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1998 LEGISLATION AFFECTING CRIMINAL LAW AND PROCEDURE

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The 1998 session of the General Assembly was a relatively quiet one in the field of criminal law and procedure, or at least in what traditionally has been considered part of that field. Few changes were made in areas such as the elements of criminal offenses or pretrial and trial procedure.

The General Assembly was far more active in less traditional areas, but ones that more and more are being linked to the administration of criminal justice. The most extensive changes were to the state's juvenile justice laws, which govern juveniles alleged to be delinquent or undisciplined. Readers interested in the new juvenile laws, which are not discussed here, should refer to Janet Mason, *1998 Legislation: Juvenile Law Reform*, ADMINISTRATION OF JUSTICE BULLETIN 98/03 (Institute of Government, Dec. 1998).

The General Assembly also passed the Crime Victims' Rights Act, implementing the state constitutional amendment on victims' rights passed by the North Carolina voters in 1996, and made substantial revisions to the motor vehicle forfeiture laws enacted in 1997. The first part of this bulletin concentrates on these two pieces of legislation. The remainder describes other criminal legislation, primarily affecting controlled substance offenses but also addressing a few other criminal offenses, miscellaneous aspects of criminal procedure, and sentencing.

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Each ratified act discussed here is identified by its chapter number in the session laws and by the number of the original bill. Many of the changes with respect to criminal law and procedure appear in the Current Operations and Capital Improvement Appropriations Act of 1998, S.L. 1998-212 (S 1366), which will be referred to here simply as the "1998 Appropriations Act." 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.

Anyone may obtain a free copy of any bill by writing the Printed Bills Office, State Legislative Building, 16 West Jones Street, Raleigh, NC 27603, or by calling that office at (919) 733-5648. Requests should identify the new law's bill number, not the chapter number.

Some of the material in this bulletin was drawn from the forthcoming Institute of Government publication NORTH CAROLINA LEGISLATION 1998. That publication, as well as other bulletins on recent legislation, may be ordered from the Institute's publications office at (919) 966-4119.

Victims' Rights

Implementation of Victims' Rights Amendment

In the 1996 general election, North Carolina voters approved an amendment to the state constitution articulating various rights of crime victims. The amendment, known as the "Victims' Rights Amendment" (Art. I, Sec. 37 of the North Carolina Constitution), provides that victims have the right to be informed of and attend court proceedings, receive restitution, and present their views to agencies considering release of the defendant. The constitutional amendment, however, did not create any enforceable rights. Instead, it left to the General Assembly the responsibility of passing legislation to implement the constitutional rights of crime victims. As important, the amendment did not define the term "victim," leaving that to the General Assembly as well.

During the 1997 session, because agreement could not be reached on legislation to implement the Victims' Rights Amendment, the General Assembly directed the Legislative Research Commission and Governor's Crime Commission to study the subject further. See Joan G. Brannon & James C. Drennan, *Courts and Civil Procedure*, in NORTH CAROLINA LEGISLATION 1997, at pp. 60-61 (Institute of Government, 1997).

This session, the General Assembly enacted legislation to implement the Victims' Rights Amendment. The keystone of this legislation is the "Crime Victims' Rights Act," enacted by section 19.4 of the 1998 Appropriations Act, S.L. 1998-212 (S 1366). It creates a new Article 45A in G.S. Chapter 15A detailing the rights of victims in criminal proceedings. The key provisions of the Crime Victims' Rights Act, most of which apply to offenses committed on or after July 1, 1999, are summarized below. The 1998 Appropriations Act also created a new set of statutes on restitution by defendants to crime victims and generally increased the compensation payable by state-run programs to victims.

Definition of "Victim"

New G.S. 15A-830, the opening section of the Crime Victims' Rights Act, defines several key terms—most importantly, the term "victim." Only those persons who are "victims" as defined in the Act are entitled to the rights enumerated in the remainder of the Act. If the victim is deceased, then the victim's next of kin is entitled to exercise those rights, except for the right to restitution, which may be exercised only by the personal representative of the victim's estate. (New G.S. 15A-841 contains similar provisions concerning the rights of family members of a victim who is mentally incompetent or a minor.)

A person meets the definition of victim, and is entitled to the rights enumerated in the Act, if there is probable cause to believe one of the following crimes has been committed against him or her:

- a Class A through E felony;
- a Class F through I felony if the felony is in violation of certain statutes;
- an attempt to commit one of the above felonies if the attempt is punishable as a felony;
- a misdemeanor in violation of certain statutes if the defendant and victim have a "personal relationship" as defined in G.S. 50B-1(b).

Table 1 at the end of this bulletin contains a complete listing of the offenses subject to the Crime Victims' Rights Act.

The last category of offenses is designed to include victims of certain acts of domestic violence. The misdemeanor offenses included within the domestic violence category are: assault with a deadly weapon, assault inflicting serious injury, assault on a female, assault by pointing a gun, domestic criminal

trespass, and stalking. Not included in this category is the offense of communicating threats. In cases involving misdemeanor offenses in the domestic violence category, the Crime Victims' Rights Act applies only if the defendant and the victim were in one of six different types of "personal relationships" (for example, as current or former spouses) described in G.S. 50B-1(b). (Chapter 50B of the General Statutes gives domestic violence victims who are within one of these relationships the right to file a civil action for a protective order against the alleged perpetrator.)

Because of the potential number of domestic violence victims who may be covered by the Crime Victims' Rights Act, the General Assembly directed the Conference of District Attorneys, with the assistance of the Administrative Office of the Courts and the Governor's Crime Commission, to project the cost of full implementation of the Act. The report must be submitted to the General Assembly by March 1, 1999. *See* S.L. 1998-212, sec. 19.4(o). The Conference of District Attorneys also is charged with maintaining a repository of victims' names, addresses, and other information for use by agencies charged with responsibilities under the Act. *See* G.S. 15A-835(e).

Those who do not meet the definition of victim under the Crime Victims' Rights Act may be covered by Article 45 of G.S. Chapter 15A (instead of new Article 45A), which has been in effect for several years. As amended by section 19.4(b) of S.L. 1998-212, Article 45 applies to felonies and serious misdemeanors not covered by the Crime Victims' Rights Act and to acts of juveniles that, if committed by an adult, would constitute a felony or serious misdemeanor. The procedures in Article 45 resemble those in the Crime Victims' Rights Act, except they are *not* mandatory. Law enforcement agencies, courts, and others in the criminal justice system are directed to make a reasonable effort to follow the procedures in Article 45 but are not required to do so.

Agency Responsibilities

The Crime Victims' Rights Act gives victims different rights at each stage of a criminal case and designates the officials (law enforcement agencies, prosecutors, and others) responsible for affording victims those rights. Many responsibilities concern the giving of notice to victims (for example, notice of the date and time of court proceedings or the disposition of the case). At each stage, victims have the option of electing (on forms provided by the officials responsible for communicating with victims at that stage of the

case) whether or not they wish to receive further notices. The notification and other responsibilities described below are effective for offenses committed on or after July 1, 1999.

Law enforcement agencies. New G.S. 15A-831 describes the responsibilities of investigating law enforcement agencies. Within seventy-two hours after identifying a victim covered by the Act, the investigating law enforcement agency must provide the victim with various types of information, such as the address and telephone number of the district attorney's office responsible for prosecuting the case and the name and telephone number of a law enforcement employee whom the victim may contact for further information.

G.S. 15A-831 also describes the responsibilities of arresting law enforcement agencies. Within seventy-two hours of arrest, the arresting law enforcement agency must notify the investigating law enforcement agency of the arrest. The investigating law enforcement agency, in turn, must notify the victim of the defendant's arrest and must provide to the district attorney's office the victim's name, address, telephone number, and other identifying information.

District attorney offices. New G.S. 15A-832 describes the responsibilities of district attorney offices. Within twenty-one days of arrest, but no less than twenty-four hours before the first-scheduled probable cause hearing, the district attorney's office must provide to the victim a pamphlet or other written materials explaining, among other things, the victim's rights, the steps generally taken by the district attorney's office in prosecuting cases, and the name and telephone number of a victim/witness assistant in the district attorney's office whom the victim may contact for further information. The district attorney's office also must notify the victim of all trial court proceedings, provide a secure waiting area for the victim during the proceedings whenever practical, and offer the victim the opportunity to consult with the prosecuting attorney prior to disposition of the case.

Courts. G.S. 15A-832 also places some responsibilities on the courts. Subsection (e) provides that if the victim will be called as a witness, the court must make every effort to permit the fullest attendance of the victim during the trial without violating the defendant's right to a fair trial. Subsection (g) provides that, at sentencing, the prosecuting attorney must submit to the court a form containing the victim's name and other identifying information. The form must be included with the final judgment and commitment transmitted to any agency that receives custody of the defendant. [G.S. 15A-832(g) states that

the custodial agency must keep this form confidential; this is the only provision in the Crime Victims' Rights Act specifically addressing confidentiality.]

Post-trial responsibilities of district attorneys and Attorney General. G.S. 15A-835 deals with post-trial responsibilities of district attorney offices and the Attorney General's office. Within thirty days after the final proceeding in the trial court, the district attorney's office responsible for the prosecution must notify the victim of the disposition of the case. If the defendant appeals, the district attorney's office must forward to the Attorney General's office the victim's name, address, and telephone number; and the Attorney General's office must provide the victim with an explanation of the appellate process, notice of any appellate proceedings, and notice of the final disposition.

Custodial agencies. G.S. 15A-836 and 15A-835(c) deal with the notification responsibilities of custodial agencies after conviction of the defendant. They must notify the victim of the projected date of release of the defendant, assignment of the defendant to a minimum custody unit, the defendant's escape from custody and capture, and if the defendant dies. If the defendant appeals the conviction and obtains release on bail pending appeal, the agency with custody of the defendant must notify the investigating law enforcement agency, which then must notify the victim. [When the defendant is released on bail before trial, the victim is not automatically notified; rather, under new G.S. 15A-831(a)(6), the victim may call an employee designated by the investigating law enforcement agency to find out whether the defendant has been released from custody.]

Adult probation and parole. G.S. 15A-837 requires the Division of Adult Probation and Parole to notify the victim of the terms of any probation, the date of any probation hearings, and other specified information.

Governor. G.S. 15A-838 requires the Governor's Clemency Office to notify the victim when the Governor is considering whether to commute the defendant's sentence or pardon the defendant. The victim has the right to present a written statement before the decision is made and has the right to notice of the decision.

Victim Impact Evidence

G.S. 15A-833 of the Crime Victims' Rights Act gives a victim covered by the Act (or the victim's next of kin if the victim is deceased) the right to offer "admissible evidence of the impact of the crime," to be considered

by the court or jury in sentencing the defendant. According to the statute, the evidence may include a description of the physical, psychological, and emotional injuries suffered by the victim, an explanation of the victim's economic or property losses, and a request for restitution and statement about whether the victim has applied for or received compensation under the Crime Victims' Compensation Act in G.S. Chapter 15B. The victim's (or family's) right to present impact evidence appears to apply to sentencing both in noncapital cases, which is conducted by a judge, and in capital cases, which is by a jury. Unlike most other parts of the Act, this provision is effective for offenses committed on or after December 1, 1998.

Restitution

Section 19.4(d) of S.L. 1998-212 (S 1366) creates a new article 81C within G.S. Chapter 15A dealing exclusively with restitution. Although the new article is not part of the Crime Victims' Rights Act, discussed above, it is very much a part of the legislation implementing the state constitutional amendment on victims' rights. Much of the article comes from prior law—primarily from G.S. 15A-1343(d), which deals with restitution as a condition of probation—but some provisions are new. Also modified [by sections 19.4(e) through (k) of S.L. 1998-212] are a number of preexisting statutes on restitution. Unless otherwise noted, the restitution changes apply to offenses committed on or after December 1, 1998.

Availability of restitution. The new restitution article applies both to cases subject to the Crime Victims' Rights Act and to other criminal cases, but the procedures differ for each category.

First, for offenses subject to the Crime Victims' Rights Act, the court *must* order restitution to the victim or victim's estate. If the defendant is placed on probation, restitution must be a condition of probation; if the defendant is placed on post-release supervision, it must be a condition of supervised release. *See* G.S. 15A-1340.24(b). Of course, in determining the amount of restitution, the court still must have adequate proof of any injury or loss and must consider the defendant's ability to pay—requirements discussed further below.

In cases not subject to the Crime Victims' Rights Act, the court must consider whether restitution is appropriate but, as under prior law, restitution is not required. *See* G.S. 15A-1340.24(a), (c). In both kinds of cases, the court also must consider, as under prior law, whether to recommend that restitution be made from work-release earnings should the defendant

receive work release privileges while imprisoned. *See* G.S. 15A-1340.26(c).

Second, G.S. 15A-1340.24(b) provides that, in cases subject to the Crime Victims' Rights Act, the court must order restitution "in addition to any penalty authorized by law." This provision apparently means that restitution is required even if the court does not sentence the defendant to probation. Thus, a court apparently must require restitution even if the defendant is sentenced to active imprisonment and is ineligible for supervised release. (Post-release supervision applies only to those defendants who receive active imprisonment for a Class B1 through E felony. *See* G.S. 15A-1368.1.) Further, in cases covered by the Crime Victims' Rights Act, a restitution order for more than \$250 is subject to execution as a civil judgment; if the restitution order accompanies a sentence of active imprisonment, the victim may be able to execute on the order immediately. (The civil judgment provisions are discussed further below.)

In cases not subject to the Crime Victims' Rights Act, the court likewise is authorized (although not required) to impose restitution "in addition to any other penalty authorized by law." G.S. 15A-1340.24(c). However, in this latter class of cases, the restitution order is not enforceable as a civil judgment. [As under prior law, the victim or victim's estate still may bring a civil suit for damages resulting from the crime. *See* G.S. 15A-1340.27(a). In such a suit, however, the defendant has the right to contest the amount of damages, and the amount of restitution imposed in the criminal case is not admissible in evidence. *See* G.S. 1-15.1.]

Amount of restitution. Determining the amount of restitution under the new restitution statutes is similar to the former procedure in G.S. 15A-1343(d), but some provisions are more specific. New G.S. 15A-1340.25 lists the costs the court must consider in determining restitution (whether or not the case is subject to the Crime Victims' Rights Act), including the cost of various types of medical and psychological services, lost income, the value of lost or destroyed property, and funeral expenses if the offense resulted in the victim's death. The court may require the victim or victim's estate to produce admissible evidence documenting these costs, which must be shared with the defendant before the sentencing hearing.

As under prior law, new G.S. 15A-1340.26 requires the court to take into consideration the resources of the defendant in determining restitution and allows the court to order partial restitution if the defendant is unable to pay for all of the loss. If the court orders partial restitution, it must state its reasons

for the record. The court also may require payment by a certain date or allow the defendant to pay in installments.

Beneficiaries of restitution. New G.S. 15A-1340.27 continues a number of other provisions formerly in G.S. 15A-1343(d). The court may require restitution to a person other than the victim or to an organization (including the Crime Victims' Compensation Fund) if the person or organization has provided assistance to the victim "and is subrogated to the rights of the victim." Restitution must be made to the victim, however, before it is made to any other person or organization.

Restitution may not be ordered to a government agency except for damages or losses over and above its normal operating costs. (The state also may receive restitution for the cost of appointed counsel.) Nor may restitution be ordered to a third party, such as an insurance company, liable for indemnifying the victim for damages or losses caused by the crime. The existence of liability insurance does not limit the court's power to order restitution to the victim, however.

Civil judgments. New G.S. 15A-1340.28 provides that a restitution order may be enforced in the same manner as a civil judgment if the offense is subject to the Crime Victims' Rights Act and the restitution order is for more than \$250. If a restitution order meets these conditions, it is subject to docketing and enforcement as follows.

The order must be docketed and indexed as a judgment in the county of conviction. It also may be docketed in other counties upon filing of a transcript of the original docket. Once docketed, the judgment constitutes a lien on any real property then owned or thereafter acquired by the defendant in the county in which the judgment is docketed. *See* G.S. 1-234.

If an order to pay restitution is *not* a condition of probation—for example, it accompanies an active sentence—the order may be subject to immediate enforcement. *See* G.S. 15A-1340.28(b). Thus, the clerk may issue a writ of execution directing the sheriff to seize the defendant's property and sell it to satisfy the restitution order. Under G.S. 15A-1340.26(b), however, the court may put the defendant on a payment schedule, in which case the date when payment is due would seem to determine when the restitution order becomes enforceable. Execution also is stayed during appeal of the conviction underlying the restitution order. *See* G.S. 15A-1340.28(d).

If an order to pay restitution is a condition of probation, execution is automatically stayed pursuant to G.S. 15A-1340.28(c). Ordinarily, the clerk may not

issue a writ of execution until the probation is terminated or revoked.¹ The judge terminating or revoking probation must determine the amount of restitution remaining to be paid, and the clerk then must enter that amount (plus docketing, copying, and other standard fees) on the judgment docket. Upon termination or revocation of probation, interest also begins to accrue on the amount remaining to be paid. The clerk must notify the victim of the judgment amount and that the judgment is subject to execution, which presumably means that the clerk need not issue a writ of execution until the victim requests execution.

Under amended G.S. 1C-1601(e), the defendant is not entitled to claim statutory exemptions against execution—that is, he or she may not exempt a portion of his or her property from execution. (The defendant still may claim state constitutional exemptions, however, for personal property and homesteads. *See* N.C. Const. Art. X.) Unlike most other parts of the new restitution provisions, the exemption changes apply to offenses occurring on or after July 1, 1999. Thus, for offenses occurring before then, a defendant still may claim statutory exemptions.

Miscellaneous. Amended G.S. 7A-304(d) changes the priorities for distribution of fines, court costs, restitution, and other charges received by the clerk of court. Effective for offenses committed on or after July 1, 1999, restitution payments have top priority in distribution, ranking ahead of costs due the county or city and fines to the county school fund.

Compensation and Assistance to Crime Victims

Compensation for crime victims. The Crime Victims' Compensation Act (G.S. 15B-1 through 15B-25), enacted in 1983, created a state-administered fund to compensate victims for economic losses caused by crime—for example, lost work income. Compensation is potentially available to all crime victims, not just those covered by the Crime Victims' Rights Act.

Effective for injuries occurring on or after December 1, 1998, section 19.4(l) of S.L. 1998-212 (S 1366) adds a new kind of compensable loss—namely, “household support loss,” defined in new G.S. 15B-

1. G.S. 15A-1340.28(c) provides that if the defendant transfers property while still on probation, the clerk may issue a writ of execution against the transferred property without awaiting termination or revocation of the probation. Presumably, this provision applies only to property subject to the lien created by the restitution judgment—that is, real property in the county in which the judgment is docketed.

2(15) as “loss of support that a victim would have received from the victim’s spouse for the purpose of maintaining a home or residence for the victim and the victim’s dependents.” New G.S. 15B-2(15) allows compensation for this loss only if the victim is unemployed and the victim’s spouse is the offender. It also limits the amount and duration of compensation.

S.L. 1998-212 [in sections 19.4(l) and (m)] makes the following additional changes to the Crime Victims' Compensation Act. It repeals G.S. 15B-11(e), which prohibited compensation if the claimed economic loss was less than \$100. It amends G.S. 15B-2(14) to raise from \$200 to \$300 per week the amount of compensation that may be paid for lost work income. It amends G.S. 15B-11(a)(1) to extend from one to two years the time in which a claimant must apply for compensation. It adds G.S. 15B-11(c1) to allow denial of a claim if the claimant has been convicted of a Class A through E felony within three years of the injury. And, it amends G.S. 15B-11(g) to raise from \$20,000 to \$30,000 the total compensation that may be paid to a victim (apart from allowable funeral expenses).

Assistance for rape victims. The Assistance Program for Victims of Rape and Sex Offenses (G.S. 143B-480.1 through 143B-480.3), enacted in 1981, provides monetary assistance to victims of first- or second-degree rape, first- or second-degree sexual offense, or attempts to commit these offenses. Under this program, the Secretary of Crime Control and Public Safety has been authorized to pay to health care and service providers up to \$500 in expenses incurred by an eligible victim for immediate, short-term medical care and ambulance and mental health services.

Effective for injuries occurring on or after December 1, 1998, section 19.4(n) of S.L. 1998-212 amends G.S. 143B-480.2(a) to raise the limit on health care assistance from \$500 to \$1000. It also allows payment of up to \$50 to victims to replace clothing held for evidence tests.

Motor Vehicle Forfeitures

In 1997 the Governor’s DWI Task Force recommended and the General Assembly enacted major revisions to North Carolina’s law on forfeiture of vehicles involved in impaired-driving offenses. *See* S.L. 1997-379 (H 448). In response to concerns expressed by several groups affected by the 1997 law, the Governor’s DWI Task Force proposed and the General Assembly made further changes to the forfeiture laws in 1998. *See* S.L. 1998-182 (S 1336), as amended by S.L. 1998-217 (S 1279).

Whether this latest round of changes will achieve the results desired by the drafters is as yet uncertain. What is obvious from the face of the law, however, is that vehicle forfeiture is a complex enterprise, with multiple parties, procedures, rights, and duties.

Overview

The basic operation of the 1997 version of the forfeiture law was fairly clear. A vehicle was subject to forfeiture if (1) it was driven by a person charged with one of the impaired-driving offenses listed in the forfeiture law (a covered offense) and (2) the person charged had a revoked driver's license based on one of a number of acts involving impaired driving (a license revocation for a covered reason). The law enforcement officer lodging the impaired-driving charge had to seize the vehicle, and the judicial official reviewing the charge had to determine if there was probable cause to support the charge and seizure. After the vehicle was seized, it was towed to a site designated by the local school board—either a commercial site owned by an entity contracting with the school board or the school board's property.

The vehicle generally was held there until the charge resulting in the seizure was resolved. If the person charged was not convicted, the vehicle was returned to its owner. If the person was convicted, the court had to conduct a hearing to determine if the vehicle should be forfeited. If the court ordered forfeiture, the school board could keep the vehicle or sell it. In some circumstances, non-driving owners as well as lienholders could obtain release of the vehicle before trial. They also had the right to seek release of the vehicle after trial at the forfeiture hearing.

The 1998 amendments leave this basic structure in place but change many key provisions. Among other things, the amendments extend the forfeiture sanction to additional drivers, modify the procedures for pretrial release of vehicles, shift the responsibility for payment of fees upon release of a vehicle, and authorize pretrial sales of seized vehicles. [In response to these changes, the Administrative Office of the Courts issued several new forms. *See* AOC-CR-330 through -337 (Dec. 1998).] Except as noted otherwise, the provisions discussed here apply to offenses committed and vehicles seized on or after December 1, 1998.

Coverage of Law

The forfeiture sanction continues to apply only if a driver is charged with a covered offense while his or

her license is revoked for a covered reason. The categories of covered offenses and revocations have been expanded, however.

The 1997 forfeiture law stated that a person had to be charged with a violation of G.S. 20-138.1 or 20-138.5—that is, impaired driving or habitual impaired driving. The 1998 amendments expand the category of covered offenses by stating that a vehicle is subject to forfeiture if the driver is charged with an “offense involving impaired driving.” *See, e.g.*, G.S. 20-28.2(b). Under the definition section of G.S. Chapter 20, an offense involving impaired driving includes, in addition to impaired driving and habitual impaired driving, homicides arising out of impaired driving (first- and second-degree murder, involuntary manslaughter, death by vehicle) and impaired driving in a commercial vehicle. *See* G.S. 20-4.01(24a).

The 1997 forfeiture law included in the category of covered revocations a wide range of revocations based on impaired driving. The main change in the 1998 law is the addition of revocations pursuant to G.S. 20-138.5 (habitual impaired driving). Also added are revocations pursuant to G.S. 20-17(a)(3) (felony involving use of motor vehicle) and 20-17(a)(11) (assault with motor vehicle) if the underlying offense involved impaired driving. *See* G.S. 20-28.2(a).

Under the 1998 amendments, some vehicles are not subject to forfeiture even if the driver is charged with a covered offense and has a covered license revocation. If an officer determines prior to seizure that the vehicle has been reported stolen, the officer may not seize the vehicle at all. Likewise, an officer may not seize a vehicle if he or she determines prior to seizure that the vehicle is a rental vehicle driven by a person not listed as an authorized driver on the rental contract. *See* G.S. 20-28.3(b).

If a vehicle is reported stolen *after* it has been seized, the owner may seek return of the vehicle on the ground that he or she is an “innocent” owner. *See* G.S. 20-28.2(a1)(2)c (definition of innocent owner includes person whose vehicle was reported stolen). The procedures for obtaining release of a seized vehicle (before trial or at a forfeiture hearing after trial) are discussed further below.

If a vehicle owner files a report of unauthorized use of a vehicle, he or she also can get the vehicle back by following the procedures on release of seized vehicles. *See* G.S. 20-28.2(a1)(2)d (definition of innocent owner includes person who files police report for unauthorized use and agrees to prosecute unauthorized operator of vehicle). But, the filing of a report of unauthorized use, even before seizure, apparently would not preclude an officer from seizing the vehicle.

Seizure Procedures

The 1998 amendments make a few changes to the procedure for seizure of vehicles. Previously, the seizing officer had to give written notice of the seizure to any vehicle owners who were not present and to lienholders. The seizing officer now must give notice within seventy-two hours of seizure to an executive agency designated by the Governor. The Division of Motor Vehicles has been selected as that agency. Within forty-eight hours of receipt of a seizure notice, DMV must provide written notice to all vehicle owners and lienholders. If the vehicle was damaged, DMV also must give written notice to the owner's insurance company. *See* G.S. 20-28.3(b), (b1).

As under the 1997 law, an officer still must go before a magistrate after seizing a vehicle and present an affidavit of impoundment setting forth the basis for seizure. If the magistrate finds that seizure was appropriate, he or she must order the vehicle held. If the magistrate finds that seizure was not appropriate, he or she must order the vehicle released to its owner but conditioned on payment of towing and storage fees. *See* G.S. 20-28.3(c). The fee requirement is a part of an overall scheme on payment of fees adopted in the 1998 amendments, discussed further below.

If the officer files an affidavit of impoundment but has not yet seized the vehicle, the magistrate must issue an order of seizure (assuming the requirements for seizure have been met). G.S. 20-28.3(c1) authorizes officers with territorial and subject matter jurisdiction over Chapter 20 violations to enter private property to execute a seizure order, but it recognizes that officers may need a search warrant in some circumstances. Thus, the statute provides that if an officer has probable cause to believe that a vehicle is located on property owned by someone other than the defendant, the officer may obtain a search warrant. *See also* G.S. 15A-244 (as condition for issuance of search warrant, officer must establish probable cause that items subject to seizure may be found in described place). The statute apparently does not require an officer to obtain a search warrant before entering the defendant's property to seize a vehicle subject to a seizure order.

Pretrial Release of Vehicles

The 1997 forfeiture law provided that if a magistrate upheld the seizure of a vehicle, a non-driving vehicle owner or lienholder could sometimes obtain release of the vehicle before trial. A defendant owner had no right to get the vehicle back before trial. The 1998 amendments make several changes to pretrial vehicle

release procedures. The new procedures apply to vehicles held on or after effective December 1, 1998, regardless of when they were seized. Thus, after December 1, a person may utilize the new procedures to obtain release of a vehicle seized before that date.

Non-driving vehicle owners. A vehicle owner other than the driver may get a seized vehicle back before trial in two ways. First, pursuant to G.S. 20-28.3(e), a vehicle owner may apply to the clerk of court for pretrial release of a seized vehicle. As under the 1997 forfeiture law, the owner must (1) file an acknowledgment with the clerk meeting certain requirements, (2) pay the towing and accumulated storage fees, and (3) post a bond. Under the amended statute, however, the amount of the bond is cut in half—from twice the value of the vehicle to the actual value of the vehicle—and the bond may be secured by one of a number of forms of security—cash, deed of trust to real property, bail bond, or bond by a commercial bonding company.

This form of pretrial release is temporary. The owner must return the vehicle on the day of the forfeiture hearing in substantially the same condition as at the time of seizure (unless it has been permanently released, discussed below). If the owner fails to return the vehicle, the bond may be subject to forfeiture. For willful violations, the owner may be held in contempt. *See* G.S. 20-28.3(e).

Second, under new G.S. 20-28.3(e1), a vehicle owner may petition the court for release of a vehicle before trial. In contrast to the 1997 forfeiture law, which was ambiguous on the availability of such relief, the 1998 amendments lay out the requirements and procedure for petitioning the court. To obtain pretrial release of a vehicle under new G.S. 20-28.3(e1), the petitioner must be an "innocent owner," defined in G.S. 20-28.2(a1)(2) as a motor vehicle owner who meets one of six criteria—for example, the owner did not know that the defendant's license was revoked, or the owner knew of the license revocation but did not give the defendant permission to drive the vehicle. The term "motor vehicle owner" is defined in G.S. 20-28.2(a1)(3a) as a person in whose name a registration card or certificate of title is issued at the time of seizure. This latter definition may prove troublesome in some circumstances—for example, there may be a gap in time between the date a person obtains ownership of a vehicle and the date DMV issues a new certificate of title. Presumably, such a person still could seek relief as an innocent owner upon producing sufficient evidence of ownership.

The petitioner must file the petition with the clerk of court, who must schedule a hearing within ten business days of filing or as soon thereafter as feasible.

If the court finds that the petitioner is an innocent owner, the petitioner is entitled to return of the vehicle upon compliance with certain conditions, such as payment of towing and storage fees and demonstration of financial responsibility (that is, insurance or its equivalent). Alternatively, the district attorney may consent before the hearing to release of the vehicle by so noting on the petition and returning it to the clerk of court, who then must enter an order releasing the vehicle subject to the same conditions.

If the court grants the petition or the district attorney consents to it, the vehicle is returned to the owner permanently. The owner need not post any bond and need not return the vehicle for further proceedings. If the petition is denied, the ruling is preliminary only. The owner still may seek return of the vehicle at a forfeiture hearing after trial.

Defendant owners. Under new G.S. 20-28.3(e2), a defendant owner—that is, a person who owns the vehicle and is charged with an offense involving impaired driving—may seek pretrial release of the vehicle. These opportunities are more limited than those afforded to non-driving owners, however.

A defendant owner may petition the court for permanent release of a vehicle before trial. The procedure to be followed is the same as that for petitions by non-driving owners. The statute provides, however, that the court is required only to decide whether the defendant's license was revoked for a covered reason at the time of the offense; the prosecution is not required to prove the underlying offense of impaired driving.

The forfeiture law does not provide a defendant owner any other avenue to get a vehicle back before trial. Unlike a non-driving owner, a defendant owner may not obtain temporary possession of a vehicle before trial by posting a bond with the clerk of court.

Lienholders. New G.S. 20-28.3(e3) establishes a procedure for lienholders to petition for pretrial release of a vehicle. (A lienholder is a party who loans money to a person to purchase a vehicle and retains an interest in the vehicle until the loan is paid off.) Like pretrial release in response to an owner's petition, this form of pretrial release is permanent. (The petition procedure is slightly different, however.) In essence, a lienholder must show that the loan is in default and that the lienholder is entitled to possession of the vehicle. The lienholder also must agree to sell the vehicle and pay to the clerk of court the proceeds from the sale, less the amount of the lien and towing and storage costs paid by the lienholder. If the court ultimately orders forfeiture, the proceeds go to the county school board. *See* G.S. 20-28.2(d)2a. If the court does not order forfeiture, the proceeds go to the vehicle owner.

G.S. 20-28.3(e3) provides alternatively that the clerk of superior court may order a seized vehicle released to a lienholder if all of the interested parties waive in writing their right to a hearing. (The term "interested parties" is not defined.)

Trials and Forfeiture Hearings

The 1998 amendments attempt to expedite the processing of forfeiture cases. If the case is in district court, the trial of the impaired-driving offense must be scheduled on the arresting officer's next court date or within thirty days of the offense, whichever occurs first. Any party seeking to continue the case beyond that date must file a written motion, with notice to the opposing party, and the judge must find a compelling reason for the continuance. The motion and judge's finding must be attached to the record of the case. *See* G.S. 20-28.3(m). These scheduling requirements do not apply to cases in superior court. Presumably, they also would not apply in district court if a party has obtained permanent pretrial release of a vehicle; then, the case no longer would be one involving the potential forfeiture of a vehicle.

The 1998 amendments do not significantly change the procedure once a person is convicted of a covered offense. The court must conduct a forfeiture hearing either at the time of sentencing or at a separate hearing as soon thereafter as feasible. *See* 20-28.2(d), 20-28.3(m). Possible issues to be resolved at the hearing include the status of the defendant's license at the time of the offense, the "innocence" of non-driving vehicle owners, and the right of a lienholder to repossess the vehicle. *See* 20-28.2(d), (e), (f). At least ten days before the hearing, the prosecution must notify the defendant and each vehicle owner and lienholder of the hearing. *See* G.S. 20-28.2(c).

The 1998 amendments also allow forfeiture of a vehicle *without a conviction* if the defendant has failed to appear (and the vehicle has not been permanently released to an owner or lienholder). This is a significant departure from previous law. Under the 1997 forfeiture law, a vehicle could not be forfeited unless the defendant was convicted of a covered offense. (Generally, a person may not be tried for a criminal offense unless he or she is present.) The 1998 amendments, in contrast, allow a court to hold a forfeiture hearing sixty days after a defendant fails to appear if the order for arrest for failing to appear has not been set aside. At this hearing, the prosecution must prove by a preponderance of the evidence that the defendant committed a covered offense and that his or her license was revoked for a covered reason. If the

prosecution meets this burden, the court may enter an order of forfeiture (unless a vehicle owner or lienholder is entitled to recover the vehicle). *See* 20-28.2(b), (d). This process does not result in a criminal conviction, however, which may be imposed only if the state locates and successfully prosecutes the defendant. As with forfeiture hearings after conviction, the prosecution must give at least ten days notice of the hearing. *See* G.S. 20-28.2(c).

Towing and Storage Fees

Towing and storage fees have been a contentious subject since passage of the 1997 forfeiture law. Of greatest concern has been storage fees, which can accumulate quickly and outstrip the value of a seized vehicle. Fees will continue to be of concern under the 1998 version of the forfeiture law. The maximum authorized storage fee has been raised from \$5 to \$10 per day; and the fee may be assessed regardless of whether the vehicle is stored on commercial or school board property (not just when the vehicle is stored on commercial property, as under the 1997 law). *See* G.S. 20-28.3(d).

The 1997 law was not entirely clear about who was responsible for paying fees upon release of a vehicle, but it appeared to allocate responsibility among different parties based on when and why the vehicle was released. The 1998 amendments impose a single, sweeping answer to the question of who must pay the fees. If a vehicle is seized and thereafter released, the person or entity recovering the vehicle must pay the towing and accumulated storage fees, at least initially. Thus, if the court finds that a vehicle owner is an innocent owner and is entitled to return of the vehicle, the owner must pay the fees. *See* G.S. 20-28.2(e), 20-28.3(e1).

Even if the defendant is acquitted at trial or found at a forfeiture hearing not to have had a covered license revocation, the owner must pay the towing and storage fees to get the vehicle back. In those circumstances, the court must order the vehicle released to the owner but conditioned on payment of towing and storage fees. If the owner fails to obtain release of the vehicle within thirty days of the court's order, the person or entity in possession of the vehicle obtains a lien for the full amount of the towing and storage charges and may dispose of the vehicle to satisfy the lien (in accordance with Article 1 of G.S. Chapter 44A). *See* G.S. 20-28.4.

If the defendant is convicted of the impaired driving charge, an innocent owner or lienholder may be able to recoup from the defendant the fees paid to

recover the vehicle. New G.S. 20-28.3(l) provides that upon conviction of a covered offense, the defendant shall be ordered to pay as restitution to a vehicle owner or lienholder the amounts paid or owing for towing, storage, or sale of the vehicle. The statute qualifies this requirement by stating that restitution may be ordered only to the extent that these costs are not covered by the proceeds from sale of the vehicle. (The statute also allows restitution to the school board for these costs. A school board has the power, however, to sell a vehicle before the towing and storage fees exceed the vehicle's value. If a school board unduly delays a sale, a defendant may have grounds to argue for limiting restitution.)

If a defendant is ordered to pay restitution under G.S. 20-28.3(l), a civil judgment in the amount of the restitution shall be docketed by the superior court clerk. (The civil judgment may include only the amount of restitution ordered for towing, storage, and sale costs; G.S. 20-28.3(l) does not authorize judgment for other restitution that may be ordered after conviction. However, under the victims' rights legislation, discussed earlier, victims of certain offenses may obtain a civil judgment for restitution.) If the defendant is sentenced to active imprisonment, the judgment is docketed and becomes effective when the conviction is final. If the defendant is placed on probation, the judge determines the amount still owing at the time of revocation or termination of the probation, and only then is a judgment docketed.

Vehicle Sales

The 1998 amendments allow local school boards to sell vehicles pending resolution of the criminal proceedings against the defendant. G.S. 20-28.3(i) gives the school board three options. It may sell the vehicle before trial if (1) all the motor vehicle owners consent, (2) the vehicle is worth \$1500 or less and has been held at least ninety days, or (3) the outstanding towing and storage fees exceed 85% of the value of the vehicle. In the second and third situation, the school board may sell the vehicle without the owners' consent. The proceeds of any pretrial sale must be deposited with the superior court clerk. They go to the school board if the court orders forfeiture and to the vehicle owner if the court does not order forfeiture (less towing and storage fees, costs of sale, and outstanding liens). The pretrial sales provisions apply to vehicles held on or after October 15, 1998, whether they were seized before or after that date. However, for pretrial sales of vehicles seized between December 1, 1997, and December 1, 1998, a school board may be

required to refund to a vehicle owner the amount of towing and storage charges deducted from the sale proceeds. (During that time period, when the 1997 law was in effect, vehicle owners were not necessarily responsible for those charges.) *See* S.L. 1998-182, sec. 39.

For sales after trial, the 1998 amendments allow school boards to use a less cumbersome procedure than the judicial sale procedure required by the 1997 forfeiture law. *See* G.S. 20-28.5(a). The post-trial sale provisions are effective October 15, 1998.

Appeals

The 1998 amendments elaborate on the right of vehicle owners to appeal adverse forfeiture decisions, but they still leave unanswered questions. The appeal provisions are contained in three separate sections—G.S. 20-28.2(e), 20-28.3(m), and 20-28.5(e).

What are a vehicle owner's appeal rights when a district court orders a vehicle forfeited? The answer appears to depend on whether the defendant appeals the conviction. If the defendant does not appeal the conviction, the vehicle owner apparently must appeal the forfeiture order to the court of appeals. *See* G.S. 20-28.5(e) (appeal from final order of forfeiture is to court of appeals).

If the defendant appeals the conviction, the vehicle owner apparently is entitled to a *de novo* forfeiture hearing in superior court. This result is supported by G.S. 20-28.5(e), which states that "[w]hen the conviction of an offense that is the basis for an order of forfeiture is appealed from district court, the issue of forfeiture shall be heard in superior court *de novo*." G.S. 20-28.2(e) states, however, that a determination at a forfeiture hearing that a person is not an innocent owner is a final judgment and is immediately appealable to the court of appeals.

Is a forfeiture order stayed pending appeal? G.S. 20-28.5(e) states that a forfeiture order is stayed if the defendant appeals the conviction underlying the order. It does not address what happens if the vehicle owner appeals the forfeiture order but the defendant does not appeal the conviction.

Suppose the defendant appeals the conviction before the district court holds a forfeiture hearing. Does the district court still hold a forfeiture hearing? The forfeiture law does not specifically address the question. On the one hand, it is possible that once an appeal of a criminal conviction is filed, the district court would lose jurisdiction over the entire matter, and a forfeiture hearing might be delayed until the conclusion of trial in superior court. On the other hand,

G.S. 20-28.2(d) mandates that a forfeiture hearing be held after conviction; that provision may require that a hearing be held in district court even though the defendant has given notice of appeal for trial in superior court.

May a vehicle owner apply for pretrial release of a vehicle once the case is in superior court? G.S. 20-28.3(m) provides that a vehicle owner may utilize the bond procedure in G.S. 20-28.3(e) to obtain release from the clerk of court. [If the owner posted a bond in district court for release of a vehicle, the bond would continue in effect in superior court. *See* G.S. 20-28.3(m), as amended by sec. 62(c), S.L. 1998-217 (S 1279).] A vehicle owner also may petition the superior court for permanent release of a vehicle before trial if the owner has not previously been heard on a petition for pretrial release or the district court did not hold a forfeiture hearing before appeal of the conviction.

What happens if the district court returns the vehicle to the owner but the defendant appeals the conviction to superior court? The owner apparently would not have to relitigate the issue of forfeiture. G.S. 20-28.5(e) provides for a *de novo* forfeiture hearing in superior court when the defendant appeals a conviction that is the basis of an "order of forfeiture." If the district court has not entered an order of forfeiture, this provision would not seem to apply.

Miscellaneous Forfeiture Provisions

Insurance proceeds. If a seized vehicle was damaged during seizure or while the defendant was committing the underlying impaired-driving offense, the proceeds of any insurance must be paid to the clerk of court. The proceeds are subject to forfeiture or return to the vehicle owner in the same manner as a vehicle. A vehicle owner who objects to the amount paid to the clerk may file an independent claim with the insurance company. *See* G.S. 20-28.2(c1), 20-28.2(d)(2), 20-28.3(h). These provisions apply to offenses committed and vehicles seized on or after December 1, 1998, except that G.S. 20-28.3(h), which authorizes school boards to negotiate insurance settlements, applies to vehicles seized before or after that date.

Revocation of registration. Under the 1997 forfeiture law, if the defendant was convicted of a covered offense while his or her license was revoked, the defendant lost the right to register in his or her name *any vehicle* until the defendant's license was restored. A non-driving owner lost the right to register the *seized vehicle* for the same time period unless found to be an innocent owner.

The 1998 version of the forfeiture law imposes the same consequences. The difference is that the judge no longer orders the revocations (pursuant to repealed G.S. 20-28.6); rather, they are imposed by DMV following conviction (under new G.S. 20-54.1).

Role of school board attorney. The attorney for the local school board has the right to appear and be heard at all proceedings related to forfeiture of seized vehicles. With the consent of the local school board, the district attorney may delegate to the school board's attorney any of the district attorney's duties concerning forfeiture proceedings. *See* G.S. 20-28.3(k).

Other Motor Vehicle Changes

Zero Tolerance Offenses

North Carolina uses alcohol concentrations (the amount of alcohol in blood or breath) as an indicator of guilt for various impaired-driving offenses. The alcohol concentration used to determine guilt for impaired driving is 0.08 or higher. *See* G.S. 20-138.1. Special classes of drivers are subject to lower levels. A person may be convicted of impaired driving in a commercial vehicle with an alcohol concentration of 0.04 or higher. *See* G.S. 20-138.2. Drivers under twenty-one may not have any alcohol in their system while driving. *See* G.S. 20-138.3. This year's legislation on impaired driving lowers the alcohol concentrations for some categories of drivers and carves out additional categories of drivers for stricter treatment. The changes discussed here all appear in S.L. 1998-182 (S 1336) and apply to offenses committed on or after December 1, 1998.

Commercial drivers. New G.S. 20-138.2A establishes a "zero tolerance" offense for drivers of commercial vehicles. A person violates this new statute by driving a commercial motor vehicle with an alcohol concentration of greater than 0.00 and less than 0.04. The offense is a lesser offense of impaired driving in a commercial vehicle in violation of G.S. 20-138.2. For a first offense, a person is guilty of a Class 3 misdemeanor and is punishable by a \$100 fine only. A second or subsequent conviction is punishable as a misdemeanor under G.S. 20-179, the punishment statute for impaired driving. A person is considered to have a second or subsequent conviction if the previous conviction was within seven years of the date of the current offense. *See* G.S. 20-138.2A(d).

A ten-day disqualification is also imposed upon conviction of a first offense. *See* G.S. 20-17.4(a1). (The disqualification occurs only if the defendant is convicted of the commercial zero tolerance offense,

not before.) Disqualification takes away the right to drive a commercial vehicle but does not affect one's right to drive other motor vehicles. For a second conviction, the disqualification increases to one year [*see* G.S. 20-17.4(a)(6)]; for a third conviction, the disqualification is for life [*see* G.S. 20-17.4(b), (b1)]. A person's license to drive is also revoked for one year for a second or subsequent conviction. *See* G.S. 20-17(a)(13).² A revocation takes away the right to drive any motor vehicle. If a person's license is revoked for this reason, he or she must comply with the substance abuse assessment requirements in G.S. 20-17.6 before the license may be restored.

The new zero tolerance offense for commercial drivers differs in a significant respect from the zero tolerance offense for drivers under twenty-one. Alcohol concentration, as evidenced by a valid chemical test, is an essential element of the commercial zero tolerance offense. Evidence that the driver of a commercial vehicle has been drinking or has some undetermined amount of alcohol in his or her system is insufficient to support a conviction. Thus, if a chemical test is not administered, a driver could not be prosecuted for the commercial zero tolerance offense. However, because the offense is designated as an implied-consent offense under G.S. 20-138.2A(b), a driver who refuses a chemical test apparently may lose his or her license under G.S. 20-16.2, which authorizes a license revocation for refusal to submit to a chemical test in certain circumstances. An officer also may have grounds to charge regular commercial impaired driving, which may be shown by alcohol concentration or other evidence of impairment.

School bus drivers and operators of child care vehicles. A similar new zero tolerance offense applies to drivers of school busses, school activity busses, and

2. New G.S. 20-138.2A(d) provides that for purposes of G.S. 20-17(a)(13), which authorizes the one-year disqualification, a person is considered to have a second conviction if the previous conviction is within seven years of the current conviction. Likewise, for purposes of the one-year revocation, a second or subsequent conviction must be within seven years. For purposes of the lifetime disqualification, however, G.S. 20-138.2A(d) does not appear to impose a seven-year time limit on the use of prior convictions. *See also* G.S. 20-36 (as amended, statute excludes from general ban on use of convictions over ten years old a third or subsequent conviction of the commercial zero tolerance offense; amended statute also excludes a second conviction of regular commercial impaired driving and a second failure to submit to a chemical test on an implied-consent offense involving driving of a commercial vehicle).

child care vehicles. [New G.S. 20-4.01(27)c1 defines "child care vehicles."] A person violates new G.S. 20-138.2B by driving one of the described vehicles with an alcohol concentration of greater than 0.00. The main difference between this offense and the commercial zero tolerance offense is that a conviction results in a ten-day revocation of the person's license to drive, not merely a disqualification to drive certain vehicles. A second or subsequent conviction results in a one-year revocation. *See* G.S. 20-17(a)(14), 20-19(c2). (As with the commercial zero tolerance offense, these license consequences occur only upon conviction.)

Drivers under twenty-one. The zero tolerance offense for drivers under twenty-one was not changed, but the license consequences for those charged were made more severe. As with charges of regular impaired driving, a zero tolerance charge against a person under twenty-one triggers an immediate pretrial revocation if the person willfully refuses to take an Intoxilyzer test or the person takes the test and the reading is more than 0.00. The revocation ordinarily lasts thirty days (in some instances, forty-five days). *See* G.S. 20-16.5(b); *see also* G.S. 20-16.5(p) (person may obtain limited driving privilege after ten days of thirty-day revocation and after thirty days of forty-five-day revocation).

Impaired Driving Punishments

The following changes appear in S.L. 1998-182 (S 1336) and are effective for offenses committed on or after December 1, 1998.

Punishment for impaired driving in a commercial vehicle. Commercial impaired driving has been a Class 1 misdemeanor, punishable under structured sentencing. Under amended G.S. 20-138.2(e), commercial impaired driving now will be subject to the same punishments applicable to regular impaired driving, contained in G.S. 20-179. G.S. 20-138.2(e) continues to provide that when a person is charged with both commercial and regular impaired driving arising out of the same transaction, the aggregate punishment may not exceed the maximum punishment for regular impaired driving.

Fines for impaired driving. Amended G.S. 20-179 doubles the maximum allowable fine for impaired driving. The maximum fine for a Level 1 punishment (the most serious) becomes \$4,000, and the maximum fine for a Level 5 punishment (the least serious) becomes \$200. This change also applies to commercial impaired driving and to second or subsequent convictions of the new zero tolerance offenses

(discussed above), which are governed by the punishment provisions in G.S. 20-179.

Licensing

Duration of pretrial license revocation. G.S. 20-16.5 normally imposes a pretrial license revocation of thirty days (in some instances, forty-five days) when a person is charged with certain alcohol-related offenses and fails a chemical test or refuses to submit to one. In 1997, G.S. 20-16.5 was revised to impose an *indefinite* pretrial license revocation in some cases, but the effective date was delayed until July 1, 1998. *See* S.L. 1997-486 (H 183).

Under amended G.S. 20-16.5(e) and (f), now effective, if a person has a pending charge that resulted in a pretrial revocation, a revocation for a new charge remains in effect until both the new and pending charges are resolved. (The revocation must remain in effect for a minimum of thirty days.) For example, suppose a person is charged with impaired driving while a charge of impaired driving is pending in district court. As long as the person continues to contest either charge, the revocation for the new charge remains in effect. The person may obtain a limited driving privilege after thirty days of an indefinite revocation (in some instances, after forty-five days) if the privilege is necessary to overcome undue hardship and other conditions are satisfied. *See* G.S. 20-16.5(p).

Also effective July 1, 1998, S.L. 1997-486 changes when the normal thirty-day pretrial revocation begins to run. Under amended G.S. 20-16.5(e), if the person is present when the revocation order is issued, the thirty-day revocation begins on the date of issuance of the order; under prior law, the thirty-day revocation began when the defendant surrendered his or her license, which might be after issuance of the revocation order.

Disqualification of commercial drivers. Effective December 1, 1998, S.L. 1998-149 (H 1474) amends G.S. 20-17.4 to disqualify a person from driving a commercial vehicle (but not other types of vehicles) if he or she is convicted of violating an out-of-service order. [G.S. 20-4.01(25a) defines an out-of-service order; G.S. 20-37.12(b) and 20-37.21(a) contain the criminal penalties for violations.] The length of the disqualification depends primarily on the number of prior convictions for violating an out-of-service order.

Graduated licenses. S.L. 1998-149 (H 1474) made a number of relatively technical changes to the graduated license system, adopted in 1997, for drivers under age eighteen. For a discussion of those changes,

see James C. Drennan & Ben F. Loeb, Jr., *Motor Vehicles*, in NORTH CAROLINA LEGISLATION 1998 (Institute of Government, forthcoming 1999).

Revocation of license for failure to perform community service. The General Assembly enacted legislation this session authorizing revocation of a driver's license for a defendant's failure to perform community service. As this legislation potentially affects all criminal cases, not just cases involving motor vehicle offenses, it is discussed under Sentencing, below.

Controlled Substances

The General Assembly made several changes to the state's controlled substance laws. Perhaps the most significant ones are to North Carolina's tax on controlled substances, commonly known as the "drug tax." Although the revisions to the drug tax are fairly limited, the stakes are potentially high—namely, the enforceability of the tax.

Modification of Drug Tax

Court cases regarding constitutionality of drug tax.

The drug tax provisions, contained in Article 2D of G.S. Chapter 105 (G.S. 105-113.105 through 105-113.113), impose a tax on individuals who illegally possess more than a specified amount of a controlled substance. Individuals who were assessed the drug tax and also prosecuted for a controlled substance offense challenged the constitutionality of the tax, arguing that requiring them to pay the tax and then prosecuting them criminally concerning the drugs on which they were taxed violated the Double Jeopardy Clause of the U.S. Constitution, which prohibits punishing a person, or placing a person in jeopardy of being punished, more than once for the same offense. The North Carolina Court of Appeals, in a two-to-one decision, rejected this argument, holding that the tax did not constitute a criminal punishment and that the defendant was placed in jeopardy only once—when tried for the criminal offense. See *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84 (1997). The North Carolina Supreme Court affirmed the *Ballenger* decision without issuing its own opinion. The court of appeals and supreme court (without opinion) also rejected the defendant's double jeopardy argument concerning the drug tax in *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997).

After the rulings in *Ballenger* and *Creason*, the U.S. Court of Appeals for the Fourth Circuit assessed the constitutionality of North Carolina's drug tax. See *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 47 (Oct. 5, 1998). The plaintiffs in the *Lynn* case brought a civil lawsuit against North Carolina and two of its tax officials. Contrary to the state appellate courts, the Fourth Circuit held that the tax *was* a criminal penalty and that the state therefore had to respect the constitutional safeguards accompanying criminal proceedings (for example, the right to trial by jury) when enforcing the tax. Because of the nature of the lawsuit, the Fourth Circuit did not address the specific double jeopardy question decided by the state appellate courts. But, by finding the drug tax to be a criminal penalty, the court clearly validated the double jeopardy argument rejected by the state courts. The U.S. Supreme Court refused to review the Fourth Circuit's decision, leaving unsettled the enforceability of North Carolina's drug tax and its impact on criminal prosecutions.

1998 amendments to drug tax. Against this background, the General Assembly passed S.L. 1998-218 (S 1554), effective October 31, 1998. The act does not modify any of the procedures for enforcement of the drug tax; rather, it affects only the amount of tax on some drugs and the penalties for failure to pay the tax. The act's preamble (which is not part of the drug tax statutes themselves) states that the General Assembly's intent is to modify the tax in accordance with the federal court's ruling in the *Lynn* case. Whether these changes accomplish this purpose, however, must await further litigation.

First, the act reduces the tax on two categories of controlled substances (the drug tax is levied on six different categories of controlled substances). As amended, G.S. 105-113.107 imposes a tax of \$50 on each gram of cocaine (rather than \$200 per gram, as under prior law), and a tax of \$200 for each ten dosage units of a controlled substance that is not sold by weight and is not classified as a "low-street-value" drug (rather than \$400 per ten dosage units, as under prior law).

Second, the act reduces the monetary penalty for failure to pay the drug tax. Under former G.S. 105-113.110A, a person who failed to pay the tax was liable for a penalty of 50% of the tax due and interest. (The penalty had previously been reduced in 1995 from 100% to 50% of the tax due. See 1995 Sess. Laws Ch. 340.) As amended, the statute imposes a penalty of 10% of the tax due. [The amended statute does not specifically refer to the amount of the penalty. Instead, it states that Article 9 of G.S. Chapter 105, which contains general penalty provisions for tax violations

and imposes a 10% penalty for failing to pay a tax, applies to the drug tax.] A person who fails to pay the drug tax remains liable for interest on the unpaid tax [under G.S. 105-241.1(i) of Article 9] at the same rate as under prior law.

The act also may have the effect of restoring criminal penalties for failure to pay the drug tax. In 1995, the General Assembly repealed the criminal penalties for failure to pay the drug tax. *See* 1995 Sess. Laws Ch. 340 (repealing G.S. 105-113.110). Article 9 of G.S. Chapter 105, which now will apply to the drug tax, contains its own criminal penalties for failure to pay taxes. *See* G.S. 105-236.

Drug Offenses Involving Minors

The General Assembly created several new drug offenses involving minors and revised the punishments for those types of offenses. This legislation, effective for offenses committed on or after January 1, 1999, is in sections 17.16(e), (f), and (h) of S.L. 1998-212 (S 1366).

Sale or delivery to minor. G.S. 90-95(e)(5) was amended to create two offenses (formerly, there was one) involving sale or delivery to a minor of a controlled substance in violation of G.S. 90-95(a)(1). The two offenses are distinguished by the minor's age. Sale or delivery to a minor who is more than thirteen but less than sixteen years of age is a Class D felony; sale or delivery to a minor thirteen years of age or younger is a class C felony. [Sale or delivery to a minor sixteen years of age or older remains subject to the general punishment provisions for illegal sale or delivery of a controlled substance, contained in G.S. 90-95(b).] The age of the minor appears to be an essential element of these offenses. Therefore, to obtain a conviction, the prosecution would have to allege the minor's age in the indictment or other pleading. Likewise, instructions to the jury would have to indicate that the prosecution has the burden of proving the requisite age beyond a reasonable doubt.

Hiring of minor. G.S. 90-95.4 was amended to create four offenses (formerly, there were two) involving hiring of a minor to violate G.S. 90-95(a)(1). (The amended statute clarifies that a person who hires *or* intentionally uses a minor for such a purpose may be found guilty of one of these offenses.) The offenses are differentiated according to the age of both the defendant and the minor.

- If the defendant is at least eighteen but less than twenty-one years of age and the minor is more than thirteen but less than eighteen years

of age, the offense is punishable as a felony one class greater than the violation for which the minor was hired.

- If the defendant is at least eighteen but less than twenty-one years of age and the minor is thirteen years of age or younger, the offense is punishable as a felony two classes greater than the violation for which the minor was hired.
- If the defendant is twenty-one years of age or older and the minor is more than thirteen but less than eighteen years of age, the offense is punishable as a felony three classes greater than the violation for which the minor was hired.
- If the defendant is twenty-one years of age or older and the minor is thirteen years of age or younger, the offense is punishable as a felony four classes greater than the violation for which the minor was hired.

As with the offenses involving sale or delivery of a controlled substance to a minor, discussed above, the prosecution must allege and prove the requisite ages to obtain a conviction.

New drug offenses involving minors. Under new G.S. 90-95.6, a person is guilty of promoting drug sales by a minor, a Class D felony, if the person knowingly: (1) entices, forces, encourages, or otherwise facilitates a minor in violating G.S. 90-95(a)(1); *and* (2) supervises, supports, advises, or protects the minor in violating G.S. 90-95(a)(1).³ Because the statute does not specify the minor's age, the general definition of "minor" in G.S. 48A-2 (a person under eighteen years of age) probably applies to this offense.

Under new G.S. 90-95.7, a person is guilty of participating in a drug violation by a minor, a Class G felony, if: (1) the person is twenty-one years of age or

3. Although the new statute contains no conjunction between elements (1) and (2)—that is, no "and" or "or"—it appears to require proof of both elements for conviction. Thus, the statute lists the elements separately; if proof of only one element were required, the listed acts (enticing, supervising, and so on) could have been set out in a single clause. Further, element (1) refers to "a" minor, and element (2) refers to "the" minor, suggesting that the defendant must enlist a minor's assistance and then oversee that minor's activities. Last, the punishment for this offense is potentially greater than the punishment for hiring or intentionally using a minor to commit a drug violation under G.S. 90-95.4, discussed previously, suggesting that more is required for conviction than the acts listed in element (1) alone.

older; (2) the person purchases or receives a controlled substance from a minor; (3) the minor is thirteen years of age or younger; and (4) the minor possesses, sells, or delivers the controlled substance in violation of G.S. 90-95(a)(1).

Pretrial Release for Drug Trafficking

G.S. 15A-533 recognizes that when a person is arrested for a noncapital offense, he or she has the right to have pretrial release conditions determined. The judicial official setting the conditions has the discretion to choose among different forms of pretrial release (for example, a secured bond or release to the custody of another person), but the judicial official must always set some pretrial release conditions, giving the defendant at least an opportunity to obtain liberty before trial.

Effective for offenses committed on or after January 1, 1999, S.L. 1998-208 (H 1023) amends G.S. 15A-533 to permit the denial of any form of pretrial release in a limited class of cases. The amended statute establishes a rebuttable presumption that when a defendant meets certain criteria, no condition of release will reasonably assure the defendant's appearance or the safety of the community. This presumption arises if the judicial official finds:

- reasonable cause to believe that the defendant committed a drug-trafficking offense;
- the drug-trafficking offense was committed while the defendant was on pretrial release for another offense; and
- the defendant has a prior conviction for a Class A through E felony or drug-trafficking offense and less than five years has elapsed since the date of conviction or the defendant's release from prison, whichever is later.

If the defendant meets these criteria, only a district or superior court judge may set pretrial release conditions and then only upon finding that there is a reasonable assurance that the defendant will appear and that release does not pose an unreasonable risk of harm to the community.

The amended statute creates a form of "preventive detention"—that is, it allows a defendant to be held in custody before trial because he or she is deemed too dangerous or too great of a flight risk to be released. In *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), the U.S. Supreme Court held that preventive detention is constitutional in

limited circumstances. North Carolina's statute may not soon be put to the test of *Salerno*, however, as it potentially applies to very few defendants.

Other Criminal Offenses

Unless otherwise noted, the following changes apply to offenses committed on or after January 1, 1999.

Life sentence for second or subsequent class B1 felony. New G.S. 15A-1340.16B, enacted by section 17.16(a) of S.L. 1998-212 (S 1366), provides for life imprisonment without parole for a Class B1 felony in some circumstances. (The only Class B1 felonies are first-degree forcible or statutory rape; first-degree forcible or statutory sexual offense; and statutory rape or sexual offense against a person who is thirteen, fourteen, or fifteen years old if the defendant is at least six years older than the person.) New G.S. 15A-1340.16B provides for a life sentence for a Class B1 felony if:

- the offense was against a person thirteen years of age or younger;
- the defendant has at least one prior conviction for a Class B1 felony; and
- the court finds no mitigating factors.

G.S. 15A-1340.16B(b) states that if the court finds any mitigating factors, it must sentence the defendant in accordance with the regular structured-sentencing rules, which prescribe a range of punishments based on the defendant's prior record.

Injury to pregnant woman. New G.S. 14-18.2, enacted by section 17.16(b) of S.L. 1998-212 (S 1366), creates the offense of injury to a pregnant woman. A person violates new G.S. 14-18.2 if:

- while committing a felony, or a misdemeanor that constitutes an act of domestic violence as defined in G.S. Chapter 50B,
- the person causes injury to a pregnant woman,
- knowing that the woman is pregnant,
- which causes a miscarriage or stillbirth.

It appears that the prosecution will have to allege and prove to the jury the underlying felony or misdemeanor, not simply present this evidence at sentencing. The new offense is punishable as a felony or misdemeanor one class higher than the underlying felony or misdemeanor committed by the defendant. If the underlying offense is a Class A1 misdemeanor, the offense is punishable as a Class I felony. The new

statute provides that it does not apply to acts committed by a pregnant woman causing a miscarriage or stillbirth by the woman.

Cruelty to animals. Section 17.16(c) of S.L. 1998-212 (S 1366) amends G.S. 14-360 to create two offenses involving cruelty to animals. Subsection (a) of G.S. 14-360 makes *intentionally* injuring, tormenting, or killing an animal a Class 1 misdemeanor.

Subsection (b) makes *maliciously* torturing or killing an animal a Class I felony (but may not be construed as increasing the punishment for cockfighting in violation of G.S. 14-362). The amended statute exempts from the prohibition on cruelty to animals several activities, such as lawful hunting and lawful biomedical research. It also changes the definition of "animal" from every "living creature" to every "living vertebrate except human beings."

Greyhound racing. New G.S. 14-309.20, enacted by section 17.16(d) of S.L. 1998-212 (S 1366), criminalizes greyhound racing. The new law makes it a Class 1 misdemeanor to do the following: (1) hold, conduct, or operate a greyhound race for public exhibition in North Carolina for monetary remuneration; or (2) transmit or receive interstate or intrastate simulcasts of greyhound races for commercial purposes in North Carolina.

Domestic criminal trespass. Section 17.19 of S.L. 1998-212 (S 1366) amends G.S. 14-134.3 to create a variation of the offense of domestic criminal trespass. A person is guilty of a Class G felony (instead of a Class 1 misdemeanor, the normal classification of domestic criminal trespass) if, in addition to committing the acts required for domestic criminal trespass, the person trespasses on property operated as a safe house or haven for domestic violence victims and the person is armed with a deadly weapon.

Escape from private correctional facility. New G.S. 14-256.1, enacted by section 17.23 of S.L. 1998-212 (S 1366), creates a new offense of escape from a private correctional facility, a Class H felony. The new offense applies only to individuals who are (1) convicted in a jurisdiction other than North Carolina and (2) housed in private correctional facilities in North Carolina. Section 17.23 of S.L. 1998-212 also directs the Department of Correction to consult with the Department of Justice and report to the General Assembly on the appropriateness of this penalty for inmates serving sentences imposed by other jurisdictions.

Increased punishment for tax violations. Effective for offenses committed on or after December 1, 1998, S.L. 1998-178 (S 1228) changes the punishment classifications for the following offenses

from a Class I to Class H felony:

- attempting to evade or defeat a tax in violation of G.S. 105-236(7);
- aiding or assisting the filing of a false or fraudulent return in violation of G.S. 105-236(9a).

The act also deletes the provisions specifying the potential fine for these offenses (up to \$25,000 for the first-listed violation and up to \$10,000 for the second-listed violation). Under G.S. 15A-1340.17, which governs fines for felonies in general, the fine will be in the court's discretion.

Local regulation of sexually-oriented businesses. Effective July 15, 1998, S.L. 1998-46 (S 452) allows cities and counties to regulate sexually-oriented businesses, defined as those that emphasize the anatomical areas and sexual activities specified in G.S. 14-202.10 (the definition section for adult establishments). [The act also broadens the definition of adult bookstore, contained in G.S. 14-202.10(1).] New G.S. 160A-181.1 contains examples of the types of zoning, licensing, and other ordinances that local governments may enact, including restrictions on the location of sexually-oriented businesses, limitations on hours of operation, and registration requirements for owners and employees. The new statute also provides that while a local government is considering potential regulations it may enact a moratorium of reasonable duration on the opening and expansion of sexually-oriented businesses. It also may require existing businesses to comply with any regulations within a reasonable period of time after adoption.

In conformity with this grant of authority to local governments, the act amends several statutes: G.S. 14-190.1 on obscene materials, G.S. 14-190.9 on indecent exposure, G.S. 14-202.11 on adult establishments, and G.S. 18B-904 on ABC permits. The amended statutes provide that they do not preempt local government regulation of sexually-oriented businesses to the extent consistent with constitutional protections for free speech. (These amendments effectively overrule a contrary ruling in *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780 (1998), which found a local ordinance on sexually-oriented businesses to be preempted.) The act also amends the description of nuisances in G.S. 19-1, providing that repeated violations of a local ordinance on sexually-oriented businesses may constitute a nuisance in specified circumstances.

Recodification of railroad offenses. Effective September 4, 1998, S.L. 1998-128 (H 1094) recodifies

two offenses relating to railroads. The offenses described in new G.S. 14-460 (riding on a train unlawfully) and G.S. 14-461 (unauthorized manufacture or sale of switch-lock keys) essentially duplicate the offenses contained in G.S. 62-319 and 62-322. In an apparent oversight, however, the act did not repeal the latter two statutes. The act also adds G.S. 136-197, which makes it a Class 1 misdemeanor for an intoxicated person to board a train after being forbidden by the conductor.

Criminal Procedure

Execution by lethal injection only. Effective for executions on or after October 30, 1998, section 17.22 of S.L. 1998-212 (S 1366) amends state law to abolish executions by lethal gas. G.S. 15-187 and 15-188, as amended, provide that a person sentenced to death may be executed by lethal injection only.

Elimination of review of sentences of life without parole. As part of the crime victims' rights legislation, the General Assembly repealed the right of a defendant to obtain review of a sentence of life without parole after he or she has served twenty-five years in prison. Under Article 85B of G.S. Chapter 15A [repealed by section 19.4(q) of S.L. 1998-212 (S 1366)], a defendant could seek review by a superior court judge, who then had to recommend to the Governor whether the sentence should be altered or commuted. The repeal is effective for offenses committed on or after December 1, 1998. Of course, the repeal does not affect the power of the Governor, under Art. III, Sec. 5(6) of the North Carolina Constitution, to grant pardons and commute sentences.

Involuntary commitment of insanity acquittees. G.S. 15A-1321 has required that a defendant found not guilty by reason of insanity be committed to a state twenty-four-hour facility (a state hospital providing services around the clock). Effective for offenses occurring on or after January 1, 1999, section 12.35B of S.L. 1998-212 (S 1366) modifies the commitment procedure for criminal defendants who are acquitted by reason of insanity. As amended, G.S. 15A-1321 continues to require automatic commitment after a finding of not guilty by reason of insanity but it distinguishes among insanity acquittees based on the criminal charges against them. If an insanity acquittee is *not* alleged to have inflicted or have attempted to inflict serious physical injury or death, he or she may be sent to any state twenty-four-hour facility. Insanity acquittees who are alleged to have engaged in such conduct, however, must be sent to a forensic unit operated by the Department of Health and Human

Services and must reside there until released in accordance with the procedures in G.S. Chapter 122C. (The procedures on release in G.S. Chapter 122C continue to apply to all insanity acquittees, regardless of the facility to which they have been committed.)

The only facility that has a forensic unit meeting the description in the amended statute is Dorothea Dix Hospital in Raleigh. In 1997, the General Assembly appropriated approximately \$3.5 million for the creation of a secure, seventy-two-bed forensic unit at Dorothea Dix for individuals who are found incompetent to stand trial or not guilty by reason of insanity and who are considered a risk of escape or violent behavior. *See* Mark F. Botts, *Mental Health and Related Laws*, in NORTH CAROLINA LEGISLATION 1997, at pp. 229-30 (Institute of Government, 1997).

Inclusion of judges' and attorneys' names in criminal case records. Effective for records compiled on or after January 1, 1999, new G.S. 7A-109.2 [enacted by S.L. 1998-208 (H 1023)] requires the clerk of court to include in the record of disposition in every criminal case (in both district and superior court) the names of the presiding judge and the attorneys for the State and defendant.

Mileage reimbursement for out-of-state witnesses. Section 16.25 of S.L. 1998-212 (S 1366) amends G.S. 7A-314(c) and 15A-813 to increase the amount of mileage reimbursement for out-of-state witnesses summoned to appear in a criminal case in North Carolina. Effective for expenses incurred on or after October 30, 1998, out-of-state witnesses are entitled to the same mileage reimbursement that in-state witnesses receive—that is, the rate allowed for state employees. If an out-of-state witness must appear for more than one day, he or she also is entitled to reimbursement for lodging and meal expenses up to the rate allowed for state employees.

Notice of bond forfeiture. Effective July 24, 1998, S.L. 1998-58 (H 354) changes the method of service of a court order declaring a bail bond to be forfeited. Amended G.S. 15A-544(b) allows the clerk of court to use first-class instead of certified mail to notify the obligors on the bond of a forfeiture order.

Regulation of bail bondsmen. S.L. 1998-211 (H 926) revises several statutes regulating bail bondsmen. The changes discussed here are effective November 1, 1998.

Amended G.S. 58-71-20 requires that a bail bondsman return the premium paid for a bond within seventy-two hours after the bondsman surrenders a defendant; previously, the statute did not contain a specific time limit. The amended statute also describes the circumstances in which a bondsman may keep the premium despite surrendering the defendant. Amended

G.S. 58-71-95(5) likewise sets a seventy-two-hour time limit on return by a bondsman of collateral security or other indemnity after the final termination of liability on a bond.

The act also revises G.S. 58-71-80 on licensing of bail bondsmen and runners. As amended, subsections (a)(2) and (6) provide that the Commissioner of Insurance *may* deny, suspend, revoke, or refuse to renew a license for conviction of any misdemeanor committed in the course of dealings under the license or for conviction of a crime involving moral turpitude. Subsection (b) provides that the Commissioner *shall* deny, revoke, or refuse to renew a license if the person is or has ever been convicted of a felony.

Increased court fees. Effective for fees assessed or paid on or after February 1, 1999, section 29A.12 of S.L. 1998-212 (S 1366) amends G.S. 7A-304(a) to increase court costs by \$6 in criminal cases—from \$80 to \$86 in district court and from \$100 to \$106 in superior court.

Sentencing

IMPACT

The IMPACT program (short for “Intensive Motivational Program of Alternative Correctional Treatment,” but commonly known as “boot camp”) has been a sentencing option for defendants sentenced to *special probation*—a form of probation in which one of the conditions is that the defendant serve a short period of imprisonment. Effective December 1, 1998, section 17.21 of S.L. 1998-212 (S 1366) amends several probation statutes to reclassify IMPACT as a *residential treatment program*. Although IMPACT will no longer be a form of special probation, it will continue to be a condition of probation and may be imposed only if the defendant is eligible for an intermediate punishment within the meaning of structured sentencing. *See* G.S. 15A-1340.11(6)b (assignment to residential program is form of intermediate punishment). The eligibility criteria for IMPACT remain unchanged—that is, the defendant must be between sixteen and thirty years of age, must have been convicted of a felony or Class A1 or 1 misdemeanor, and must pass a medical examination. *See* 15A-1343.1. The length of a sentence to IMPACT also remains the same—from 90 to 120 days. *See* G.S. 15A-1343(b1)(2a).

Classifying IMPACT as a residential treatment program instead of a form of special probation has two potential consequences. First, under prior law, a person could be sentenced to IMPACT only if the time to be

served in that program was no longer than one-half of the suspended term of imprisonment. This time limit was part of the rules governing special probation, which limit the period of confinement that may be imposed as part of that form of probation. The amended probation statutes no longer contain this time limit for IMPACT. *See* G.S. 15A-1344(e), 15A-1351(a). The change will not affect the length of time a defendant may be sentenced to IMPACT, as the amended statutes still provide that the sentence may be for no longer than 120 days. But, it may expand the situations in which a court may impose IMPACT. Under the amended statutes, a court apparently may sentence a defendant to IMPACT even though the period of confinement may be for longer than one-half of the suspended term of imprisonment given the defendant.

Second, under prior law, time served in IMPACT had to be credited against an activated term of imprisonment if the defendant’s probation was revoked. *See State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994) (time spent in confinement as condition of special probation must be credited against activated term of imprisonment); G.S. 15-196.1 (sentence must be credited with time spent committed to or confined in state or local correctional, mental, or other institution as result of charge); *see also North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (punishment already exacted for offense must be fully credited against sentence). Because IMPACT remains a form of confinement, credit may still need to be given for time served in that program; however, the reclassification of IMPACT, from special probation to residential treatment, may reopen that issue.

Community Service and License Revocations

Community service is work performed by defendants without pay, usually as a condition of probation or deferred prosecution. Effective October 31, 1998, section 34 of S.L. 1998-217 (S 1279) adds subsection (f) to G.S. 143B-475.1 authorizing a court to revoke a person’s driver’s license for a willful failure to perform community service. Under this new provision, the community service staff shall report to the court a “significant violation” of the terms of probation or deferred prosecution related to community service. The staff must serve on the defendant, by mail or personal delivery, a notice of hearing stating the basis of the alleged violation at least ten days before the hearing. The hearing may go forward even if the defendant fails

to appear. If the court determines that there has been a willful failure to comply with the community service requirement, it shall revoke the driver's license of the defendant. The revocation continues until the community service requirement is met. If the defendant is present, the court also may take any other action authorized for violation of a condition of probation.

Although not spelled out in new G.S. 143B-475.1(f), any license revocation probably lasts until the person meets the community service requirement or the court revokes or terminates the person's probation,

which terminates any community service requirement. Another potential issue involves the North Carolina state constitution, which establishes the outer limit on the courts' power to punish a person for a criminal offense. Whether revocation of a person's driver's license for failure to comply with a condition of probation is a permissible punishment has not yet been considered by the courts. *See generally* STEVENS H. CLARKE, LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA 18-19 (Institute of Government, 2d ed. 1997).

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Table 1
 Felonies (Class F through I)[†] and Misdemeanors*
 Subject to Crime Victims' Rights Act
 [G.S. 15A-830(a)(7)]

Statute	Description of Offense	Punishment
14-16.6(b)	Assault with deadly weapon on executive or legislative officer	Class F felony
14-16.6(c)	Assault inflicting serious bodily injury on executive or legislative officer	Class F felony
14-18	Involuntary manslaughter	Class F felony
14-32.1(e)	Aggravated assault on handicapped person	Class F felony
14-32.2(b)(3)	Patient abuse: conduct resulting in serious bodily injury	Class F felony
14-32.3(a)	Abuse by caretaker of disabled/elder adult in domestic setting: resulting in serious injury	Class F felony
	resulting in injury	Class H felony
14-32.3(b)	Neglect by caretaker of disabled/elder adult in domestic setting: resulting in serious injury	Class G felony
	resulting in injury	Class I felony
14-32.3(c)	Exploitation by caretaker of disabled/elder adult in domestic setting: resulting in loss of more than \$1000	Class H felony
14-32.4	Assault inflicting serious bodily injury	Class F felony
14-33(a)	Simple assault, simple assault and battery, or simple affray	Class 2 misdemeanor*
14-33(c)(1)	Assault: inflicting serious injury	Class A1 misdemeanor*
	with deadly weapon	Class A1 misdemeanor*
14-33(c)(2)	Assault on female	Class A1 misdemeanor*
14-33.2	Habitual misdemeanor assault	Class H felony

[†]All Class A through E felonies are subject to the Crime Victims' Rights Act. An attempt to commit a Class A through E felony or one of the Class F through I felonies listed here is also subject to the Crime Victims' Rights Act if the attempt is punishable as a felony. Unless a different classification is otherwise stated, an attempt to commit a felony is punishable one class lower than the felony attempted. *See* G.S. 14-2.5. An attempt to commit a Class I felony is normally a Class A1 misdemeanor, so it normally is not subject to the Crime Victims' Rights Act.

*A misdemeanor is subject to the Crime Victims' Rights Act only if the defendant and victim have a personal relationship as defined in G.S. 50B-1(b).

Statute	Description of Offense	Punishment
14-34	Assault by pointing gun	Class A1 misdemeanor*
14-34.2	Assault with deadly weapon on government officer or employee or on company or campus police officer	Class F felony
14-34.6(b)	Assault on firefighter or emergency personnel inflicting serious bodily injury with deadly weapon other than firearm	Class I felony Class I felony
14-34.6(c)	Assault with firearm on firefighter or emergency personnel	Class F felony
14-41	Abduction of minor	Class F felony
14-43.2	Involuntary servitude	Class F felony
14-43.3	Felonious restraint	Class F felony
14-51	Second-degree burglary	Class G felony
14-58	Second-degree arson	Class G felony
14-87.1	Common-law robbery	Class G felony
14-134.3(a)	Domestic criminal trespass	Class 1 misdemeanor*
14-190.17	Second-degree sexual exploitation of minor	Class F felony
14-190.17A	Third-degree sexual exploitation of minor	Class I felony
14-190.19	Participating in prostitution of minor	Class F felony
14-202.1	Taking, or attempting to take, indecent liberties with child	Class F felony
14-277.3	Stalking: first offense while court order in effect prohibiting similar behavior second or subsequent conviction within 5 years	Class 1 misdemeanor* Class A1 misdemeanor* Class I felony
14-288.9	Assault on emergency personnel: with dangerous weapon or substance	Class F felony
20-138.5	Habitual impaired driving	Class F felony
20-141.4(a1)	Felony death by vehicle	Class G felony

*A misdemeanor is subject to the Crime Victims' Rights Act only if the defendant and victim have a personal relationship as defined in G.S. 50B-1(b).