

# Sentencing, Corrections, Prisons, and Jails

As discussed in Chapter 6, “Criminal Law and Procedure,” the General Assembly’s main activity in the criminal law field in 2008 focused on sex offenders and gangs. New legislation in those arenas creates new crimes, raises the offense class of existing crimes, and it adds additional sentence enhancements and aggravators.

With respect to corrections, probation was under the microscope this year. In the wake of the murders of a UNC Chapel Hill undergraduate in Chapel Hill and a Duke University graduate student in Durham—both allegedly committed by probationers—the General Assembly looked for ways to evaluate probation officer caseloads, management oversight, and information sharing between the Division of Community Corrections (DCC) and other state agencies.

## Sentencing

### Summary of Offense Class Changes

The following is a summary of offense class and sentence enhancement changes the General Assembly made in 2008. All of the changes became effective for offenses committed on or after December 1, 2008, unless otherwise indicated. For summaries of substantive changes in the law accompanying these offense class changes, see Chapter 6, “Criminal Law and Procedure.”

- Injuring houses, churches, fences and walls (G.S. 14-144) is made a Class I felony when damages are in excess of \$5,000; under previous law this offense was a Class 2 misdemeanor, irrespective of the cost of damage. S.L. 2008-15 (H 946).
- Placing a burning or flaming cross on the property of another or on a public street or highway or on any public place (G.S. 14-

12.12) is changed from a Class I to a Class H felony. S.L. 2008-197 (S 685).

- First degree sexual exploitation of a minor (G.S. 14-190.16) is changed from a Class D to a Class C felony. S.L. 2008-117 (H 933).
- Second degree sexual exploitation of a minor (G.S. 14-190.17) is changed from a Class F to a Class E felony. S.L. 2008-117.
- Third degree sexual exploitation of a minor (G.S. 14-190.17A) is changed from a Class I to a Class H felony. S.L. 2008-117.
- Promoting prostitution of a minor (G.S. 14-190.18) is changed from a Class D to a Class C felony. S.L. 2008-117.
- Solicitation of a child by computer to commit unlawful sex act [G.S. 14-202.3(c)] is changed from a Class H to a Class G felony if the defendant or any person for whom the defendant was arranging the meeting actually appears at the meeting location. S.L. 2008-218 (S 132).
- Child abuse (G.S. 14-318.2) is changed from a Class 1 to a Class A1 misdemeanor. S.L. 2008-191 (S 1860).
- Failure to stop in the event of a crash resulting in death or serious bodily injury (G.S. 20-166) is changed from a Class H to a Class F felony. S.L. 2008-128 (S 944).
- The criminal penalty for violations of Article 16 (Professional Housemoving) of G.S. Chapter 20 or any regulation of the Department of Transportation governing housemoving is increased from a Class 3 to a Class 1 misdemeanor. S.L. 2008-89 (S 236).
- The criminal penalty for violations of regulations of mortgage servicers under G.S. 53-243.02 is decreased from a Class I felony

to a Class 3 misdemeanor, effective for offenses committed on or after January 1, 2009. S.L. 2008-228 (H 2463).

- New G.S. 14-50.22 creates a one-class enhancement for any misdemeanor committed by a person fifteen or older for the benefit of, or at the direction of, or in association with a criminal street gang. A Class A1 misdemeanor is enhanced to Class I felony under this law. S.L. 2008-214 (H 274).
- Class A1 and Class 1 misdemeanors committed because of the victim's race, color, religion, nationality, or country of origin are enhanced to Class H felonies, rather than Class I felonies as provided under existing G.S. 14-3. S.L. 2008-197 (S 685).

### Other Sentencing Legislation

**Sex offenders.** The General Assembly made numerous changes to the sex offender registration and monitoring laws in 2008, many of which have sentencing and corrections implications. For ease of reference, the summary of this legislation can be found in Chapter 6, "Criminal Law and Procedure."

**New aggravating factor.** Effective for offenses committed on or after December 1, 2008, S.L. 2008-129 (H 1003) adds a new felony sentencing aggravating factor to the list of statutory aggravators in G.S. 15A-1340.16(d). Under the new factor a defendant who, during the ten-year period prior to the commission of the offense for which he or she is now being sentenced, has been found by a North Carolina judge to be in willful violation of a condition of probation, or by the Post-Release Supervision and Parole Commission (the Commission) to be in willful violation of a condition of parole or post-release supervision, may be sentenced in the aggravated range. The law does not appear to be limited to violations that result in revocation. Thus findings of willful violation resulting in extension or modification of probation—or indeed resulting in termination of probation or no action at all—could support the new aggravating factor.

The law states that this aggravating factor may, like a previous juvenile adjudication for a serious felony under G.S. 15A-1340.16(d)(18a), be found by the court and not by the jury. This provision appears to rest on the assumption that prior revocations of probation, parole, or post-release supervision would fall within the prior-record exception to the rule set out in *Blakely v. Washington*, 542 U.S. 296 (2004), which requires facts other than a "prior conviction" to be admitted to or submitted to a jury and proved beyond a reasonable doubt before they may be used to increase the sentence beyond the presumptive statutory maximum. The North Carolina Court of Appeals has determined juvenile adjudications to be sufficiently analogous to "prior convictions" to fall within the prior-

record exception to *Blakely*.<sup>1</sup> Whether the courts would reach the same conclusion with respect to probation revocations is an open question.

**Broadened sentence enhancement for use of firearm or deadly weapon.** For a discussion of the broadened sixty-month sentence enhancement for the use of a firearm *or deadly weapon* added by the North Carolina Street Gang Suppression Act (S.L. 2008-214), see Chapter 6, "Criminal Law and Procedure."

## Corrections

### Prisons

**Medical release for ill and disabled inmates.** Under S.L. 2008-2 (S 1480) the the Commission is directed to establish a program, to be administered by the Department of Correction (DOC), for the medical release of certain disabled, terminally ill, or geriatric inmates. The law became effective June 10, 2008.

An inmate is eligible to be considered for medical release if DOC determines that he or she:

- is diagnosed as *permanently and totally disabled*; or
- is diagnosed as *terminally ill*; or
- is diagnosed as *geriatric*; and
- is incapacitated to the extent that he or she does not pose a public safety risk; and
- was not convicted of a capital felony, a Class A, B1, or B2 felony, or an offense requiring registration as a sex offender; and
- meets whatever additional eligibility conditions are established by the Commission.

The statute defines each of the italicized terms above. An inmate is *permanently and totally disabled* when he or she suffers from a "permanent and irreversible physical incapacitation" that was unknown at the time of sentencing or has progressed since sentencing. *Terminally ill* describes an inmate with an incurable illness or disease that was unknown at the time of sentencing or has progressed since sentencing such that the inmate is likely to die within six months. *Geriatric* means sixty-five years of age or older and suffering from an age-related chronic infirmity, illness, or disease related to aging. Each of the defined terms also requires that the condition be such that the inmate "does not pose a public safety risk"—seemingly making the requirement of "incapacitation" under G.S. 15A-1369.2(a)(2) redundant.

The procedure for medical release is set out in G.S. 15A-1369.3. The initial referral for release is made by DOC to the Commission, based on a

1. *State v. Boyce*, 175 N.C. App. 663, 625 S.E.2d 553 (2006).

request from the inmate, the inmate's attorney, or the inmate's next of kin, or upon a recommendation from within DOC. The referral, which must be completed within forty-five days of receiving a request for release, must include an assessment of the inmate's "medical and psychosocial condition" and the risk he or she poses to society. The Commission then has fifteen days to make its determination of whether to grant release to a terminally ill inmate, or twenty days in the case of permanently and totally disabled and geriatric inmates. An inmate denied release under the program may not reapply absent a demonstrated change in medical condition.

Inmates granted release are subject to conditions that apply through the date upon which the inmate's sentence would have expired, including supervision by DCC. The inmate must allow DCC officers to "visit the inmate at reasonable times at the inmate's home or elsewhere." Upon receipt of "credible information that an inmate has failed to comply with any reasonable condition" of release, the Commission shall order an inmate returned to DOC custody pending a revocation hearing, probably governed by the hearing procedures set out in G.S. 15A-1368.6, although the statute does not expressly say so.

Under existing law the Secretary of Correction has authority to "extend the limits of the place of confinement" of certain terminally ill or permanently and totally disabled prisoners by authorizing them to "leave the confines of that place unaccompanied" to receive palliative care. G.S. 148-4(8). This authority (used sparingly in recent years) is presumably unaffected by the new medical release program, though the new program may have greater appeal as a means to reduce state liability for the cost of medical care for eligible inmates.

**Limited release of inmates for deportation.** Effective August 8, 2008, under S.L. 2008-199 (S 1955), the Commission may, in its discretion, conditionally release certain inmates into the custody and control of United States Immigration and Customs Enforcement (ICE) pursuant to new G.S. 148-64.1. That section sets out the following eligibility criteria:

- ICE must submit to DOC a final order of removal for the inmate; and
- The inmate must be incarcerated only for nonviolent offenses, defined in the statute as including *only* impaired driving; breaking and entering buildings under G.S. 14-54; breaking and entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft under G.S. 14-56; possessing stolen goods under G.S. 14-71.1; obtaining property by false pretenses under G.S. 14-100, where the thing of value is less than \$100,000; and possession of a Schedule VI controlled substance under G.S. 90-95(d)(4); and

- The inmate must have served at least half of the minimum sentence imposed by the court, or must be parole eligible in the case of impaired driving under G.S. 20-138.1; and
- The inmate must not have been convicted of an impaired driving offense resulting in death or serious bodily injury; and
- The inmate must agree not to reenter the United States unlawfully.

If ICE does not deport the inmate, the inmate must be returned to DOC custody to serve the remainder of his or her sentence. If an inmate released under the new law returns unlawfully to the United States, the release will be revoked and the inmate will serve the maximum of his or her sentence, less time already served. Additionally, the inmate will be ineligible from that point forward for any form of release other than post-release supervision.

## Parole and Post-Release Supervision

**Parole reviews for inmates convicted of murder.** The parole laws still apply to inmates sentenced for crimes committed before October 1, 1994. Previously, under G.S. 15A-1371, the the Commission considered parole-eligible inmates for release on parole once each year. Under S.L. 2008-133 (H 1624), the Commission will review the cases of prisoners convicted of first- or second-degree murder once every three years, unless exigent circumstances or the interests of justice demand more frequent consideration.

**Limit on release following arrest of sex offenders.** Ordinarily, when a person on post-release supervision is arrested for a violation of the terms of that supervision he or she is entitled to a preliminary hearing within seven days under G.S. 15A-1368.6(b) to determine whether there is probable cause to believe that the supervisee actually committed the violation. If this hearing does not take place, the supervisee must be released to continue on supervision pending a hearing. A provision in the Jessica Lunsford Act for NC (Jessica's Law), S.L. 2008-117, adds new G.S. 15A-1368.6(b1), prohibiting release prior to the holding of a preliminary hearing, regardless of whether seven days have passed, if the person was on post-release supervision for an offense subject to sex offender registration. Though the new law appears to do away entirely with the requirement for release of a supervisee if a hearing is not held within seven days, supervisees may still be entitled as a matter of constitutional due process to a preliminary hearing "as promptly as convenient after arrest while information is fresh and sources are available."<sup>2</sup>

2. *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

## Probation

**Limit on bail following arrest of sex offenders.** Jessica’s Law amends G.S. 15A-1345(b) with respect to bail following arrests for probation violations, prohibiting “the court” (which was probably meant to include any judicial official, including a magistrate) from releasing a probationer who has ever been convicted of what is now a reportable sex crime (regardless of whether the crime was reportable at the time committed, and regardless of the offense for which the person is currently on probation), without first finding that the probationer is not a danger to the public.

**Probation revocation after the period of probation.** G.S. 15A-1344(f) grants jurisdiction to hold a probation revocation hearing after the period of probation has expired. The statute previously required the state to file a written motion of its intent to conduct a revocation hearing prior to the expiration of the period of probation, and it required the court to make a finding that the state had made a “reasonable effort to notify the probation and to conduct the hearing earlier” G.S. 15A-1344(f). For at least two reasons the statute had been a source of confusion and frustration. First, the statute’s prior wording only granted a judge authority to “revoke” probation after the period of probation expired—not to extend or modify it.<sup>3</sup> Second, a series of appellate decisions over the past several years had put complicated gloss on what constituted a “reasonable effort” by the state to hold the hearing earlier.<sup>4</sup>

Changes to the statute under S.L. 2008-129 address both problems. The law adds the words “extend” and “modify” to the statute, making clear that the court is empowered to do everything after the period of probation is expired that it could have done during the period itself. The law also does away entirely with the requirement of a judicial finding as to the state’s “reasonable efforts.” In its place, the amended statute requires findings that the probationer violated “one or more conditions of probation prior to the expiration period [sic] of probation,” and that probation should be extended, modified, or revoked “for good cause shown and stated.” Extensions under the amended statute are governed by existing G.S. 15A-1342(a), although it is unclear whether the new 15A-1344(f)(4) authorizes the court to order the special extension for restitution or treatment after the period of probation has expired, as that extension may be ordered only in the last six months of the original period of probation. If that special extension is not possible after the period has expired, then extensions would be limited by the maximum authorized period of probation, five years.

3. *State v. Reinhardt*, 183 N.C. App. 291, 644 S.E.2d 26 (2007).

4. *See, e.g., State v. Burns*, 171 N.C. App. 759, 615 S.E.2d 347 (2005); *State v. Bryant*, 361 N.C. 100, 637 S.E.2d 532 (2006).

The amended law applies to probation violation hearings held on or after December 1, 2008.

## Interstate Compact for Adult Offender Supervision

**Changes in membership of State Council, clarification of procedures.** The Interstate Compact for Adult Offender Supervision (the Compact) was enacted in North Carolina in 1951 and has now been adopted by all states. The Compact allows a person who is sentenced to probation or granted parole in one state, and who wants to reside in another state, to be supervised in the other state. The Compact is a source of some confusion for magistrates and others in the criminal justice system, who confuse Compact supervisees with fugitives from justice subject to extradition, or who are unaware of the hearing procedures required under the Compact and related state law.

Under S.L. 2008-189 (S 1214), three new positions are added to the North Carolina State Council for Interstate Adult Offender Supervision, including a district court judge (appointed by the chief justice), a district attorney (appointed by the governor), and a sheriff (also appointed by the governor). The law also enacts new G.S. 148-65.7(a), implementing a \$150 transfer application fee for persons convicted in North Carolina who desire to transfer supervision to another state under the Compact. The fee may be waived by the Compact Commissioner or his or her designee if it constitutes an undue economic burden. Persons supervised in North Carolina under the Compact are still subject to a \$30 monthly fee under what is now G.S. 148-65.7(b).

Compact supervisees in North Carolina may be detained for up to fifteen days pending a hearing to determine whether or not North Carolina officials will recommend returning the supervisee to his or her state of conviction (the “sending state”) for a parole, probation, or post-release supervision violation. The new law clarifies that the offender is not entitled to bail pending this hearing (though a similarly situated North Carolina probationer would be entitled to bail under G.S. 15A-1345(b)). With respect to the hearing itself, the new law requires that a record of the hearing shall be made and, as soon as practicable, forwarded with recommendations to the supervisee’s sending state. If the recommendation is that the sending state retake or re-incarcerate the supervisee, then he or she may be detained pending notice of a final decision from the sending state. If the sending state agrees, the supervisee may be further detained as long as reasonably necessary to arrange for the retaking.

## Budget and Reporting Requirements

Most of the reporting requirements relevant to sentencing and corrections are outlined in Chapter 6, “Criminal Law and Procedure.”

Two high-profile homicides helped shape the General Assembly’s criminal law agenda in 2008. On January 19, 2008, Abhijit Mahato, an engineering graduate student at Duke University, was found dead in his apartment in Durham. On March 5, 2008, Eve Carson, an undergraduate and the student body president of the UNC Chapel Hill was murdered in Chapel Hill. One suspect was implicated in both of the murders; another was allegedly involved only in the Mahato case. Because both suspects were on probation at the time of the murders, DCC faced considerable scrutiny with respect to probation officer caseloads, professionalism, and information sharing among DCC county offices and between DCC and law enforcement. The appropriations and reporting requirements outlined below reflect the General Assembly’s response to the murders (S.L. 2008-107, H 2436).

- DOC is required to report by March 1 of each year with data on caseload averages for probation officers and the process of

assigning offenders to an appropriate supervision level based on a risk assessment.

- DOC must conduct a study of probation/parole officer workload at least biannually.
- The Office of State Personnel, in conjunction with DOC, must study compensation study of probation/parole officers.
- A \$2.5 million reserve fund is created to address critical staffing and resource needs in Probation and Parole Field Services.
- \$100,000 is allocated from Administrative Office of the Courts funds in the Court Information Technology Fund to develop an interface between DOC’s Offender Population Unified System (OPUS) and the Automated Court Information System to provide probation/parole officers with access to the most recent information on arrests and pending charges against probationers.

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