

ADMINISTRATION OF JUSTICE BULLETIN

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2006 LEGISLATION AFFECTING CRIMINAL LAW AND PROCEDURE

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The General Assembly passed three major acts affecting criminal law and procedure in 2006. One significantly expanded the obligations of and restrictions on individuals who are required to register as sex offenders. The second created a new commission to review claims of innocence by individuals who have been convicted of felonies. The third made sweeping changes to the state's impaired driving laws. The first two acts, along with the many other acts passed in 2006 that affect criminal law and procedure, are discussed in the body of this bulletin. The impaired driving act is summarized in the attached paper by James C. Drennan.

Each ratified act discussed here is identified by its chapter number in the session laws and by the number of the original bill. When an act creates new sections in the General Statutes (G.S.), the section number is given; however, the codifier of statutes may change that number later. Copies of the bills may be viewed on the General Assembly's website, <http://www.ncga.state.nc.us/>.

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Some of the material in this bulletin was drawn from the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2006. That publication will be posted on the School's web site at <http://ncinfo.iog.unc.edu/pubs/nclegis/nclegis2006/index.html>. It also can be ordered from the School's publication sales office. Contact information for the publications department is included at the end of this bulletin.

Sex Offender Act

In S.L. 2006-247 (H 1896), the General Assembly significantly revised the obligations of individuals required to register as sex offenders. The act is referred to here as the Sex Offender Act. The revisions have various effective dates, discussed below.

The North Carolina Attorney General's Office has prepared a summary of the sex offender registration program and the changes the General Assembly has made since the program started in 1996. The summary may be viewed on the North Carolina Department of Justice website at <http://www.jus.state.nc.us/ncja/sexoffen.pdf>. It identifies the effective dates of significant revisions made by the General Assembly, which are useful in understanding the registration requirements that different individuals must satisfy.

Length of Registration Period

North Carolina has had two adult sex offender registration programs—a ten-year program and a lifetime program. For those subject to the ten-year program, the law has provided that their registration obligations terminated automatically after ten years. The Sex Offender Act repeals the automatic termination provision and requires a person subject to the ten-year program to continue to register beyond ten years unless a court terminates the requirement.

After ten years from the date of initial registration, a person subject to the ten-year program may petition the superior court in the district where the person resides to terminate the registration requirement. *See* G.S. 14-208.12A (setting forth procedure for petitioning court). The court may grant relief if all of the following conditions are met:

- the person has not been convicted of a subsequent offense requiring registration;
- the person demonstrates to the court that since completing his or her sentence, he or she has not been arrested for any crime that would require registration;

- the court is satisfied that the person is not a current or potential threat to public safety; and
- termination of registration complies with any federal standards applicable to the termination of registration or required as a condition of receipt of federal funds by the state.

The final requirement indicates that if federal law is revised and requires a period of registration longer than ten years, the superior court judge considering the petition may not terminate the registration requirement until that additional period of time elapses.¹

These changes apply to anyone for whom the period of registration would terminate on or after December 1, 2006. This effective date means that people who are subject to the ten-year program but who have not reached the ten-year mark as of December 1, 2006, must continue to register until a court terminates their registration requirement. They no longer qualify for automatic termination of their registration obligations on their ten-year anniversary. Most of the people who have been in the ten-year program fall into this category. The sex offender program did not begin in North Carolina until January 1, 1996. Therefore, only those individuals whose ten-year registration obligations began during the first year of the sex offender program will have satisfied their obligations before the effective date of the revised statute.²

1. A new federal law, enacted July 27, 2006, extends the minimum period of registration to fifteen years and makes several other changes to the federal standards for sex offender registration programs. States are not required to implement these changes, however, until the later of three years after July 27, 2006, or one year after the U.S. Attorney General creates software for states to use in operating uniform sex offender registries and internet websites. *See* Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-248, codified at 42 U.S.C. 16091 *et seq.* Superior court judges hearing termination petitions therefore may not be bound by the new fifteen-year minimum until North Carolina takes further action to implement the new federal standards. As under previous federal law, a state that fails to adopt the federal standards may lose 10% of the federal funds that it otherwise would receive through the Edward Byrne Memorial Justice Assistance Grant Program.

2. For these few individuals, the commencement date of their obligation is not entirely clear. G.S. 14-208.12A has provided that the ten-year registration obligation terminates ten years after the date of initial county registration. But, G.S. 14-208.7 has provided that the ten-year registration obligation commences on the defendant's release from a penal institution or, if the defendant did not receive active time, the date of conviction. Effective December 1, 2006, the

Offenses Subject to Registration

The Sex Offender Act makes the following additional offenses subject to registration requirements. A person convicted of any of the listed offenses must register for at least ten years unless the person falls into the lifetime registration program for other reasons (for example, the person meets the definition of “recidivist” in G.S. 14-208.6(2b)).

Statutory rape or sexual offense. The offense of statutory rape or sexual offense of a person who is 13, 14, or 15 years of age when the defendant is at least six years older than the person—a violation of G.S. 14-27.7A(a)—is added as a “sexually violent offense” under G.S. 14-208.6(5) and is therefore a “reportable conviction” under G.S. 14-208.6(4). This change applies to offenses committed on or after December 1, 2006. Statutory rape or sexual offense of a person who is 13, 14, or 15 when the defendant is more than four but less than six years older than the person—a violation of G.S. 14-27.7A(b)—is not subject to the sex offender registration program.

Sexual servitude. The offense of subjecting or maintaining a person in sexual servitude—a violation of new G.S. 14-43.13, discussed further below—is classified as a “sexually violent offense” under G.S. 14-208.6(5). This change applies to offenses committed on or after December 1, 2006, when the statute creating the new offense became effective. The related new offenses of human trafficking (G.S. 14-43.11) and involuntary servitude (G.S. 14-43.12), also discussed below, are not subject to the sex offender registration program.³

Out-of-state conviction. The definition of “reportable conviction” in G.S. 14-208.6(4) is revised to include a final conviction in another state that requires registration under the sex offender registration statutes of that state. The change applies to offenses committed on or after December 1, 2006. It also applies to individuals who move into North Carolina on or after that date. Previously, the subsection applied to an out-of-state conviction only if the conviction was substantially similar to an offense against a minor or a sexually violent offense as defined by North Carolina’s sex offender statute. That part of the definition remains in effect along with the revised definition.

statutes were conformed to provide that the ten-year period begins on the date of initial county registration.

3. The codifier of statutes modified the statute numbers of these offenses and other provisions in the new article on Human Trafficking (Art. 10A of G.S. Ch. 14). These statutes were originally numbered in the legislation as G.S. 14-43.4 through 14-43.7.

Registration Obligations

The Sex Offender Act modifies and expands the obligations of individuals who are required to register in the following respects.

In-person registration. Revised G.S. 14-208.6A and 14-208.7 provide that an individual required to register under either the ten-year program or the lifetime program must register in person.⁴ The requirement is effective December 1, 2006, which means that it applies to anyone still required to register as of that date. Other statutes are similarly revised to require registrants to appear in person to verify their registration information (discussed below), notify the sheriff of a temporary residence for out-of-county employment or of an intended move to another state (discussed below), and notify the sheriff of a change in academic status or educational employment (under revised G.S. 14-208.9(c) and (d), also effective December 1, 2006).

Semiannual verification of registration information. Revised G.S. 14-208.9A states that registrants must verify their registration information semiannually rather than annually.⁵ The revised section also directs the sheriff to photograph the person if the picture that is on record does not provide an accurate likeness. (Under new G.S. 14-208.9A(c), a sheriff also may request a registrant to appear at the sheriff’s office between verification dates for a new photograph if the photograph on file no longer provides an accurate likeness. A willful failure to comply with the sheriff’s request for a photograph is a Class 1 misdemeanor.) This part of the Sex Offender Act is effective December 1, 2006, and applies to offenses committed on or after that date. Thus, the new

4. Revised G.S. 14-208.6B likewise provides that a juvenile transferred to superior court and convicted of an offense subject to registration must register in person. Registration in juvenile transfer cases is limited, however, to “sexually violent offenses” and “offenses against a minor” as defined in G.S. 14-208.6. Adults must register for those categories of offenses and, if required by the court, certain peeping offenses listed in G.S. 14-208.6(4)d.

5. Subsection (1) of G.S. 14-208.9A(a) states that the Division of Criminal Statistics of the Department of Justice must mail a verification form to the registrant on the anniversary of the person’s initial registration date “and again six months after that date.” This language suggests that registrants must verify their registration information twelve months after they initially register and then every six months thereafter. The General Assembly’s intent, however, may have been to require that registrants reverify their registration information every six months after they initially register.

procedures go into effect December 1, 2006, and a person required to register who violates the procedures on or after that date may be subject to prosecution.

The Sex Offender Act imposes a similar semiannual verification requirement, in G.S. 14-208.28, for juveniles who are required to register. Juvenile court counselors have been responsible for submitting registration information on behalf of juveniles, and the revised statute does not change that procedure. The sheriff must mail a verification form to the court counselor semiannually, rather than annually, and the juvenile court counselor must obtain the necessary information from the juvenile, sign the form along with the juvenile, and return it to the sheriff. The revised statute does not require the juvenile to appear in person. The change is effective December 1, 2006, and applies to offenses committed on or after that date.

Temporary residence for out-of-county employment. New G.S. 14-208.8A requires registrants to notify the sheriff of the county in which they're registered if they work and maintain a temporary residence outside that county for more than ten business days within a thirty-day period or for more than thirty days a year. The new requirements take effect June 1, 2007, which means that they apply to individuals still required to register as of that date.

Moving to another state. G.S. 14-208.9 has required registrants to notify the sheriff of the county in which they are currently registered if they move to another state. The statute is revised to require registrants to notify the sheriff at least ten days before they intend to move. The sheriff may take a new photograph of the registrant. Registrants also must notify the sheriff within ten days after they were supposed to move to another state if they change their mind and decide to remain in North Carolina. The revised requirements become effective December 1, 2006, which means that they apply to individuals still required to register as of that date.

Violations of registration obligations. G.S. 14-208.11 is the general punishment statute for violating registration obligations. Violations of the registration obligations listed in the statute, including the obligations discussed above, are Class F felonies, except for failing to comply with a sheriff's request for a new photograph, which is a Class 1 misdemeanor under G.S. 14-208.9A(c).

Effective for violations committed on or after December 1, 2006, all violations must be "willful." *See* G.S. 14-208.11 (general punishment statute); G.S. 14-208.9A(c) (photograph violations). Also effective that date, G.S. 14-208.11 provides that a person is deemed to have complied with the registration and verification

obligations if he or she is incarcerated, notifies the officer in charge of his or her obligations, and meets his or her registration or verification obligations no later than ten days after release.

Restrictions on Association with Minors

North Carolina's probation statutes have contained special conditions of probation for individuals convicted of an offense requiring registration. Those conditions include restrictions on residing with a minor if the offense requiring registration involved abuse of a minor. If the abuse of the minor was sexual, the defendant may not reside in a household with a minor during the period of probation; if the abuse was physical or mental, the defendant may not reside in a household with a minor unless permitted by the court. *See* G.S. 15A-1343(b2); *see also* G.S. 15A-1368.4(b1) (setting forth similar conditions for individuals who are on post-release supervision, which last for five years after release pursuant to G.S. 15A-1368.2(c)).

In 2005, the General Assembly made it a Class 1 misdemeanor (and a Class H felony for a subsequent offense) to provide a baby sitting service if the provider is registered as a sex offender or, when the service is provided in a home, a resident of the home is registered as a sex offender. *See* G.S. 14-321.1. The statute is limited to baby sitting services that are for profit, for children under the age of thirteen who are not related to the provider, and for more than two hours per day while the child's parents or guardian are not on the premises.

The Sex Offender Act creates three new felonies imposing broader restrictions on contact between anyone required to register and minors.

Residential restrictions. New G.S. 14-208.16 makes it a Class G felony for

- a person who is required to register as a sex offender
- knowingly to
- reside within 1,000 feet
- of property on which any public or nonpublic school, or child care center as defined in G.S. 110-86(3), is located.

Subject to certain exclusions, a child care center is "an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care." *See* G.S. 110-86(3)a. The new statute does not apply to home schools as defined in G.S. 115C-563; institutions of higher education; child care centers not included in the definition in G.S. 110-86(3); and child care centers that

are included in that definition that are located on or within 1,000 feet of an institution of higher education where the registrant is a student or is employed.

With certain exceptions, the statute applies to individuals who are still required to register on or after December 1, 2006. The statute states that a registrant does not violate the statute if the ownership or use of the nearby property changes after he or she has established residence. (New G.S. 14-208.16(d) describes the ways a residence is considered to be established.) The effective-date provision adds that the statute does not apply to a person who established a residence before the statute's effective date, December 1, 2006.

Restrictions on working and volunteering. New G.S. 14-208.17(a) makes it a Class F felony for a person who is required to register as a sex offender

- to work for any person or as a sole proprietor, with or without compensation
- at any place where a minor is present if
- the registrant's responsibilities or activities include instruction, supervision, or care of a minor or minors.

The statute applies to violations committed on or after December 1, 2006.⁶

Restrictions on care and custody of minor within residence. New G.S. 14-208.17(b) makes it a Class F felony for any person

- to conduct any activity at his or her residence where
- the person accepts a minor or minors into his or her care or custody from another
- knowing that a person who resides at that location is required to register as a sex offender.

The statute applies to violations committed on or after December 1, 2006.

Satellite Monitoring of Registrants

The Sex Offender Act creates a new satellite-based monitoring program for certain sex offenders. It appears in new Part 5 in the sex offender registration article (Art. 27A of G.S. Ch. 14).⁷ The new program

6. The caption of the new statute states that it prohibits "sexual predators" from working or volunteering as specified in the statute, but the body of the statute provides that all individuals who are required to register are subject to the statute's prohibitions.

7. The codifier of statutes modified the statute numbers of the provisions in the new article on satellite monitoring (Art. 10A of G.S. Ch. 14). The statutes were originally

applies to two categories of registrants—lifetime registrants and registrants convicted of certain offenses involving minors. Some requirements apply to both categories; others apply to only one category or the other.

Requirements applicable to all individuals subject to satellite monitoring. Everyone who is subject to the new program must submit to an active, continuous satellite-based monitoring system unless an active program will not work; then, the person must submit to a passive continuous satellite-based system. The system will incorporate continuous tracking of the geographic location of the person using global positioning system (GPS) technology. The frequency of reporting of a person's whereabouts may range from near real-time (with an active system) to once a day (with a passive system). *See* G.S. 14-208.40.

Satellite monitoring is a mandatory condition of probation for anyone who is subject to the monitoring program (G.S. 15A-1343(b)(7) and (8), -1343.2(f1)), including during any extended period of probation (G.S. 15A-1344(e2)). It is also a condition of any post-release supervision (G.S. 15A-1368.4(b)(6) and (7)) or parole (G.S. 15A-1374(1)).

Each person required to submit to satellite monitoring must pay a one-time fee of \$90. The court may waive the fee for good cause. *See* G.S. 14-208.45.

Criteria and requirements for lifetime registrants. A person who has been found to be a sexually violent predator, who is a recidivist, or who has been convicted of an aggravated offense as those terms are defined in G.S. 14-208.6—that is, a person who is required to register for life—is subject to the new satellite monitoring program for life. *See* G.S. 14-208.40(a)(1), -208.42. Upon completion of their sentence, these registrants also must remain on unsupervised probation for life.⁸ The lifetime satellite

numbered in the legislation as G.S. 14-208.33 through 14-208.38.

8. The purpose of the post-sentence requirement of unsupervised probation, in G.S. 14-208.42, is unclear. There is no sentence for the court to activate if it revokes this probation. Likewise, it does not appear that a court could impose additional active time for contempt for a violation of this probation because the person already would have served all of the active time due under his or her sentence. *See generally State v. Belcher*, 173 N.C. App. 620, 619 S.E.2d 567 (2005) (defendant was entitled to credit against sentence for time incarcerated for contempt for violating probation; legislature intended that defendant be credited with all time spent in custody as result of charge). The lifetime probationary requirement could be interpreted as depriving the person of his or her citizenship rights, including the right

monitoring requirement (and unsupervised probation) may be terminated by the North Carolina Post-Release Supervision Commission. New G.S. 14-208.43 sets forth the procedure for a person to request termination of the lifetime requirements.

Criteria and requirements for registrants convicted of certain offenses involving minors. A person who meets all of the following criteria is subject to satellite monitoring under G.S. 14-208.40(a)(2). The person

- must have been convicted of a reportable offense,
- must be required to register,
- must have committed an offense involving physical, mental, or sexual abuse of a minor, and
- requires the highest possible level of supervision and monitoring based on a risk assessment program to be developed by the Department of Correction.

A person who meets these criteria is subject to monitoring for the period of time ordered by the court. *See* G.S. 14-208.40(a)(2), -208.41(a). The statutes do not explicitly set an outside limit; however, the period of monitoring could be for no longer than the period during which the person is “required to register,” one of the criteria for satellite monitoring for this category of registrants. The Post-Release Supervision Commission does not have the authority to terminate the period of monitoring ordered by the court for this category of registrants. *See* G.S. 14-208.43(e).

Violations of monitoring requirements. Two new crimes were created in conjunction with the satellite monitoring program. Under G.S. 14-208.44(a), a person commits a Class F felony if he or she

- is required to enroll in the satellite-based monitoring program and
- fails to enroll.

It is not entirely clear at what point a person would become guilty under this statute for not enrolling. The new satellite monitoring statutes do not designate a specific event triggering the obligation to enroll, such as notice from the court upon sentencing or the Department of Correction upon release from prison. They also do not set a deadline for enrolling after that

to vote, until the requirement is terminated. *See* G.S. 13-1 (person convicted of felony who is probationer has rights of citizenship automatically restored when unconditionally discharged by Department of Correction). It seems unlikely, however, that the General Assembly intended to make such a significant change in citizenship rights through a mechanism aimed principally at implementing the satellite monitoring program.

event occurs. Consequently, the statutes do not establish a specific time period for enrolling, after which a person is criminally liable for failing to enroll. The statutes establishing the obligation to register as a sex offender, in contrast, set a time period for registering and provide an explicit basis for determining whether a person’s failure to register is untimely. *Compare* G.S. 14-208.8 (if person will be released from penal institution and become subject to registration obligation, penal institution must notify person of obligation to register; when person does not receive active sentence, court must notify person of obligation to register); G.S. 14-208.7 (specifies amount of time individual has to register in various circumstances—for example, ten days from release from penal institution).

G.S. 14-208.44(b) creates a second offense once a person is enrolled in the program. A person is guilty of a Class E felony if he or she

- intentionally
- tampers with, removes, or vandalizes
- a device issued as part of the satellite-based monitoring program
- to a person duly enrolled in the program.

Effective dates. The satellite monitoring program became effective August 16, 2006, and applies to those persons described in the applicable effective-date provision (section 15(l) of the Sex Offender Act). A person subject to the monitoring program does not have to enroll until January 1, 2007, when the program is scheduled to get underway.

First, the satellite monitoring provisions apply to any offenses committed on or after August 16, 2006. Thus, a person who commits an offense on or after that date would be subject to satellite monitoring if they meet the program criteria.

Second, the provisions apply to any person released from prison by post-release supervision or parole on or after August 16, 2006. Thus, a person who commits an offense before August 16, 2006, but is released from prison on or after that date, would be subject to the monitoring program if they meet the program criteria; however, a person released from prison before August 16, 2006, is not subject to the program, whether or not still on post-release supervision or parole on or after that date.

Third, the provisions apply to any person who completes his or her sentence on or after August 16, 2006, and who is not on post-release supervision or parole. This third category could be construed as complementing the second category and applying only to individuals who are released from prison on or after August 16, 2006, and who are not on post-release supervision or parole. For example, under structured

sentencing, a person who is sentenced to prison for a Class F through I felony does not have to serve any period of post-release supervision or parole after release from prison; under this third part of the effective-date provision, such a person would be subject to the monitoring program if released from prison on or after August 16, 2006. Literally construed, however, this third category could apply more broadly and reach any person who, as of August 16, 2006, has not completed his or his sentence. Thus, it could be construed to apply to anyone still serving a probationary sentence as of that date. Such an interpretation would mean that the program includes people who did not serve active time but are on probation on or after August 16, 2006, but the program excludes the presumably more dangerous offenders who served active time, were released before August 16, but who are subject to post-release supervision or parole on or after that date.

Funding and implementation of satellite monitoring program. The Sex Offender Act directs the DOC to use \$1.3 million of the funds appropriated for fiscal year 2006-07 to implement the satellite monitoring program. A little over \$1.2 million of that amount is designated as recurring, and five new positions within DOC are authorized. The DOC may use additional funds if it anticipates that expenditures will exceed that amount. To implement the program, DOC may contract with a single vendor for the necessary hardware services. The North Carolina Department of Justice also was appropriated \$200,000 in nonrecurring funds to upgrade its sex offender registry to include, among other things, GIS mapping. *See* Section I (Justice, Correction), Joint Conference Committee Report on the Continuation Expansion and Capital Budgets (June 30, 2006).

Other measures. The DOC also is directed to study and develop a plan for offering mental health treatment for incarcerated sex offenders to reduce the possibility of recidivism. The DOC must consider the fiscal impact, if any, of implementing a plan and must submit a preliminary report by January 15, 2007, and a final report by October 1, 2007, to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Other Monitoring of Registrants

Duties of Probation Officers. Effective August 16, 2006, new G.S. 15A-1341(d) provides that when a court places a defendant on probation, the probation officer assigned to the case must conduct a search of

the defendant's name against the registration information maintained by the Division of Criminal Statistics of the North Carolina Department of Justice. The officer may conduct the search using the internet site maintained by the Division.⁹

Duties of Division of Motor Vehicles. DMV must notify each person who applies for a drivers license, learner's permit, instruction permit, or special identification card that if the person is a sex offender, he or she must register. This requirement applies regardless of how long the person has resided in the state. *See* G.S. 20-9.3.¹⁰

The following requirements, set forth in new G.S. 20-9(i), apply to applicants for a drivers license or special identification card who have resided in the state for less than twelve months.

- DMV may not issue a license or identification card to the person until it has searched the National Sex Offender Registry to determine whether the person is currently registered as a sex offender in another state.
- If the person is registered in another state, DMV may not issue a license or identification card until the person submits proof of registration issued by the sheriff of the county where the person currently resides.
- If the person does not appear on the National Registry, DMV may not issue a license or identification card unless the person signs an affidavit acknowledging that if he or she is a sex offender, he or she must register.
- If DMV is unable to access all of the information in the National Registry at the time of the person's application, DMV may

9. Revised G.S. 15A-1343.2(f) also appears to delegate to probation officers the authority to add satellite monitoring as a condition of probation for registrants subject to G.S. 14-208.40(a)(2), the more limited monitoring program. This provision may be of no effect because G.S. 14-208.40(a)(2) requires the court to set any period of satellite monitoring for such registrants.

10. When sex offenders convicted in other states have moved into North Carolina in the past, issues have arisen as to whether the offenders have been adequately notified of their duties to register in this state. That issue was raised in *State v. Bryant*, 163 N.C. App. 478, 594 S.E.2d 202 (2004), and the Court of Appeals concluded that the North Carolina sex offender statute failed to provide notice to out-of-state offenders and was unconstitutional as applied to those offenders. Although that decision was reversed by the North Carolina Supreme Court, 359 N.C. 554, 614 S.E.2d 479 (2005), the new statutory requirement provides a mechanism for showing that notice was given.

issue a license or identification card to the person but must require the person to sign an affidavit stating that he or she does not appear in the National Registry and acknowledging that he or she has been notified of the duty of sex offenders to register. DMV also must continue to check the National Registry to obtain any missing information, and if the person is in the National Registry, DMV must revoke the person's license or identification card and notify the sheriff of the county where the person resides. The statutes do not specify how long the revocation lasts.

- A person denied a license may obtain judicial review of a denial as provided in G.S. 20-9(i)(4).

These requirements become effective December 1, 2006, and apply to applications submitted on or after that date.

Assisting Violator in Eluding Arrest

Effective for offenses committed on or after December 1, 2006, new G.S. 14-208.11A makes it a Class H felony in certain circumstances to assist a person who has failed to comply with his or her registration obligations. Under the new statute, it is a Class H felony for any person

- who has reason to believe that a sex offender is in violation of Article 27A of G.S. Chapter 14 and
- who has the intent to assist the offender in eluding arrest
- to do any of the following:
 1. withhold information from or fail to notify a law enforcement agency about the offender's noncompliance and, if known, the offender's whereabouts; or
 2. harbor, attempt to harbor, or assist another person in harboring or attempting to harbor the offender; or
 3. conceal, attempt to conceal, or assist another person in concealing or attempting to conceal the offender; or
 4. provide information to a law enforcement agency about the offender that the person knows to be false.

The section does not apply if the offender is in custody.

The unique part of this statute is that in certain circumstances it criminalizes failing to report a crime—that is, failing to notify law enforcement of an offender's noncompliance, as provided in 1., above.

Ordinarily, not reporting a crime is not itself a crime. The potential reach of the new offense is limited by the requirement that the person must have the "intent" to assist the offender in eluding arrest. A failure to report may be insufficient alone to satisfy this "intent" requirement. A person's inaction may be as much the result of indifference as an intent to assist. *See also* 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.3(a), at 358 (2d ed. 2003) (for criminal law purposes, "motive" is not the same as "intent," and even a bad motive may not make an act criminal). The "intent" requirement may not present the same proof difficulties for the other actions criminalized by the new statute—harboring, concealing, and providing false information. An intent to assist the offender can more easily be inferred from the overt act of harboring, concealing, or lying.

For all the variants of the new offense, the person also must have acted (or not have acted) to assist the offender in "eluding arrest." The new statute does not define this requirement. One interpretation is that at the time of the person's action (or inaction), law enforcement must have been trying to arrest or apprehend the offender or, at least, have been trying to locate him or her. *Compare* G.S. 20-141.5 (this offense, captioned as "Speeding to elude arrest," requires that the defendant be fleeing or attempting to elude a law enforcement officer while the officer is performing his or her duties). The General Assembly may have used the term in a broader sense, however, to indicate that the person must have acted with the intent to assist the offender in avoiding detection, whether or not the authorities were then trying to locate the offender.

New and Revised Criminal Offenses in Sex Offender Act

The Sex Offender Act creates several new offenses, in a new Article 10A, entitled "Human Trafficking," in G.S. Chapter 14.¹¹ It also modifies some existing offenses. The provisions apply to offenses committed on or after December 1, 2006.

Involuntary servitude. G.S. 14-43.2 has made it a crime to hold a person in involuntary servitude as defined in that statute. The Sex Offender Act repeals

11. The codifier of statutes modified the statute numbers of the provisions in the new Human Trafficking article. The statutes were originally numbered in the legislation as G.S. 14-43.4 through 14-43.7.

that statute and enacts a new G.S. 14-43.12, making it a Class F felony to:

- knowingly and willfully
- hold another
- in involuntary servitude

New G.S. 14-43.10(a)(3) defines the term “involuntary servitude.” The definition states that it includes labor obtained by deception, coercion, or intimidation. New G.S. 14-43.10(a)(1) and (2), in turn, define “coercion” and “deception.” Those definitions include such acts as causing or threatening bodily harm (a form of coercion) and promising benefits that the defendant does not intend to provide (a form of deception).

The statutes do not define what it means to “hold” another in involuntary servitude. This requirement may be significant, as it suggests some ongoing control or power over the person amounting to “servitude.” The statute also states that failing to deliver benefits or perform services alone is not sufficient to support a conviction.

The offense is not subject to the sex offender registration program.

Failure of party to labor contract to report involuntary servitude. New G.S. 14-43.12(e) provides that it is a Class 1 misdemeanor if

- any person reports a violation of the involuntary servitude statute,
- which violation arises out of a contract for labor,
- to a party to the contract, and
- the party fails to report the violation immediately to the sheriff of the county in which the violation is alleged to have occurred.

Sexual servitude. New G.S. 14-43.13 creates the offense of sexual servitude, a Class F felony if the victim is an adult and a Class C felony if the victim is a minor. A person commits this offense if he or she

- knowingly
- subjects or maintains another
- in sexual servitude.

New G.S. 14-43.10(a)(5) defines “sexual servitude.” The definition states that it includes “sexual activity” induced, obtained, or provided by coercion or deception or from a minor. That subsection refers, in turn, to existing G.S. 14-190.13 for the meaning of “sexual activity,” which covers a broad array of acts of a sexual nature. Inducing those acts alone does not amount to sexual servitude, however; the other elements of the offense must be met.

New G.S. 14-43.10(a)(1) and (2) define “coercion” and “deception,” discussed above in connection with the new offense of involuntary

servitude. The statutes do not define what it means to “subject” or “maintain” another in sexual servitude, but as under the new involuntary servitude statute, the terms suggest some ongoing control or power over the person amounting to “servitude.” Again, failing to deliver benefits or perform services alone is not sufficient to support a conviction.

The offense of sexual servitude is classified as a “sexually violent offense” under G.S. 14-208.6(5) and thus is subject to the sex offender registration program. This requirement applies to offenses committed on or after December 1, 2006, when the statute creating the new offense becomes effective.

Human trafficking. New G.S. 14-43.11 creates the offense of human trafficking, a Class F felony if the victim is an adult and a Class C felony if the victim is a minor. A person commits this offense if he or she

- knowingly
- recruits, entices, harbors, transports, provides, or obtains by any means another person
- with the intent
- that the other person be held in involuntary or sexual servitude.

The offense is not subject to the sex offender registration program.

Revised definition of sexual battery. A person is guilty of sexual battery under G.S. 14-27.5A if he or she engages in “sexual contact” with another person in certain circumstances. Effective for offenses committed on or after December 1, 2006, the Sex Offender Act expands the definition of sexual contact, in G.S. 14-27.1, to include ejaculating, emitting, or placing semen, urine, or feces on any part of another person.¹²

Revised definition of kidnapping. G.S. 14-39(a) makes it kidnapping to confine, retrain, or remove a person for certain purposes. The Sex Offender Act revises the list of purposes to add holding a person in involuntary servitude in violation of new G.S. 14-43.12 (rather than repealed G.S. 14-43.2); subjecting or maintaining a person for sexual servitude in violation of new G.S. 14-43.13; and trafficking another person with the intent that the person be held in involuntary or sexual servitude in violation of new G.S. 14-43.11. Kidnapping for these or other purposes is not subject to the sex offender registration program.

12. Under legislation enacted in 2005 and applicable to offenses committed on or after December 1, 2005, sexual battery was made a reportable offense, subject to the sex offender registration program. Because it is a reportable offense, sexual battery is subject to the revised registration requirements enacted this session, discussed above.

Innocence Commission

S.L. 2006-184 (H 1323) sets up a new commission, the North Carolina Innocence Inquiry Commission (“Innocence Commission” or “Commission”), to review claims of innocence by individuals who have been convicted of a felony in the North Carolina courts. New Article 92 in G.S. Ch. 15A (G.S. 15A-1460 through 15A-1475) contains the main provisions on this new commission as well as the process for review of claims of innocence. In essence, the new article authorizes the Innocence Commission to investigate claims of innocence and refer meritorious cases to a special three-judge panel with the authority to dismiss the charges if it finds that the convicted person is innocent.

The act creating the Innocence Commission takes effect August 3, 2006. Claims of innocence may be filed beginning November 1, 2006, except that claims of innocence by individuals convicted on a plea of guilty may not be filed until November 1, 2008. The Commission is to give priority to cases in which the convicted person is currently incarcerated solely for the crime for which he or she has filed a claim of innocence. *See* G.S. 15A-1466(2). Claims may be filed until December 31, 2010.

Structure of Innocence Commission. The Innocence Commission is an independent commission within the Judicial Department and receives administrative support from the Administrative Office of the Courts. It consists of eight members—a superior court judge, who serves as chair; prosecutor; victim advocate; criminal defense attorney; public member who is neither an attorney nor an employee of the Judicial Department; and two members whose vocations are within the discretion of the Chief Justice of the North Carolina Supreme Court. The Chief Justice appoints five members as specified in the act, and the Chief Judge of the North Carolina Court of Appeals appoints three members. The Commission will have a director, who must be a North Carolina attorney; and the director may hire staff with the approval of the Commission Chair. For more detail regarding the method of appointment of Commission members, their terms, and the duties of the director, *see* G.S. 15A-1463 through 15A-1465. The 2006 budget appropriates \$160,000 in recurring funds and \$50,000 in nonrecurring funds for the Innocence Commission and establishes three staff positions. *See* Section I (Judicial) of Joint Conference Committee Report on the Continuation Expansion and Capital Budgets (June 30, 2006).

Meaning of “claim of innocence.” The Innocence Commission is authorized to consider “claims of factual innocence,” as defined in G.S. 15A-1460(1). To qualify, a claim must be

- on behalf of a living person
- convicted of a felony in the North Carolina trial courts
- asserting the complete innocence for the felony for which the person was convicted and for any reduced level of criminal responsibility relating to the crime
- for which there is some credible, verifiable evidence of innocence
- that has not been presented at trial or considered at a hearing granted through postconviction relief.

The last element of the definition requires that evidence supporting the claim be “new” in a limited sense. Thus, it requires that “some” evidence be submitted in support of the claim that was not previously presented, but all of the evidence need not meet this requirement. The definition does not require the claimant to have been unaware of the evidence or to have been unable to obtain the evidence at the time of trial; it only requires that the evidence not have been presented at a trial or at a hearing granted through postconviction relief. Evidence is not considered to have been previously presented in postconviction proceedings if it was presented in support of a postconviction request for which a hearing was not granted.

Submission of claim and waiver of rights. Any person, court, or agency may submit a claim of innocence to the Commission on behalf of a convicted person. The Commission may informally screen and dismiss a case summarily or undertake a formal inquiry. *See* G.S. 15A-1467(a). Before the Commission begins a formal inquiry, the convicted person must execute an agreement waiving his or her procedural safeguards and privileges and agreeing to provide full disclosure to the Commission on matters related to his or her claim of innocence. The waiver does not apply to matters unrelated to the claim. *See* G.S. 15A-1467(b). Evidence of criminal acts, professional misconduct, or other wrongdoing disclosed during the formal inquiry or later Commission proceedings are to be referred to the appropriate authority. Evidence favorable to the convicted person must be disclosed to the convicted person and his or her counsel, if any. *See* G.S. 15A-1468(d). If at any point during the inquiry the convicted person refuses to comply with the

Commission's requests or is otherwise deemed to be uncooperative, the Commission may discontinue the inquiry. *See* G.S. 15A-1467(g).

Right to counsel. The convicted person has the right to advice of counsel before executing a waiver of rights, and if a formal inquiry is conducted, throughout the formal inquiry. If the convicted person does not have counsel, the Commission Chair must determine whether the person is indigent and, if appropriate, enter an order for the appointment of counsel. *See* G.S. 15A-1467(b); *see also* G.S. 15A-1469(e) (indigent person has right to appointed counsel in proceedings before three-judge panel).

Notice to victim. If the Commission proceeds with a formal inquiry, the Director must use due diligence to notify the victim of the case and explain the process. The victim has the right to present his or her views and concerns throughout the Commission's investigation. *See* G.S. 15A-1467(c). The victim also has the right to notice of any proceedings before the full Commission, discussed below, and to attend Commission proceedings subject to limitations imposed by the Commission. *See* G.S. 15A-1468(b); *see also* G.S. 15A-1469(f) (victim receives notice of hearing before three-judge panel).

Access to evidence. The Commission has the power to issue process to compel the attendance of witnesses and production of evidence, administer oaths, and petition the superior court of Wake County or of the original jurisdiction for enforcement of process or other relief. *See* G.S. 15A-1467(d), (e). In addition, all state discovery and disclosure statutes in effect at the time of the inquiry are enforceable as if the convicted person were being tried for the charge being investigated by the Commission. *See* G.S. 15A-1467(f).

Commission proceedings. G.S. 15A-1468 details the procedures before the Commission once the formal inquiry is completed. All relevant evidence from the inquiry must be presented to the full Commission, which may hold a public hearing or keep the proceedings closed. *See* G.S. 15A-1468(a). After reviewing the evidence, the Commission votes on whether to refer the case for review by a three-judge panel. In cases in which the convicted person did not plead guilty, five or more Commission members must find sufficient evidence of innocence for the case to be referred for judicial review. In cases in which the convicted person pled guilty, all eight Commission members must find sufficient evidence of innocence. *See* G.S. 15A-1468(c). The Commission must issue an opinion, whether it finds sufficient or insufficient evidence of innocence. If a case is referred to a three-judge panel, all of the records in support of the

Commission's conclusion, including a transcript of the hearing before the Commission, become public; if the case is not referred for judicial review, the files remain confidential except as otherwise provided in the new article. *See* G.S. 15A-1468(e).

Review by three-judge panel. G.S. 15A-1469 details the procedures before the three-judge panel. If the Commission concludes that there is sufficient evidence of innocence to merit judicial review, the Chief Justice appoints a three-judge panel to conduct an evidentiary hearing. The panel may not include any trial judge who has had substantial previous involvement in the case. Following an order setting a date for a hearing, the State has sixty days to file a response to the Commission's opinion. The district attorney of the district of conviction represents the State at the hearing. The panel may compel the testimony of any witness, including the convicted person. The convicted person has the right to be present but may not assert any privilege or prevent any witness from testifying. If the three-judge panel unanimously finds by clear and convincing evidence that the convicted person is innocent of the charges, it enters a dismissal of the charges. If the vote is not unanimous, the panel denies relief.

Finality of proceedings and availability of other relief. The decisions of the Commission and the three-judge panel are final and are not subject to review. *See* G.S. 15A-1470(a). Submission of a claim to the Innocence Commission does not adversely affect the right to other postconviction relief. *See* G.S. 15A-1470(b); G.S. 15A-1411(d) (claim to Innocence Commission does not constitute motion for appropriate relief and does not affect right to relief under postconviction statutes). Revised G.S. 15A-1417(a) provides that a court may, in ruling on a motion for appropriate relief, refer a claim of factual innocence to the Innocence Commission; but, the revised statute does not require the court to refer such claims to the Innocence Commission if other grounds exist for relief, such as a constitutional violation.

Criminal Offenses

Restrictions on sale of pseudoephedrine. In 2005, the General Assembly enacted several restrictions on the sale of pseudoephedrine, an ingredient used in lawful cold medication and in the illegal manufacture of methamphetamine. *See* Chapter 90, Article 5D (Control of Methamphetamine Precursors), G.S. 90-113.50 through 90-113.60. Effective for offenses committed on or after August 3, 2006, S.L. 2006-186 (S 686) revises these statutes to prohibit the retail sale

of pseudoephedrine products, whether in the form of a tablet, caplet, or gel cap, except in blister packages; this restriction previously applied only to tablets or caplets containing more than thirty milligrams of pseudoephedrine. The revised statutes also prohibit the sale of more than two packages containing a combined total of more than 3.6 grams of any pseudoephedrine product per day; the previous limit was two products containing more than six grams. New G.S. 90-113.61 adds that certain pseudoephedrine products are not subject to the article's restrictions but are subject to the requirements of the federal Combat Methamphetamine Act of 2005, a part of the USA Patriot Improvement and Reauthorization Act of 2005 (P.L. 109-177).

Disorderly conduct at funeral. Effective for offenses committed on or after December 1, 2006, S.L. 2006-169 (S 1833) creates a new disorderly conduct offense involving funerals. A person violates new G.S. 14-288.4(a)(8) if he or she

- intentionally causes a public disturbance
- by engaging in conduct with the intent to impede, disrupt, disturb, or interfere
- with the orderly administration of any funeral, memorial service, or family procession to the funeral or memorial service or with the normal activities and functions in facilities where a funeral or memorial service is taking place.

The new provision states that it includes military funerals, services, and family processions. It also specifies that certain conduct during, or within one hour before or after, a funeral or memorial service constitutes disorderly conduct—for example, displaying within 300 feet of the ceremonial site any visual image that conveys fighting words or actual or imminent threats of harm toward any person or property associated with the service.

A first offense is a Class 2 misdemeanor, a second offense is a Class 1 misdemeanor, and a third or subsequent offense is a Class I felony.

Assault on handicapped person. G.S. 14-32.1 is a specialized assault statute imposing enhanced punishments for assault on a handicapped person. Effective for offenses committed on or after December 1, 2006, S.L. 2006-179 (S 488) increases the offense of simple assault or battery on a handicapped person from a Class 1 to Class A1 misdemeanor. This change brings the punishment for this offense in line with such offenses as assault on a child and assault on a female, both Class A1 misdemeanors.

Harassment of participant in neighborhood watch program. S.L. 2006-181 (H 1120) authorizes cities and counties to establish neighborhood crime watch programs. As part of this initiative, the act adds

G.S. 14-226.2 creating a new offense of harassing a participant in a neighborhood crime watch program, effective for offenses committed on or after December 1, 2006. A violation is a Class 1 misdemeanor and must include a minimum fine of \$300. A person commits this offense if he or she

- willfully threatens or intimidates
- an identifiable member or resident in the same household as the member of a neighborhood crime watch program
- for the purpose of intimidating or retaliating against that person for the person's participation in a neighborhood crime watch program.

The statute states that a violation includes threats or intimidation that occur while a member is traveling to or from a neighborhood crime watch meeting, actively participating in a neighborhood crime watch program activity, or actively participating in an ongoing criminal investigation.

Dog fighting. G.S. 14-362.2 has prohibited promoting, conducting, and related conduct involving dog fighting, making a violation a Class H felony. Effective for offenses committed on or after December 1, 2006, S.L. 2006-113 (H 2098), as amended by Section 37 of S.L. 2006-259 (S 1523), expands the statute to make it a Class H felony to engage in such conduct in connection with the fighting of a dog with an animal other than a dog. The revised statute states that it does not prohibit the use of dogs in the lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission—in other words, using dogs to hunt.

The act also makes changes to civil remedies for animal cruelty, effective for actions commenced on or after December 1, 2006. G.S. 19A-70 has provided that in cases in which a person has been arrested for illegally fighting dogs, a shelter that has taken custody of the dogs may petition the court to require the defendant to deposit sufficient funds for the care of the dogs. The act revises that statute to authorize a petition for animal care expenses upon an arrest for a violation of any provision of Chapter 14, Art. 47 (the animal cruelty statutes) or G.S. 67-4.3 (attack by dangerous dog), or upon the commencement of a civil action for an injunction under G.S. 19A-3. Under revised G.S. 19A-70, a person who is acquitted of all criminal charges, or is found in the action for an injunction not to have committed animal cruelty, is entitled to a refund of the deposit less any funds already expended for animal care (not a refund of the entire deposit as under prior law).

Phase-out of video gaming machines. In 2000, the General Assembly banned the introduction of new

video gaming machines into North Carolina and regulated the use of machines already in the state.¹³ Legislation enacted this session (S.L. 2006-6 (S 912), as amended by Sections 6, 33 of S.L. 2006-259 (S 1523)) phases out video gaming machines, banning them by mid-2007. The only exceptions are for federally recognized Indian tribes, which may operate video gaming machines on Indian land, and for assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines, which may perform those functions for machines to be used outside the state or by a federally recognized Indian tribe on Indian land. Unless otherwise noted, the changes appear in current G.S. 14-306.1, which is repealed effective July 1, 2007, and new G.S. 14-306.1A, which takes effect July 1, 2007. The old and new statutes contain the same definition of “video gaming machine”—essentially, a video machine, of one of the types listed (video poker, video keno, and the like), requiring payment to activate, and awarding any prizes, merchandise, cash, replays, or coupons that may be exchanged for such awards.

The act establishes various cutoff dates for the phase-out of video gaming machines. From July 6, 2006, the date the act became law, through September 30, 2006, it is permissible for a single location to operate up to three video gaming machines, as under prior law. Effective October 1, 2006, a single location may operate up to two video gaming machines. Effective March 1, 2007, a single location may operate only one video gaming machine. During these time periods, the machines may not be moved from their registered location to a new location within North Carolina. Beginning July 1, 2007, the possession and operation of video gaming machines are prohibited entirely in North Carolina unless one of the exceptions applies.

The penalty for a first violation involving a video gaming machine remains a Class 1 misdemeanor, but the penalty for a second violation is raised from a Class I to Class H felony and the penalty for a third or subsequent offense is raised from a Class H to Class G felony. These punishment changes also apply to violations involving slot machines and other gambling devices under G.S. 14-304 through 14-309, effective for offenses committed on or after July 1, 2007. A violation involving five or more video gaming machines remains a Class G felony. *See* G.S. 14-309.

13. The earlier act, S.L. 2000-151 (S 1542), is summarized in *Administration of Justice Bulletin* 2000/03 at 7–10 (School of Government, Oct. 2000), posted at <http://www.sog.unc.edu/programs/crimlaw/aoj200003rubinlegis.pdf>.

The act provides that it is void if a court issues a final order prohibiting video gaming machines by a federally recognized Indian tribe on the ground that machines are prohibited elsewhere.

Sexual offenses. The Sex Offender Act (S.L. 2006-247 (H 1896)) created and modified a number of offenses involving sexual and other conduct. The new offenses are involuntary servitude, sexual servitude, and human trafficking. The modified offenses involve sexual battery and kidnapping. The Sex Offender Act also created and modified a number of offenses involving individuals required to register as sex offenses. Those offenses are discussed under Sex Offender Act, above.

Breaking and entering place of worship.

Effective for offenses committed on or after December 1, 2006, G.S. 14-72(b) is amended to provide that a larceny committed pursuant to a violation of G.S. 14-54.1 (breaking or entering building that is place of religious worship) is a felony regardless of the value of the property in question. *See* Section 4 of S.L. 2006-259 (S 1523). A “building that is a place of religious worship” is defined in G.S. 14-54.1(b).

Carrying of concealed weapon by company police. Effective October 1, 2006, G.S. 14-269(b) is amended to exempt from the prohibition on carrying a concealed weapon officers of a company police agency while discharging their official duties. Revised G.S. 74E-6(c) permits company police officers to carry concealed weapons if duly authorized by their superior officer. *See* Section 5 of S.L. 2006-259 (S 1523).

Possession of antique firearm by felon. Effective August 23, 2006, G.S. 14-409.11 is amended to provide a new definition of “antique firearm,” and G.S. 14-415.1 is amended to provide that the prohibition on the possession of a firearm by a felon does not apply to antique firearms as defined in revised G.S. 14-409.11. *See* Section 7 of S.L. 2006-259 (S 1523).

Raffles by government entities. Effective August 27, 2006, Section 3 of S.L. 2006-264 (S 602) amends G.S. 14-309.15(a) to allow a government entity to conduct a raffle. Such raffles were permitted by a prior session law, Chapter 219 of the 1993 Session Laws, which was repealed with the above amendment.

Motor Vehicle Offenses

Impaired driving and related offenses. The biggest changes to the motor vehicle laws are contained in S.L. 2006-253 (H 1048), which made extensive changes in several areas involving impaired driving, including investigation techniques and procedures, pretrial and trial procedure, evidence rules, new and modified

impaired driving offenses, sentencing for impaired driving, licensing, vehicle forfeiture, and record keeping. Those changes are summarized in a paper by James C. Drennan, DWI Omnibus Bill—2006, which is attached to this bulletin. Parts of that act do not directly involve impaired driving, and they are summarized below along with other acts involving motor vehicle and related laws.

Use of seat belts. G.S. 20-135.2A has required front-seat occupants of a motor vehicle manufactured with seat belts to wear seat belts while the vehicle is in forward motion on a street or highway. S.L. 2006-140 (S 774) amends that statute to extend this requirement to rear-seat occupants. With some modifications, the statute continues to have a list of exceptions to the seat belt requirement—for example, for occupants of motor homes who are not the driver or front-seat passengers. The revised statute states that a law enforcement officer may not stop a vehicle solely for the failure of a rear-seat occupant to wear a seat belt. This language does not prohibit an officer from citing a person for such a violation if the officer has stopped the vehicle for a different violation, such as speeding or the failure of a front-seat occupant to wear a seat belt.

It is an infraction under G.S. 20-135.2A for a front-seat or rear-seat occupant to fail to wear a seat belt. A front-seat occupant is still subject to a penalty of \$25 plus \$50 in court costs, but a rear-seat occupant is subject to a penalty of \$10 with no court costs. G.S. 20-137.1 continues to establish the penalties for the failure of a driver to secure a child under 16 years of age in a proper restraint system. An open bed or cargo area of a vehicle is not governed by either the regular seat belt or child seat belt statute. It continues to be governed by G.S. 20-135.2B, which regulates how children under the age of 12 may ride in such areas.

The changes apply to offenses committed on or after December 1, 2006, but law enforcement agencies may only issue warnings for rear seat violations until July 1, 2007.

Use of mobile phone in car by younger drivers. S.L. 2006-177 (1289) added G.S. 20-137.3 to create a new infraction involving the use of mobile telephones in motor vehicles by younger drivers. A person commits the offense if he or she

- is under the age of 18 and
- operates a motor vehicle
- on a public street or highway or public vehicular area
- while using a mobile telephone
- while the vehicle is in motion.

The new statute states that it does not prohibit the use of a mobile telephone if the vehicle is stationary. It also creates exceptions for emergency calls to certain

emergency personnel and calls to a parent, legal guardian, or spouse.

A violation of G.S. 20-137.3 is an infraction, subject to a \$25 penalty. No drivers license points, insurance surcharge, or court costs may be assessed for a violation of G.S. 20-137.3; and a violation alone does not authorize the seizure or forfeiture of a mobile telephone. The act makes conforming changes to G.S. 20-11, the graduated license statute for drivers under age 18, to condition movement to the next level on not having been found responsible for a violation of G.S. 20-137.3 for the preceding six months.¹⁴

Passing stopped school bus. In 2005, the General Assembly increased the punishment for passing a stopped school bus and for failing to remain stopped for a school bus from a Class 2 to Class 1 misdemeanor and made a violation resulting in serious bodily injury a Class I felony. This session, the General Assembly enacted two provisions involving these offenses. Effective for offenses committed on or after September 1, 2006, S.L. 2006-160 (H 2880) amended G.S. 20-217(e) to prohibit a court from granting a prayer for judgment continued (PJC) for a violation of G.S. 20-217.

Effective for offenses committed on or after August 23, 2006, Section 11 of S.L. 2006-259 (S 1523) modified the elements of the felony school bus offense. Previously, a person had to violate the school bus

14. In revising G.S. 20-11, the General Assembly added the prohibition on using a mobile telephone as a restriction on driving by Level 1, 2, and 3 license holders. The General Assembly also revised G.S. 20-11(*l*) to state that a violation of the restriction regarding the use of a mobile telephone is an infraction, subject to a penalty of \$25. These additions create a little uncertainty about the charges and punishments for mobile telephone violations because revised G.S. 20-11 does not contain all of the details that appear in G.S. 20-137.3—for example, G.S. 20-11 does not explicitly contain any exceptions for emergency calls and does not explicitly disallow court costs for a violation. One interpretation is that the General Assembly intended to create one offense only, punishable as described in the principal mobile telephone provisions in G.S. 20-137.3. A second interpretation is that the General Assembly created two offenses—a violation of G.S. 20-137.3 and a violation of a license restriction in G.S. 20-11—but the provisions must be read *in pari materia* (that is, as laws on the same subject matter that should be construed with reference to each other). Under this interpretation, the same rules would apply regardless of which offense is charged. A third interpretation is that the two offenses are to be construed separately and without regard to the wording of the other offense.

passing statute, G.S. 20-217(a), and “willfully” strike a person and cause serious bodily injury. Under revised G.S. 20-217(g), a person must “willfully” violate the school bus statute and strike another person and cause serious bodily injury. Thus, an accidental striking is covered if the violation of the school bus statute is willful.

Boating safety laws. Effective for offenses committed on or after January 1, 2007, S.L. 2006-185 (S 948) makes numerous changes to Ch. 75A, Art. 1, the Boating Safety Act. The most significant changes involving criminal law are described here.

Revised G.S. 75A-10(b1) applies the prohibition on impaired boating to the operation of all vessels on State waters, not just motorboats or motor vessels. An offense is a Class 2 misdemeanor for all vessels. (G.S. 75A-10(b) has prohibited the manipulation of water skis, surfboards, nonmotorized vessels, or similar devices while under the influence of an impairing substance, but it did not make it a per se offense to manipulate such devices while having an alcohol concentration of .08 or more.)

Revised G.S. 75A-11 requires the operator of a vessel involved in a collision or accident that results in a person’s death or disappearance to notify the nearest law enforcement agency as soon as possible. The operator also must notify the Wildlife Resources Commission within 48 hours of the occurrence. If the collision or accident results in property damage of \$2,000 or more, or the complete loss of a vessel, the operator must notify the Wildlife Resources Commission within ten days of the occurrence. A violation is a Class 3 misdemeanor, punishable by a fine only of up to \$250 under G.S. 75A-18.

Revised G.S. 75A-17 makes the following changes regarding law enforcement vessels.

- Law enforcement vessels are authorized to use a flashing blue light while engaged in law enforcement or public safety activities. A person other than a law enforcement officer who activates, installs, or operates a flashing blue light on a vessel other than a law enforcement vessel is guilty of a Class 1 misdemeanor.
- No vessel other than a law enforcement vessel or other emergency response vessel may use a siren. A violation is a Class 3 misdemeanor, punishable by a fine only of up to \$250 under G.S. 75A-18.
- Vessels operated on State waters must stop when directed by a law enforcement officer and must remain at idle speed or must maneuver in a way that permits the officer to

come alongside the vessel. A violation is a Class 2 misdemeanor.

- Vessels operated on State waters must slow to a no-wake speed when passing a law enforcement vessel that is displaying a flashing blue light and must maintain a certain distance depending on the width of the waterway. A violation is a Class 3 misdemeanor.

Failure to have financial responsibility for motor vehicle. Effective for lapses in financial responsibility occurring on or after July 1, 2008, S.L. 2006-213 (S 881) makes various changes to Article 13 of Chapter 20, which requires that motor vehicle owners have liability insurance or other forms of financial responsibility. One of these changes is the repeal of G.S. 20-312, which makes it a Class 1 misdemeanor for a vehicle owner to fail to deliver the registration card and registration plate to the Division of Motor Vehicles after receiving notice of revocation for not maintaining financial responsibility. Instead, the failure to surrender the registration card and registration plate will be a Class 2 misdemeanor under G.S. 20-45. The act also revises the civil penalties that may be imposed by the Division of Motor Vehicles, described in G.S. 20-311, for lapses in motor vehicle insurance.

Open containers of alcohol in motor vehicle.

G.S. 20-138.7(a1) was added in 2000 to prohibit anyone, including passengers, from possessing an open container of alcohol or consuming alcohol in the passenger area of a motor vehicle while the motor vehicle is on a highway or highway right-of-way. For a discussion of the elements of the offense, exceptions, and penalties, see *Administration of Justice Bulletin* 2000/03, at 12–13 (School of Government, Oct. 2000), posted at <http://www.sog.unc.edu/programs/crimlaw/aoj200003rubinlegis.pdf>. The prohibition was initially set to expire in 2002, but was extended to September 30, 2006. See S.L. 2002-25 (H 1488). This session the General Assembly eliminated the expiration, or “sunset,” clause and made the prohibition permanent. See Section 21.7 of S.L. 2006-66 (S 1741).

Convictions from tribal courts. Effective for offenses committed on or after December 1, 2006, Section 8 of S.L. 2006-253 (H 1048) amends the definition of “state” in G.S. 20-4.01(45) to include the Sovereign Nation of the Eastern Band of the Cherokee Indians with tribal lands located within North Carolina. This amendment permits DMV to take actions on convictions reported from courts of that nation in the same manner as for convictions received from other states.

Proof of giving notice by DMV. Effective for offenses committed on or after December 1, 2006, Section 21 of S.L. 2006-253 (H 1048) amends G.S. 20-48 to provide that whenever the DMV is authorized or required to give any notice by personal delivery or mail, the giving of such notice by DMV may be proved by a notation in the DMV records that notice was sent to a particular address for the specified purpose. The revised statute states that a certified copy of the DMV record, sent by the Police Information Network, fax, or other electronic means, is admissible in evidence and is sufficient to discharge the burden of the party offering the record that the notice was sent to the person and address named in the record for the purpose indicated in the record.

Move-over law. Effective August 23, 2006, Section 9 of S.L. 2006-259 (S 1523) amends G.S. 20-157(f) (known as the move-over law) to provide that drivers must move over or slow down for public service vehicles as well as emergency vehicles.

Alcohol Offenses

Consumption of alcohol by underage person. G.S. 18B-302(b) has prohibited the purchase or possession of alcohol by a person under the age of 21. Effective for offenses committed on or after December 1, 2006, Section 26 of S.L. 2006-253 (H 1048) amends that subsection to prohibit consumption of alcohol by a person under the age of 21. A violation is a Class 3 misdemeanor under G.S. 18B-302(i) if the person is 19 or 20 years old, and a Class 1 misdemeanor under G.S. 18B-102(b) if the person is less than 19 years old. New G.S. 18B-302(j) allows a law enforcement officer to require a person to submit to an approved alcohol screening device if the officer has probable cause to believe the person is under 21 and has consumed alcohol; that subsection also provides that the results or a refusal to submit to the test are admissible in evidence. The revised statute exempts alcohol consumption by an underage person for medical, sacramental, or culinary school activities, as described in G.S. 18B-103.

Keg sales. Effective for offenses committed on or after December 1, 2006, Sections 2 and 3 of S.L. 2006-253 (H 1048) regulate keg sales. Under revised G.S. 18B-101, a "keg" is defined as a portable container designed to hold at least 7.75 gallons of beer or other malt beverage. Under new G.S. 18B-403.1, a person who purchases a "keg" for transportation and off-premises consumption must obtain a purchase-transportation permit from the seller, and the seller

must retain the permit record for at least ninety days. A purchaser's failure to obtain a permit is a violation of the unlawful purchase statute (G.S. 18B-303), punishable as a Class 1 misdemeanor under G.S. 18B-102(b). A seller's first violation is punishable by a warning only under G.S. 18B-403.1(e); a subsequent violation is a Class 1 misdemeanor under G.S. 18B-102(b).

Law Enforcement

Enforcement of immigration laws. One of the session's two technical corrections acts (Section 24 of S.L. 2006-259 (S 1523)) added a new statute authorizing state and local law enforcement officers to exercise the powers of federal immigration officers in certain circumstances. New G.S. 128-1.1 provides that any state or local law enforcement agency may authorize its law enforcement officers to perform the functions of an officer under 8 U.S.C. 1357(g) if the agency has a memorandum of understanding for that purpose with a federal agency. The indicated federal statute establishes the parameters for such agreements, permitting the United States Attorney General to enter into agreements with state and local law enforcement agencies that authorize their officers to perform the functions of immigration officers at the expense of the state or local agency. The act states that the new state statute became effective January 1, 2006, and any action taken between that date and the date that the act became law (August 23, 2006) are retroactively validated.

Handgun permits. Effective June 30, 2006, S.L. 2006-39 (H 126) revises G.S. 14-404(a)(1) to clarify that the sheriff must conduct a criminal history background check before issuing a handgun permit and must check the National Instant Criminal Background Check System (NICS). The act likewise revises G.S. 14-415.13(b) to require the sheriff to check the NICS before issuing a concealed handgun permit.

Effective August 27, 2006, Section 5 of 2006-264 (S 602) amends G.S. 14-407.1 to provide that sheriffs, rather than clerks of superior court, issue purchase permits for blank cartridge permits.

Sentencing

Parole review of inmates sentenced before structured sentencing. In 2005, the General Assembly directed the Post-Release Supervision and Parole Commission to analyze the amount of time

served by each parole-eligible inmate compared to the time served by offenders for comparable crimes under structured sentencing. The Commission was directed to report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by October 1, 2005. *See* Section 17.28 of S.L. 2005-276 (S 622), summarized in *Administration of Justice Bulletin* 2005/08, at 18-19 (School of Government, Dec. 2005), posted at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0508.pdf>. This session the General Assembly revised that provision to direct the Commission to conduct such an analysis for each inmate who is eligible for parole on or before July 1, 2007. It also directed the Commission to report by April 1, 2007, to the above legislative committee and to the Chairs of the Senate and House Appropriations Committees and Appropriations Subcommittees on Justice and Public Safety. *See* Section 16.5 of S.L. 2006-66 (S 1741).

Notification of parole. Effective August 27, 2006, Section 34 of S.L. 2006-264 (S 602) amended G.S. 15A-1371(b) to require that when the Post-Release Supervision and Parole Commission is considering the parole of a person sentenced to life in prison, it must notify the sheriff of the county where the crime occurred at least thirty days beforehand. (This provision has no effect on inmates sentenced to life in prison for offenses committed after October 1, 1994, when the General Assembly eliminated the possibility of parole.)

Sentencing for impaired driving. S.L. 2006-253 (H 1048) revised the sentencing procedures for impaired driving offenses, in G.S. 20-179, in response to the U.S. Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated sentencing schemes in which a person could be sentenced to an enhanced sentence based on aggravating factors found by a judge rather than a jury. The new sentencing procedures are discussed in the attached paper by James C. Drennan.

Collateral Consequences and Proceedings

Compensation for crime victims. Effective for claims filed on or after July 1, 2006, S.L. 2006-183 (H 2060) revised Chapter 15B, which sets forth a procedure for victims of crime to apply for state funds to compensate them for their injuries and losses. The act makes two changes regarding funeral expenses: it increases from

\$3,500 to \$5,000 the allowable amount for expenses related to funeral, cremation, and burial; and it includes as a collateral source of benefits, which serves to reduce any award of compensation from state funds, a contract for insurance for expenses related to a funeral, cremation, and burial. *See* G.S. 15B-2. The act also clarifies the circumstances in which an award may be denied for a claimant's failure to cooperate in the pursuit of a criminal case. Revised G.S. 15B-11(c) provides that a claim may be denied or reduced, or an award may be reconsidered, if a claimant or victim fails to cooperate, without good cause, with law enforcement agencies or in the prosecution of the case regarding the criminal acts that are the basis of the claim or award.

Criminal record checks. The General Assembly authorized the North Carolina Department of Justice to provide criminal history checks to the boards and departments indicated below. The record check may only be conducted with the person's consent; however, a refusal to consent gives the board or agency grounds to take adverse action against the person, such as terminating employment or denying licensure.

Effective August 1, 2006, the North Carolina Psychology Board may obtain a criminal history check of an applicant for licensure or reinstatement of a license, or of a licensed psychologist or psychological associate under investigation by the Board for violating Ch. 90, Art. 18A (Psychology Practice Act). *See* S.L. 2006-175 (H 1327).

Effective October 1, 2006, the Judicial Department may obtain a criminal history check of any current or prospective employee, volunteer, or contractor of the Judicial Department. *See* Section 3 of S.L. 2006-187 (H 1848).

Forfeiture of property rights by slayers. Effective for property passing from decedents dying on or after July 13, 2006, S.L. 2006-107 (S 1378) revised Article 3 of Chapter 31A, which bars a "slayer" from succeeding to various property rights if the slayer was found in a criminal or civil case to have willfully and unlawfully killed the decedent. The act revises the article by: redefining the circumstances in which a civil case may bar a slayer's inheritance rights; making a juvenile subject to the forfeiture provisions if he or she is found delinquent for an act that, if committed by an adult, would make the adult guilty of a willful and unlawful killing of the decedent; and excluding from the term "slayer," and thus from the forfeiture of property rights, a person found not guilty by reason of insanity. The revised article also states that it preempts the common law rule preventing a person whose

culpable negligence causes the death of a decedent from succeeding to the decedent's property.

Court Administration

As in most years, the budget act contained numerous budgetary and personnel provisions affecting the operation of the courts. *See* S.L. 2006-66 (S 1741), as amended by S.L. 2006-221 (S 198), and Section I (Judicial) of Joint Conference Committee Report on the Continuation Expansion and Capital Budgets (June 30, 2006) ("Conference Report on Budget"). Many other administrative matters affecting the courts are contained in an additional act, the Omnibus Courts Act. *See* S.L. 2006-187 (H 1848). Portions of those acts as well as other legislation involving court administration are summarized below. For a full discussion of legislation involving court administration, *see* James C. Drennan, *Courts and Civil Procedure*, in NORTH CAROLINA LEGISLATION 2006 (School of Government, forthcoming 2007), to be posted at <http://ncinfo.iog.unc.edu/pubs/nclegis/nclegis2006/index.html>.

Electronic bondsmen registry. S.L. 2006-188 (S 846) amends G.S. 58-71-140 to require the Administrative Office of the Courts to create a statewide Electronic Bondsmen Registry by October 1, 2006, for licenses, powers of appointment, and powers of attorney for bondsmen. Once the registry is established, the Commissioner of Insurance must notify all professional bondsmen, surety bondsmen, runners, and qualified insurance companies that the registry is in operation and that they must register in that system. Upon registering, the person is authorized in all counties to execute bail bonds under his or her license, power of appointment, or power of attorney. The registry eliminates the requirement to file licenses, powers of appointment, and powers of attorneys in the clerk's office in the counties where the person seeks to write bonds.

Open-file discovery project. The General Assembly allocated \$3 million in nonrecurring, nonreverting funds for an automated evidence tracking system for prosecutors, which will register articles of evidence, track their use, and verify that the articles have been disclosed pursuant to open-file discovery requirements. *See* Section I (Judicial) of Conference Report on Budget. For a discussion of the open-file discovery requirements, *see Administration of Justice Bulletin* 2004/06, at 2-8 (School of Government, Oct. 2004), posted at <http://sog.unc.edu/programs/crimlaw/aoj200406.pdf>.

Foreign language interpreters. G.S. 7A-314(f) has provided in criminal cases that when the court appoints a foreign language interpreter to assist an indigent defendant, a witness for an indigent defendant, or a witness for the state who does not speak or understand English, the fees set by the court for the interpreter are payable from funds appropriated to the Administrative Office of the Courts (AOC). Effective August 3, 2006, Section 5 of S.L. 2006-187 (H 1848) expands that requirement. It provides that in all cases in which the Judicial Department bears the costs of representation for a party, the fees for foreign language interpreters appointed by the court to assist that party and that party's witnesses are payable from funds appropriated to the AOC. Thus, this provision now applies to any case in which a party is indigent and entitled to counsel at state expense, such as in abuse and neglect cases.

Under revised G.S. 7A-343(9b), the AOC is authorized to prescribe uniform policies and procedures for the appointment and payment of foreign language interpreters in the cases specified in G.S. 7A-314(f). It also permits the AOC to convert contractual foreign language interpreter positions to permanent state positions. The budget act funds this conversion, allowing the AOC to use funds appropriated for the 2006-07 fiscal year to establish up to ten interpreter positions to replace contract positions. *See* Section 14.20(b) of S.L. 2006-221 (S 198), amending S.L. 2006-66 (S 1741). The AOC also was appropriated \$775,000 in nonrecurring funds to pay for interpreter services for fiscal year 2006-07. *See* Section I (Judicial) of Conference Report on Budget.

Judicial ethics and judicial officer ethics. Two acts this session dealt with ethics in the courts. One revises the procedures of the Judicial Standards Commission, which oversees judges. *See* Sections 11-12 of S.L. 2006-187 (H 1848), as amended by Section 44(b) of S.L. 2006-259 (S 1523). The other deals with ethics in government generally and applies in some respects to judicial officers (judges, district attorneys, and clerks of court) and judicial employees (director and assistant director of AOC and any person making a salary of \$60,000 or more who is designated by Chief Justice). *See* S.L. 2006-201 (H 1843). These acts are discussed in James C. Drennan, *Courts and Civil Procedure*, in NORTH CAROLINA LEGISLATION 2006 (School of Government, forthcoming 2007), to be posted at <http://ncinfo.iog.unc.edu/pubs/nclegis/nclegis2006/index.html>.

Payment of fines and fees. Effective August 3, 2006, new G.S. 7A-321 permits the Judicial Department to accept payment of fines and fees by

credit card, charge card, or debit card. New G.S. 7A-343(9b) authorizes the AOC to enter into contracts with private vendors to implement this provision and allows private vendors to assess a convenience or transaction fee for the service. *See* Section 1 of S.L. 2006-187 (H 1848).

Electronic filing. New G.S. 7A-49.5 authorizes the North Carolina Supreme Court to adopt rules for electronic filing of pleadings and other documents required to be filed with the courts. The new statute also authorizes the AOC to contract with a vendor to implement this provision. The act applies to all matters filed with the court after the date the North Carolina Supreme Court adopts rules on electronic filing. *See* Section 2 of S.L. 2006-187 (H 1848).

Studies

The studies bill, S.L. 2006-248 (H 1723), authorizes the Legislative Research Commission (LRC) to study several topics related to criminal law and the courts.

The LRC may study the state's discovery obligations in criminal cases in superior court, including the following topics:

- identities of informants who furnished information leading to a search warrant against the defendant,
- personal information of the victim,
- the "work product" provision in G.S. 15A-904,
- open discovery in noncapital postconviction cases, and
- any other related issues.

The LRC also may study the following topics: banning of cell phone use while driving; credit report identity theft; a good faith exception to the exclusionary rule¹⁵; habitual felon statutes; minority incarceration; driving by a person less than 21 years old after consuming alcohol or drugs; racial bias and the death penalty; trafficking of persons; victim restitution; the impact of undocumented immigrants on the state, including the impact on the criminal justice

system and corrections; and modifying the definition of "clear proceeds" in a manner that allows the proceeds from red light camera systems to be used for the operation of such systems. An additional act (S.L. 2006-32 (H 2120), as amended by Section 8 of S.L. 2006-187 (H 1848) and Section 44(a) of S.L. 2006-259 (S 1523)) charges the LRC with studying drug treatment courts, including issues relating to funding mechanisms, target populations, interagency collaboration, and any other appropriate matters.

The North Carolina Courts Commission will study the current state of the trial courts, including workloads, case backlogs, and other issues relevant to the efficient administration of justice. The Commission also will examine whether the current organization of the state into judicial divisions and superior court, district court, and prosecutorial districts needs to be revised.

The North Carolina Sentencing and Policy Advisory Commission may study issues related to the conviction and sentencing of youthful offenders aged 16 to 21 years of age.

A new Joint Legislative Study Committee on Sex Offender Registration and Internet Crimes against Children will study several issues related to sex offender registration and internet crimes, including the offenses subject to registration, length of registration, verification of registration, and use of registration fees.

15. The United States Supreme Court has created an exception to the exclusionary rule for certain good faith actions by law enforcement officers. The North Carolina Supreme Court has declined to recognize this exception, holding that the state constitution requires exclusion of evidence obtained in violation of a person's constitutional rights regardless of whether the officers were acting in good faith. *See State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988).

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DWI omnibus bill-2006
S.L. 2006-253 (H 1048)

James C. Drennan
School of Government
November, 2006

(Numbers in parentheses refer to specific sections in S.L. 2006-253)

1. Substantive changes to criminal offenses

- a. Impaired Driving—GS 20-138.1 (Sec. 9).
 - i. Specifies that results of a chemical analysis is ‘deemed sufficient evidence’ to prove a person’s alcohol concentration for purposes of establishing the person’s guilt under GS 20-138(a)(2).
 - ii. Adds additional prong of offense which provides that driving with any Schedule I controlled substance, or its metabolites in one’s blood or urine is a per se violation of impaired driving offense.
 - iii. Specifies that person who obtains blood test as alternative to state mandated chemical analysis may use the test to rebut the state’s analysis.
 - iv. Specifies that person may assert that chemical analysis is inadmissible if preventive maintenance not properly performed.
 - v. Deletes exemption for lawnmowers and bicycles, which means that driving on either is now covered by impaired driving offense.
 - vi. Amends GS 20-179 (Sec. 23) to delete the judge’s option of meeting the mandatory conditions of probation required for non-activated sentences at levels three through five by imposing a period of non-operation of a motor vehicle.
- b. Impaired Driving in Commercial Vehicle—GS 20-138.2 (Sec. 10).
 - i. Makes changes identical to 1) (a), (ii), (iii), and (iv) above.
 - ii. Specifies that gross vehicle weight rating of a vehicle may be proved by opinion testimony, observation of the gross vehicle weight rating affixed to the vehicle, registered or declared weight shown on Division of Motor Vehicles, gross vehicle weight as determined by the VIN, listed gross weight publications from the vehicle manufacturer, or any other description or evidence.
- c. Habitual Impaired Driving—GS 20-138.5 (Sec. 12).
 - i. Extends ‘look-back’ period for determining if prior convictions count for purposes of establishing that person had requisite number of prior convictions from seven to ten years.
 - ii. Specifies that provisions of GS 20-139.1 (procedures governing chemical analysis) apply to prosecutions under this statute.
- d. Death by Vehicle—GS 20-141.4 (Sec.14)--Establishes new offenses of Felony Serious Injury by Vehicle, Aggravated Serious Injury by Vehicle, Aggravated Felony Death by Vehicle and Repeat Felony Death by Vehicle
 - i. Felony Serious Injury requires unintentional causation of “serious injury” while driving while impaired—Class F felony.
 - ii. Aggravated Felony Serious Injury is same as (1) and person has one or more previous convictions of an offense involving impaired driving within seven years of offense date of instant offense—Class E felony.

- iii. Reclassifies Felony Death by Vehicle as Class E felony.
- iv. Aggravated Felony Death by Vehicle is same as felony death by vehicle and person has one or more previous convictions of an offense involving impaired driving within seven years of offense date of instant offense—Class D felony.
- v. Repeat Felony Death by Vehicle occurs if person who has a conviction of Felony Death by Vehicle or Aggravated Felony Death by Vehicle commits either offense again, and is punishable as second degree murder
 - 1. No limit on how long in the past the prior offense occurs.
- vi. No specific license revocation for new injury offenses, and does not amend definition of Offense Involving Impaired Driving to include them; Death offenses would be covered by existing statutes classifying death by vehicle as offense involving impaired driving, with specified license consequences.
- e. Driving after Notification or Failure to Appear—GS 20-28(a2). (Sec. 22.1)
 - i. Two alternative ways of committing offense—
 - 1. Drive on highway with a revoked license for an impaired driving license revocation after the Division of Motor Vehicles has sent notification in accordance with GS 20-48.
 - 2. Fail to appear for two years from the date of the charge after being charged with an implied-consent offense.
- f. Definition of Public Vehicular Area (Sec.8). Amends GS 20-4.01 (32) to specify that area is public vehicular area if it open to public at any time (instead of “generally”); to specify that business areas that meet definition remain public vehicular area, even if the business is closed; and clarifies that residential subdivision roads that are not public roads are public vehicular areas if road is used by vehicular traffic in or leading to a subdivision.
- g. Consumption of alcohol by underage person. (Sec. 26). Amends GS 18B-302 to make it a misdemeanor for a person under 21 to consume (it is already unlawful to purchase or possess) alcohol. Allows law enforcement officer with probable cause to require any person whom the officer has probable cause to believe has violated this statute to submit to alcohol screening devices approved by HHS. Refusal to submit may be introduced in evidence as may be the screening results. Exempts consumption for medical, sacramental or culinary school activities.

2. Driver’s license changes

- a. Amends GS 20-17(a)(2) (Sec. 22.2) to limit authority to revoke driver’s license for convictions of impaired driving in a commercial vehicle to those cases in which driver’s alcohol concentration is 0.06 or higher. (Revocation under this section prohibits driving punishable pursuant to GS 20-28, but under separate sections of commercial driver license law, driver would also be disqualified from driving commercial vehicle for the same conduct and any driving of a commercial vehicle during the period of disqualification would also be a violation of the commercial licensing laws.) Specifies that chemical analysis result is conclusive and judge may not alter it.
- b. Amends GS 20-16.2(e) (sec. 15) to provide that hearing in superior court to review revocation based on willful refusal under that section is limited to whether there is sufficient evidence in the record to support the DMV findings of fact and conclusions and whether conclusions are consistent with law.

- c. For convictions of offense of driving after notification or failure to appear (see 1. e. above) (Sec. 22.1), revokes license for an additional period of one year for first conviction, two years for second and permanently for third offense. Revocation is in addition to any revocation in effect at the time of conviction.
 - i. First year revocation may not be reduced by DMV.
 - ii. For longer revocations person may apply for conditional restoration after one year for a two-year revocation and three years for a permanent revocation. Restoration to be conditioned on compliance with substance abuse assessment, and if alcohol abuse found, on use of interlock during period of time required by GS 20-17.8.
 - 1. Violations of conditions or subsequent convictions result in cancellation of license, re-revocation, and registration revocation of any vehicles registered by defendant.
- d. Amends GS 20-28 (Sec. 22.1) to require person originally revoked under GS 20-16.5 (CVR law) who is punished under GS 20-28(a1) (driver without reclaiming license), as condition of reinstatement of license must show proof of financial responsibility to Division and obtain substance abuse assessment, and complete any recommended treatment or education within time required by Division.
- e. Amends GS 20-17.8 to add new subsection (l) (Sec. 22.4) to add medical exception to requirement that driver use interlock. Medical condition must make person incapable of personally activating the interlock. Exception must be certified to by at least two physicians. Commissioner not bound by medical recommendations. Commissioner's negative decision may be reviewed by DMV Medical Review Board under GS 20-9.
- f. Repeals GS 20-17.2 (Sec. 25), which authorizes DMV to revoke in DWI cases in which the court orders a person not to drive as a condition of probation the mandatory conditions of probation required for levels . A related amendment to GS 20-179 deletes the judge's option of meeting three through five by imposing such a probation condition.
- g. Amends GS 20-48 (Sec. 21) to specify that proof of notice given by DMV may be made by a notation in the DMV records that notice given to a particular address for a specified purpose. Repeals requirement that the notice be proved by certificate or affidavit of DMV employee. Allows certified copies of DMV records to be sent PIN, fax, or electronically, and specifies that records so sent are admissible in evidence and are sufficient to "discharge the burden" of establishing that the notice was sent to the person and address named in the record for the purpose specified. Specifies that the actual notice need not be produced.
- h. Amends definition of "state" in GS 20-4.01 (45) (Sec. 8) to include Sovereign nation of Eastern Band of Cherokee, which authorizes DMV to take actions on convictions reported from the tribal courts of that nation in same manner as in convictions received from other states.

3. Investigative and detention changes

- a. Amends GS 20-16.3A (Sec. 4) to revise procedures to conduct license checking stations and roadblocks (formerly called "impaired driving checks"). Specifies that checking stations operated to determine compliance with motor vehicle law are to operated pursuant to that statute. Checking stations operated for other purposes that are consistent with state and federal constitutions not affected by this statute. Agency policy must be written, and

must include guidelines for establishing the pattern for a particular checkpoint, but that pattern need not be in writing. Locations must be random or statistically indicated, but violation of that rule is not basis to suppress evidence.

- b.** Amends GS 20-16.3 (Sec. 7) to clarify that fact that test results from preliminary breath testing devices showed that a person had a positive or negative test result may be introduced in evidence in court or used in administrative hearing for purpose of determining if reasonable grounds exist to believe driver had committed an implied consent offense and the driver had consumed alcohol. Allows negative results (but not low readings) to be used in determining if impairment is caused by something other than alcohol. Alcohol concentration results may not be admitted into evidence, but does not change admissibility of results in zero tolerance statutes such as GS 20-138.3.
- c.** Adds new GS 20-38.2 (Sec. 5) to authorize law enforcement officer investigating an implied consent offense that occurs in his or her jurisdiction to seek evidence both in- or out-of-state, and to make arrests anywhere in state.
- d.** Adds new GS 20-38.3 (Sec. 5) to require officer to inform defendant of the charges against him and take defendant to judicial official for an initial appearance as required by law.
- e.** After arrest and before initial appearance allows officer to take defendant to any chemical test location in the state for testing or to any site for medical evaluation, to any place in the state for to have person identified, and may have the defendant fingerprinted and photographed.
- f.** Adds new GS 20-38.4 (Sec. 5) to spell out additional procedures magistrate may or must follow in implied consent cases:
 - i.** May hold initial appearance anywhere in county, and must, if practicable be available anywhere in county as appropriate
 - ii.** Must consider whether preventive detention provisions of GS 15A-534.2 should be imposed, if probable cause found
 - iii.** Must inform person in writing of procedures to have others come to jail to observe his condition or administer additional test of breath or blood, and must require person unable to make bond to furnish names and phone numbers of people he wishes to contact. The list of names must be kept in case file.
- g.** Adds new GS 20-38.5 (Sec. 5) to require Chief District Judge, DA, sheriff and Department of Health and Human Services to have a written procedure for attorneys and witnesses to have access to chemical testing rooms, and a procedure for those same people to have access to defendants in jail unable to comply with pretrial release conditions. Requires county to have signs indicating the location of chemical test sites, with initial signs to be provided by Department of Transportation. Requires the posting of a written notice of a person's rights in the chemical analysis process. When mobile chemical testing equipment is used, Department of Health and Human Services responsible for the notices and procedures.
- h.** Rewrites GS 20-16.2 (Sec.15), which deals with the duty of a motorist to submit to chemical analyses in implied consent offenses, to make numerous editorial changes. Eliminates references to "charging officer" and replaces them with references to "law enforcement officer". Retains requirement that chemical analyst or law enforcement officer authorized to administer a breath

an alcohol concentration or the presence of a controlled substance if person conducting analysis had the proper permits from HHS.

1. Adds new GS 20-139.1(d2), (d3) to mandate that physician, nurse, emergency medical technician or other qualified person withdraw blood upon request of law enforcement officer. Officer must reduce request to writing if requested by medical personnel. Immunizes medical personnel from civil or criminal liability, except for negligence, in the drawing of blood or collection of urine.
- iii. Medical Records (HIPAA). (Sec. 17-18). Adds new GS 90-21.20B to specify that health care provider providing care to person involved in vehicle crash must provide basic identifying information to law enforcement and allow law enforcement to have access to patient, and must comply with court orders requiring release of information. Provides that law enforcement and prosecution must not release information except as necessary for the investigation or prosecution. Amends GS 8-53.1, medical privilege, to specify that the privilege does not apply to matters covered by new statute.
- iv. Alternatives test by state and defendant.
 1. Adds new GS 20-139.1(d1) to specify that law enforcement officer may compel a defendant who refuses a chemical analysis to provide blood or urine samples without getting a court order if the officer believes getting a court order would result in a dissipation of the person's alcohol concentration.
 2. Rewrites GS 20-139.1(d), which authorizes defendant to try to obtain an additional test. If defendant is not released on pretrial release, person with custody of the defendant must make timely, reasonable efforts to provide defendant with telephone access and insure that outside parties have physical access to defendant.
- 4. Trial procedure and evidence changes. (Sec. 5)** Adds new Article 2D (20-38.1—38.7) to GS Ch. 20 setting out special procedures applicable to the trial procedures for implied consent cases handled in the District Court Division. Also makes other changes to trial procedures (in this section d, unless otherwise noted, all provisions are contained in new Art. 2D.)
- a. Requires defense motions to suppress or dismiss the charges, to be made before trial, except for motions to dismiss at close of state's or defendant's case and motion based on new facts not known to defendant before trial.
 - b. State must be given reasonable time to prepare for motion. If state stipulates evidence will not be offered, judge must grant motion summarily. Judge must also summarily deny motions not made before trial unless specifically allowed by law to be filed during trial.
 - c. If hearing required, judge must find facts, and all testimony must be under oath. Written findings and conclusions required. If judge "preliminarily indicates" that defendant prevails, judge may not enter an order until state either appeals to superior court or decides not to appeal.
 - d. Appeals to superior court by state are heard de novo. Defendant may not appeal denial of motion before trial but may "appeal upon conviction as provided by law".
 - e. If defendant convicted and appeals to superior court, any judgment is vacated. Case may be remanded back to district court with the consent of the

court and prosecutor. If appeal withdrawn or case remanded, district court must hold new sentencing hearing, and must consider any pending or new charges or convictions, and delay sentencing in the remanded case until all pending cases are disposed of.

- f.** Amends GS 8C-1, Rule 702 (Sec. 6) to allow introduction of Horizontal Gaze Nystagmus test results by person who has been trained in the test's administration and interpretation of the test data, and to allow testimony as to whether a person is under the influence of an impairing substance and what category of substance caused the impairment. Specifically allows Drug Recognition Expert testimony by trained personnel in the DRE protocols to testify as to impairment. New subsection (a1) does not authorize expert testimony on issue of specific alcohol concentration. Witness must be qualified as expert and must establish foundation. Also allows accident reconstruction experts to give opinions as to speed of vehicles.
- g.** Amends GS 20-138.4 (Sec. 19) to require prosecutor to give detailed reasons in the record and orally to the court for his or her actions dismissing or reducing an implied consent case or involving driving while license revoked for impaired driving. Record must include

 - i.** Alcohol concentration, prior convictions of the defendant, license status, any pending charges.
 - ii.** Elements the prosecutor believes can and cannot be proven, and why.
 - iii.** Name of charging officer, and the agency of employment.
- h.** Amends various sections in GS 20-139.1 (Sec. 16) to require court to take judicial notice of:

 - i.** Rules of HHS regarding chemical analysis rules
 - ii.** Lists of permits issued by HHS
 - iii.** Whether a person had a valid permit at the time of the chemical analysis, based on HHS website
 - iv.** HHS permits issued to blood analysts, types of instruments they can use, and the time periods for which they are valid
 - v.** Preventive maintenance records
- i.** Adds new subsections GS 20-139.1(c1)-(c4) (sec. 16) to specify procedures to be used in collection of blood and urine samples. Provides that test results from SBI or Charlotte Police Lab are admissible in evidence without authentication or personal appearance by lab personnel unless defendant notifies state at least five days before trial or hearing in superior or juvenile court that he or she objects to the introduction by that method. Allows transmission of results by fax or electronically. Retains right of any party to subpoena witnesses. Requires testing to be consistent with SBI rules or ASCLD approved procedures. Specifies that results may be used to prove an alcohol concentration or the presence of a controlled substance if person conducting analysis had the proper permits from HHS. Prescribes procedure for establishing chain of custody of blood or urine. Provides that statement of various persons in possession of evidence (with required information specified in bill) is prima facie evidence that person had custody and made delivery as indicated in statement, and that personal appearance in court of that person is not necessary.
- j.** Amends GS 20-139.1(e) (Sec. 16) to allow defendant to get continuance if he or she shows that state did not provide notice of chemical analysis result before trial, but may not be grounds to suppress evidence or dismiss charges.

- k. Amends subsection (e1) (Sec. 16), which allows testimony of chemical analyst by affidavit in district court, to provide that subpoena for chemical analyst in district court trial may not be issued unless person files affidavit specifying the factual grounds on which person believes the chemical analysis was not administered and the basis for asserting that the analyst's presence is necessary. If court finds analyst's presence to be necessary, case may be continued, but it may not be dismissed for failure of an analyst to appear unless the analyst willfully fails to appear after being ordered to do so by the court.
- l. Amends GS 15A-1420 (Sec. 30) to prohibit granting of a motion for appropriate relief in district court unless district attorney files notice that he or she has been notified or has consented to the motion, or unless 10 business days have passed since defendant gives written notice or oral notice in open court.

5. Sentencing changes

- a. Amends GS 20-179 (sec. 23) to modify the procedure used to determine the existence of aggravating factors in superior court. Generally requires that jury determine all factors other than those involving prior convictions, to make procedure consistent with *Blakeley v. Washington*. Requires the factors to be proved beyond a reasonable doubt.
- b. Amends GS 20-179 (sec. 23) to require defendant to serve 48 continuous hours if the court orders the person to serve a term of 48 hours or has more than 48 hours remaining on a term. Requires credit to be given only hour for hour for time actually served, and requires jail to maintain a log of hours served. Requires local confinement personnel to refuse to admit defendant who reports to jail with any alcohol in its body. Directs court to hold a hearing when defendant is refused admission into jail. Directs judge to order defendant to serve time immediately and may not allow it to be served only on weekends if judge finds that the person did in fact report with alcohol in his or her body.
- c. Amends GS 20-179 (sec. 23), in subsections describing mandatory punishments for levels three through five, to delete authority for judge to satisfy mandatory probation conditions by imposing period nonoperation of a motor vehicle. Effect is to require judge punishing at those levels who imposes probation judgment to require either special probation (jail) or community service as a probation condition.
- d. Amends GS 15A-1374 (Sec. 27) to require defendant who is paroled and has completed treatment program but is not being paroled to a residential treatment facility must either be paroled on community service parole or be subject to electronic monitoring as a condition of parole.
- e. Driving by underage driver after drinking—GS 20-138.3. (Sec. 11 and Sec. 23). Makes no substantive change to elements of the offense and leaves the offense as a Class 2 misdemeanor. However, in Sec. 23 of this bill, GS 20-179 is amended to make the offense subject to punishment under that section, which is the punishment for convictions of DWI. Early versions of this bill had made the underage drinking/driving offense subject to DWI punishments and contained similar language in the text of GS 20-138.3, but the final version of the legislation removed all those references in GS 20-138.3. The conforming change in GS 20-179 was not removed. The effect is that GS 20-138.3 says that it is a Class 2 misdemeanor and GS 20-179 says it is punished as an impaired driving offense. This creates a conflict which will likely be

interpreted to punish convictions under this section as a Class 2 misdemeanor, based on the legislative history that can be discerned by looking at previous versions of the bill.

- f. Amends various statutes in the vehicle forfeiture laws (GS 20-28.2, et. seq.) (Sec. 21) to extend coverage of those laws to persons charged with impaired driving and who at the time of the offense had neither a valid drivers license or insurance. Specifies that hearing to determine if vehicle subject to forfeiture at any hearing for the underlying offense, a separate hearing after conviction, or a forfeiture hearing held after person fails to appear for the underlying offense. Specifies that burden of proof for any of those hearings is greater weight of the evidence.

6. ABC law changes

- a. Keg regulation. (Sec. 1, 2). Amends GS 18B-101 to define keg as portable container designed to hold at least 7.75 gallons of beer or other malt beverage. Adds new GS 18B-403.1 to require purchaser of a keg to obtain a purchase-transportation permit from the seller of the keg. The permit is to be retained by seller for at least 90 days or for as long as any person asks that it be retained. Failure to obtain permit is violation of unlawful purchase statute in GS 18B-303. Failure of seller to comply with statute is punishable by warning for first offense.
- b. Rehiring former permittees. (Sec. 28). Amends GS 18B-1003(c) to make it unlawful for a permittee to hire a person who was the previous permit holder for that same location if that person had his or her permit revoked in the preceding 18 months.
- c. Consumption of alcohol by underage person. (Sec. 25). Amends GS 18B-302 to make it a misdemeanor for a person under 21 to consume (it is already unlawful to purchase or possess) alcohol. Allows law enforcement officer with probable cause to require any person whom the officer has probable cause to believe has violated this statute to submit to alcohol screening devices approved by HHS. Refusal to submit may be introduced in evidence as may be the screening results. Exempts consumption for medical, sacramental or culinary school activities.

7. Data collection changes

- a. Prosecutor disclosure in dismissals. (Sec. 19). Amends GS 20-138.4 to require prosecutor to enter detailed “explanation” before reducing, dismissing or otherwise not proceeding with the original charge in implied consent cases and in DWLR for impaired driving. (Previously the explanations were required only in offenses involving impaired driving.) Requires explanation to be in writing and signed by prosecutor, and must contain:
 - i. Results of any chemical test
 - ii. Prior alcohol or DWLR offenses, and current status of license
 - iii. List of any pending charges or a representation that the AOC database was checked
 - iv. Elements that cannot be proved, and why
 - v. Name of officer and agency making arrest, and whether officer is available.
 - 1. Copies must be sent to the law enforcement head and the district attorney and filed electronically. The electronic filing is not required until the Administrative Office of the Courts rewrites its criminal information system

- b. Clerk's records
 - i. Amends GS 7A-109.2 (Sec. 20.1) to require clerks to maintain electronic database on any case involving vehicles and alcohol. Database must include reasons for any pretrial dismissal by the court, alcohol concentration of driver, if known and reasons for suppression of any evidence. This requirement is not effective until the Administrative Office of the Courts rewrites its criminal information system.
 - ii. Adds new GS 7A-109.4 (Sec. 24) to require clerks to maintain all records of convictions for an offense involving impaired driving for at least 10 years from conviction date and to maintain permanent record of defendant's name, the judge, prosecutor, any attorney or waiver of attorney, alcohol concentration or refusal to take a chemical analysis, the sentence, if appealed the disposition in superior court as well. (Unlike new GS 7A-109.2 above, which is not effective until the information system is upgraded, this section becomes effective when bill becomes effective).
- c. Web-based statewide data (Sec. 20.2)
 - i. Adds new GS 7A-346.3 to require AOC to provide annual report to legislature and to maintain website on data for vehicle/alcohol cases. Database must include types of dispositions for whole state and by county, judge, prosecutor and defense attorney. Also must include fines and costs imposed and collected and compliance data for community service, jail, substance abuse assessment, treatment and education. This requirement is not effective until the Administrative Office of the Courts rewrites its criminal information system.
- d. **Effective date.** Effective December 1, 2006 for offenses committed on and after that date. Sections requiring AOC to maintain electronic Internet database, requiring clerks to keep electronic records of reasons for court dismissals and requiring AOC to maintain electronic copies of prosecutor's explanations of dismissals are not effective until AOC rewrites the clerk's criminal information system. (AOC budget contains \$5.1 million in recurring and \$1.3 in nonrecurring funds, and authority to hire for 30 new positions, for critical technology projects, including rewriting of obsolete processing systems for clerks)

For a copy of the DWI bill, go to www.ncleg.net and use the "Bill Look Up" search engine on the right hand column of the home page.