

# ADMINISTRATION OF JUSTICE BULLETIN

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## 2005 LEGISLATION AFFECTING CRIMINAL LAW AND PROCEDURE

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The most significant legislation enacted by the General Assembly in the field of criminal law and procedure was what has become known as the *Blakely* bill, which responds to rulings of the United States Supreme Court that rendered unconstitutional portions of North Carolina's sentencing statutes. As is common in most sessions, the General Assembly also passed legislation on a wide array of criminal law and procedure topics. Most of the attention was paid to creating and revising criminal offenses, including new restrictions on the sale of pseudoephedrine, a cold medication ingredient also used to manufacture methamphetamine, and revamped laws on identity theft and exploitation of an elderly or disabled adult. The General Assembly also passed legislation that indirectly involves criminal law, expanding the collateral consequences of criminal convictions by requiring sex-offender registration for a wider range of offenses and requiring criminal history checks for a wider range of employment and other activities.

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 web site of the General Assembly, <http://www.ncga.state.nc.us/>.

Some of the material in this bulletin was drawn from the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2005. That publication will be posted on the School's web site at <http://ncinfo.iog.unc.edu/pubs/nclegis/index.html> and also can be ordered from the School's publication sales office. Contact information for the publications department is included on the last page of this bulletin.

## The *Blakely* Bill

### Background

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the U.S. Supreme Court held that any fact (other than a prior conviction) that increases the defendant's sentence beyond the statutory maximum permitted for the offense must be submitted to a jury and found beyond a reasonable doubt. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court elaborated on this principle, holding that the term "maximum" means the maximum sentence that a judge may impose based solely on the facts found by the jury or admitted by the defendant. These rulings have had significant repercussions for felony sentencing in North Carolina. Almost all felonies in North Carolina are governed by structured sentencing, which has permitted a judge to impose a higher sentence based on the judge's own findings, by a preponderance of the evidence, that certain aggravating factors and prior record points exist. In several North Carolina Court of Appeals decisions, and in the North Carolina Supreme Court's decision in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), the courts have recognized that, with some exceptions, such an approach violates the principles of *Apprendi* and *Blakely*.

In light of these problems, the General Assembly enacted S.L. 2005-145 (H 822), effective for offenses committed on or after June 30, 2005. (The North Carolina Supreme Court's *Allen* decision and the decisions by the North Carolina Court of Appeals govern the procedures to be followed for offenses committed before June 30, 2005. For a detailed discussion of the differences in procedure for offenses committed before and after the effective date of the act, see Jessica Smith, *North Carolina Sentencing after*

*Blakely v. Washington and the Blakely Bill*, posted at <http://www.sog.unc.edu/programs/crimlaw/faculty.htm> (Sept. 2005)). The *Blakely* bill, as it has become known, applies to structured sentencing for felonies in both district and superior court. It does not apply to structured sentencing for misdemeanors, which so far is unaffected by the U.S. Supreme Court's decisions. The act also does not apply to the sentencing scheme for impaired driving offenses under G.S. Ch. 20, although that scheme is affected by the U.S. Supreme Court's decisions. For some guidance on the sentencing procedure to follow in those cases, see *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005); see also Smith, *supra*.

The *Blakely* bill makes the following changes to the procedures for imposing a sentence in a felony case. The revised procedures can be divided into three categories—the procedures for pleading or otherwise alleging aggravating factors and prior record points that would enhance a defendant's sentence, the procedures for determining the existence of aggravating factors and prior record points, and the procedures for considering and weighing mitigating factors against aggravating factors and imposing sentence. Unless otherwise noted, all the changes appear in revised G.S. 15A-1340.16 (aggravated and mitigated sentences) and 15A-1340.14 (prior record level for felony sentencing).

### Pleading Requirements

The act essentially creates three different pleading rules depending on the aggravating factors and prior record points being sought to enhance a defendant's sentence.

1. The state must allege in an indictment or other charging instrument (such as an information if an indictment is waived) the aggravating factor under G.S. 15A-1340.16(d)(20), known as a nonstatutory aggravating factor because it does not specify any particular conduct but rather includes any aggravating factor "reasonably related to the purposes of sentencing."

2. The state must provide written notice to the defendant of its intent to prove the existence of any aggravating factor listed in G.S. 15A-1340.16(d)(1) through (19), known as statutory aggravating factors because they do specify conduct that constitutes an aggravating factor. The state also must provide written notice of its intent to prove the prior record level point in G.S. 15A-1340.14(b)(7), which adds a point if the

defendant committed the offense while on probation, parole, or post-release supervision, while serving a sentence of imprisonment, or while on escape from a correctional facility during a sentence of imprisonment. The state must give this notice at least 30 days before trial or entry of a guilty or no contest plea, but the defendant may waive the notice. The act does not require the state to include these factors or points in an indictment or other charging instrument.

3. The state is not required to allege in the charging instrument or in a written notice prior convictions or the prior record point in G.S. 15A-1340.14(b)(6), which adds a point if all the elements of the present offense are included in a prior offense for which the defendant was convicted.

### **Procedure for Determining Aggravating Factors and Prior Record Points**

The act essentially creates four new procedures for determining aggravating factors and the prior record point under G.S. 15A-1340.14(b)(7) (offense while on probation, parole, etc.). These new procedures do not apply to prior convictions and the prior record point under G.S. 15A-1340.14(b)(6) (present offense included in prior offense); the act does not change the prior structured sentencing procedures for those sentence enhancements, which a judge continues to determine by a preponderance of the evidence. The act states that the judge also determines the aggravating factor that the defendant was previously adjudicated delinquent for an offense that would be a Class A through E felony if committed by an adult. (According to revised G.S. 15A-1340.16(a), the judge must find this factor beyond a reasonable doubt.) The North Carolina Court of Appeals has held, however, that this factor, like other aggravating factors, must be determined by the jury or admitted by the defendant. *See State v. Yarrell*, \_\_\_ N.C. App. \_\_\_, 616 S.E.2d 258 (2005). The North Carolina Supreme Court has temporarily stayed the Court of Appeals decision but, until there is a final ruling, the safer course is for trial courts to apply the new sentencing procedures to this aggravating factor. The new procedures are as follows.

1. If the defendant does not plead guilty to the charged felony and does not admit the aggravating factors and prior record points alleged by the state, a jury is impaneled to try the felony and determine the existence of the alleged aggravating factors and points. The state must prove these factors and points beyond a reasonable doubt. The judge may submit both the

felony charge and factors and points to the jury at the same trial unless the interests of justice require that the jury consider the factors and points at a separate proceeding after trial of the felony. The act describes the procedures to be followed for reconvening the jury in the event separate proceedings are held.

2. If the defendant pleads guilty to the felony but contests one or more of the alleged aggravating factors or prior record points, a jury is impaneled to determine the existence of the aggravating factors and points only.

3. If the defendant admits the alleged aggravating factors and prior record points but pleads not guilty to the charged felony, the jury decides the felony charge only, and evidence relating solely to the establishment of the factors and points is inadmissible. In taking the defendant's admission, the court must comply with the procedures for taking guilty pleas in new G.S. 15A-1022.1, discussed next.

4. If the defendant pleads guilty to the charged felony and admits the alleged aggravating factors and prior record points, a jury trial is unnecessary. In accepting the defendant's admission to aggravating factors and points, the judge must engage in the colloquy for accepting a guilty plea under G.S. 15A-1022(a) and must follow the procedures in new G.S. 15A-1022.1, including advising the defendant of his or her rights, determining that there is a factual basis for the factors and points admitted by the defendant, and determining that the decision to admit is the informed choice of the defendant. A new AOC transcript of plea form, AOC-CR-300 (Oct. 2005), contains these steps.

Under all of the above procedures the judge does not determine the existence of aggravating factors or prior record points. A judge may rely on those factors and points to enhance a defendant's sentence only if they are found by a jury or admitted by the defendant.

### **Consideration of Mitigating Factors and Selection of Sentence Range**

As under the previous version of structured sentencing, the judge determines the existence of any mitigating factors. If a jury has determined or the defendant has admitted any aggravating factors, and the judge determines that the aggravating factors outweigh any mitigating factors, the judge may depart from the presumptive range of sentences and impose a sentence in the aggravated range. If the judge determines that the mitigating factors outweigh the aggravating factors, the judge may impose a sentence in the mitigated

range. The judge must consider any evidence of mitigating factors, but the decision to depart from the presumptive range is in the judge's discretion.

## Criminal Offenses

### Sex-related Offenses

**Computer solicitation of sex act with child.** G.S. 14-202.3 has made it a Class I felony for a person to solicit a child by computer to commit a sex act if the person is 16 years of age or older and the child is less than 16 years of age and at least three years younger than the person. Effective for offenses committed on or after December 1, 2005, S.L. 2005-121 (S 472) raises the punishment for this offense to a Class H felony. It also revises the statute to make it a Class H felony if the person *believes* the child is less than 16 years of age and at least three years younger than the person, whether or not the child is actually that age. The revised statute explicitly states that consent is not a defense to a violation.

The act also amends the sex offender registration statutes to provide that a violation of G.S. 14-202.3 is a "sexually violent offense" within the meaning of G.S. 14-208.6(5), which means that a person convicted of such an offense must register as a sexual offender for ten years following release or, if no prison sentence is imposed, for ten years following conviction. *See* G.S. 14-208.7.

Last, the act amends G.S. 114-15 to authorize the State Bureau of Investigation, on request of the Governor or Attorney General, to investigate the use of a computer to solicit certain sex-related crimes involving children.

**Indecent exposure.** G.S. 14-190.9(a) has made it a Class 2 misdemeanor for a person willfully to expose his or her private parts in a public place in the presence of a person of the opposite sex. Effective for offenses committed on or after December 1, 2005, S.L. 2005-226 (S 776) revises that section by deleting the requirement that the other person be of the opposite sex. The revised statute also provides that "same sex" exposure does not constitute indecent exposure if it occurs in a place designated for a public purpose and is incidental to a permitted activity.

The act also adds new G.S. 14-190.9(a1) making an act of indecent exposure a Class H felony if, in addition to the elements of misdemeanor indecent exposure, the defendant is 18 years of age or older, the other person is under 16 years of age, and the defendant acts for the purpose of arousing or gratifying sexual desire. The revised section states that the new

felony offense is not a lesser offense of indecent liberties with a child under G.S. 14-202.1.

Last, the act revises G.S. 14-208.6(5) to designate the felony version of indecent exposure as a "sexually violent offense," subjecting a defendant to the ten-year sex offender registration requirements under G.S. 14-208.7.

**Baby sitting by or near sex offender.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-416 (H 1517) adds new G.S. 14-321.1 to make baby sitting unlawful in certain circumstances in which a sex offender is present. Under the new statute, it is unlawful for an

- adult
- to provide or offer to provide
- a "baby sitting service"
- either in a home in which a resident of the home is a sex offender who is registered in accordance with G.S. Ch. 14, Art. 27, or when a provider of care for the baby sitting service is a sex offender who is registered in accordance with G.S. Ch. 14, Art. 27.

"Baby sitting service" is defined as

- providing for profit
- supervision or care of a child under the age of 13
- who is unrelated to the provider by blood, marriage, or adoption
- for more than two hours per day
- while the child's parents or guardian are not on the premises.

A first offense is a Class 1 misdemeanor, and a subsequent offense is a Class H felony.

**Sexual battery.** In 2003, the General Assembly enacted G.S. 14-27.5A, making it a Class A1 misdemeanor for a person to commit a sexual battery, defined as the touching of another person by force and against the person's will for the purpose of sexual gratification. Effective for offenses committed on or after December 1, 2005, S.L. 2005-130 (H 1209) amends the sexual offender registration statutes to provide that a violation of G.S. 14-27.5A is a "sexually violent offense" within the meaning of G.S. 14-208.6(5), subjecting the defendant to the ten-year sex offender registration requirements under G.S. 14-208.7. Previously, the only offenses subject to the mandatory sex-offender registration requirements have been offenses involving minors or felonies. (Repeat misdemeanor peeping offenses are subject to the registration requirements, but the sentencing judge has

the discretion to determine whether to require registration.) The act also amends G.S. 15A-266.4 to add sexual battery to the list of offenses for which a person must provide a DNA sample if convicted.

### Animal-related offenses

**Assault on assistance animal.** G.S. 14-163.1 has made it a Class 1 misdemeanor to cause or attempt to cause physical harm to an assistance animal (an animal trained to assist a person with a disability) or to a law-enforcement agency animal, and it has made it a Class I felony to cause or attempt to cause serious physical harm to such an animal. Effective for offenses committed on or after December 1, 2005, S.L. 2005-184 (S 1058) amends the statute to expand the definitions for both levels of offense to include harms that are not physical. For the misdemeanor offense, “harm” includes “any behavioral impairment” that impedes or interferes with the duties of the animal. For the felony offense, “serious harm” includes harm that requires retraining or retirement of the animal. The revised statute also requires that a person convicted of a violation make restitution for specified expenses, such as veterinary care for the animal and retraining.

**Electronic dog collars.** G.S. 14-401.17 has made it a Class 3 misdemeanor, and a Class 2 misdemeanor for a subsequent offense, to remove an electronic collar from a dog in 38 of North Carolina’s 100 counties. Effective for offenses committed on or after December 1, 2005, S.L. 2005-94 (H 862) extends that prohibition to the remaining counties. The act accomplishes this result by repealing G.S. 14-401.17(d), which listed the counties to which the prohibition applied.

**Dog fighting.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-383 (H 1085) establishes a procedure to allow the court to order a defendant charged with illegally using dogs for fighting in violation of G.S. 14-362.2 to deposit with the clerk of superior court the expected costs of caring for the dogs pending disposition of the charges. New G.S. 19A-70 addresses the petition process (initiated by an animal shelter that takes possession of the dog), service and hearing requirements, period of time covered by orders for the deposit of funds, renewal of orders, forfeiture of dogs for failure to pay, adoption or euthanizing of the dogs in the event of forfeiture, circumstances under which the defendant may obtain a refund of all or part of the deposit, and care of the dogs without removal from their existing location.

The new statute does not specify whether these matters are heard in district or superior court. If the matter is treated like a civil action, the district court

may be the exclusive place for hearing. Article 1 of G.S. Ch. 19A provides that civil complaints for the protection and humane treatment of animals are filed in the district court in the county in which the animal cruelty allegedly occurred. In contrast, if the matter is construed to follow the criminal case, it could be heard by the district or superior court depending on the stage of the case. A violation of G.S. 14-362.2, which is the basis for a petition for dog care expenses, is a Class H felony, which ordinarily begins in district court and, unless dismissed or resolved by guilty plea in district court, ends in superior court.

**Cockfighting.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-437 (H 888) amends G.S. 14-362 to increase the offense of cockfighting from a Class 2 misdemeanor to Class I felony.

**Computer-assisted remote hunting.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-62 (H 772) prohibits engaging in computer-assisted remote hunting, or providing or operating a facility that allows computer-assisted remote hunting, of wild animals or wild birds located within North Carolina. “Computer-assisted remote hunting” is defined in new G.S. 113-291.1A as “the use of a computer or other device, equipment, or software, to remotely control the aiming and discharging of a firearm or other weapon, that allows a person, not physically present at the location of that firearm or weapon, to hunt or shoot a wild animal or wild bird.” A violation is a Class 1 misdemeanor under G.S. 113-294(q) and results in a two-year suspension under G.S. 113-276.3(d) of any license or permit applicable to the type of activity that resulted in the conviction.

### Theft-related Offenses

**Identity theft.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-414 (S 1048) renames the offense of financial identity fraud, in G.S. 14-113.20, as “identity theft” and makes other changes to facilitate enforcement of the statute. Amended G.S. 14-113.20 expands the definition of identifying information subject to the section to include employer tax identification numbers, state identification cards, passport numbers, electronic mail names and addresses, internet account numbers, and internet identification names. Under amended G.S. 14-113.21, the venue for prosecution of identity theft includes the county where the victim or defendant live, any county where part of the identity theft took place, and any county instrumental to the completion of the offense. New G.S. 14-113.21A allows law enforcement officers

to take complaints of identity theft and forward them to the appropriate law enforcement agency even though they do not have jurisdiction to investigate or prosecute the offense.

The criminal law changes are a small part of a larger act aimed at preventing identity theft. The act creates a new Article 2A in G.S. Ch. 75, entitled the "Identity Theft Protection Act," which contains numerous provisions requiring businesses to protect personal identifying information, such as social security numbers. Violations of the new provisions are considered violations of G.S. 75-1.1, subject to civil penalties under Article 1 of G.S. Ch. 75. The act also adds new G.S. 132-1.8 restricting the disclosure of social security numbers and other personal identifying information by agencies of the state or its political subdivisions. These provisions have varying effective dates. The new section also forbids a person, effective December 1, 2005, from filing a document in the official records of the register of deeds or of the courts that includes certain personal identifying information, such as social security numbers, unless expressly required by law or court order or adopted by the State Registrar on records of vital events. A violation of this restriction is an infraction, subject to a penalty of up to \$500. The register of deeds and clerk of court may not be held liable, however, for the inclusion of personal identifying information in records filed with them.

**Breaking or entering place of worship.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-235 (S 972) adds new G.S. 14-54.1 making it a Class G felony to break or enter a building that is a place of religious worship (as defined in the new section) with the intent to commit a felony or larceny. Breaking or entering other types of buildings (other than a dwelling) remains a Class H felony.

**Failure to return rented vehicle.** G.S. 14-167 has made it a Class 2 misdemeanor to fail to return rented property, including a rented motor vehicle, at the expiration of the rental period. Effective for offenses committed on or after December 1, 2005, S.L. 2005-182 (H 1392) amends G.S. 14-167 to make it a Class H felony to fail to return a rented motor vehicle if at the time of the rental the vehicle had a fair market value of more than \$4,000. If the defendant has leased or rented a motor vehicle by a written agreement, the following circumstances (described in new G.S. 14-168.5) constitute prima facie evidence of an intent to commit the offenses of failing to return rented property in violation of G.S. 14-167, renting property with the intent to defraud in violation of G.S. 14-168, and conversion of rented property in violation of G.S. 14-168.1:

- After the agreement has expired, the defendant has failed or refused to return the vehicle to the place specified within 72 hours after written demand by one of the methods specified in new G.S. 14-168.5(b)—for example, hand delivery of the demand; or
- The lease or rental of the vehicle was obtained by presentation of identifying information to the lessor or renter that is false, fictitious, or knowingly not current.

New G.S. 20-102.2 provides that a law-enforcement officer who receives a report of a failure to return a rented vehicle in violation of G.S. 14-167 must report the information to the National Crime Information Center (NCIC); upon recovery of the vehicle, the officer must report the information to the NCIC and to the party who reported the loss.

**Larceny of construction materials.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-208 (S 532) adds new G.S. 14-72.6 to make larceny, receiving stolen goods, and possession of stolen goods Class I felonies if the goods are stolen from a permitted construction site and the goods have a value of more than \$300 and less than \$1,000. Larceny, receiving, and possession remain Class H felonies, regardless of the site of the theft, if the goods are worth more than \$1,000.

**Exploitation of elder or disabled adult.** G.S. 14-32.3(c) has made it a crime for a caretaker to exploit an elder or disabled adult. Violation of that subsection has been a Class H felony if the exploitation resulted in the loss of more than \$1,000 and a Class 1 misdemeanor if the loss was \$1,000 or less. Effective for offenses committed on or after December 1, 2005, S.L. 2005-272 (H 1466) repeals G.S. 14-32.3(c) and replaces it with G.S. 14-112.2.

The new statute creates two offenses involving exploitation of an elder or disabled adult (defined in new G.S. 14-112.2(a)). Under new G.S. 14-112.2(b), it is unlawful for a person

- who stands in a position of trust and confidence or has a business relationship with an elder or disabled adult
- knowingly
- by deception or intimidation
- to obtain or use or endeavor to obtain or use an elder or disabled adult's funds, assets, or property
- with the intent to deprive temporarily or permanently the elder or disabled adult of the use, benefit, or possession of the property or

to benefit someone other than the elder or disabled adult.

A violation is a Class F felony if the property is valued at \$100,000 or more, a Class G felony if the property is valued at \$20,000 or more but less than \$100,000, and a Class H felony if the property is valued at less than \$20,000.

Under new G.S. 14-112.2(c), it is unlawful for a person

- who knows or reasonably should know
- that an elder or disabled adult lacks the capacity to consent
- to obtain or use, endeavor to obtain or use, or conspire with another to obtain or use an elder or disabled adult’s funds, assets, or property
- with the intent to deprive temporarily or permanently the elder or disabled adult of the use, benefit, or possession of the property or to benefit someone other than the elder or disabled adult.

A violation is a Class G felony if the property is valued at \$100,000 or more, a Class H felony if the property is valued at \$20,000 or more but less than \$100,000, and a Class I felony if the property is valued at less than \$20,000. The subsection states that it does not apply to a person acting within the scope of his or her lawful authority as agent for the adult.

**Pirating of movie in theater.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-301 (H 687) adds G.S. 14-440.1 making it a crime for a person to

- knowingly
- operate or attempt to operate
- an audiovisual recording device
- in a motion picture theater
- to transmit, record, or otherwise make a copy of a motion picture
- without the written consent of the theater owner.

A first offense is a Class 1 misdemeanor, and a subsequent offense is a Class I felony. Upon conviction, the court must order the forfeiture and destruction of unauthorized recordings and devices used in connection with the offense.

**Preparation to break or enter motor vehicle.** G.S. 14-55 has made it a Class I felony to possess certain weapons or tools with the intent to break or enter a building and commit a felony or larceny. Effective for offenses committed on or after December

1, 2005, S.L. 2005-352 (H 891) adds a parallel statute prohibiting preparation to break or enter a motor vehicle. New G.S. 14-56.4(b) makes it unlawful to

- possess
- a motor vehicle master key, manipulative key, or other motor vehicle lock-picking or hot wiring device
- with the intent to commit a felony, larceny, or unauthorized use of a motor conveyance.

New G.S. 14-56.4(c) makes it unlawful to

- willfully
- buy, sell, or transfer
- a motor vehicle master key, manipulative key or device, and certain other instruments
- designed to open or capable of opening the door or trunk, or starting the engine, of a motor vehicle
- for use in any manner prohibited by G.S. 14-56.4.

A first offense is a Class 1 misdemeanor, and a subsequent offense is a Class I felony. The prohibition does not apply to locksmiths, towing service employees, law enforcement officers, and certain others.

**Controlled Substances**

**Pseudoephedrine (methamphetamine precursor).** Effective for offenses committed on or after January 15, 2006, S.L. 2005-434 (H 248) imposes various restrictions on the sale of pseudoephedrine, an ingredient in lawful cold medication but also used in the illegal manufacture of methamphetamine. New G.S. 90-113.52 through 90-113.54 contain these restrictions—for example, a retailer may not offer pseudoephedrine for sale by self-service and a customer may not make a retail purchase without a prescription of more than three packages containing a total of more than nine grams of pseudoephedrine products within a thirty-day period.

New G.S. 90-113.56 establishes the following penalties for violations of these sales restrictions:

- A retailer who willfully and knowingly violates the restrictions in G.S. 90-113.52 through 90-113.54 is guilty of a Class A1 misdemeanor for a first offense and a Class I felony for a subsequent offense. A retailer convicted of a third offense on the premises

of a single establishment is prohibited from selling pseudoephedrine products at that establishment. *See* G.S. 90-113.56(a).

- A purchaser or employee of a retailer who violates the restrictions in G.S. 90-113.52(c) or 90-113.53 is guilty of a Class 1 misdemeanor for a first offense, a Class A1 misdemeanor for a second offense, and a Class I felony for a subsequent offense. According to G.S. 90-113.56(b), these penalties do not apply to a bona fide innocent purchaser.
- A retailer who fails to train employees in accordance with G.S. 90-113.55, supervise them in transactions involving pseudoephedrine products, or discipline them for violations is subject to a fine of \$500 for a first violation, \$750 for a second violation, and \$1,000 for a subsequent violation. It appears that these sanctions, although labeled “fines,” are civil penalties, imposed administratively and not as part of a criminal case.

New G.S. 90-113.57 gives retailers and employees immunity from civil liability for reporting to law enforcement, reasonably and in good faith, criminal activity involving the sale or purchase of pseudoephedrine products or for refusing to sell such products to a person reasonably believed to be ineligible to purchase them.

The act also adds G.S. 66-254.1 making it unlawful for itinerant merchants, peddlers, and specialty markets to sell pseudoephedrine products and other drugs. A first offense is a Class 1 misdemeanor, a second offense is a Class A1 misdemeanor, and a subsequent offense is a Class I felony.

For a discussion of the new pretrial release restrictions related to methamphetamine offenses, see *Criminal Procedure and Evidence*, below.

**Illegal substances tax.** G.S. 105-113.112 has restricted the disclosure and use in a criminal proceeding of information obtained in the course of administering the tax on illegal substances in Art. 2D of G.S. Ch. 105. Effective September 27, 2005, S.L. 2005-435 (H 105) amends that section to clarify the restrictions on disclosure and use. Amended G.S. 105-113.112 provides as follows:

- Information obtained by the Department of Revenue in the course of administering the illegal substances tax is confidential.
- The information may not be disclosed except in the limited circumstances in G.S. 105-259.

- The information may not be used as evidence in a criminal prosecution, and no employee or agent of the Department of Revenue may testify about the information in a criminal prosecution, other than for an offense under the illegal substances tax article or under the article on general administration of the tax laws (Art. 9 of G.S. Ch. 105). This restriction does not apply to information obtained from a source other than an employee or agent of the Department of Revenue. An employee or agent who provides evidence or testimony in violation of this provision is guilty of a Class 1 misdemeanor.

## Alcohol and Tobacco

**Stronger beer.** Effective August 13, 2005, S.L. 2005-277 (H 392) amends G.S. 18B-101(9) to revise the definition of “malt beverage” to increase the allowable alcohol content from 6% to 15% by volume. A malt beverage with more than 6% alcohol by volume must bear a label indicating the alcohol content.

**Alcohol and tobacco sales.** Effective September 7, 2005, S.L. 2005-350 (H 1500) amends G.S. 18B-302(d) and G.S. 14-313(b) to provide that it is a defense to selling alcohol or tobacco to an underage purchaser that the seller relied on a biometric identification system that demonstrated that the purchaser was the required minimum age. A biometric identification system is a system in which the customer registers his or her identification in advance with the seller and thereafter makes purchases that would otherwise require proof of age by, for example, pressing his or her finger on a fingerprint reader.

## Motor Vehicle and Related Offenses

**Hit-and-run and move-over laws.** Two bills amend the statutes that regulate a driver’s conduct when accidents or other traffic disruptions occur. One revises the “hit and run” statute, and the other clarifies the duties of a motorist subject to the “move over” law.

The hit-and-run bill, S.L. 2005-460 (H 217), amends G.S. 20-166, effective for offenses committed on or after December 1, 2005, to clarify the duties of drivers involved in accidents. Drivers already had to stop, provide information to other drivers, report most accidents to law enforcement authorities, and if appropriate seek medical assistance. The act revises the statute to add that, until the investigating officer completes his or her investigation of the accident, the



driver may not allow or agree to let another person remove the vehicle that the driver had been driving except in specified circumstances—for example, to call for medical assistance or to avoid significant risk of injury. A violation of this requirement is a Class H felony if the accident resulted in injury or death to any person and a Class 1 misdemeanor if the accident resulted in injury or death without the driver's knowledge or damage to property only. New G.S. 20-166.2 places similar restrictions on passengers in a vehicle involved in an accident, making it a Class H felony or Class 1 misdemeanor depending on the accident's severity to leave the scene by acting as the driver of a vehicle involved in the accident, except in specified circumstances. New G.S. 20-166.2(b) also makes it a Class 1 misdemeanor for a passenger to fail to provide to the drivers of the other vehicles involved in the accident the usual identification that is transferred at accident scenes.

Effective for offenses committed on or after July 1, 2006, S.L. 2005-189 (H 288) amends the move-over requirements in G.S. 20-157(f). That law was enacted in response to the needs of emergency personnel who are present at accident scenes or other times when emergency vehicles are present. It has required drivers either to move over to the lane of traffic away from an emergency vehicle or to slow down if the driver has to stay in the lane nearest the emergency vehicle. The act expands the definition of covered vehicles to include "public service vehicles," which are vehicles assisting in the towing or moving of disabled vehicles. It also increases the penalty for violations of G.S. 20-157, which regulates the conduct of drivers when they are approached by emergency vehicles as well as when they pass stopped emergency vehicles.<sup>1</sup> Most violations are infractions subject to a penalty of up to \$250 (previously, \$100). A failure to move over in violation of G.S. 20-157(a) remains a Class 2 misdemeanor. Under G.S. 20-157(h), a violation that results in more than \$500 damage to property near an emergency or public service vehicle or in personal injury to an emergency response worker is a Class 1 misdemeanor. Under G.S. 20-157(i), a violation that results in serious injury or death to such workers is a Class I felony. The Division of Motor Vehicles also may suspend for up to six months the driver's license of any driver convicted of the felony version of the offense, but a judge may issue a limited driving privilege under the same terms and conditions applicable to limited privileges issued in speeding

1. Amended G.S. 20-157(a) also provides that a driver's failure to move over when approached by an emergency vehicle constitutes negligence per se.

cases under G.S. 20-16.1(b).

**Passing stopped school bus.** Effective for offenses committed on or after Sept. 1, 2005, S.L. 2005-204 (H 1400) amends G.S. 20-217 to increase the punishment for passing a stopped school bus from a Class 2 to Class 1 misdemeanor. Under the revised statute, it is a Class I felony if a person passes a stopped school bus in violation of the statute and willfully strikes a person and causes serious bodily injury. The act also eliminates the requirement that the sign indicating that the bus is a school bus be marked by letters eight inches high. The sign must be visible, but no minimum size is specified.

**Speeding to elude arrest.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-341 (H 1279) amends G.S. 20-141.5 to increase the punishment in certain circumstances for the offense of "speeding to elude arrest." (The offense does not actually require speeding as an element; a person commits the offense by using a motor vehicle to flee or attempt to elude a law enforcement officer.) Revised G.S. 20-141.5(c) provides that in cases in which the offense is the proximate cause of death of any person, the offense is a Class H felony if it would have been a Class 1 misdemeanor, and a Class E felony if it would have been a Class H felony, under G.S. 20-141.5.

**Commercial drivers.** S.L. 2005-349 (H 670) makes several changes to the laws governing commercial drivers licenses, effective for offenses committed on or after September 30, 2005. *See James C. Drennan, Motor Vehicles, in NORTH CAROLINA LEGISLATION 2005* (forthcoming from the School of Government). The changes that involve criminal law are discussed here.

**PJCs.** Most actions that the Division of Motor Vehicles (DMV) take that affect a person's license require the person to have been convicted of an offense. Amended G.S. 20-4.01(4a)a. includes in the definition of conviction any prayer for judgment continued (PJC) if the offender holds a commercial drivers license or the offense occurs in a commercial motor vehicle. A PJC is a sentence deferral procedure often used in motor vehicle cases to postpone the imposition of a sentence indefinitely. Noncommercial drivers must accumulate three PJCs before they count as convictions.

**Disqualification.** G.S. 20-17.4 sets out the rules governing license disqualifications. Disqualifications are special license actions taken by DMV to prohibit a person from driving a commercial vehicle. They do not, by themselves, prohibit the driver from driving a noncommercial vehicle. G.S. 20-17.4 has required that the conduct that leads to the disqualification occur in a commercial vehicle, unless otherwise specifically

provided in the statute. The act reverses that rule, so that a commercial driver who commits an offense in a private automobile will be treated for disqualification purposes in the same manner as if he or she had been driving a commercial vehicle. It also adds as grounds for disqualification the following: civil revocations under G.S. 20-16.5 or similar statutes in other jurisdictions if the offense occurs in a commercial vehicle; convictions of death by vehicle or manslaughter occurring while the person was operating a commercial motor vehicle; and driving a commercial vehicle while the person's license is revoked or is otherwise disqualified from driving a commercial vehicle.

*Serious traffic violations.* The act also reverses another rule. Amended G.S. 20-17.4(d) provides that multiple disqualifications for "serious traffic offenses" run consecutively to other disqualifications. The general rule for most license actions is that multiple periods of revocation run concurrently. Note that the act also revises the definition of "serious traffic violation" in G.S. 20-4.01(41a), which previously included certain violations in a commercial motor vehicle only, to include offenses involving commercial and other motor vehicles.

*Ten-year-old convictions.* The act exempts some commercial license records from another rule applicable to most drivers. G.S. 20-36 prohibits DMV from considering convictions that are more than ten years old. Amended G.S. 20-36 eliminates that ten-year limit for offenses occurring in a commercial vehicle and for a second failure to submit to a chemical test for an implied-consent offense in a commercial vehicle.

*Civil penalties for drivers and their employers.* Amended G.S. 20-37.21 imposes civil monetary penalties (in addition to any criminal punishments) on a person convicted of driving a commercial vehicle without a license and on an employer convicted of knowingly permitting a driver to drive a commercial vehicle without a license. Amended G.S. 20-37.21 also imposes civil monetary penalties on an employer who knowingly permits a driver of a commercial vehicle to violate any railroad grade requirements contained in G.S. 20-142.1 through 20-142.5; the same conduct also may be prosecuted in criminal court as an infraction under those sections.

**No contest pleas in other states.** Effective for offenses committed on or after September 30, 2005, S.L. 2005-349 (H 670) revises G.S. 20-4.01(4a)b. to include in the definition of "conviction," for both commercial and noncommercial drivers, a final conviction of a criminal offense in another state based on a no-contest plea. This change appears to eliminate

any requirement for the other state to have made a finding of guilt in taking the defendant's no-contest plea. *Compare Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990) (in taking no contest plea for offense committed in North Carolina, court must determine there is factual basis for plea).

**All-terrain vehicles.** An all-terrain vehicle (ATV) is a motorized off-highway vehicle designed to travel on three or four low-pressure tires, having a seat designed to be straddled by the operator and handlebars for steering control. S.L. 2005-282 (S 189) adds several new statutes to regulate ATVs in specified circumstances. All violations are infractions only, subject to a penalty of up to \$200. There are no driver's license consequences, and the provisions do not apply to ATV's used in farming operations or for hunting or trapping purposes if the person is lawfully engaged in hunting or trapping. Except as indicated below, the act applies to offenses committed on or after December 1, 2005.

- New G.S. 20-171.10 makes it unlawful for a parent or legal guardian to permit his or her child to operate an ATV of any kind if the child is under eight years of age. A parent or legal guardian may permit a child who is at least eight and under twelve to operate an ATV of less than 70 cubic centimeters, and may permit a child who is at least 12 and under 16 to operate an ATV of less than 90 cubic centimeters, if the child is under the continuous visual supervision of a person over 18; however, these restrictions do not apply if the child operating the ATV turned eight on or before August 15, 2005, and the parent or legal guardian owned the ATV before August 15, 2005.
- New G.S. 20-171.11 forbids the operator of an ATV from carrying a passenger unless the ATV is designed by the manufacturer to carry passengers.
- New G.S. 20-171.12 forbids a person from knowingly selling or offering to sell an ATV for use by a person in violation of the statutory age restrictions.
- New G.S. 20-171.13 requires that ATV's be equipped with brakes, a muffler, and a spark arrester.
- New G.S. 20-171.14 prohibits a person from operating an ATV without eye protection and a safety helmet; while under the influence of alcohol, a controlled substance, or a drug that impairs vision or motor coordination; in a careless or reckless manner; on a public street or highway except to cross the street or

highway or as otherwise permitted by law; on an interstate or limited-access highway except as otherwise permitted by law; or at night without lights unless the use of lights is prohibited by other laws.

- New G.S. 20-171.15 requires ATV operators born on or after January 1, 1990, to possess an appropriate safety certificate. This last requirement takes effect October 1, 2006.

**Personal watercraft.** G.S. 75A-13.3(b) has allowed a person who is at least 12 but under 16 years of age to operate a personal watercraft if accompanied by a person at least 18 years of age or if he or she has satisfactory proof of completion of an approved boating safety education course. S.L. 2005-161 (H 702) amends that statute to require that the underage person be at least 14 years old. The act is effective November 1, 2005, except that the higher age requirement does not apply to children who turned 12 before November 1, 2005.

**Obstructing boat dock.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-164 (H 1430) amends G.S. 113-135.1 to make it an infraction, punishable by a penalty of \$50, to park a vehicle in violation of a rule regulating the parking of vehicles at boating access or boating launch areas. Revised G.S. 113-264 authorizes a wildlife or other law-enforcement officer to have a vehicle towed from a public boating access area that is owned or operated by the Wildlife Resources Commission if it is parked in an area not designated for parking or is left for a purpose other than launching, operating, or retrieving a boat.

**Red and blue lights.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-152 (355) amends G.S. 20-130.1, which prohibits the use of red or blue lights on unauthorized vehicles, to broaden the definition of such lights. The revised statute states that a red or blue light includes any forward facing red or blue light installed on a vehicle after its initial manufacture.

**Highway inspection reports.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-96 (H 664) revises G.S. 136-13.2 to make it a Class H felony for any person to falsify knowingly, or to direct a subordinate to falsify, any inspection or test report required by the Department of Transportation in connection with the construction of highways. Previously, the statute applied only to employees of the Department of Transportation.

**Solicitation on roads and highways.** Effective August 25, 2005, S.L. 2005-310 (H 813) adds new G.S. 20-175(d) permitting local governments to enact

ordinances restricting or prohibiting a person from standing on any street, highway, or right-of-way, excluding sidewalks, while soliciting or attempting to solicit employment, business, or contributions from drivers or occupants of vehicles.

## Gambling

**Lottery offenses.** The act authorizing a state-sponsored lottery (S.L. 2005-344 (H 1023), effective August 31, 2005) creates two new offenses in G.S. 18C-131(d):

- Selling a lottery ticket or share to a person under 18 years of age, a Class 1 misdemeanor, and
- Purchasing a lottery ticket or share by a person under 18 years of age, also a Class 1 misdemeanor.

The seller has a defense, under new G.S. 18C-131(e), if the underage buyer showed appropriate identification.

The act adds G.S. 14-309.2 to exclude the state lottery from the prohibitions in Part 1 of G.S. Ch. 14, Art. 37 (Lotteries and Gaming, G.S. 14-289 through 14-309.1). The act amends certain statutes within Part 1 to exclude the lottery from their coverage, but the general exclusionary language in new G.S. 14-309.2 appears broad enough to cover all of the statutes within that part. The act also modifies the existing gambling statutes to permit possessing a lottery ticket from, or playing or betting on, a lottery lawfully conducted in another state.

**Raffles.** Effective August 31, 2005, S.L. 2005-345 (H 320) amends G.S. 14-309.15(d) to increase the maximum cash prize that may be offered for any one raffle from \$10,000 to \$50,000, and to increase the maximum total cash prizes that may be offered or paid by any nonprofit organization or association during one calendar year from \$10,000 to \$50,000.

## Confidentiality Violations

**“Responsible Individuals” list.** When a county department of social services receives a report of suspected child abuse or neglect, the department conducts an assessment to determine whether the child has been abused or neglected. Regardless of the determination, the department submits information about the report and assessment to a central registry maintained by the state Department of Health and

Human Services (DHHS). The registry is a confidential collection of information used both to generate statewide statistics and to enable social services departments to identify children who are the subject of more than one report. Effective for investigation assessment responses initiated by county departments of social services on or after October 1, 2005, S.L. 2005-399 (H 661) provides that when the county social services director's assessment determines that a child has been abused or seriously neglected, the director also must identify the person responsible for the child's status and report that information to DHHS for inclusion on a "Responsible Individuals" list. These responsibilities are reflected in revised G.S. 7B-311, which also identifies to whom DHHS may disclose information from the list, such as child care providers that need to determine the fitness of an individual to care for a child. G.S. 7B-311(c) makes it a Class 3 misdemeanor for a public official or employee knowingly to release information from the list or the central registry to an unauthorized person; for an authorized person who receives such information to release it to an unauthorized person; or for an unauthorized person to access or attempt to access the information.

For a further discussion of the "Responsible Individuals" list, including the procedure for having one's name removed from the list (in new Art. 3A in G.S. Ch. 7B), see Janet Mason & John Saxon, *Social Services*, in NORTH CAROLINA LEGISLATION 2005 (forthcoming from the School of Government).

**Confidential school employee information.** G.S. 115C-321 has designated as confidential most information in a school employee's personnel file. Effective for offenses committed on or after December 1, 2005, S.L. 2005-321 (S 1124) amends the statute to make it a Class 3 misdemeanor, punishable by a fine of up to \$500 only, for a person knowingly, willfully, and with malice to permit a person to have access to confidential personnel information when not authorized (G.S. 115C-321(c)); or for a person who is not authorized to have access to a personnel file to knowingly and willfully examine in its official place, remove, or copy any portion of a personnel file (G.S. 115C-321(d)).

**Autopsy records.** S.L. 2005-393 (H 1543) enacts new G.S. 130A-389.1 to regulate the disclosure of photographs and video and audio recordings of autopsies. A person who lawfully obtains an autopsy photograph or video or audio recording and discloses it without authorization is guilty of a Class 2 misdemeanor. See G.S. 130A-389.1(c). Other knowing and willful violations of the new section are also Class 2 misdemeanors. See G.S. 130A-389.1(g). A person is

guilty of a Class 1 misdemeanor if he or she is not authorized to obtain an autopsy photograph or video and knowingly removes, copies, or otherwise creates an image of the photograph or recording with the intent to steal it. See G.S. 130A-389.1(h). The new section does not apply to the use of autopsy photographs or video or audio recordings in a criminal, civil, or administrative proceeding, but the presiding judge may restrict public disclosure of autopsy, crime scene, or similar photographs or recordings. The act applies to unauthorized disclosures and other offenses committed on or after December 1, 2005, whether or not the autopsy occurred before or after December 1.

## Regulatory Offenses

**Debt adjusting.** G.S. 14-424 has made it a Class 2 misdemeanor to engage in "debt adjusting," defined in G.S. 14-423 as entering into a contract with a debtor under which the debtor agrees to pay money to the debt adjuster, who then distributes the money to the debtor's creditors. G.S. 14-426 has exempted certain practices from this prohibition. S.L. 2005-408 (S 590) revises the definition of debt adjusting and exempts additional individuals and organizations from the prohibition, such as attorneys licensed to practice in North Carolina who are not employed by a debt adjuster. The act also revises G.S. 14-425 to authorize the Attorney General to file an action in superior court to enjoin, as an unfair or deceptive trade practice, the continuation or offering of any debt adjusting services. The act has varying effective dates in 2005 but expires October 1, 2007.

**Voting systems.** Effective for purchases or upgrades of voting systems on or after August 1, 2005, S.L. 2005-323 (S 223) imposes new requirements on vendors of voting systems and, depending on the requirement at issue, makes it a Class G or Class I felony for a violation. The act also authorizes civil penalties up to \$100,000 per violation, to be assessed by the State Board of Elections. See G.S. 163-165.9A.

**Bank logos.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-162 (H 1168) adds G.S. 53-127(c1) to prohibit a person from using the name or logo of a bank in connection with the sale or advertising of any financial product or service unless the bank has consented in writing. A violation is a Class 3 misdemeanor. New G.S. 53-127(e) provides that a bank may file an action to enjoin the use of its name or logo, and a court may grant an injunction and order the defendant to pay the bank all profits derived from and all damages suffered by the wrongful use of the name or logo.

**Boiler and pressure vessels.** Effective October 1, 2005, S.L. 2005-453 (H 768) revises the civil and criminal penalties for violating the Uniform Boiler and Pressure Vessel Act. New G.S. 95-69.20 makes it a Class 2 misdemeanor to misrepresent oneself as an authorized inspector or to make a false statement in a report or document required to be filed. Other violations incur civil penalties under new G.S. 95-69.19.

**Recreational therapy.** Effective October 5, 2005, S.L. 2005-378 (H 613) adds G.S. 90C-36 to make it a Class 1 misdemeanor for a person without a license to hold himself or herself out as licensed under the North Carolina Recreational Therapy Act or to practice recreational therapy. The maximum fine for an offense is \$500.

**Notaries.** Effective December 1, 2005, S.L. 2005-391 (S 671) repeals Ch. 10A on notaries and replaces it with new Ch. 10B. The criminal penalties for violations of the new chapter are set forth in new G.S. 10B-35.

**Lobbyists.** Effective January 1, 2007, S.L. 2005-456 (S 612) amends the restrictions on legislative branch lobbying in Article 9A of G.S. Ch. 120 and creates a new Article 4C in G.S. Ch. 147 restricting executive branch lobbying, violations of which are Class 1 misdemeanors under G.S. 120-47.9 and 147-54.42.

**Pathology services and practice of medicine.** Effective December 1, 2005, S.L. 2005-415 (H 636) requires certain disclosures on bills for pathology services. Each intentional failure to disclose is a Class 3 misdemeanor, punishable by a fine up to \$250 under new G.S. 90-681(i). The act also amends G.S. 90-18(a) to make it a Class I felony for an out-of-state practitioner to practice medicine without being licensed in North Carolina; it remains a Class 1 misdemeanor to practice medicine without a license.

**Unemployment insurance.** G.S. 96-18(b1) provides that the penalties and provisions of certain tax statutes apply to comparable violations with respect to unemployment insurance contributions. That subsection has provided that G.S. 105-236(7), which makes it a Class H felony to attempt to evade or defeat a tax, applies to unemployment insurance contributions if the employing unit or unpaid contribution is of a certain size. Effective December 1, 2005, S.L. 2005-410 (S 757) revises G.S. 96-18(b1) to make it a Class 1 misdemeanor to violate G.S. 105-236(7) if those size criteria are not met.

**False statements by grantees of state funds.** Effective July 1, 2005, S.L. 2005-276 (S 622) adds 143-6.2(b2) to require non-state entities that receive state funds to file with the disbursing state agency a

sworn statement that the non-state entity does not have any overdue tax debts. A false statement is a Class A1 misdemeanor under new G.S. 143-34(b).

**Credit insurance.** G.S. 58-57-80 has made it a Class 3 misdemeanor for a creditor to violate certain credit insurance requirements in G.S. Ch. 58, Art. 57. Effective January 1, 2006, S.L. 2005-181 (H 653) repeals that section and enacts G.S. 58-57-71 giving the Commissioner of Insurance broader civil enforcement powers.

## Other Offenses

**Shooting into occupied property.** G.S. 14-34.1 has made it a Class E felony for a person willfully or wantonly to discharge or attempt to discharge a firearm into an occupied building or conveyance. Effective for offenses committed on or after December 1, 2005, S.L. 2005-461 (S 486) amends that section to create three separate offenses.

- G.S. 14-34.1(a) continues to make the above offense a Class E felony.
- New G.S. 14-34.1(b) makes it a Class D felony for a person willfully or wantonly to discharge a firearm into an occupied dwelling (not just any occupied building) or an occupied conveyance that is in operation.
- New G.S. 14-34.1(c) makes it a Class C felony if a violation of subsections (a) or (b) results in serious bodily injury. A definition of "serious bodily injury" is not given. Compare G.S. 14-32.4(a) (for purposes of offense of assault inflicting serious bodily injury, "serious bodily injury" is defined as "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization").

**Concealing death of person.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-288 (H 926) adds new G.S. 14-401.22 creating two new crimes. It is a Class I felony for a person who, with the intent to conceal the death of a person, fails to notify law enforcement of the death or secretly buries or otherwise secretly disposes of a dead person. It is a Class A1 misdemeanor to aid or abet another in concealing the death of a person.

**False bomb report.** G.S. 14-69.1(a) has made it a

Class H felony to make a false report that there is a bomb located in a building or conveyance, and G.S. 14-69.1(c) has made it a Class G felony to make a false report that there is a bomb in a public building. Effective for offenses committed on or after December 1, 2005, S.L. 2005-311 (H 490) revises both subsections to provide that it is also a violation to make a false report that there is a bomb in sufficient proximity to cause damage to the building.

**Truancy.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-318 (H 779) amends G.S. 115C-380 and G.S. 116-235(b)(2) to increase from a Class 3 to Class 1 misdemeanor the offense of aiding and abetting a student's unlawful absence from school.

**Pointing laser device at aircraft.** Effective for offenses committed on or after December 1, 2005, S.L. 2005-329 (S 428) adds G.S. 14-280.2 making it a Class H felony for a person to

- willfully
- point a laser device at an aircraft that is taking off, landing, in flight, or otherwise in motion
- while the device is emitting a laser beam.

The statute does not apply if the laser use has been approved by a federal or state agency.

## Criminal Procedure and Evidence

**Jury service.** Effective for people summoned for jury service on or after October 1, 2005, S.L. 2005-149 (S 321) amends G.S. 9-6.1 to allow people 72 years of age or older to request a temporary or permanent exemption from jury duty without appearing in person. Previously, a person could request an exemption if 65 years of age or older. The statute does not give people 72 and older an automatic exemption. In practice, however, court officials routinely grant such requests.

**Expunction of records.** Two acts deal with expunction of criminal records. One act, S.L. 2005-452 (H 1213), adds new G.S. 15A-146(a1) to authorize the expunction of multiple charges if

- all of the charges were dismissed or findings of not guilty or not responsible were made,
- the offenses were alleged to have occurred within the same twelve-month period or the charges were dismissed or findings were made at the same term of court (one week for superior court and one day for district court),
- the applicant for an expunction has not previously received an expungement under

the new subsection or under G.S. 15A-145 or G.S. 90-96, and

- the applicant has not been convicted of a felony.

A person may obtain an expunction of multiple charges under the new subsection even though they did not arise out of the same transaction or occurrence and were not consolidated for judgment. It also appears that a person may obtain an expunction of multiple charges under the new subsection even if he or she previously obtained an expunction under G.S. 15A-146(a). New G.S. 15A-146(a1) bars an expunction only if the person has previously obtained an expunction under "this subsection"—that is, G.S. 15A-146(a1)—or under the other listed sections. An expunction under G.S. 15A-146(a) is not listed as a bar. The act states that it is effective October 1, 2005, which means that a person should be able to obtain an order of expunction whether the alleged offense occurred or the proceedings ended before or after October 1, 2005.

The second act, S.L. 2005-319 (H 1328), adds new G.S. 15A-149 to provide that if a person receives a pardon of innocence from the Governor, the person is entitled to have the records of the conviction expunged. The new section describes the steps to be followed by the applicant, the clerk of court, and the various agencies in possession of the records to be expunged. The act states that it is effective August 25, 2005, which means that a person should be able to obtain an order of expunction whether the conviction or pardon occurred before or after August 25, 2005.

**Search warrants.** Generally, for a judicial official to issue a search warrant, he or she must receive an affidavit from the applicant setting forth the facts and circumstances justifying issuance of the warrant. G.S. 15A-245(a) has allowed the supporting affidavit to be supplemented by oral testimony under oath. Effective October 1, 2005, S.L. 2005-334 (H 1485) amends G.S. 15A-245(a) to allow a search warrant to be issued based on audio-video transmission of oral testimony under oath or affirmation from a sworn law enforcement officer to the issuing official. Both the issuing official and officer must be able to see and hear each other. The statute does not address various implementation issues—for example, how the testimony will be memorialized and served. *Compare* FEDERAL RULE OF CRIMINAL PROCEDURE 41 (authorizing warrants based on telephonic communications and specifying, among other things, that the testimony must be recorded by a recording device or court reporter, that the recording or court reporter's notes must be transcribed and certified by

the issuing official, and that the issuing official must prepare an original warrant and the applicant must prepare a duplicate warrant for service). The act requires that before a district may permit the issuance of search warrants based on audio-video transmissions, the senior resident superior court judge and chief district court judge must obtain approval from the Administrative Office of the Courts of the equipment and procedures to be used.

**Source of bond funds for pretrial release.** S.L. 2005-375 (H 1409) amends G.S. 15A-539 to permit a judge, on motion of the state or on a judge's own motion, to conduct a hearing into the source of money or property to be posted for a defendant who is about to be released on a secured appearance bond. The judge may refuse to accept the money or property offered as security for the appearance bond if the state proves by a preponderance of the evidence that, because of its source, the money or property will not reasonably assure the appearance of the person. The act applies to bond hearings conducted on or after December 1, 2005. It also states that if a pretrial release order has been entered before December 1, 2005, it may not be revoked or modified solely on the basis of the act.

**Pretrial release restrictions involving methamphetamine offenses.** Effective for offenses committed on or after January 15, 2006, S.L. 2005-434 (H 248) adds G.S. 15A-736.1 to authorize judicial officials to deny pretrial release for certain methamphetamine offenses under certain conditions. The new section provides that a rebuttable presumption arises that no conditions of release would assure the safety of the community if the state shows by clear and convincing evidence that

- the defendant is charged with a violation of G.S. 90-95(b)(c) (manufacture of methamphetamine) or 90-95(d1)(2)b. (possession of precursor chemical knowing that it will be used to manufacture methamphetamine), and
- the defendant is dependent on or regularly uses methamphetamine and the violation was committed or attempted to maintain or facilitate the defendant's dependence or use.

The act places this new section in the article on extradition (Art. 37 of G.S. Ch. 15A), rather than in the article on pretrial release (Art. 26, Part 1 of G.S. Ch. 15A); and the new section states that it applies notwithstanding G.S. 15A-736, which deals with bail in extradition cases. Although it seems unlikely that the General Assembly intended to limit the new

restrictions to extradition cases—that is, to methamphetamine offenses committed in another state—the placement of the restrictions in the extradition article makes it unclear whether they may be applied to in-state offenses.

**Federal lands.** Effective May 27, 2005, S.L. 2005-69 (H 236) revises G.S. 104-7, which deals with the acquisition of state lands by the United States for certain purposes, such as expanding U.S. army bases. The revised section provides that the state has concurrent power to enforce its criminal law on lands purchased or otherwise obtained by the United States. This provision appears to apply prospectively to lands obtained by the United States on or after May 27, 2005. For lands obtained by the United States before that date, the terms and date of the transfer determine whether the state and federal government have concurrent jurisdiction or the federal government has exclusive jurisdiction. For a discussion of this issue, see ROBERT L. FARB, *ARREST, SEARCH & INVESTIGATION* 17 & n.60 (3d ed. 2003).

**Speed-checking devices.** G.S. 8-50.2 has allowed results obtained by radio microwave, laser, and other speed-measuring instruments to be admitted to corroborate the opinion of a person who visually observed the speed of an object. The statute also has required, as a condition of admissibility, that microwave and other electronic speed-measuring instruments be tested for accuracy by an appropriately licensed technician and that laser instruments be tested in accordance with standards established by the North Carolina Criminal Justice Education and Training Standards Commission. Effective October 1, 2005, S.L. 2005-137 (H 821) clarifies these testing requirements (in G.S. 8-50.2(c)) in two respects: (1) it requires that all of these devices be tested by an appropriately licensed technician and that the testing be done in accordance with Commission standards; and (2) it specifies the types of licenses and certificates that qualify a technician to test these devices.

## Law Enforcement

**Campus police at private nonprofit colleges.** Effective July 28, 2005, S.L. 2005-231 (S 527) creates the Campus Police Act, codified in new G.S. Ch. 74G. It authorizes the Attorney General to certify a private, nonprofit institution of higher education as a campus police agency and to commission campus police officers. Police agencies at private institutions of higher education that are certified under G.S. Ch. 74E (the Company Police Act) are automatically converted to campus police agencies under new G.S. Ch. 74G

unless the institution's board of trustees elects not to have the agency converted. Police agencies with public institutions of higher education remain under G.S. Ch. 116 (constituent institutions of The University of North Carolina) and Ch. 115D (community colleges) unless they elect to apply to the Attorney General to be certified as campus police agencies under new G.S. Ch. 74G.

While in the performance of their duties, campus police officers commissioned by the Attorney General have the same powers as municipal and county police officers to arrest for felonies and misdemeanors and to charge infractions in the following areas:

- Real property owned by or in the possession and control of the employing institution,
- Public roads or highways passing through the institution's property or immediately adjoining it, and
- Other real property while the officer is in continuous and immediate pursuit of a person for an offense committed on the institution's property or a public road or highway immediately adjoining it.

The governing body of an educational institution that has a campus police agency may enter into joint agreements with municipalities, counties, and other educational institutions with campus police agencies extending the law enforcement authority of its campus police officers into the other entity's jurisdiction. If authorized by their campus police agency, campus police officers may carry concealed weapons in accordance with G.S. 14-269(b)(5).

The act revises several criminal law and procedure statutes to recognize the status of campus police officers, including them under G.S. 14-34.2 (assault with firearm or other deadly weapon on officer), G.S. 14-415.10(4) and (5) (eligibility of officers for concealed handgun permit), G.S. 15A-402(f) (authority of officers to arrest outside territorial jurisdiction while in continuous and immediate pursuit of suspect for offense committed within territorial jurisdiction), and certain other statutes applicable to law-enforcement officers.

The act also adds new G.S. 14-33(c)(8) making it a Class A1 misdemeanor to assault a company police officer certified under G.S. Ch. 74E or a campus police officer, whether certified under the new Campus Police Act or under G.S. Ch. 17C or 116.

**General Assembly special police.** Effective September 7, 2005, S.L. 2005-359 (H 1086) expands the territorial jurisdiction of General Assembly special police officers by providing that they have jurisdiction

in Raleigh while on official duty, in unincorporated parts of Wake County surrounded by the innermost right-of-way of Interstate 440 while on official duty, and in any part of the state in connection with official duties of General Assembly members and General Assembly events. A General Assembly police officer also has the authority to arrest a person outside the above areas when the person has committed an offense within any area for which the officer could have arrested the person and the arrest is made during the person's immediate and continuous flight from the area.

**Concealed handguns.** Five acts deal with concealed handgun permits and weapons.

*Military personnel.* Effective July 28, 2005, S.L. 2005-232 (S 109) adds new G.S. 14-415.16A to extend concealed handgun permits of deployed military personnel for 90 days after the end of their deployment. The new section allows a deployed military permittee or his or her agent to apply to the sheriff for the extension. Even if a military permittee does not apply for an extension, the act provides the following protections to a permittee who carries a concealed handgun after the permit expires. First, during the 90 days following the end of deployment, a military permittee with an expired permit may not be charged with carrying a concealed handgun in violation of G.S. 14-415.21 if he or she displays proof of military deployment to a law enforcement officer who approaches the permittee and meets the other requirements of G.S. 14-415.11(a) (that is, the permittee notifies the officer that he or she is carrying a concealed handgun). Second, during the 90-day period, a military permittee with an expired permit may not be charged with carrying a concealed weapon in violation of G.S. 14-269(a1) if or she displayed proof of deployment to the officer. Third, new G.S. 14-269(b2) provides that it is a defense to prosecution for carrying a concealed weapon if the military permittee provides proof of deployment to the court. Under this third provision, it appears that the defendant has the benefit of the defense regardless of whether the defendant displayed proof of deployment to the officer; however, the defense may apply only to the carrying of the handgun during the period of deployment.

*Security guards.* G.S. 14-415.12A has provided that a qualified sworn law enforcement officer or former officer is deemed to have satisfied the requirement under G.S. 14-415.12(a)(4) that an applicant for a concealed handgun permit complete an approved firearms safety and training course. Effective for applications submitted on or after July 20, 2005, S.L. 2005-211 (S 778) extends that exemption to a person who is licensed or registered as an armed



security guard by the North Carolina Private Protective Services Board and who has been issued a firearm registration permit by the Board.

*Campus police officers.* Effective July 28, 2005, S.L. 2005-231 (S 527) amends G.S. 14-415.10(4) and (5) to treat campus police officers as law-enforcement officers for purposes of obtaining a concealed handgun permit.

*Recipients of domestic violence protective orders.* Effective August 27, 2005, S.L. 2005-343 (H 1311) adds new G.S. 50B-3(c1) to provide that, when a domestic violence protective order is issued, the clerk of superior court must provide to the plaintiff an informational sheet explaining his or her right to apply for a concealed handgun permit. The act directs the Administrative Office of the Courts to develop a standard informational sheet for use by the clerks. The act also modifies the requirements in G.S. 14-415.15(b) for issuance of a temporary concealed handgun permit. The revised section provides that proof of a domestic violence protective order constitutes evidence of an emergency situation warranting a temporary permit. The applicant still must meet the other statutory requirements to get a temporary or regular permit.

*Off-duty officers.* Effective August 26, 2005, S.L. 2005-337 (H 1401) amends G.S. 14-269(b) to allow off-duty law-enforcement officers to carry a concealed weapon if they do not consume alcohol or an unlawful controlled substance and do not have any alcohol or an unlawful controlled substance in their system. The act deletes the requirement that the carrying of a concealed weapon be authorized by local regulations issued by the sheriff, chief of police, or other officer in charge.

**Disposition of firearms.** G.S. 15-11.1(b1) has authorized the court to order various dispositions of a firearm that was seized in a criminal case and that is no longer necessary as evidence. Effective August 22, 2005, S.L. 2005-287 (H 1016) amends G.S. 15-11.1(b1) to permit a court to order that such a firearm be turned over to a law enforcement agency in the county of trial for the agency's official use or for sale to or exchange with a federally licensed firearm dealer. Such a disposition must be requested by the head of the law enforcement agency, and the firearm must have a legible, unique identification number. Proceeds of sales go to the schools. The act makes similar changes to G.S. 14-269.1, which authorizes the court to order the disposition of a deadly weapon upon conviction of certain offenses involving use of the weapon.

The act also adds new G.S. 15-11.2, which provides for the disposition of unclaimed firearms that were not seized as trial evidence and were not the subject of a conviction covered by G.S. 14-269.1. The

new section includes notice and disposition procedures.

**Electronic surveillance.** Effective December 1, 2005, S.L. 2005-207 (S 748) makes the following changes to Article 16 of G.S. Ch. 15A, which regulates the interception of wire, oral, and electronic communications—that is, electronic surveillance.

First, the act extends the time during which an order authorizing electronic surveillance remains in effect. As under current law, the surveillance order may be for up to 30 days. Revised G.S. 15A-293(c) provides further that the 30-day period begins when the officer first begins the interception under the order or 10 days after the order is entered, whichever is earlier. This provision gives law enforcement an opportunity to set up the surveillance before the order is considered to begin running. The revised section also provides that the order may be extended for up to an additional 30 days rather than up to the current 10 days.

Second, revised G.S. 15A-293(c) deals with intercepted communications that are in a foreign language or code. It provides that when an expert in that language or code is not reasonably available, "minimization" (in essence, limiting the interception to communications that are relevant to the investigation) may be done as soon as practicable. The revised section also provides that the surveillance may be done by state or federal government personnel or contractors acting under supervision of the law enforcement officer authorized to conduct the interception. This provision would permit an officer to contract with a foreign language interpreter to interpret an intercepted communication.

Third, new G.S. 15A-294(i) allows law enforcement in certain circumstances to obtain an order authorizing electronic surveillance that does not specify the facilities or place from which the communications are to be intercepted. Thus, an order might authorize an officer to engage in electronic surveillance of a particular individual who uses multiple communication devices (such as prepaid cell phones that have a limited life span). New G.S. 15A-294(j) adds that the time period of the order commences when the officer implementing the order ascertains where the communications are to be intercepted.

**Enforcement of lottery laws.** The lottery bill (S.L. 2005-344 (H 1023)), as modified by the budget bill (S.L. 2005-276 (S 622)), revises G.S. 18B-500 to provide that, in addition to their other duties, alcohol law-enforcement agents have the responsibility of enforcing the lottery laws.

**Seizure of registration and license documents.**

Effective December 1, 2005, S.L. 2005-357 (H 1404) amends G.S. 20-45 to authorize any sworn law enforcement officer, with jurisdiction, to seize a certificate of title, registration card or plate, permit, or license if the officer has notice from the Division of Motor Vehicles (DMV) that the item has been revoked or cancelled or the officer otherwise has probable cause to believe that the item has been revoked or cancelled. If the item is needed for a criminal prosecution, the officer is to retain the item as evidence, but otherwise the officer is to turn the item over to DMV. For registration plates, the officer must report the seizure to DMV within 48 hours.

## Sentencing, Probation, and Corrections

**Aggravating factors.** G.S. 15A-1340.16(d)(6) has made it an aggravating factor in felony sentencing if the offense was committed against or proximately caused serious injury to certain individuals while that individual was engaged in the performance of official duties or because of that individual's official duties. Effective for offenses committed on or after December 1, 2005, S.L. 2005-101 (S 507) revises that subsection to add social workers to the list of covered individuals.

**Appeal of probation from district court.** In *State v. Smith*, 165 N.C. App. 256, 598 S.E.2d 408 (2004), the North Carolina Court of Appeals addressed the effect of a defendant's appeal of a probationary sentence from district to superior court for a trial de novo. The court held that under the wording of G.S. 15A-1431(f), the defendant's probation was not stayed while the appeal was pending in superior court. The court also held that the time for the state to move to revoke the defendant's probation began to run from the date the district court imposed probation, notwithstanding that the probationary judgment was effectively in limbo while the case was pending in superior court. On July 1, 2005, the North Carolina Supreme Court reversed the Court of Appeals ruling and held that probation was stayed in the above circumstances. 359 N.C. 618, 614 S.E.2d 279 (2005).

Consistent with that approach, the General Assembly, in S.L. 2005-339 (H 1145), effective August 26, 2005, repealed G.S. 15A-1431(f) and added G.S. 15A-1431(f1), which states explicitly that an appeal for a trial de novo stays all of the following: payments of costs, payment of fines, probation or special probation, and active punishment. The amended statute recognizes that a district court's order imposing pretrial release conditions remains in effect

during the appeal unless modified. (Under G.S. 15A-1431(c), which was not changed, it appears that a district court judge may modify a pretrial release order up to ten days after it enters judgment, when jurisdiction of an appealed case passes to superior court. See also 1 JOHN RUBIN, THOMASIN HUGHES, & JANINE FODOR, NORTH CAROLINA DEFENDER MANUAL § 1.9A, at 18 (May 1998) (discussing different interpretations of time within which district court judge may act), posted at <http://www.ncids.org>.)

New G.S. 15A-1431(f1) also states that pending a trial de novo the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility. It seems unlikely that the General Assembly intended by this provision to authorize a judge to order the defendant confined, without any pretrial release conditions, pending a trial de novo. Rather, it appears that a judge may order confinement if the defendant fails to meet pretrial release conditions (essentially the wording of repealed G.S. 15A-1431(f)). The provision apparently was intended to make it clear that, notwithstanding the stay of the district court's judgment, a judge may still impose "appropriate" pretrial release conditions. Confinement without any opportunity to obtain release is not an appropriate pretrial release determination for misdemeanors (or for most felonies) under North Carolina law. In addition, interpreting the statute otherwise would conflict with the overall purpose of the statutory change—to stay any punishment pending a trial de novo—and could be considered to impinge on a defendant's right to appeal and right to a jury trial and exceed the constitutional limits on preventive detention. See generally *United States v. Salerno*, 481 U.S. 739 (1987).

**Parole.** Section 17.28 of S.L. 2005-276 (S 622) directs the Post-Release Supervision and Parole Commission (Parole Commission), with the assistance of the North Carolina Sentencing and Policy Advisory Commission and Department of Correction (DOC), to analyze the amount of time each parole-eligible inmate has served compared to the time served by offenders for comparable crimes under structured sentencing. The Parole Commission must reinstate the parole review process for any parole-eligible person who has served more time in custody than he or she would have served if sentenced to the maximum sentence under structured sentencing. "Maximum sentence" is defined as the maximum sentence a person could receive if sentenced in the presumptive range in prior record level VI. The Parole Commission must report to the General Assembly the results of the analysis by October 1, 2005, and the results of the parole reviews by February 1, 2006. The DOC and Parole

Commission also must make a good faith effort (under sec. 17.27 of the bill) to enroll at least 20% of all eligible, pre-structured sentencing felons in the Mutual Agreement Parole Program by May 1, 2006. The DOC and Parole Commission must report to the General Assembly if the 20% participation goal is not met and explain why the goal was not realized.

**No smoking in prison.** Effective January 1, 2006, S.L. 2005-372 (S 1130) adds G.S. 148-23.1 prohibiting the use of tobacco products inside buildings at state correctional institutions except for authorized religious purposes. Violations by inmates and employees are subject to disciplinary measures by the DOC; visitors in violation of the ban are subject to removal from the facility and loss of visitation privileges. The act also directs the DOC to study the feasibility of banning smoking on all grounds (inside and outside buildings) of state correctional institutions.

**Palliative care.** G.S. 148-4(8) has allowed the Secretary of Correction to extend the limits of the place of confinement of a prisoner for the purpose of receiving palliative care if the prisoner is terminally ill or permanently and totally disabled. Effective August 13, 2005, S.L. 2005-276 (S 622) revises the criteria for such relief. A “terminally ill” inmate must have an incurable condition caused by illness or disease that was unknown at the time of sentencing and was not diagnosed upon entry to prison, will likely produce death within six months, and is so debilitating that it is highly unlikely that the inmate poses a significant public safety risk. A “permanently and totally disabled” inmate must suffer from permanent and irreversible physical incapacitation as a result of an existing physical or medical condition that was unknown at the time of sentencing and was not diagnosed upon entry to prison, and is so incapacitating that it is highly unlikely that the inmate poses a significant public safety risk. The Secretary must act expeditiously upon learning that an inmate meets these criteria and, in the case of a terminally ill inmate, must make a good faith effort to make a determination within thirty days of learning of the inmate’s terminal condition.

**Costs of substance abuse monitoring as condition of probation.** Judges sometimes waive court costs or put the costs of probation treatment programs in a higher priority than other costs due the courts. Effective August 13, 2005, S.L. 2005-276 (S 622) amends G.S. 15A-1343(b) to prohibit the practice of making costs associated with a substance abuse monitoring program (and any other special condition of probation) a higher priority.

**ADETS.** S.L. 2005-312 (H 35) addresses attendance at Alcohol and Drug Education Traffic

School (ADETS), a sanction for those convicted of impaired driving. It directs the Commission on Mental Health, Developmental Disabilities, and Substance Abuse Services to revise its rules to do two things—raise the minimum number of hours of attendance to 16 and limit the maximum size per class to 20. To reflect what likely will be increased costs to programs to implement these changes, the act raises the fee for ADETS from \$75 to \$160. The fee increase will not become effective until the Commission revises its rules. Beginning January 1, 2009, the act establishes statutory minimum qualifications for ADETS instructors; beginning that date each instructor must be a certified substance abuse counselor, certified clinical addiction specialist, or certified substance abuse prevention consultant, as those terms are defined by G.S. 122C-142.1(d1).

**Credentialing of substance abuse treatment providers.** Article 5C of G.S. Ch. 90 of the General Statutes establishes standards for the credentialing of substance abuse professionals practicing in North Carolina. Professionals credentialed under this law include, among others, substance abuse counselors, substance abuse prevention consultants, clinical supervisors, clinical addictions specialists, and substance abuse residential facility directors. Effective September 22, 2005, S.L. 2005-431 (S 705) amends Article 5C to add “certified criminal justice addictions professional” (CCJP) to the list of credentialed substance abuse professionals. New G.S. 90-113.31A(5) defines a “CCJP” as a person certified by the North Carolina Substance Abuse Professional Practice Board to practice as a CCJP and who, under supervision, provides direct services to clients or offenders exhibiting substance abuse disorders in a program determined by the Board to be in a criminal justice setting. New G.S. 90-113.40(d1) describes the requirements for certification as a CCJP.

The act also requires, in new G.S. 90-113.46A, that all applicants for credentialing as a substance abuse professional submit to a criminal history record check. If the applicant has a conviction, the Board must consider various factors in determining whether to deny registration, certification, or licensure of the applicant; however, a conviction does not automatically bar issuance of a credential. The act adds G.S. 114-19.11A to authorize the Department of Justice to provide criminal history information to the North Carolina Substance Abuse Professional Practice Board. For more information about the act, see Mark F. Botts, *Mental Health, in NORTH CAROLINA LEGISLATION 2005* (forthcoming from the School of Government).

## Collateral Consequences

### Miscellaneous Consequences

**Parental rights.** G.S. 7B-1111(a)(8) has provided that a court may terminate the parental rights of a parent if the parent has committed certain offenses against his or her child (such as solicitation to commit murder), another child of the parent (such as murder or voluntary manslaughter), or other child in the home. Effective for termination proceedings filed on or after June 30, 2005, S.L. 2005-146 (H 97) revises the statute to provide that a court also may terminate the parental rights of a parent if the parent has committed murder or voluntary manslaughter of the other parent of the child; however, the court may consider whether the parent's actions were committed in self-defense or defense of others or were based on some other justification.

**Sex offender registration.** For changes to the sex offender registration requirements, see the discussion above, under Criminal Offenses, of computer solicitation of a sex act with child, sexual battery, and felony indecent exposure.

**Domestic violence.** S.L. 2005-423 (S 1029) makes several changes to the civil laws governing domestic violence protective orders. See Cheryl Howell, John Saxon & Janet Mason, *Children and Families*, in NORTH CAROLINA LEGISLATION 2005 (forthcoming from the School of Government). The changes in that act involving criminal law are minimal. Effective October 1, 2005, amended G.S. 50B-3.1(e) and (f) provide that a person may not retrieve firearms that have been ordered to be surrendered to the sheriff as part of an action for a domestic violence protective order until final disposition of any pending state or federal criminal charges allegedly committed by the defendant against the person who is the subject of the protective order.

### Criminal Record Checks

**Prospective adoptive parents.** G.S. 48-3-309 has required the Department of Health and Human Services (DHHS) to obtain a criminal history of all prospective adoptive parents seeking to adopt a minor who is in the custody of a department of social services. Effective June 27, 2005, S.L. 2005-114 (H 451) requires that the Department obtain criminal histories of all individuals who are 18 years of age or older and who reside in the prospective adoptive home. Under the revised statute, a county department of social services must issue an unfavorable assessment if

it determines that, based on the criminal histories, either the prospective adoptive parent is unfit to care for children or the other individuals required to be checked are unfit to have children reside with them in the home.

**DHHS workers.** Effective June 27, 2005, S.L. 2005-114 (H 451) revises G.S. 114-19.6(a)(1) to expand the list of individuals associated with DHHS who are subject to a criminal record check. The revised statute covers applicants for employment, current employees, independent contractors and their employees, and others who have been approved to perform volunteer services. Previously, the statute was limited to employees and applicants for employment who provided direct care for a client, patient, student, resident, or ward of the Department.

**Health care facilities.** Effective March 23, 2005, S.L. 2005-4 (S 41) revises several statutes that have required long-term care facilities (adult care homes and their contract agencies, and nursing homes or home-care agencies) and providers of mental health, developmental disabilities, and substance abuse services to obtain a criminal history check of certain applicants for employment. Because the existing statutes (G.S. 122C-80(b), 131D-40(a) and (a1), and 131E-265(a) and (a1)) allowed such facilities to obtain the results of a national criminal history check of the applicant, they appeared to violate federal limitations on who could view such information. The revised statutes direct the North Carolina Department of Justice to turn over the national criminal history of employment applicants to the Criminal Records Check Unit of DHHS, which then notifies the long-term care facility whether the information affects employability. The revised statutes forbid DHHS from sharing the actual national record check results with the facility.

**County governments.** In 2003, the General Assembly added G.S. 114-19.14 to allow cities to obtain criminal history checks from the Department of Justice for applicants for city employment. Effective September 7, 2005, S.L. 2005-358 (S 737) revises that section to give a county the same access to criminal history information for applicants for county employment. The act also adds G.S. 153A-94.2 authorizing boards of county commissioners to adopt rules requiring applicants for county employment to be subject to a criminal history check.

**Archaeology.** Effective for applications for permits and licenses submitted to the Department of Cultural Resources ("Department") on or after October 1, 2005, S.L. 2005-367 (S 796) adds G.S. 114-19.17 to allow the Department to obtain criminal history checks from the Department of Justice for applicants for a permit or license to conduct archaeological

investigations on state lands (under G.S. Ch. 70, Art. 2) and exploration, recovery, or salvage operations in certain waters within and adjacent to North Carolina (under G.S. Ch. 121, Art. 3). The act revises the articles regulating these operations to specify the parameters of such record checks.

**Lotteries.** Effective August 31, 2005, S.L. 2005-344 (H 1023), as modified by S.L. 2005-276 (S 622), adds G.S. 114-19.16 to allow the North Carolina State Lottery Commission and its director to obtain criminal history checks from the Department of Justice for any prospective employee of the Commission and any prospective lottery vendor.

**Substance abuse treatment providers.** For criminal record checks for these jobs, see the discussion of the topic under Sentencing, Parole, and Corrections, above.

## Juvenile Justice

**Interstate compact.** The Interstate Compact on Juveniles was created in 1955 to give states a uniform approach to dealing with juveniles who cross state lines—both those who run away and those who need supervision in one state as a result of an offense committed in another state. All states adopted the compact, but it has become seriously outdated. The desired uniformity is lacking because not all states have passed the same amendments to their versions of the compact. S.L. 2005-194 (H 1346) adds to the Juvenile Code (G.S. Ch. 7B) a new Article 40, “The Interstate Compact for Juveniles.” This new compact becomes effective when thirty-five states have adopted it. When all states have adopted it, North Carolina’s version of the Interstate Compact on Juveniles, Article 28 of G.S. Ch. 7B, is repealed. Extensive information about the compact can be obtained from the website of the Council of State Governments, <http://www.csg.org>.

**Biennial juvenile recidivism studies.** S.L. 2005-276 (S 622) enacts G.S. 164-48, directing the North Carolina Sentencing and Policy Advisory Commission to conduct biennial recidivism studies of a sample of juveniles who have been adjudicated delinquent to assess their subsequent involvement in both the juvenile justice and the criminal justice systems. The act repeals Article 33 of the Juvenile Code (G.S. Ch. 7B), which imposed similar responsibilities on the Department of Juvenile Justice and Delinquency Prevention.

**Other evaluations and reports.** The budget bill (S.L. 2005-276 (S 622)) contains numerous provisions requiring evaluations or reports by or related to the

Department of Juvenile Justice and Delinquency Prevention. Some of the topics, and the sections of the act in which they appear, are

- local Juvenile Crime Prevention Council grants (sec. 16.2);
- operation and effectiveness of Project Challenge North Carolina, Inc., in providing alternative dispositions and services to juveniles adjudicated delinquent or undisciplined (sec. 16.3(a));
- effectiveness of the Juvenile Assessment Center and of juvenile assessment plans and services (sec. 16.3(b));
- the operation and effectiveness of Communities in Schools (sec. 16.3(c));
- evaluation of the Eckerd and Camp Woodson wilderness camp programs, the teen court programs, the program that grants funds to local Boys and Girls Clubs, the Save Our Students program, the Governor's One-on-One Programs, and multipurpose group homes (sec. 16.4);
- the treatment staffing model being piloted at Samarkand and Stonewall Jackson Youth Development Centers, and implementation of the treatment staffing model at Dobbs, Dillon, and Juvenile Evaluation Center youth development centers (sec. 16.6);
- progress in the planning, design, and construction of new youth development centers (sec. 16.7);
- grants awarded to Juvenile Crime Prevention Councils for street gang violence prevention and intervention programs (sec. 16.8(a));
- county-operated juvenile detention centers in Durham, Guilford, Forsyth, and Mecklenburg counties, including admission trends and projections, offense histories and assessed needs, staffing levels, housing capacity, cost to operate, feasibility of state operation if recommended by a county, repair and renovation needs, and estimated cost to plan, design, and construct new detention centers, if appropriate (sec. 16.9) (study to be done by Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee);
- the awarding and use of grants to up to four Juvenile Crime Prevention Councils, from a \$250,000 appropriation, to provide residential and/or community-based intensive services to juveniles who have been adjudicated delinquent and have a level 2 or 3 disposition or are reentering the community after release from a youth development center (sec. 16.11);

- the operations and effectiveness of the National Guard Tarheel Challenge Program (sec. 18.1) (report is to be made by Department of Crime Control and Public Safety).

## Court Administration

### Organization and Personnel

**Reorganized districts.** The 2005 session saw the continuation of a recent trend to divide or reconfigure the districts used as the basis for administration of the superior and district court and district attorney's offices. The state budget, S.L. 2005-276 (S 622), contained provisions dividing the 29th district and reconfiguring the two districts that formerly constituted the 20th district.

The 29th district is a five-county district in the mountains, composed of McDowell, Rutherford, Polk, Henderson, and Transylvania counties. The budget bill divides the 29th district into two districts—with McDowell and Rutherford comprising district 29A and Polk, Henderson, and Transylvania comprising district 29B. This split applies to all three kinds of districts—superior court, district court, and prosecutorial. There are no new judgeships associated with this split, but there will be a new district attorney position (and a new investigatorial assistant position) to reflect that there will now be two district attorney's offices. This split is effective December 1, 2005, except that the prosecutorial district split is effective January 1, 2007, after the district attorneys are elected for both districts in the 2006 general election.

The 20th district is on the southern border of the state, immediately east of Mecklenburg County. It consists of Anson, Stanly, Richmond, and Union counties. For superior court purposes only, Anson and Richmond had comprised district 20A and were allocated one judge, and Union and Stanly had comprised district 20B and were allocated two judges. This legislation, and a later technical corrections bill, S.L. 2005-345 (H 320), moved Stanly county and one of the judgeships into district 20A, which leaves district 20B (Union county) with one judge. This legislation adds another judge for district 20B effective after the 2010 general election, and the election of the remaining Union county judge is postponed for four years until 2010. The election of the judgeship assigned from Stanly county to new district 20A is also delayed until 2008, when the election of the other judge is scheduled to be held.

The district court districts will have the same counties in each of the new districts, but S.L. 2005-345 (H 320) further subdivides district 20B (Union county) into two subdistricts (district 20B and district 20C) for electoral purposes. One judge runs in district 20B and the other two run in district 20C, which is composed of the remaining parts of the county. These subdistricts are used solely for elections; the two districts together comprise a "set of districts," which is used as the administrative unit. For example, there will be only one chief district judge for the two subdistricts that comprise the set of districts in district 20B-C. The prosecutorial districts will mirror the superior court districts, and will be effective January 1, 2007, following the 2006 general election. One new district attorney position (and one new investigatorial assistant) will be created to staff the new district.

**New positions.** In addition to the positions created for the reorganized districts, discussed above, the state budget creates a new deputy clerk of court position in Hyde County and two support positions for a business court in Mecklenburg County (discussed in Joan G. Brannon & James C. Drennan, *Courts and Civil Procedure*, in NORTH CAROLINA LEGISLATION 2005 (forthcoming from the School of Government)).

**Starting date of district court judges terms.** Effective September 22, 2005, S.L. 2005-425 (H 650) amends G.S. 7A-140 to provide that the terms of office for district court judges begin on January 1 following an election rather than on the first Monday in December.

**Longevity pay for certain personnel.** S.L. 2005-276 (S 622) amends G.S. 7A-65(d) to provide that service as a "resource prosecutor" counts for purposes of calculating longevity pay for assistant district attorneys. A "resource prosecutor" means a former assistant district attorney who has left a district attorney's office to serve in a time-limited position with the Conference of District Attorneys.

The act also amends G.S. 7A-101(c) to provide that service as a magistrate (as well as a justice or judge) counts for purposes of calculating longevity pay for a clerk of superior court.

**Conference of Superior Court Clerks.** Effective July 1, 2005, S.L. 2005-100 (H 878) adds G.S. 7A-805 through 7A-808 to establish a statutory Conference of Clerks of Superior Court. The conference is composed of elected clerks of court (and acting and interim clerks). The Conference is to meet twice a year, and it may prepare training manuals, cooperate with other agencies to promote the effective administration of justice, and provide education in conjunction with the Institute of Government and the Administrative Office

of the Courts. When funds are available, it may employ an executive secretary (no funds are provided in the 2005-07 budget).

## Drug Court

The budget bill (S.L. 2005-276 (S 622)), as amended by the technical corrections budget bill (S.L. 2005-345 (H 320)), provides that funds appropriated to the Judicial Department for the adult Drug Treatment Court program may be used only to provide treatment and case coordination to offenders sentenced to intermediate punishment or to offenders sentenced to community punishment who are at risk of revocation. The Judicial Department may, however, use \$300,000 in existing funds for the 2005-06 fiscal year to fund the operations of the Mecklenburg Drug Treatment Court to provide treatment to DWI offenders and pretrial offenders.

## Costs and Fees

**Local crime lab tests.** Effective for offenses committed on or after October 1, 2005, S.L. 2005-363 (H 890) adds G.S. 7A-304(a)(8) to direct the judge to assess a fee of \$300 for the services of a crime laboratory operated by a local government if (a) the defendant is convicted, (b) as part of the investigation leading to conviction, the lab performed DNA analysis, tests of the defendant for the presence of alcohol or controlled substances, or analysis of a controlled substance possessed by the defendant or defendant's agents, and (c) the judge finds that the work was substantially equivalent to the kind of work performed by the State Bureau of Investigation. The court may waive or reduce the fee for good cause. Any fees go to the general fund of the local government that operates the lab, to be used for law enforcement purposes.

**Out-of-state attorneys.** Effective for fees assessed on or after September 14, 2005, S.L. 2005-396 (S 327) increases from \$100 to \$125 the fee for an out-of-state attorney to appear in a criminal or civil proceeding in North Carolina. The General Court of Justice continues to receive \$100 of the fee, and the North Carolina State Bar receives the additional \$25.

**Other cost increases.** Effective for costs assessed or collected on or after September 1, 2005, the budget bill, S.L. 2005-276 (S 622), increases the various costs in criminal cases. The bill

- amends G.S. 7A-304(a)(3a) and (4) to raise the costs in criminal cases in both district and

superior court by \$10 (of which \$9.50 is for the support of the General Court of Justice and \$.50 is for supplemental pension benefits for sheriffs);

- amends G.S. 15A-145(e) to increase the fee for a petition for expunction of a criminal record from \$65 to \$125;
- adds new G.S. 15A-1343(c2) to require a person placed on house arrest with electronic monitoring to pay a fee of \$90 for the device unless the court for good cause exempts the person from paying the fee; and
- amends G.S. 20-135.2A(e) to increase court costs for motorcycle helmet and seat belt violations from \$50 to \$75.

## Indigent Defense

**Copies of files.** Effective July 5, 2005, S.L. 2005-148 (S 689) amends G.S. 7A-452 to require that, in cases in which an indigent person has appealed and has been appointed appellate counsel by the Office of Indigent Defense Services, the clerk of superior court must make a copy of the complete trial division file, including documentary exhibits if requested, and must furnish those materials to the appointed attorney.

Effective August 4, 2005, S.L. 2005-251 (S 593) adds new G.S. 7A-308(b1) to clarify that fees charged by the clerk for copies (in G.S. 7A-308(a)(12)) are not chargeable when the copies are requested by an attorney who has been appointed to represent an indigent person at state expense and the request is made in connection with the appointed case.

**\$50 appointment fee.** Effective August 4, 2005, S.L. 2005-250 (S 592) revises G.S. 7A-455.1, which imposes a \$50 attorney appointment fee in criminal cases. The changes were made to conform to the North Carolina Supreme Court's decision in *State v. Webb*, 358 N.C. 92, 591 S.E.2d 505 (2004), which struck down the portion of the statute requiring payment of the fee from defendants who were not convicted. The decision continued to permit assessment of the appointment fee after conviction. The revised statute therefore requires defendants to pay a \$50 appointment fee only upon conviction. The court must add the fee to any amounts it determines to be owed for the value of the attorney's services in the case. The act does not modify the other limitations in the statute on assessment of the fee. The statute continues to impose the fee in criminal cases at the trial level only; provides that the failure or refusal to pay the fee is not grounds for the denial of counsel, withdrawal of counsel, or contempt; provides that the fee is due only once for

each attorney appointment, regardless of the number of cases to which an attorney is assigned; and bars a second fee if the cases in which the attorney was appointed are reassigned to a different attorney.

**Repayment of attorney's fees for appeals, Ch. 7B proceedings, and probation.** G.S. 7A-455(c) directs the court to enter a judgment for the value of services rendered by an attorney on behalf of an indigent defendant who has been convicted in a criminal case. Effective August 5, 2005, S.L. 2005-254 (S 594) amends that subsection to provide that no judgment for fees may be entered for the value of legal services rendered on appeal to the appellate division or in postconviction proceedings if all of the matters raised in the proceeding are vacated, reversed, or remanded for a new trial or resentencing. *See also State v. Rogers*, 161 N.C. App. 345, 587 S.E.2d 906 (2003) (holding under previous version of statute that attorneys fees could not be assessed for first trial and appeal when supreme court vacated convictions and ordered new trial).

Effective for appointments on or after October 1, 2005, the act revises G.S. 7B-603, which has authorized the court to order a parent or guardian to repay the costs of an attorney or guardian ad litem appointed for a juvenile in an abuse, neglect, and dependency proceeding or a proceeding to terminate parental rights. The statute has been unclear, however, whether the court could order repayment of the fees for an attorney appointed for the parent in such proceedings. The revised statute clarifies that a court may order repayment of such fees if the juvenile is adjudicated abused, neglected, or dependent or the parent's rights are terminated. The revised statute does not mandate repayment, however. New G.S. 7B-603(b1) uses the discretionary term "may" rather than the mandatory "shall," and it also provides that in determining whether to order repayment the court must consider the respondent's ability to pay. Thus, a court might decide not to order repayment if it found that the additional financial obligation would interfere with the parent's ability to take the necessary steps to care for his or her child. (The court must engage in a similar assessment under G.S. 7A-450.3 in deciding whether to require the parent to repay the attorneys fees incurred for a juvenile.) If the court orders the parent to repay attorneys fees (whether incurred for the parent or juvenile), and the parent fails to pay at the time of disposition, the court must enter a judgment in the amount due the state. The act deletes the provision, previously applicable to orders to repay attorneys fees for juveniles, requiring the court to delay entry of judgment for 90 days following the order of repayment (in G.S. 7A-450.3). As part of these changes, the act

also deletes the provision authorizing contempt for a failure to pay attorneys fees (in G.S. 7B-603(c)); however, other sections in G.S. Ch. 7B (G.S. 7B-2704 and -2706) continue to state that a court may hold a parent or guardian in contempt for failing to comply with court orders issued in delinquency proceedings, including court orders to pay the attorneys fees incurred on behalf of the juvenile.

G.S. 15A-1343(e) provides that, unless the court finds extenuating circumstances, it must require as a condition of probation that the defendant repay the fees of his or her public defender or appointed attorney. Effective August 4, 2005, S.L. 2005-250 (S 592) revises G.S. 15A-1343(e) to clarify that the repayment obligation includes other counsel who are employees of the Office of Indigent Defense Services (IDS), such as capital defenders, and counsel under contract with IDS, such as counsel who have contracted to handle a block of cases.

**Appointment of counsel in Ch. 35A proceedings.** Effective August 4, 2005, S.L. 2005-250 (S 592) amends G.S. 35A-1245(c) to clarify that the appointment of counsel for a ward when the guardian is seeking sterilization must be in accordance with IDS rules. This change makes the statute consistent with the other statutes on appointment of counsel.

**Legal services for inmates.** Effective October 1, 2005, S.L. 2005-276 (622) transfers from the Department of Correction to IDS the responsibility for administering legal services for inmates in cases in which the state is obligated to provide legal assistance and access to the courts. The act revises G.S. 7A-498.3, which identifies the types of cases under IDS, to add this responsibility. Prisoners Legal Services, Inc. (PLS) has been providing legal services to inmates pursuant to a contract with DOC, and the act directs IDS to contract with PLS for an additional two years, during which time IDS must evaluate the services provided by PLS. The act transfers from DOC to IDS \$1,883,865 for the 2005-06 fiscal year and \$2,511,820 for the 2006-07 fiscal year to administer these services.

**Expansion of public defender system.** The budget bill, S.L. 2005-276 (S 622), authorizes IDS to use existing funds to complete the establishment of a public defender office in Wake county, created by the General Assembly during the 2004 session. The act authorizes the hiring of twenty attorneys, four investigators, and six administrative support staff. The act also authorizes IDS to use existing funds to add up to ten new attorney and five new support staff positions in other offices.

The budget bill established a public defender office in district 5 (New Hanover and Pender counties), but the technical corrections budget bill (S.L. 2005-345



(H 320), sec. 50A) repealed those provisions. The technical corrections bill also authorized the addition of two new attorney positions and one new support staff position in district 1 and one new attorney position in district 3A for the purpose of handling indigent cases in district 2, where there is not a public defender office.

**Rates for appointed counsel.** G.S. 7A-458 has provided that the fee to which an attorney who represents an indigent person is entitled shall be fixed in accordance with IDS rules. Pursuant to that statutory authorization, IDS adopted a rule establishing a statewide rate of \$65 an hour for all appointed cases (other than capital cases) in the district and superior courts. S.L. 2005-276 (S 622) amends G.S. 7A-458 to clarify that a court may not award fees at a rate higher than established by IDS unless approved by IDS. The court still retains the authority to review the hours claimed in each fee application and to approve or reduce those hours based on the factors normally considered in fixing attorneys fees, such as the nature of the case and time and responsibility involved.

## Studies and Reports

**Capital cases.** S.L. 2005-295 (H 1436) directs the North Carolina Sentencing and Policy Advisory Commission to study whether capital sentencing law should include as an aggravating factor that the capital felony was committed at a time when the defendant knew the behavior was prohibited by a valid protective order entered under Chapter 50B or by a valid protective order entered by the courts of another state or of an Indian tribe. The report is due by May 1, 2006.

**Domestic violence.** S.L. 2005-356 (H 569) creates 16-member legislative committee to “examine, on a

continuing basis, domestic violence issues in North Carolina in order to make on-going recommendations to the General Assembly on ways to reduce the incidences of domestic violence, and to provide additional assistance to victims of domestic violence.” The legislation also requires the Administrative Office of the Courts to study and review the use of global positioning satellite technology to track criminal offenders; to expand the family court model to additional districts in the state as resources allow; and to study elements of the family court model that can be implemented without additional funding. The act directs the Department of Correction (DOC) to study and report on measures the Division of Community Corrections is taking to address the issue of supervising domestic violence offenders.

**Other studies and reports.** The budget bill (S.L. 2005-276 (S 622)) requires the following studies and reports. For studies related to juvenile justice, see Juvenile Justice above.

- During the 2005-07 biennium, the Office of Indigent Defense Services (IDS) is to formulate proposals to reduce costs, including the possibility of decriminalizing minor traffic offenses, changing the way criminal district court is scheduled, and reevaluating the handling of capital cases. IDS is to consult with the District Attorneys and District and Superior Court Judges Conferences.
- The DOC is to report on a pilot program using global positioning systems technology to monitor sex offenders and domestic violence offenders. The DOC also must report annually on its efforts to increase the use of electronic monitoring of offenders who violate probation as an alternative to revocation of their probation and incarceration.

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