magistrate cannot set pretrial release conditions for the new offense; only a judge may do so.

Issuance of cross-warrants. G.S. 15A-304 provides that a judicial official may issue an arrest warrant when he or she is supplied with sufficient information, supported by oath or affirmation, that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it. The DV Act amends G.S. 15A-304 to clarify that when probable cause exists to issue an arrest warrant, a judicial official may not refuse to issue a warrant solely because a prior warrant has been issued for the arrest of another person involved in the same matter. For example, suppose John goes to the magistrate's office and, based on the information he presents that Sally assaulted him, the magistrate issues a warrant for Sally's arrest. Sally later goes to the magistrate and presents sufficient information to show probable cause that John assaulted her. Amended G.S. 15A-304 clarifies that the magistrate may not refuse to issue a warrant for John's arrest—in other words, a cross-warrant—solely because John got to the courthouse and obtained a warrant first. The amended statute continues to provide that a judicial official may not issue a warrant, including in situations involving cross-warrants, if the information provided is insufficient to show probable cause. A judicial official retains the discretion, under G.S. 15A-303 and -304, to issue a criminal summons directing the person to appear in court, instead of an arrest warrant directing law enforcement to arrest the person, when the judicial official finds probable cause but concludes that taking the person into custody is unnecessary.

These amendments were effective August 12, 2004.

Clarification of Nurse Privilege. In the 2003 legislative session, the General Assembly enacted G.S. 8-53.13, which established a privilege comparable to the physician–patient privilege for information obtained by nurses. The DV Act clarifies the circumstances in which information privileged under that statute is admissible. First, amended G.S. 8-53.13 provides that if the court has found disclosure of the contents warranted, hospital medical records produced in accordance with G.S. 8-44.1 may be admitted. (G.S. 8-44.1 provides that hospital medical records that have been subpoenaed are admissible if they are authenticated by live testimony or if they have been submitted to the court with an appropriate authenticating affidavit in accordance with North Carolina Rule of Civil Procedure 45(c) regarding subpoenas for hospital medical records.) Second, amended G.S. 8-53.1 provides that, like the physician–patient privilege, the nurse privilege is not grounds for excluding evidence of abuse or neglect of a child under age sixteen in judicial proceedings related to a report of abuse, neglect, or dependency under the Juvenile Code.

The amendments to G.S. 8-53.13 were effective December 1, 2004.

Training, Studies, and Funding

Domestic violence training. G.S. Chapters 17C and 17E require the North Carolina Criminal Justice and Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission to create training standards for law enforcement officers and sheriffs. The DV Act amends those chapters to require the two commissions to adopt standards that include domestic violence training for entry-level officers, in-service training for current officers, and training for domestic violence instructors. Among other things, entry-level and in-service training must include training in investigation procedures for *evidence-based prosecutions*, those in which the alleged victim does not testify. Training must be available by March 1, 2005.

The DV Act also requests the North Carolina Supreme Court to adopt minimum training standards for district court judges presiding in civil and criminal domestic violence cases. In addition, the Administrative Office of the Courts (AOC) is directed to study the issue of domestic violence training for court personnel. The AOC must report its findings and recommendations to the 2005 regular session of the General Assembly.

Domestic violence studies. The DV Act requires various agencies to study issues relating to domestic violence. The North Carolina Department of Public Instruction, in collaboration with the State Board of Education, must study the issue of antiviolence programs in the schools and

training for school personnel who deal with students who are victims of domestic and relationship violence. The Department of Health and Human Services must study the issue of and develop a plan for serving clients of domestic violence programs who have mental health and substance abuse needs. The plan must address, among other things, diagnostic and referral services for such clients. The North Carolina State Bar, in cooperation with the North Carolina Bar Association, must study the issue of giving Continuing Legal Education (CLE) credit to attorneys who provide pro bono legal representation, including the possibility of granting CLE credit for pro bono legal representation of domestic violence victims. The DV Act also amends G.S. 7B-1402 to place two domestic violence representatives—one from the North Carolina Domestic Violence Commission and one from the North Carolina Coalition against Domestic Violence—on the North Carolina Child Fatality Task Force within the Department of Health and Human Services.

Domestic violence program funding. The budget bill [S.L. 2004-124 (H 1414)] appropriates \$132,000 for improvements to the court information system to track domestic violence offenders, \$90,000 for training judicial officials on domestic violence issues, and \$20,000 for the Sentencing Commission to study misdemeanor offense classifications. The budget bill adds one position to the Criminal Justice Training Division and one position to the Sheriffs' Standards division to develop and oversee domestic violence training for various law enforcement personnel. It also states that the creation of various new positions within the court system, such as judgeships and positions in district attorneys' offices, is necessary, for among other reasons, to enhance the courts' response to domestic violence.

Criminal Offenses

General Provisions

Possession of firearm by felon. Perhaps the biggest change involving criminal offenses this session was the complete elimination of a person's right to possess a firearm after conviction of a felony. This modification, a part of the domestic violence amendments recommended by the House Select Committee on Domestic Violence, is discussed under "Domestic Violence," above.

Increased penalties for offenses involving methamphetamine. In response to concerns about the spread of methamphetamine labs in North Carolina, the General Assembly increased the penalties for several offenses involving that drug. Effective for offenses committed on or after December 1, 2004, S.L. 2004-178 (S 1054) makes the following changes:

1. G.S. 14-17 has defined second-degree murder to include murder proximately caused by the unlawful distribution of cocaine when ingestion of the cocaine causes the user's death. That statute is revised to make such actions involving methamphetamine second-degree murder as well.
2. G.S. 90-95(b) has made it a Class H felony to manufacture a Schedule II controlled substance. That section is revised to make it a Class C felony to manufacture methamphetamine; however, packaging, repackaging, labeling, or relabeling methamphetamine remain Class H felonies even though those actions might otherwise be considered forms of manufacturing.
3. G.S. 90-95(d1) makes it a Class H felony to commit offenses involving immediate precursor chemicals used for the manufacture of a controlled substance. New G.S. 90-95(d1a) provides that if the offenses involve immediate precursor chemicals for the manufacture of methamphetamine, the offenses are Class F felonies. G.S. 90-95(d2) also is revised to add several new substances to the list of precursor chemicals to which subsections (d1) and (d1a) apply.
4. G.S. 15A-1340.16(d) lists the factors that may be used to impose an aggravated sentence for felony offenses. A new aggravating factor is that the offense is the manufacture of methamphetamine and was committed where a person under age eighteen lives, was present, or otherwise was endangered by exposure to the drug.

5. G.S. 15A-1340.16A has provided for an enhanced sentence for the use of a firearm for certain offenses. G.S. 15A-1340.16B and 15A-1340.16C provide similar enhancements for certain other conduct. New G.S. 15A-1340.16D provides that a person's sentence must be increased by twenty-four months if (1) the offense is manufacture of methamphetamine; (2) certain personnel, such as law enforcement officers, were seriously injured while discharging their duties; and (3) such injury was directly caused by a hazard associated with the manufacture of methamphetamine. If the offense involves packaging, repackaging, labeling, or relabeling, the enhancement does not apply. The new section requires that the enhancement be alleged in the indictment or information, submitted to the jury for decision, and proved by the state beyond a reasonable doubt.

In addition to the criminal law changes discussed above, new G.S. 130A-284 directs the Commission for Health Services to adopt rules containing decontamination standards for property that has been used for the manufacture of methamphetamine and requires property owners and others in control of the property to comply with those rules; and new G.S. 114-43 provides civil and criminal immunity for certain actions taken in good faith as part of a Methamphetamine Watch Program approved by the Department of Justice, such as cooperating in a law enforcement investigation concerning the manufacture of methamphetamine.

To combat illegal methamphetamine operations, the budget bill (S.L. 2004-124) creates six sworn lab positions and eight sworn agent positions in the SBI. The budget bill also states that the creation of various new positions within the court system, such as judgeships and assistant district attorney positions, is necessary, for among other reasons, to assist the courts in dealing with the growth in the methamphetamine caseload.

Firearm on educational property. S.L. 2004-198 (H 1453) revises G.S. 14-269.2(b), which has made it a Class I felony to possess a firearm on educational property, to create a new offense of discharging a firearm on educational property, a Class F felony. The act provides, in new G.S. 14-269.2(g)(4), that the prohibition on possession and use of weapons on educational property does not apply to weapons used for hunting with the written permission of the school's governing board. S.L. 2004-198 is effective for offenses committed on or after December 1, 2004.

Specialized assault. S.L. 2004-26 (H 1373) creates G.S. 14-33(c)(7) to make it a Class A1 misdemeanor to assault a public transit operator, whether a public employee or private contractor, when the operator is discharging or attempting to discharge his or her duties. Previously, assault on a public employee performing such duties could be prosecuted as assault on a government official under G.S. 14-33(c)(4), also a Class A1 misdemeanor, while assault on a private contractor could be prosecuted as a simple assault under G.S. 14-33(a), a Class 2 misdemeanor. S.L. 2004-26 is effective for offenses committed on or after December 1, 2004.

Threatening witness. Effective for offenses committed on or after December 1, 2004, S.L. 2004-128 (S 577) revises G.S. 14-226, which has made it a Class H felony to intimidate a witness in state court, to provide that it is a violation of the statute for a criminal defendant to threaten a witness in the defendant's case with the assertion or denial of parental rights. Other parts of the act, discussed under "Collateral Consequences," below, deny parental rights to a person convicted of a rape resulting in the birth of a child.

Peeping changes. Last session the General Assembly substantially revised G.S. 14-202, the statute prohibiting peeping, to create several new peeping offenses. S.L. 2004-109 (S 1167) adds G.S. 14-202(a1) making it a Class 1 misdemeanor to secretly peep under or through the clothing of another person without consent using a mirror or other device to view the other person's body or undergarments. The act also revises G.S. 14-202(l), which has required the sentencing court to consider whether to require a person to register as a sex offender upon a second or subsequent conviction of certain peeping offenses. The act amends that subsection to add a violation of new G.S. 14-202(a1) to the list of potential triggering offenses. These provisions are effective for offenses committed on or after December 1, 2004.

Indecent liberties with student. G.S. 14-202.4 has made it a Class I felony for school personnel to engage in indecent liberties (that is, conduct for the purpose of arousing or gratifying sexual desire) with a student. One element of the offense has been that the school official and student must have been at the "same school" before or at the time of the sexual conduct. Under the

previous definition of “same school,” a student had to be enrolled at, and the school official had to be employed at, assigned to, or a volunteer at the school in question. Effective for offenses committed on or after December 1, 2004, S.L. 2004-203 (H 281) expands the definition of “same school” by providing that a student and school official are also considered at the same school if the student and official are present at a school-sponsored or school-related activity. The act does not change the definition of “same school” in G.S. 14-27.7A, which applies to vaginal intercourse and certain other sexual acts by school personnel with students.

Rebirthing. In 2003 the General Assembly passed G.S. 14-401.21 outlawing “rebirthing techniques” that include restraint and create a situation in which a person may suffer physical injury or death. The budget bill (S.L. 2004-124) amends that section to provide that no state funds may be used to pay for unlawful rebirthing techniques performed in another state that permits the technique. The amendment was effective July 1, 2004.

Unlawful removal or destruction of electronic dog collars. S.L. 2004-60 (H 1613) adds Anson and Chowan to the list of counties in which it is a Class 2 misdemeanor, under G.S. 14-401.17, to remove or destroy an electronic dog collar placed on a dog by its owner. The amendment increases the number of covered counties to thirty-eight. It is effective for offenses committed on or after October 1, 2004.

Regulatory Offenses

Use of unauthorized CB radio. Effective for offenses committed on or after December 1, 2004, S.L. 2004-72 (H 257) creates G.S. 62-328 to make it a Class 3 misdemeanor to knowingly and willfully use a citizens band radio (CB radio) not authorized by the Federal Communications Commission. Certain licensees under federal law are not subject to the new provision.

Professional employer organizations. S.L. 2004-162 (S 20) creates new Article 89 in G.S. Chapter 58, establishing a regulatory and licensing scheme for professional employer organizations. Such organizations assign employees to work for client companies on a long-term or continuing basis and share employment responsibilities with the client companies. A violation of the licensing requirements in new G.S. 58-89-170 is a Class H felony under new G.S. 58-89-175. S.L. 2004-162 is effective for contracts entered into, business conducted, and actions taken on or after January 1, 2005.

Electioneering communications. S.L. 2004-125 (H 737) creates new Article 22E in G.S. Chapter 163, establishing a reporting and regulatory scheme for electioneering communications. A violation of the new article is a Class 2 misdemeanor. The criminal penalties in this act are effective for offenses committed on or after October 1, 2004.

Unauthorized insurance. S.L. 2004-166 (H 1107) amends G.S. 58-33-95 to increase the penalty for soliciting, negotiating, or selling insurance on behalf of an unauthorized insurer. Taking such actions knowing that the insurer is unauthorized is a Class H felony; taking such actions without knowledge is a Class 1 misdemeanor. Previously, a violation of the section was a Class 1 misdemeanor. S.L. 2004-166 is effective for offenses committed on or after December 1, 2004.

Fortune-telling. Effective August 17, 2004, S.L. 2004-203 repeals G.S. 14-401.5, which made it unlawful to practice fortune-telling, palmistry, and similar crafts in certain counties.

Wildlife offenses. The General Assembly passed several local bills relating to wildlife offenses and enforcement. Among other things, the General Assembly [in S.L. 2004-87 (H 1649), effective July 9, 2004] authorized Wake County to “regulate, control, restrict, and prohibit hunting” with a firearm while impaired.

Criminal Procedure and Evidence

Jurisdiction over Probation Revocation Hearing

In 1996 the General Assembly revised G.S. 7A-272 to authorize district courts to accept guilty pleas to Class H or I felonies with the consent of the prosecutor, defendant, and presiding judge. If the defendant was placed on probation and thereafter was alleged to have violated probation, the revocation hearing would take place in district court. Confusion arose, however, over which court initially should hear the appeal of a district court's decision to revoke probation, and the North Carolina Supreme Court ultimately interpreted the statutes as giving the defendant the right to a de novo revocation hearing in superior court. *See State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004).

S.L. 2004-128 indirectly addresses this result by adding G.S. 7A-271(e). It provides that unless the state and defendant agree to have the district court hold the revocation hearing, the superior court has exclusive jurisdiction over probation revocation hearings in cases in which the defendant pled guilty to a Class H or I felony in district court. Thus, if the state does not agree, the initial revocation hearing is held in superior court, and the defendant's only right of appeal is to the appellate division. These changes took effect July 26, 2004.

Admissibility of Forensic Analysis

In drug-related prosecutions G.S. 90-95(g) has allowed the state to submit a report of a chemical analysis of a controlled substance, in lieu of calling the analyst as a witness, if the state satisfies certain conditions. Among other things, if the report is to be used in a criminal proceeding in superior court (or in an adjudicatory hearing in juvenile court), the state must notify the defendant of its intent to introduce the report and may introduce it only if the defendant fails to object within the time limits in the statute. [G.S. 90-95(g1) contains similar procedures allowing the state to introduce a written statement to establish chain of custody for a controlled substance.]

Following that approach, Section 15.2(c) of the budget bill (S.L. 2004-124) establishes procedures allowing the state to submit a laboratory report of a forensic analysis, including an analysis of the defendant's DNA, without calling the analyst as a witness. New G.S. 8-58.20 requires that the forensic analysis meet certain standards, that the analyst complete an affidavit containing certain averments (for example, that the analyst is qualified to perform the analysis), and that the prosecutor provide a copy of the report and affidavit to the defendant's attorney (or to the defendant if he or she has no attorney) within the time specified in the statute. If the defendant fails to file a written objection with the court within fifteen business days of receipt of the report and affidavit, the state may introduce the report and affidavit without calling the analyst as a witness unless the presiding judge rules otherwise. If the defendant timely objects, the state may not introduce the forensic analysis unless it would otherwise be admissible. The notice and objection procedures apply to both district and superior court proceedings. The new section is effective for offenses committed on or after December 1, 2004.¹

1. The new procedures for introducing forensic analysis reports (as well as the procedures for introducing controlled substances reports) must satisfy the U.S. Supreme Court's decision in *Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354 (2004). There, the court held that the Confrontation Clause forbids the state from introducing "testimonial" out-of-court statements except in limited circumstances. The Court did not give a precise definition of *testimonial*, but it most likely includes affidavits such as those described here, which are prepared by the state as part of its criminal investigation. Although not specifically discussed as an exception, the new statutory procedures may satisfy the Confrontation Clause because the state must give notice of its intent to offer the evidence and the defendant has the right to object and prevent the state from introducing the evidence unless it is otherwise admissible. *See State v. Miller*, 790 A.2d 144 (N.J. 2002) (pre-*Crawford* case finds that such a procedure does not violate Confrontation Clause if defendant has no burden other than to submit objection; footnote 2 collects cases reaching similar result); *but see*

Video Testimony

Section 14.5 of the budget bill directs the AOC to conduct a pilot program in Superior Court District 27B (Cleveland and Lincoln counties) allowing SBI lab analysts to testify by videoconference about chain-of-custody issues and other matters. The act provides that analysts may provide such testimony notwithstanding any law to the contrary. The General Assembly appropriated \$25,640 in recurring funds and \$67,589 in nonrecurring funds to purchase the necessary equipment for courthouses in that district and \$3,000 in recurring funds and \$45,500 in nonrecurring funds to the SBI for implementation of the project.

Nurse Privilege

As part of a package of changes concerning domestic violence, the General Assembly clarified the admissibility of information subject to the nurse privilege in G.S. 8-53.13, enacted in 2003. See “Domestic Violence: Criminal Procedure and Evidence,” above.

Law Enforcement

Pistol Purchases

S.L. 2004-183 (H 817) revises G.S. 14-402 to provide that a person may purchase a pistol without a purchase permit if he or she has a valid North Carolina concealed handgun permit and is a North Carolina resident at the time of the purchase. The new law was effective August 10, 2004.

Gaming Tables

Section 47 of S.L. 2004-199 updates G.S. 14-298 to accord with current procedural requirements for the seizure of property. That provision had allowed law enforcement officers to seize and destroy illegal gaming tables, apparently without judicial authorization, upon the receipt of information under oath. It also purported to allow officers to call to their aid “all the good citizens of the county” to help destroy illegal gaming tables. The statute was found to violate due process in *Helton v. Hunt*, 330 F.3d 242 (4th Cir. 2003). The revised statute authorizes law enforcement officers to seize illegal gaming tables if they have probable cause and comply with applicable state law. Thus, unless an exception applies, officers need a warrant to seize gaming tables. The revised statute also contains procedures ensuring judicial oversight of any decision to destroy or otherwise dispose of the property. This act repeals a provision in Section 20 of S.L. 2004-203 (passed earlier in the session) that dealt with the same statute. The new legislation was effective October 1, 2004.

Funds for Rape Kit Backlog

The budget bill (S.L. 2004-124) requires the Department of Justice to use \$250,000 of appropriated funds to contract with private entities to test the backlog of rape kits in storage in local law enforcement agencies.

People v. McClanahan, 729 N.E.2d 470 (Ill. 2000) (court finds that similar statute violates Constitution because it impermissibly requires defendant to take procedural step to secure his or her confrontation rights).

Involuntary Commitment

S.L. 2004-23 (H 1366) amends various sections of the involuntary commitment law to clarify that a custody order issued by a magistrate or clerk is valid throughout the state and can be served in any county in North Carolina no matter where issued. The act was effective June 25, 2004.

Sentencing

Drug Treatment Court Program

S.L. 2004-128 creates G.S. 15A-1340.11(3a) to designate assignment to a drug treatment court program as an intermediate punishment under structured sentencing. The new subsection defines a *drug treatment court program* as one in which, as a condition of probation, offenders are required to comply with certain rules and to participate in specified activities, such as drug screening or testing. The subsection was effective July 26, 2004.

Other Sentencing Changes

Other sentencing changes are discussed in connection with the changes in the domestic violence and methamphetamine laws, under “Domestic Violence” and “Criminal Offenses,” above.

Capital Punishment

Effective August 17, 2004, S.L. 2004-203 revises G.S. 15-190 to provide that the names of those people designated to carry out an execution are confidential, exempt from the public records law, and not subject to discovery or introduction as evidence in any proceeding unless the senior resident superior court judge for Wake County finds that disclosure is necessary to a proper administration of justice. [The budget bill (S.L. 2004-124), effective July 20, 2004, made similar revisions to G.S. 15-190; presumably, S.L. 2004-203, which has a later effective date, supersedes the provisions in the budget bill.]

Victims’ Rights

Payment of Restitution

G.S. 15A-145 allows expunction of records for certain young offenders. As amended by S.L. 2004-133 (H 1518), that section provides that to be eligible for such an expunction, the petitioner must attest in an affidavit, and the court must find, that there are no outstanding restitution orders or civil judgments representing amounts ordered for restitution against the petitioner. The new section applies to petitions for expunctions filed on or after September 1, 2004.

Access to Crime Profits

S.L. 2004-159 (H 1519) adds new Article 2 to G.S. Chapter 15B allowing victims of certain crimes to reach crime profits and other funds received by offenders.

The key definitions in new G.S. 15B-31 are as follows:

- *Offender* means a person who has been convicted of a *felony*, which in turn is defined as a felony that was committed in North Carolina and that resulted in physical or emotional injury or death.
- *Profit from crime* means any income, assets, or property obtained through or generated from the commission of the crime for which the offender was convicted, including profits

from the sale of crime memorabilia or obtained through the use of unique knowledge obtained during the commission of the crime. The term does not include donations or contributions to an offender's appeal if not obtained in exchange for something of material value.

- *Funds of an offender* means funds from any source (not just crime profits), other than earned income and child support, received by an offender while he or she is serving an active sentence of imprisonment, a probationary sentence, or a period of post-release supervision.
- *Eligible person* means the victim of the crime for which the offender was convicted; a surviving spouse, parent, or child of a deceased victim of the offender's crime; or any other person dependent for his or her principal support on a deceased victim of the offender's crime.

G.S. 15B-32 imposes various notice obligations in accordance with these definitions. A person or entity that pays or agrees to pay an offender profit from a crime or funds of an offender exceeding \$10,000 must notify the Crime Victims Compensation Commission (Commission) of the arrangement. The state must give written notice to the Commission if an offender is serving an active sentence of imprisonment and the prison or jail receives funds of an offender in excess of \$10,000. The state also must give written notice to the Commission if it pays or has an obligation to pay funds of an offender in excess of \$10,000. In other instances involving payment of funds of an offender in excess of \$10,000 (for example, an offender is serving a probationary sentence and is to receive the money from an entity other than the state), the offender must give written notice to the Commission. Upon receiving notice the Commission must notify those people eligible to recover from the offender.

If a person or entity (other than the state) fails to give the required notice to the Commission, G.S. 15B-33 authorizes an assessment against that person or entity up to the amount of the payment to the offender, plus a penalty of \$1,000 or 10 percent of the payment, whichever is greater. The Commission must deposit the assessment in an escrow account for the three-year limitations period established by G.S. 15B-34, discussed next. If an eligible person presents to the Commission a civil judgment for damages arising out of the offender's crime, the Commission is to satisfy the judgment up to the amount of the escrow account. If no one comes forward with a judgment within the three-year limitations period, the Commission is to return the assessment to the person or entity that paid it. The penalties for failure to give the required notice are not placed in the escrow account for satisfaction of judgments and are not returned at the end of the three-year limitations period; instead, they go to the Civil Penalty and Forfeiture Fund.

Under new G.S. 15B-34 an eligible person has three years from the discovery of crime profits or funds of an offender to bring a civil action for damages. This provision appears to have the effect of extending the limitations period for civil damage actions, allowing an eligible person to bring a civil action within three years after discovery of crime profits or funds of an offender even if the limitations period has otherwise expired.

G.S. 15B-34 also gives the Commission the authority to seek provisional remedies, such as attachment or receivership, to freeze crime profits and funds of an offender. After the filing of a civil action by an eligible person, the Commission may seek such remedies to the extent the plaintiff in the civil action could do so. The Commission may seek provisional remedies before the filing of a civil action by an eligible person if such remedies would otherwise be authorized before commencement of an action.

The act applies to contracts for crime profits entered into, and funds of an offender that have accrued, on or after October 1, 2004. Any action taken by an offender to defeat the purpose of the new article is void as against public policy under new G.S. 15B-37.

Crime Victims' Compensation

G.S. Chapter 15B contains procedures for the payment of compensation to victims of certain criminal conduct. The budget bill (S.L. 2004-124) amends the definition of *allowable expense* in

G.S. 15B-2(1) to specify that compensation for medical expenses is limited to 66 2/3 percent of the amount usually charged by the provider for treatment or care. The amended section also states that a medical provider who accepts compensation paid as an allowable expense agrees that the compensation constitutes payment in full for the treatment and care and that he or she will not hold the patient financially responsible for additional sums for that service.

To eliminate the backlog of approved but unpaid claims for compensation, the budget bill appropriates \$2.5 million in nonrecurring funds to the Crime Victims Compensation Fund. The budget bill states that this increase will allow the crime victims compensation program to draw an additional \$1.5 million in federal matching funds.

Collateral Consequences

Parental Rights and Conviction of Rape

S.L. 2004-128 amends G.S. 14-27.2 and -27.3 to provide that a person convicted of first- or second-degree rape has no rights to custody of or inheritance from a child born as a result of the rape. The person also has no rights under the adoption or abuse, neglect, and dependency statutes. The act makes conforming amendments to G.S. 48-3-603(a), G.S. 50-13.1, and various provisions in Chapter 7B. These amendments are effective for offenses committed on or after December 1, 2004.

Criminal Record Checks

Continuing a trend of several years, the General Assembly authorized the Department of Justice (DOJ) to provide criminal history record checks for the following additional personnel:

- Effective July 13, 2004, S.L. 2004-89 (S 1254) amends G.S. 90-652 to authorize DOJ to provide a criminal record check to the Respiratory Care Board for applicants for licensure.
- Effective October 1, 2004, S.L. 2004-171 (S 676) amends G.S. 53-243.16 to authorize DOJ to provide a criminal record check to the Commissioner of Banks for applicants for licensure as mortgage bankers; if the applicant is a corporation or other entity, DOJ may provide a criminal record check for any person who has control, is the managing principal, or is the branch manager of the entity.

Section 10.1 of the budget bill (S.L. 2004-124) directs the Department of Health and Human Services (DHHS) to centralize all activities relating to the processing of criminal record checks, beginning January 1, 2005. Section 10.36 of the budget bill directs the Division of Child Development to use lapsed salary money to support up to three additional temporary positions to eliminate the backlog of criminal record checks for child care centers. Effective January 1, 2005, Section 10.19D of the budget bill amends G.S. 131E-265 concerning nursing homes and home care agencies, G.S. 131D-40 concerning adult care homes, and G.S. 122C-80 concerning mental health area authorities to clarify that DOJ shall provide national criminal record checks for certain positions not covered by federal law. To carry out these duties, the act directs DHHS to use up to \$200,000 from appropriated funds and to transfer to DOJ \$284,000 for processing expenses and office space for fiscal year 2004–2005. The budget bill also provides that DOJ may establish up to eleven positions from receipts for background checks on direct service providers at adult care homes.

Studies

Unless otherwise indicated, all of the studies discussed below were authorized by the studies bill, S.L. 2004-161 (S 1152). Studies pertaining to domestic violence and juvenile proceedings are discussed under the applicable headings, above.

Criminal Issues

- The Legislative Research Commission is authorized to study sentencing guidelines, judicial approval for pleas in certain cases; reclassifying statutory rape, amendments to the habitual felon law, restructuring prior criminal record points; sentence lengths, adjusting penalties for Class B1 to E felonies, arson offenses, drug trafficking laws, youthful offenders, street gang terrorism prevention, trafficking in persons, casino nights for nonprofits, and charitable bingo.
- The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee is authorized to study the state's current system of structured sentencing and compare it with the federal system. It also is directed, in Section 14.2A of the budget bill (S.L. 2004-124), to study the funding formula used for state funding to community mediation centers.
- The Sentencing Commission is required to study the structured sentencing laws in light of *Blakely v. Washington*, the U.S. Supreme Court's decision raising questions about the constitutionality of certain aspects of North Carolina's sentencing scheme.
- The AOC and DOC are directed to study the process for collecting and paying restitution and to determine methods for reducing the number of restitution payments that go unclaimed. The AOC and DOC are also directed, in Section 17.12 of the budget bill, to study ways to improve the collection rate of fees from probationers and nonprobationers sentenced to community service.
- Section 15.1 of the budget bill directs the Office of State Budget and Management to study the cost of the DCI-PIN system.

Corrections

- The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee (Committee) is authorized to study the issue of people who escape from the custody of the Department of Juvenile Justice and Delinquency Prevention (DJJDP) and to develop appropriate sanctions. If it undertakes this study, the committee shall consult with DJJDP, the AOC, and the Sentencing Commission to develop a statutory scheme under which both juveniles and people over the age of sixteen shall be punished for escaping from the custody of DJJDP.
- The Committee is also authorized to study the confinement of inmates who are irreversibly physically incapacitated due to chronic illness or disability. The Committee's study may include a review of current policies, a calculation of potential population figures and medical care costs, a determination of possible alternatives to incarceration and accompanying costs, and a consideration of procedures for termination or commutation of sentences.
- The Post-Release Supervision and Parole Commission is required, in Section 17.10 of the budget bill, to report on a plan for restructuring and reducing staff in light of reduced workload. The Sentencing Commission, in consultation with the Post-Release Supervision and Parole Commission, is to review alternatives for transferring responsibility for post-release supervision to another division of DOC or to the Judicial Department.

John Rubin

