



2009 Legislation Affecting Criminal Law and Procedure

John Rubin

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John Rubin is a School of Government faculty member who specializes in criminal law and procedure.

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The work of the 2009 General Assembly reached into numerous aspects of criminal law and procedure. The General Assembly created and revised several criminal offenses; modified pre-trial, trial, sentencing, and postconviction procedures; made significant changes to probation terms and conditions; and addressed specialized types of cases, passing the Racial Justice Act for capital cases and adding to the laws governing sex offenders. These criminal law and procedure acts are discussed in this bulletin. Some of the acts are the subject of more in-depth treatment by School of Government (SOG) faculty, and links to their work are included in this bulletin. School faculty also have written about legislation in other areas, such as juvenile delinquency proceedings and judicial administration, that may interest readers of this bulletin, and links to those materials are included as well. A complete list of legislative summaries by SOG faculty and other information concerning 2009 legislation may be viewed at www.sog.unc.edu/dailybulletin/summaries09/.

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

Criminal Offenses

Drug Offenses

Trafficking in amphetamine. G.S. 90-95(h)(3b) has prohibited trafficking in methamphetamine and amphetamine, imposing the same punishments for both substances. Effective for offenses committed on or after September 1, 2009, S.L. 2009-463 (S 1091) revises that subsection to

delete amphetamine and adds G.S. 90-95(h)(3c) to create a separate and lower set of punishments for trafficking in amphetamine. Under the new subsection, trafficking in amphetamine is: a Class H felony, with a minimum term of 25 months and a maximum term of 30 months in prison and a minimum \$5,000 fine, if the amount is 28 grams or more but less than 200 grams; a Class G felony, with a minimum term of 35 months and a maximum term of 42 months in prison and a minimum \$25,000 fine, if the amount is 200 grams or more but less than 400 grams; and a Class E felony, with a minimum term of 90 months and a maximum term of 117 months in prison and a minimum \$100,000 fine, if the amount is 400 grams or more. Both the revised methamphetamine subsection and the new amphetamine subsection state that they apply to the specified quantities of methamphetamine and amphetamine *and* any mixture containing those substances. This statement responds to the North Carolina Court of Appeals decision, *State v. Conway*, ___ N.C. App. ___, 669 S.E.2d 40 (2008), in which the court held that because the then-existing statutory language on trafficking in methamphetamine (as well as amphetamine) did not include the clause “or mixture containing such substance,” the overall weight of the mixture was not relevant in determining whether the defendant met the threshold quantity for trafficking.

Salvia divinorum. Effective for acts committed on or after December 1, 2009, S.L. 2009-538 (S 138) adds G.S. 14-401.23 to prohibit a person from knowingly or intentionally manufacturing, selling, delivering, or possessing with intent to manufacture, sell, or deliver *Salvia divinorum* or Salvinorin A. According to the U.S. Department of Justice, *salvia divinorum* is an herb in the mint family used by the Mazatec Indians of Mexico for ritual and healing purposes. The plant is either chewed or smoked. It is not subject to the federal Controlled Substances Act but is considered a drug of concern by the U.S. Department of Justice. See www.deadiversion.usdoj.gov/drugs_concern/salvia_d/salvia_d.htm. Under the new North Carolina statute, a first or second violation is an infraction, subject to a minimum penalty of \$25. A third or subsequent violation is a Class 3 misdemeanor. Certain activities, such as growing the plant for aesthetic, landscaping, or decorative purposes, are exempt from the new prohibition. Possession or use of the plant is not made unlawful by the statute.

Glass tubes and splitters. Effective for offenses committed on or after December 1, 2009, S.L. 2009-205 (H 722) adds Article 5F, Control of Potential Drug Paraphernalia Products, to G.S. Chapter 90. The new article regulates the sale of two items: (1) glass tubes, defined in new G.S. 90-113.81(a) as hollow glass cylinders that meet certain dimensions (2 to 7 inches in length and 1/8 to 3/4 inches in diameter) and may be used to facilitate violations of the Controlled Substances Act, including packaging, storing, concealing, and using controlled substances; and (2) splitters, defined in new G.S. 90-113.81(c) as ring-shaped objects that allow the insertion of wrapped tobacco products, such as cigars, and that cut or slice the wrapping of the tobacco product along the product’s length as it is drawn through the device. New G.S. 90-113.82 allows retailers to sell these items to the public but subject to that section’s requirements—for example, the retailer must require the purchaser to provide a picture identification and must record the person’s name and address. Under G.S. 90-113.83, a retailer or employee of a retailer who knowingly and willfully violates the requirements of G.S. 90-113.82 is guilty of a Class 2 misdemeanor, and a person who knowingly makes a false statement or representation in fulfilling the purchasing requirements of G.S. 90-113.82(b)—for example, a purchaser provides false identification—commits a Class 1 misdemeanor.

Reporting of controlled substances data. G.S. 90-113.73(a) requires dispensers of prescription drugs to report prescription information periodically to the Department of Health and Human Services (DHHS). Effective January 2, 2010, S.L. 2009-438 (S 628) amends this statute to require

dispensers to report this information no later than seven days after the prescription is dispensed. Effective August 7, 2009, the act also amends G.S. 90-113.74 to provide an exception to the general rule of confidentiality for prescription information submitted to DHHS. It permits DHHS to provide the information to the chief medical examiner and county medical examiners for the purpose of investigating a person's death.

Thefts, Property Crimes, and Related Offenses

Larceny of motor vehicle part. Effective for offenses committed on or after December 1, 2009, S.L. 2009-379 (H 1256) adds G.S. 14-72.8 to make larceny of a motor vehicle part a Class I felony if the cost of repairing the motor vehicle is \$1,000 or more. Because the statute makes the cost of repairs an element of the offense, it presumably applies only to the removal of a part from a car and not theft of parts generally. The statute differs from the typical approach to larceny in two respects. First, the usual dividing line between misdemeanor and felony larceny is the value of the property taken. Thus, it is a Class H felony to steal property worth \$1,000 or more. Under the new statute, although the part taken may be worth less than \$1,000, the larceny is a felony if the repair cost meets the \$1,000 threshold. Second, the value of property for larceny purposes is usually measured by the value of the item taken. The new statute provides that the cost of repair includes replacement of the part taken and any additional costs necessary to install the replacement part.

Larceny of and injury to timber. Effective for offenses committed on or after December 1, 2009, S.L. 2009-508 (S 990) amends G.S. 14-135, which has made it a Class 1 misdemeanor to cut down, injure, or remove any standing, growing, or fallen tree or log on the property of another by making such conduct punishable as in cases of larceny under G.S. 14-72. Thus, if the value of the timber is more than \$1,000, the offense would be a Class H felony. The revised statute imposes the punishments applicable to larceny in cases in which a person takes trees or logs in violation of the statute as well as in cases in which the person cuts down or injures timber.

Taking or vandalizing portable toilets. Effective for offenses committed on or after December 1, 2009, S.L. 2009-37 (H 616) adds G.S. 14-86.2 to make it a Class 1 misdemeanor for a person to

- steal, take from its temporary location or from any person having lawful custody thereof, or willfully destroy, deface, or vandalize
- a chemical or portable toilet as defined in G.S. 130A-290 or a pumper truck operated by a septage management firm issued a permit under G.S. 130A-291.1.

Embezzlement by settlement agent. Effective for offenses committed on or after December 1, 2009, S.L. 2009-348 (S 764), as amended by S.L. 2009-570 (S 220), amends G.S. 14-90 to specify that a settlement agent as defined in G.S. 45A-3 is a fiduciary for purposes of embezzlement. The act also adds G.S. 45A-8, which provides that a settlement agent holds closing funds in a fiduciary capacity and must account for and pay the closing funds to the parties or entities identified in the parties' agreement.

Medical assistance provider fraud. Effective for offenses committed on or after December 1, 2009, S.L. 2009-554 (H 1135) adds G.S. 108A-63(e) to make it a Class H felony for a medical assistance provider under the Medical Assistance Program to defraud that program. A conspiracy to violate the new subsection is a Class I felony. The act also adds G.S. 108A-63(f) to make it a Class I felony, punishable under G.S. 108A-63(c), for a provider of medical assistance to obstruct an investigation into a violation by the attorney general's office or to falsify records.

Dealing in regulated metals. In 2007 the General Assembly made several revisions to the obligations of secondary metal recyclers set out in G.S. 66-11. The new legislation imposed additional record-keeping requirements, limitations on purchases of regulated metals, and other restrictions. See S.L. 2007-301 (H 367). Effective for purchases and offers of purchase on or after October 1, 2009, S.L. 2009-200 (H 323) revises G.S. 66-11 in several additional respects. The title of the act states that it is intended “to prevent the theft of” regulated metals. Among other things, the revised statute prohibits secondary metal recyclers from purchasing various materials, including traffic light signals, water meter covers, street lights, and regulated metals marked with the identification of a public utility or government entity. It also requires secondary metal recyclers to issue a receipt to the person delivering regulated metals and to be able to provide documentation of the employee who completed the transaction, requires a fingerprint impression of the person delivering the materials in transactions involving catalytic converters not attached to a vehicle and central air conditioner evaporator coils or condensers, limits purchases for cash, and allows law enforcement officers to inspect both regulated metals in the possession of a secondary metals recycler and records required to be maintained under the statute. The revised statute also provides that records submitted to public law enforcement agencies pursuant to the statute are records of criminal investigation or criminal intelligence information as defined in G.S. 132-1.4 and are not public records as defined by G.S. 132-1.

Firearms and Other Weapons

Firearms in courthouse. G.S. 14-269.4 prohibits firearms on certain state grounds, including buildings housing a court, subject to exceptions for certain personnel, such as law enforcement officers. In 2007, the General Assembly added judges to the list of exceptions. Effective August 26, 2009, S.L. 2009-513 (H 473) amends G.S. 14-269.4 to add magistrates to the list. A magistrate may carry a concealed handgun without violating the statute in any portion of a building housing a court, other than a courtroom in which the magistrate is presiding, if the magistrate (1) is in the building to discharge official duties, (2) has a concealed handgun permit, (3) has successfully completed a one-time weapons retention training substantially similar to that provided to certified law enforcement officers, and (4) secures the weapon in a locked compartment when it is not on the magistrate’s person. These provisions do not necessarily allow a magistrate to carry a concealed handgun in all portions of a building containing a court. Thus, if a building contains both a jail and courthouse, the jail may continue to bar the carrying of weapons in the jail.

Altering, destroying, or removing serial number from firearm. Effective for offenses committed on or after December 1, 2009, S.L. 2009-204 (H 787) adds G.S. 14-160.2 to create two new offenses involving the removal of serial numbers from firearms. G.S. 14-160.2(a) makes it a Class H felony to

- alter, deface, destroy, or remove
- the permanent serial number, manufacturer’s identification plate, or other permanent distinguishing number or identification mark from any firearm
- with the intent to conceal or misrepresent the identity of the firearm.

G.S. 14-160.2(b) makes it a Class H felony to

- knowingly sell, buy, or be in possession of
- any firearm on which the permanent serial number, manufacturer’s identification plate, or other permanent distinguishing number or identification mark has been altered, defaced, destroyed, or removed
- for the purpose of concealing or misrepresenting the identity of the firearm.

Continuing permits for crossbows for manufacturers and dealers. G.S. 14-402(a) makes it unlawful to sell, transfer, purchase, or receive any pistol or crossbow unless a license or permit is first obtained from the local sheriff by the purchaser or receiver. G.S. 14-402 through G.S. 14-406 address the issuance, terms, and other requirements for such a license or permit. Effective March 19, 2009, S.L. 2009-6 (S 5) adds G.S. 14-406.1 to provide that a corporation that is a manufacturer, wholesale dealer, or retail dealer of crossbows may obtain a continuing permit for the purchase or receipt of crossbows, with no expiration date, by applying to the sheriff of the county in which the corporation is located. In determining whether to issue the permit, the sheriff must apply the standards in G.S. 14-404, which set forth the criteria for issuing or refusing a permit. The act also amends G.S. 14-406 to exempt from the statutory record keeping requirements corporations that manufacture crossbows and wholesale dealers of crossbows for sale to other crossbow wholesale or retail dealers.

Concealed handgun permit applications. Effective for permit applications and renewal applications submitted on or after January 1, 2010, S.L. 2009-307 (H 1132), as amended by S.L. 2009-570 (S 220), revises G.S. 14-415.16 to provide that (1) at least 45 days before the expiration date of a concealed handgun permit, the sheriff of the county where the permit was issued must send notice to the permittee that the permit is about to expire along with information about how to renew the permit; (2) if a permittee applies for renewal of a permit 90 days before the expiration date and remains qualified for a permit, the sheriff must renew the permit; (3) if a permittee applies within the 90-day period as provided in G.S. 14-415.16(c), the permit remains valid beyond the expiration date until the permittee receives or is denied a renewal permit; and (4) if a permittee applies for renewal within 60 days after a permit expires, the sheriff may waive the requirement of taking another firearms safety and training course. The act also amends G.S. 14-415.10(4) to include within the definition of *qualified former sworn law enforcement officer* a person with 20 or more aggregate years of part-time or auxiliary law enforcement service. A person who falls within this definition does not have to take an approved firearms safety and training course. See G.S. 14-415.12A(a).

Concealed handgun permits for retired law enforcement officers. Effective August 28, 2009, S.L. 2009-546 (S 978) adds G.S. 14-415.26(b1) to require the North Carolina Criminal Justice Education and Training Standards Commission to coordinate with state and local law enforcement officers and with the community college system to provide multiple firearms qualification sites throughout the state where qualified retired law enforcement officers may satisfy the firearms qualification criteria required for certification for a concealed handgun permit.

Domestic Violence

Enforceability of ex parte domestic violence protective orders. Effective July 24, 2009, S.L. 2009-342 (H 115) amends the domestic violence protective order (DVPO) statutes in response to the North Carolina Supreme Court's decision in *State v. Byrd*, 363 N.C. 214 (May 1, 2009). The act revises G.S. 50B-4 and 50B-4.1 to provide that a "valid protective order" includes an "emergency" and "ex parte" order entered under G.S. Chapter 50B. This change effectively overrides the court's statutory interpretation of the consequences of a violation of an ex parte DVPO. The court had also expressed constitutional concerns about imposing criminal consequences for a violation of an ex parte order, discussed at the end of this section.

The specific question addressed in *Byrd* was whether a person who violates an ex parte order is subject to the sentencing enhancement in G.S. 50B-4.1(d), which elevates a felony by one class if the defendant violates a "valid protective order" in the course of committing the felony.

The court ruled first that the sentencing enhancement did not apply to the defendant's conduct because the order that the defendant violated was a temporary restraining order (TRO) entered under North Carolina Rule of Civil Procedure 65(b), not a DVPO entered under Chapter 50B. Secondly, the court ruled that even if the order had been entered under Chapter 50B, it did not fall within the term "valid protective order" because it was entered *ex parte*. G.S. 50B-1(c) defined a *protective order* as an order entered "upon hearing by the court or consent of the parties." The court found that this language required a hearing of which the defendant received notice and had an opportunity to be heard. An order entered by a court *ex parte* is, by definition, without notice or an opportunity for the defendant to be heard and did not satisfy these requirements. Although the court's decision arose in the context of the felony sentencing enhancement in G.S. 50B-4.1, its reasoning applied to the other criminal consequences in that statute, discussed below, because all required that a "valid protective order" be in effect.

S.L. 2009-342 undoes the court's ruling because it specifically includes *ex parte* orders within the definition of a *valid protective order*. This revision makes the criminal consequences in G.S. 50B-4.1 applicable to violations of *ex parte* DVPOs as well as DVPOs entered after notice and a hearing. The criminal consequences are as follows.

- It is a Class A1 misdemeanor under G.S. 50B-4.1(a) to knowingly violate an *ex parte* DVPO entered under G.S. Chapter 50B.
- Law enforcement officers must arrest a person, with or without a warrant, if they have probable cause to believe that the person knowingly violated an *ex parte* DVPO in the circumstances described in G.S. 50B-4.1(b), such as violating a provision excluding the person from the residence or household occupied by a victim of domestic violence.
- A person is subject to increased punishment for knowingly violating an *ex parte* DVPO in the circumstances described in G.S. 50B-4.1(d), (f), and (g) (for example, violating a DVPO by failing to stay away from a person or place as directed, while possessing a deadly weapon).

For these consequences to apply, the defendant still must have received notice of the court's entry of the DVPO, as each consequence applies only if the defendant "knowingly" violated the DVPO.

The changes apply to violations of *ex parte* DVPOs committed on or after July 24, 2009, when the act became effective. Thus, if an *ex parte* DVPO was entered before July 24 and a person violated the order on or after July 24, a magistrate may issue criminal process and a law enforcement officer may arrest for the Class A1 misdemeanor offense of violating a DVPO.

The expanded definition of a *valid protective order* does not include a violation of a TRO entered under Rule 65 of the North Carolina Rules of Civil Procedure. Therefore, a violation of a Rule 65 TRO is not a Class A1 misdemeanor under G.S. 50B-4.1 and is not subject to the other criminal consequences in that section.

The act may not finally resolve the permissible consequences for a violation of an *ex parte* DVPO. In *Byrd*, the North Carolina Supreme Court expressed Due Process concerns about the imposition of criminal consequences for a violation of an order entered without notice and an opportunity to be heard. In light of the court's concerns, defendants in criminal cases will undoubtedly challenge the constitutionality of the revised statute, and the courts will eventually need to resolve the issue. Until the courts issue a ruling, magistrates and law enforcement officers are bound to follow the General Assembly's direction and make charging and arrest decisions as mandated by the revised statute.

Mandatory arrest provisions. In *Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372 (2006), the North Carolina Court of Appeals addressed whether the plaintiff could sue the police for failing to arrest her estranged husband for violating a DVPO. The plaintiff alleged that he had been following her in violation of a DVPO against him and, after she notified the police about the violations, the police failed to arrest him. He later broke into the plaintiff's house, killed the plaintiff's daughter, and seriously injured the plaintiff. The court held that under North Carolina's public duty doctrine, the plaintiff could only sue the police for a failure to arrest if the law established a mandatory duty to arrest or, if the law did not establish a mandatory arrest duty, the police had assumed a duty to the plaintiff by their actions in the specific case. The court found that the domestic violence statutes—specifically, G.S. 50B-4.1(b)—did not establish a mandatory arrest duty even though they stated that a law enforcement officer “shall” arrest and take a person into custody if the officer has probable cause to believe the person has violated certain provisions of a DVPO. The court stated that the term “shall” did not make arrest mandatory without a specific finding by the General Assembly that it intended to make arrest mandatory. (The court found the plaintiff's case could still proceed because the police had assumed a duty to the plaintiff.)

Effective July 31, 2009, S.L. 2009-389 (H 1464) makes that finding. The act states that notwithstanding the *Cockerham-Ellerbee* decision, G.S. 50B-4.1(b) creates a mandatory provision under which a law enforcement officer must arrest and take a person into custody if the requirements in that statute are met. The act also revises G.S. 50B-4.1(b) to clarify that arrest is mandatory in those circumstances, with or without a warrant or other process.

DVPOs and pets. Effective August 5, 2009, S.L. 2009-425 (S 1062) revises G.S. 50B-3(a) to authorize, in addition to the other types of relief available under a DVPO, providing for the care, custody, and control of the parties' pets and directing that a party refrain from cruelly treating or abusing another party's pets.

Conforming changes to laws related to stalking. In 1992 North Carolina first created the offense of stalking in G.S. 14-277.3. The General Assembly revised the definition of the offense and its punishment in 1997, 2001, and 2003. In 2008 the General Assembly repealed G.S. 14-277.3 and enacted G.S. 14-277.3A in its place, incorporating many of the previous changes and making additional ones. See John Rubin, “2008 Legislation Affecting Criminal Law and Procedure,” *Administration of Justice Bulletin* No. 2008/06, at pp. 17–18 (Nov. 2008), www.sog.unc.edu/programs/crimlaw/aoj.htm. In enacting the new statute, the General Assembly did not make conforming changes to a number of statutes that refer to stalking. Effective June 5, 2009, S.L. 2009-58 (S 617) amends the following to refer to G.S. 14-277.3A. They are: G.S. 14-415.12(b) (8) (concealed handgun permit), G.S. 15A-266.4(b)(3) (DNA sample), G.S. 15A-830(a)(7) (Crime Victims' Rights Act), G.S. 15C-2(12) (address confidentiality program), G.S. 50B-1(a)(2) (DVPOs), G.S. 50C-1(6) (civil no contact orders), and G.S. 95-260(3)b (civil no contact order for employees).

Computer-Based Offenses

Cyberbullying. Effective for offenses committed on or after December 1, 2009, S.L. 2009-551 (H 1261) creates a new criminal offense entitled “cyberbullying,” which prohibits the following six types of acts:

- with the intent to intimidate or torment a minor,
 - building a fake profile or website,
 - posing as a minor in certain electronic communications (such as an e-mail message),

- following a minor online or into an Internet chat room, or
- posting or encouraging others to post on the Internet private, personal, or sexual information pertaining to a minor;
- with the intent to intimidate or torment a minor or the minor’s parent or guardian,
 - posting a real or doctored image of a minor on the Internet,
 - accessing, altering, or erasing any computer network, data, program, or software, including breaking into a password protected account, or
 - using a computer system for repeated electronic communications to a minor
- planting any statement, whether true or false, that provokes or tends to provoke any third party to stalk or harass a minor;
- copying and disseminating, or causing to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting the minor;
- signing up a minor for a pornographic Internet site; and
- without authorization of the minor or minor’s parent or guardian, signing up a minor for electronic mailing lists or to receive junk electronic and instant messages, resulting in intimidation or torment of the minor.

A violation is a Class 1 misdemeanor if the defendant is 18 years of age or older at the time of the offense and a Class 2 misdemeanor if the defendant is under the age of 18. A defendant is eligible for discharge, dismissal, and expunction of an offense committed before the defendant turned 18. See John Rubin, “Expunction Guide: Types, Requirements, and Impact of 2009 Legislation,” *Administration of Justice Bulletin* No. 2009/10 (Dec. 2009), www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0910.pdf.

Definition of computer crimes. Effective for offenses committed on or after December 1, 2009, S.L. 2009-551 (H 1261) adds *Internet chat room* and *profile* to the definitions in G.S. 14-453, which apply to the computer-related crimes in G.S. Chapter 14, Article 60.

Internet ticket sales. In 2008 the General Assembly enacted G.S. 14-344.1, which exempts Internet sales of tickets above face value from the prohibition on ticket scalping in G.S. 14-344. See S.L. 2008-158 (S 1407). The act contained a sunset clause, which provided that the act would expire June 30, 2009. S.L. 2009-255 (H 309) removes the sunset provision.

Computer-related crimes by sex offenders. See “Sex Offenders,” below.

School-Related Offenses

Compulsory school attendance. Effective beginning with the 2009–10 school year, S.L. 2009-404 (S 708) revises G.S. 115C-378(a) to provide that every parent, guardian, or custodian having charge or control of a child between the ages of seven and sixteen years of age must cause the child to attend school as provided in the statute. Previously, the statute applied to every parent, guardian, or person having charge or control of a child.

Reporting acts of violence in schools. G.S. 115C-288(g) has required school principals to report certain offenses that occur on school property to the appropriate law enforcement agency. The statute also has stated that it is the intent of the General Assembly for the principal to notify the superintendent and for the superintendent to notify the local school board of reports made by the principal. Effective August 5, 2009, S.L. 2009-410 (H 1078) amends G.S. 115C-288(g) to mandate notice to the superintendent and local school board. Effective beginning with the 2010–11 school year, the act also adds G.S. 115C-47(56) to require local boards of education to adopt a policy on notifying parents or legal guardians of any students alleged to be victims of acts required to be reported under G.S. 115C-288(g).

Failure to discharge duty by school board member. G.S. 115C-39(a), repealed by the General Assembly in 2007, contained a procedure for a school board to remove members of the board for failing to discharge their official duties. See S.L. 2007-498 (H 349). In its place, the General Assembly enacted S.L. 2009-107 (H 43), adding school board members to the coverage of G.S. 14-230. That statute makes it a Class 1 misdemeanor for various officials to willfully omit, neglect, or refuse to discharge any of their duties. It provides further that if the official acted willfully and corruptly, the official is guilty of misbehavior in office and, as part of the court's sentence in the criminal case, must be removed from office. The act applies to offenses committed on or after December 1, 2009.

Indecent liberties with student. See "Sex Offenders," below.

Bullying at school. S.L. 2009-212 (S 526) addresses bullying or harassing behavior at school by adding Article 29B, School Violence Prevention, to G.S. Chapter 115C. Effective beginning with the 2009–10 school year, new G.S. 115C-407.5 states that no student or school employee shall be subject to bullying or harassing behavior by school employees or students on school property, at a school-sponsored function, or on a school bus. New G.S. 115C-407.6 requires each local school administrative unit to adopt policies prohibiting bullying and harassing behavior. The act does not provide for criminal penalties for a violation of the new statutes.

Student protection fund for proprietary school students. Effective July 1, 2010, S.L. 2009-562 (S 860) adds G.S. 115D-95.1 establishing a student protection fund and amends G.S. 115D-96 to make it a Class 3 misdemeanor for a person to operate a proprietary business, technical, trade, or correspondence school without paying the assessments into the fund.

Motor Vehicles

The General Assembly enacted several changes to the motor vehicle laws. Summaries of motor vehicle legislation, by School of Government faculty member Shea Denning, are included in the online article "2009 Legislation of Interest to Court Officials," www.sog.unc.edu/dailybulletin/summaries09/category04.html. The following are of particular interest for criminal law purposes:

- S.L. 2009-99 (H 1198), regarding the waiting period for conditional restoration of a driver's license revoked for conviction of impaired driving resulting in a fatality
- S.L. 2009-135 (H 9), which adds G.S. 20-137.4A to make it an infraction to text while driving, subject to a number of exceptions, and a Class 2 misdemeanor to text while operating a school bus
- S.L. 2009-147 (H 440), which revises G.S. 20-217 to allow into evidence, if consistent with the North Carolina Rules of Evidence, photographs and videos of a person passing a stopped school bus in violation of G.S. 20-217(a) and makes it a Class H felony to pass a stopped school bus and strike a person, resulting in the person's death
- S.L. 2009-234 (S 649), regarding speed limits on roads annexed by municipalities and in work zones
- S.L. 2009-319 (H 882), which adds G.S. 20-183.8(b1) to make it a Class 3 misdemeanor to perform a safety or emissions inspection without a license
- S.L. 2009-369 (H 1185), regarding conditional restoration of a driver's license revoked for habitual impaired driving
- S.L. 2009-376 (S 368), which makes numerous changes to the motor vehicle laws, including changes to viewing televisions, computers, and video players while driving
- S.L. 2009-416 (S 931), which makes various changes affecting commercial driver's licenses

- S.L. 2009-456 (H 67), which revises G.S. 20-63(g) to make it an infraction to cover with a license plate frame the state name, year sticker, or month sticker on a registration plate
- S.L. 2009-459 (H 121), which allows cities and counties to regulate the operation of golf carts on public streets (see Shea Denning, “Who Needs a Hybrid? Regulation of Golf Carts on Local Streets,” (Aug. 2009), <http://sogweb.sog.unc.edu/blogs/localgovt/?p=533>)
- S.L. 2009-495 (S 631), which adds G.S. 20-49.3 governing the disposition and use of seized and forfeited vehicles by the Bureau of License and Theft of the Division of Motor Vehicles
- S.L. 2009-500 (H 926), which amends G.S. 20-19(d)(2) and G.S. 20-19(e)(2) to allow a person to submit to a continuous alcohol monitoring system to meet the requirements in those subsections for restoration of a revoked driver’s license
- S.L. 2009-526 (H 191), which adds G.S. 20-130.1(c1) to exempt from the prohibition on the installation or operation of a blue light the possession or installation of an inoperable blue light for shows, exhibits, and other activities as specified in the new subsection
- S.L. 2009-528 (H 889), which revises G.S. 20-141.4(b) to increase from a Class 1 to Class A1 misdemeanor the punishment for misdemeanor death by vehicle

Animals

Assaulting search and rescue animal. G.S. 14-163.1 makes it a crime to assault a law enforcement agency or assistance animal. The class of offense depends on the seriousness of the harm caused. Effective for offenses committed on or after December 1, 2009, S.L. 2009-460 (H 1098) adds search and rescue animals to the statute’s coverage and adds as a form of restitution for a violation involving such animals the salary of the search and rescue animal handler as a result of the services lost during the time the handler is with the animal receiving training or retraining. The act also adds search and rescue animals to the coverage of G.S. 15A-1340.16(d)(6a), which makes it an aggravating factor in felony sentencing if the offense was committed against or proximately caused serious harm or death to an animal listed in that subsection.

Reptiles. Article 55 of G.S. Chapter 14 (G.S. 14-416 through G.S. 14-422) has regulated the handling of poisonous reptiles. Effective for offenses committed on or after December 1, 2009, S.L. 2009-344 (S 307) makes numerous changes to those statutes, specifying in much greater detail the types of reptiles covered by the statutes (the three main categories are venomous reptiles, large constricting snakes, and crocodilians), the specifications for enclosures for such reptiles, the required response by law enforcement and animal control officers to violations, and other regulations. A violation of the article remains a Class 2 misdemeanor under G.S. 14-422(a) in most instances. The act creates two new higher offenses: a Class A1 misdemeanor under new G.S. 14-422(b) if a person other than the owner, owner’s agent or employee, or member of the owner’s immediate family suffers a life-threatening injury or is killed as a result of a violation of the article; and a Class A1 misdemeanor under G.S. 14-422(c) if a person intentionally releases into the wild a nonnative reptile covered by the article. New G.S. 14-422(d) also provides that a violation of subsections (b) or (c) constitutes wanton conduct and subjects the violator to punitive damages in a civil action.

Wildlife and Related Rules

Coverage of Wildlife Violator Compact. The 2008 General Assembly enacted the Interstate Wildlife Violator Compact (G.S. 113-300.5 through G.S. 113-300.8) to establish a reciprocal program to deal with violations of wildlife laws by residents of member states. For a discussion of the compact, see John Rubin, “2008 Legislation Affecting Criminal Law and Procedure,”

Administration of Justice Bulletin No. 2008/06, at p. 24–25 (Nov. 2008), www.sog.unc.edu/programs/crimlaw/aoj.htm. Effective October 1, 2009, S.L. 2009-15 (H 105) amends the definition of *wildlife* in Article II(15) of the compact (within G.S. 113-300.6) to include animals protected or regulated by the Wildlife Resources Commission, Marine Fisheries Commission, and Division of Marine Fisheries in the Department of Environment and Natural Resources. The act also amends G.S. 113-300.7 to clarify the role of those agencies in administering the compact, providing among other things that each may suspend or revoke a person's license to hunt, fish, trap, possess, or transport wildlife in North Carolina to the extent that the person's license has been suspended or revoked by a member state.

Hunting and fishing licenses for members of the military. G.S. 113-276 contains several exemptions from North Carolina's licensing requirements for hunting and fishing. Effective July 1, 2009, S.L. 2009-25 (H 97) amends G.S. 113-276 to add an exemption for North Carolina residents who are members of the United States Armed Forces and are serving outside the state, or who are members of a reserve unit and are serving full-time active military duty outside the state, allowing them to hunt or fish in North Carolina without a license while on leave in North Carolina for 30 days or less.

Hunting of wild boar. G.S. 113-133.1(e) lists various local acts relating to wildlife that remain in force in specific counties notwithstanding the authority of the Wildlife Resources Commission over wildlife in North Carolina. Effective October 1, 2009, S.L. 2009-89 (H 1118) revises G.S. 113-133.1(e) to repeal the local acts relating to the hunting of wild boars and adds *wild boar* to the definitions of wildlife resources in G.S. 113-129 subject to Wildlife Resources Commission regulation. The act also directs the Department of Agriculture and Consumer Services, in consultation with the Wildlife Resources Commission and others, to study the risks, including the risk of disease, of importing feral swine into North Carolina.

Traps for beavers and otters. Effective October 1, 2009, S.L. 2009-120 (S 1101) revises the portions of G.S. 113-291.6 and G.S. 113-291.9(c) relating to the dimensions of conibear-type traps that may be used in areas in which beaver and otter may be lawfully trapped.

Boating safety education. Effective May 1, 2010, S.L. 2009-282 (S 43) adds G.S. 75A-16.2 to make it an infraction for a person to operate a vessel with a motor of 10 horsepower or more on the state's public waters unless the person has met the requirements for boating safety education as provided in that statute. A violation results in the assessment of court costs but no penalty. If the person produces in court a certification or proof of satisfactory completion of a boating safety course, the person may not be found responsible for a violation.

The act also adds G.S. 75A-13.3(c3) to require a vessel livery (that is, a rental company) to provide the operator of a leased personal watercraft with basic safety instruction before allowing operation of the watercraft. A violation by a vessel livery is a Class 3 misdemeanor.

Taking of shellfish. Effective August 7, 2009, S.L. 2009-433 (S 107) amends several statutes within G.S. Chapter 113 regulating the taking of shellfish such as oysters and clams.

ABC Laws

The alcoholic beverage control (ABC) laws enacted in 2009 do not have a direct impact on criminal law and procedure. For summaries of ABC legislation, see Michael Crowell, "2009 Statewide Legislation Affecting Alcoholic Beverage Control" (Sept. 2009), www.sog.unc.edu/dailybulletin/summaries09/category01.html.

Businesses

Natural hair care license violations. Effective July 1, 2010, S.L. 2009-521 (H 291), as amended by S.L. 2009-471 (H 596), amends G.S. 88B-22 to make it a Class 3 misdemeanor for a natural hair care specialist to practice cosmetic art for pay or reward without a license.

Violations by facilities for aged and disabled individuals. S.L. 2009-462 (H 456) adds G.S. 131D-2.5, effective October 1, 2009, and G.S. 131D-2.6, effective January 1, 2010, to make the operation of covered facilities without a license a Class 3 misdemeanor, punishable by a fine only of not more than \$50 for a first offense and by a fine only of not more than \$500 for each subsequent offense. The act repeals G.S. 131D-2, which contained similar punishments.

Log of pumpouts of marine sanitation devices. Effective for offenses committed on or after July 1, 2010, S.L. 2009-345 (H 1378) adds G.S. 77-128 to make it a Class 3 misdemeanor for the owner or operator of a marine sanitation device to fail to maintain a record for at least one year of each pumpout and the location of the pumpout facility and adds G.S. 77-129 to make it a Class 1 misdemeanor to discharge treated or untreated sewage into coastal waters. The latter violation is also subject to civil penalties under G.S. 77-130.

Marriage and family therapy. Effective for offenses committed on or after October 1, 2009, S.L. 2009-393 (S 935) amends G.S. 90-270.48 to make it a Class 2 misdemeanor, under G.S. 90-270.61, for a person not licensed as a marriage and family therapy associate to practice marriage or family therapy.

Refrigerator contractors. Effective for offenses committed on or after December 1, 2009, S.L. 2009-333 (H 1105) amends G.S. 87-61 to reduce from a Class 2 to Class 3 misdemeanor the punishment for engaging in refrigerator contracting without a license.

Environmental health specialists. Effective for offenses committed on or after August 7, 2009, S.L. 2009-443 (S 834) amends G.S. 90A-52 to make it a Class 1 misdemeanor, under G.S. 90A-66, to practice as an environmental health specialist or intern, or to use those titles, without a certificate of registration from the Board of Environmental Health Specialist Examiners.

Motor vehicle franchise laws. Effective for offenses committed on or after July 24, 2009, S.L. 2009-338 (S 913) amends G.S. 20-305.1 to prohibit additional acts, punishable as Class 1 misdemeanors under G.S. 20-308, by manufacturers and component parts manufacturers against motor vehicle dealers.

Occupational safety and health laws violations injuring children. Article 16 of G.S. Chapter 95 is the Occupational Safety and Health Act (OSHA) for North Carolina. Violations may result in criminal or civil penalties. G.S. 95-139 has made it a Class 2 misdemeanor for an employer to violate an OSHA rule and cause an employee's death. The authorized punishment may include a fine of up to \$10,000. A second violation is a Class 1 misdemeanor, which may include a fine of up to \$20,000. Effective for violations committed on or after December 1, 2009, S.L. 2009-351 (H 23) adds G.S. 95-139(b) and (c) to increase the maximum fine to \$20,000 for an OSHA violation causing the death of an employee under age 18 and, if the defendant has a prior conviction for violating an OSHA rule and causing the death of an employee, to increase the maximum fine to \$40,000 for a violation causing the death of an employee under age 18. The act also amends G.S. 95-139(e), which makes it a Class 2 misdemeanor to falsify records required by OSHA, to increase the maximum fine for a violation to \$20,000 if the falsification pertains to an employee under age 18; a falsification involving an employee age 18 or older remains a Class 2 misdemeanor punishable by a fine of up to \$10,000. The act also increases the civil monetary penalties in G.S. 95-138 for OSHA violations involving employees under age 18 and the civil monetary penalties for violations of Article 2A of G.S. Chapter 95 (Wage and Hour Act).

Mortgage lending laws. Effective for applications for licensure on or after July 31, 2009, S.L. 2009-374 (H 1523), as amended by S.L. 2009-526 (H 191), S.L. 2009-550 (H 274), and S.L. 2009-570 (S 220), repeals Article 19A of G.S. Chapter 53 (Mortgage Lending Act) and adds Article 19B (Secure and Fair Enforcement Licensing Act). New G.S. 53-244.112 of Article 19B makes it a Class 3 misdemeanor to engage in the mortgage business or act as a mortgage loan originator without a license. The new statute makes each transaction involving unlicensed activity a separate offense.

Polysomnography regulations. Effective October 1, 2009, S.L. 2009-434 (H 819) adds Article 39A, the Polysomnography Practice Act, to G.S. Chapter 90, regulating the practice of monitoring, analyzing, and recording physiological data during sleep and wakefulness to assist in the assessment of sleep and like disorders. On or after January 1, 2012, practicing polysomnography without being listed with the North Carolina Medical Board and certain other acts are Class 1 misdemeanors under new G.S. 90-677.3.

Miscellaneous Offenses

Prohibition of “targeted” picketing of residence. Effective for offenses committed on or after December 1, 2009, S.L. 2009-300 (H 885) adds G.S. 14-277.4A creating the offense of targeted picketing of a residence. The statute makes it a Class 2 misdemeanor to

- engage in *targeted picketing* of a *residence* as those terms are defined in the statute
- when the picketer knows or should know
- that the manner of the picketing would cause a reasonable person either
 - to fear for the person’s safety or safety of the person’s immediate family or close personal associates or
 - substantial emotional distress as that term is defined in G.S. 14-277.3A(b)(4), the statute on stalking.

The new statute provides that an aggrieved person may seek injunctive relief to prevent threatened or further violations and that a violation of an injunction constitutes criminal contempt, punishable by a term of imprisonment of 30 days to 12 months. The new statute also states that it does not prohibit general picketing through residential neighborhoods or past residences.

Raffle prize limits. G.S. 14-309.15 establishes limits on prizes for raffles conducted by non-profit organizations and associations. Effective June 1, 2009, S.L. 2009-49 (H 85) raises the limit on cash prizes and merchandise redeemable for cash from \$50,000 to \$125,000 per raffle and raises the total amount that may be offered by any organization or association from \$50,000 to \$125,000 per calendar year. New G.S. 14-309.15(g) allows an exception to this limit, permitting real property to be offered as a raffle prize in an amount of up to \$500,000 per raffle and \$500,000 by an organization or association per calendar year.

Fireworks display restrictions. G.S. 14-410 regulates displays of pyrotechnics at concerts and other public exhibitions. It has allowed such displays if supervised by experts and other conditions were satisfied, but the statute did not identify the requirements to qualify as an expert. Effective for offenses committed on or after February 1, 2010, S.L. 2009-507 (S 563) revises the statute to provide that individuals who exhibit, use, handle, or discharge pyrotechnics at public exhibitions must have completed the training required under new G.S. 58-82A-2 and be under the direct supervision and control of a display operator who holds a display operator permit issued by the state fire marshal under new G.S. 58-82A-3. Under the latter statute, the state fire

marshal may refuse to issue or revoke a permit if, among other things, the display operator is convicted of a crime under Article 54 (Sale, etc., of Pyrotechnics) of G.S. Chapter 14A. Violations of Article 54 remain punishable under G.S. 14-415.

Self-dealing by public officers and employees. G.S. 14-234 prohibits self-dealing by public officers and employees. For example, subsection (a)(1) prohibits public officers or employees from deriving a benefit from a contract they enter into or administer on behalf of a public agency. G.S. 14-234(d1) provides an exception to the prohibition in subsection (a)(1) for smaller towns and cities and public hospitals if, among other things, the amount of the contract does not exceed certain limits. Effective October 1, 2009, S.L. 2009-226 (H 682) raises the contract limit from \$12,500 to \$20,000 for medically related services and from \$25,000 to \$40,000 for other goods or services within a 12-month period.

Retail sale of novelty lighters. Article 2 of G.S. Chapter 66 has regulated the sale of matches. Effective for offenses committed on or after October 1, 2009, S.L. 2009-230 (S 652) adds G.S. 66-16.1 to make it an infraction, subject to a penalty of \$500 for each violation, to sell at retail a novelty lighter as defined in the new statute.

Restrictions on tobacco products and mobile phones on state correctional premises. Effective for offenses committed on or after March 1, 2010, S.L. 2009-560 (S 167) revises G.S. 148-23.1 and adds G.S. 148-23.2 to restrict tobacco products and mobile phones on state correctional facilities premises.

Revised G.S. 148-23.1 prohibits anyone—inmates, visitors, and employees—from using tobacco products on state correctional facilities premises, not just inside the facilities. Further, no person may possess tobacco products on such premises. The statute contains two exceptions—one for tobacco products used in religious observances and the other for possession of tobacco products by employees or visitors in a motor vehicle in a designated parking area of the premises.

Revised G.S. 148-23.2 prohibits anyone from possessing a mobile telephone or other wireless communications device on state correctional facilities premises, except as authorized by Department of Correction (DOC) policy. The statute exempts possession of mobile devices by an employee or visitor in a motor vehicle in a designated parking area of the premises.

Violations are punishable under revised G.S. 14-258.1. A person who gives or sells tobacco products to an inmate or another person for delivery to an inmate as provided in G.S. 14-258.1(c) is guilty of a Class 1 misdemeanor. A person who gives or sells a wireless device or a component of one of those devices to another person for delivery to an inmate as provided in G.S. 14-258.1(d) is guilty of a Class 1 misdemeanor. An inmate who possesses a tobacco product or wireless device as provided in G.S. 14-258.1(e) is guilty of a Class 1 misdemeanor. The revised statutes do not specify criminal penalties for employees or visitors for mere possession or use of tobacco products or wireless devices on state correctional facility premises.

Smoking in non-smoking area. Effective January 2, 2010, S.L. 2009-27 (H 2), as amended by S.L. 2009-550 (H 274), prohibits smoking in certain public places and authorizes local governments to enact no-smoking laws, subject to certain exceptions. Portions of the act are enforceable through the criminal justice system. Part 1B of Article 23 of G.S. Chapter 130A, which regulates smoking in state government buildings and vehicles, continues to provide (in G.S. 130A-493) that a violation is not a misdemeanor. Part 1C of Article 23 of G.S. Chapter 130A, which regulates smoking in restaurants, bars, and lodging establishments that prepare and serve food and drink, provides (in G.S. 130A-497) that a person who continues to smoke in a nonsmoking area, following oral or written notice by the person in charge of the area, commits an infraction, a noncriminal violation of the law punishable by a penalty of up to \$50. A person may not be

assessed court costs. Part 2 of Article 23 of G.S. Chapter 130A, which authorizes local governments to restrict smoking in public places and in local government buildings, grounds, and vehicles, provides (in G.S. 130A-498) that continuing to smoke in violation of a local ordinance or other local rule, law, or policy constitutes an infraction, punishable by a penalty of up to \$50. There are no court costs. Revised G.S. 130A-22 provides that a local health director may impose administrative penalties (a written notice for a first and second violation and up to a \$200 penalty for a third and subsequent violation) on a person who manages, operates, or controls a place subject to Parts 1C or 2 and who fails to comply with those provisions. The act states that the General Assembly's intent is also to restrict smoking in places of employment, and the revised statutes include references to employees, employers, and places of employment, but other than the locations described above, the act does not specify any restrictions on smoking in places of employment and does not include any penalties.

For further discussion of the new smoking law, as well as other smoking prohibitions (such as prohibitions on smoking in schools and prisons), see Aimee Wall, "Smoking in Public Places: Recent Changes in State Law," *Health Law Bulletin* No. 90 (May 2009), www.sog.unc.edu/pubs/electronicversions/pdfs/hlb90.pdf.

Interference with electronic monitoring device. See "Pretrial and Trial Procedures: Pretrial Release," below.

Solicitation of child by computer to commit unlawful sex act. See "Sex Offenders," below.

Pretrial and Trial Procedures

Right to Counsel

Appointment of counsel by magistrates. Effective July 1, 2009, S.L. 2009-419 (S 514) adds G.S. 7A-146(11) and G.S. 7A-292(15) to authorize the chief district judge in each district court district to give magistrates who are duly licensed attorneys the authority to appoint counsel pursuant to Article 36 of G.S. Chapter 7A—that is, for defendants entitled to counsel at state expense. Under the new provisions, a magistrate may not appoint counsel for potentially capital offenses and may not accept waivers of counsel.

In making appointments, magistrates must follow the rules adopted by the Office of Indigent Defense Services (IDS). See G.S. 7A-452(a) (upon a determination that a person is indigent and entitled to counsel under Article 36 of G.S. Chapter 7A, counsel shall be appointed in accordance with rules adopted by IDS). In districts with a public defender's office, the Public Defender has adopted a plan for appointment of counsel; many of those plans require appointment of the Public Defender, who then determines whether to assign the case to an assistant public defender or to private assigned counsel. Most districts without a public defender's office also have a local appointment plan, which magistrates should consult in making appointments.

Because the new appointment authority is limited to magistrates who are attorneys, it does not cover the majority of criminal cases, which ordinarily enter the judicial system through an initial appearance before a magistrate. In *Rothgery v. Gillespie County*, ___ U.S. ___, 128 S. Ct. 2578 (2008), the U.S. Supreme Court held that the right to counsel attaches at initial appearance before a magistrate. Although the Court did not require that a defendant have counsel at the initial appearance, it indicated that counsel must be appointed within a reasonable time thereafter. In felony cases in North Carolina, appointment generally occurs soon after arrest because a defendant who is in custody must have a first appearance before a judge within 96 hours, at

which time the presiding judge appoints counsel for indigent defendants who want counsel. In misdemeanor cases, however, appointments may not occur nearly as quickly.

Some districts hold first appearances for misdemeanors, although not required by statute. In many districts, however, defendants do not appear until the officer's first court date, which may be weeks after arrest.

If a defendant has been in custody for 48 hours without having counsel appointed, G.S. 7A-453 requires the authority having custody of the defendant to notify the IDS designee in those counties having one—that is, the Public Defender in districts with a public defender office—and the clerk of court in all other counties. The Public Defender or clerk is then supposed to take appropriate steps to enable the appointment of counsel. Many districts, however, do not have a process for implementing the statute's requirements.

Some magistrates at initial appearance advise defendants of their *Rothgery* rights, telling them that they have a right to have counsel appointed if they qualify (based on indigency and the type of case) and noting the advisement and any request for counsel on the release order or other form. Whether this process expedites appointment, however, is unclear. Other districts may be employing additional procedures to expedite appointment of counsel.

Appointment of counsel at satellite monitoring "bring-back" hearings. See "Sex Offenders," below.

Pretrial Release

Electronic house arrest. G.S. 15A-534(a) has authorized four types of pretrial release: written promise to appear, unsecured bond, custody release, and secured bond. Effective for offenses committed on or after December 1, 2009, S.L. 2009-547 (S 726) amends G.S. 15A-534(a) to authorize a fifth form of pretrial release: house arrest with electronic monitoring. If electronic house arrest (EHA) is imposed, the defendant also must execute a secured bond.

The legislation does not contain additional funding to implement EHA programs; rather, it gives statutory authorization for programs already in operation or implemented in the future. In counties that have an EHA program, judicial officials should not impose EHA as a condition if the program is not then able to accept the defendant—for example, it does not have equipment available to place the defendant on EHA. In those circumstances, requiring EHA as a condition of pretrial release would amount to denial of pretrial release.

Can the defendant be required to reimburse the administering agency for the cost of EHA? The Administrative Office of the Courts (AOC) has advised judicial officials that there does not appear to be statutory authority for requiring the defendant to do so. According to the AOC, a convicted defendant placed on pretrial EHA may be assessed a one-time fee of \$15 for those services. See G.S. 7A-304(a)(5) (allowing \$15 for pretrial services, to be remitted to county providing the services). The AOC has concluded that there does not appear to be authority to assess a fee for EHA for defendants who are not convicted or a fee greater than \$15 for those who are convicted.

In addition to authorizing EHA as a form of pretrial release, the act amends G.S. 15A-534(a) to provide that a judicial official must impose "at least" one of the five forms of pretrial release. Previously, the subsection stated that a judicial official must impose "one" of the forms of pretrial release, which apparently meant that the judicial official could impose one form only. While the change may have been intended merely to give effect to the new required combination of a secured bond and EHA, the new phrasing was not limited to that situation. Other combinations of pretrial release (for example, a custody release and unsecured bond) may be permissible.

Interference with electronic monitoring devices. Effective for offenses committed on or after December 1, 2009, S.L. 2009-415 (S 713) adds G.S. 14-226.3 to make it an offense to engage in certain acts. The provisions apply to individuals on pretrial release, probation, parole, or post-release supervision. It is a violation of the new statute to

- knowingly and without authority
- remove, destroy, or circumvent
- the operation of an electronic monitoring device being used to monitor a person who is
 - complying with a house arrest program or
 - wearing the device as a condition of bond, pretrial release, probation, parole, or post-release supervision.

It is also a violation of the new statute to

- knowingly and without authority
- request or solicit any other person
- to remove, destroy, or circumvent
- the operation of an electronic monitoring device being used to monitor a person for one of the indicated purposes.

The punishments for violations are as follows. It is:

- an offense one class lower than the offense of conviction if the violation is by a person required to comply with electronic monitoring as a result of conviction—for example, a person on probation,
- a Class 1 misdemeanor if the violation is by a person required to comply with electronic monitoring as a condition of bond or pretrial release, and
- a Class 2 misdemeanor by any other person.

The statute does not apply to tampering with a device worn by an individual subject to satellite-based monitoring under North Carolina's sex offender registration and monitoring program, which is governed by G.S. 14-208.44(b); a violation of that statute is a Class E felony.

Pretrial and prehearing release for probationers. Article 26, Bail, of G.S. Chapter 15A requires the setting of pretrial conditions for most individuals arrested for a criminal offense, whether or not the individual is on probation. G.S. 15A-1345(b) likewise has provided that a person arrested for a violation of probation is entitled to the setting of conditions of release pending a revocation hearing in the same manner as provided in G.S. 15A-534, a part of the article on bail. Effective for offenses committed on or after December 1, 2009, S.L. 2009-412 (S 1078), as amended by S.L. 2009-547 (S 726), restricts pretrial release if the probationer has a pending felony charge and is found to pose a danger to the public (the term *danger* is not defined). The act creates two separate categories of defendants, with slightly different pretrial release rules for each. Revised AOC-CR-200 (Dec. 2009) (conditions of release and release order) and new AOC-CR-272 (Dec. 2009) (detention of probationer arrested for felony) are intended to aid judicial officials in making the required determinations.

If the defendant is *charged with a felony and arrested while on probation*, revised G.S. 15A-534.2(d2) sets forth three options.

1. If the judicial official determines that the *defendant does not pose a danger* to the public, the official must impose conditions of pretrial release as in other cases.

2. If the judicial official determines that the *defendant poses a danger* to the public, the official must impose a secured bond or electronic house arrest with a secured bond. (The latter form of pretrial release is discussed in the summary of electronic house arrest, above.)
3. If the judicial official has *insufficient information* to determine whether the defendant poses a danger to the public, the official must deny release. The judicial official must record (1) the basis for the official's decision that additional information is needed and the nature of the information needed and (2) a date, within 96 hours of arrest, for the defendant to be brought before a judicial official. If sufficient information is provided before the first appearance, the first available judicial official must set pretrial release conditions. If a pretrial release determination has been delayed for insufficient information until the defendant's first appearance, the judge at first appearance must set conditions. It does not appear that the judge may further delay the determination. Presumably, the state has the burden of showing dangerousness and, if there is insufficient information about dangerousness, the judge must set pretrial release conditions as in other cases—that is, the judge may but is not required to impose a secured bond.

If the defendant is *alleged to have violated probation and arrested while a felony charge is pending*, revised G.S. 15A-1345(b1) sets forth the following three options.

1. If the judicial official determines that the *defendant does not pose a danger* to the public, the official must impose conditions of release as in other cases.
2. If the judicial official determines that the *defendant poses a danger* to the public, the official must deny release pending a revocation hearing.
3. If the judicial official has *insufficient information* to determine whether the defendant poses a danger to the public, the official must deny release. Denial of release for this reason may last no longer than seven days. After seven days, if sufficient information has not been provided to determine dangerousness, the defendant must be brought before any judicial official to determine conditions of release. It does not appear that the judicial official may further delay the determination. Presumably, as in cases involving the first category, the state has the burden to show dangerousness. If there is insufficient information about dangerousness, the judicial official must set conditions of release as in other cases—that is, the judicial official may not deny release altogether.

With respect to this second category of defendants, the act also amends G.S. 15A-1345(c). That subsection provides that a probationer is entitled to a preliminary hearing on a probation violation within seven working days of arrest and, if a preliminary hearing is not held, is entitled to be released to continue on probation pending a hearing. The act amends that subsection to provide that this release requirement does not apply if the probationer has a pending felony charge, has been charged with a probation violation, and has been denied release on the ground that he or she poses a danger to the public. In that instance, the probationer must be held until the final violation hearing.

The new provisions impose a form of preventive detention, delaying and in some instances denying release pending further proceedings. *See* United States v. Salerno, 481 U.S. 739 (1987) (approving preventive detention in certain circumstances); 4 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 12.3 (3d ed. 2007) (discussing issue and practices). North Carolina has a number of preventive detention provisions in place, but they cover a narrower range of cases. *See*

John Rubin, “Exceptions to Pretrial Release Procedures: A Guide for Magistrates” (Dec. 2009) (indicating circumstances in which pretrial release conditions may be delayed or denied under North Carolina’s statutes), www.sog.unc.edu/programs/ncmagistrates/2009FallConference/EXCEPTIONS%20TO%20PRETRIAL%20RELEASE%20PROCEDURES%20TABLE.pdf.

In cases involving the application of the new pretrial release restrictions to probationers alleged to have violated probation, questions also may arise regarding how long probationers may be held in custody without receiving a hearing on the allegations. Probationers are entitled as a matter of constitutional due process to a preliminary hearing “as promptly as convenient after arrest.” *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (parolees); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (applying principle to probationers).

Delay in releasing defendant for communicable disease testing. G.S. 15A-534.3 provides that if a judicial official who is conducting an initial or first appearance has probable cause to believe an individual was exposed to the defendant in a manner that poses a significant risk of transmission of AIDS or hepatitis B by the defendant, the judicial official may order the defendant detained for up to 24 hours for testing by public health officials. Typically, when a magistrate acts pursuant to this authority at the defendant’s initial appearance following arrest, the magistrate sets pretrial release conditions but orders that release be delayed for up to 24 hours to allow testing. Effective August 29, 2009, S.L. 2009-501 (H 1002) amends G.S. 15A-534.3 to clarify that a defendant may be held for testing only for *nonsexual* exposures that result in a significant risk of transmission of AIDS or hepatitis B. The change apparently was adopted to conform to public health regulations. G.S. 15A-534.3 states that it applies if testing is required by public health officials pursuant to G.S. 130A-144 and G.S. 130A-148. Under 10A N.C. ADMIN. CODE 41A .0202 (control measures—HIV) and 10A N.C. ADMIN. CODE 41A .0203 (control measures—hepatitis B), the source of exposure must be tested only if the contact was not sexual and only if it is not already known that the source is infected.

Notice of forfeiture of bond. G.S. 15A-544.3 provides that if a defendant who was on bail fails to appear in court as required, the court must enter a forfeiture for the bond amount. G.S. 15A-544.4 provides that if a bond is forfeited, the court must give notice of the forfeiture to the defendant and to each surety on the bond. Effective August 28, 2009, S.L. 2009-550 (H 274) amends G.S. 15A-544.4(e) to require that the notice be mailed within 30 days of the date the defendant failed to appear and a called and failed was entered. Previously, the subsection required the mailing of notice within 30 days of the entry of the forfeiture.

Setting aside of forfeitures. G.S. 15A-544.5 includes a procedure for setting aside an order of forfeiture of a bail bond. Effective for motions to set aside a forfeiture filed on or after January 1, 2010, S.L. 2009-437 (S 929) amends G.S. 15A-544.5(d)(8) to provide that if a surety fails to sign a motion to set aside a forfeiture, the surety is subject to monetary sanctions unless the failure was unintentional; to require that a motion for sanctions be filed and served no later than ten days before the hearing; and to specify the amount of monetary sanctions the court may impose—for example, 25 percent of the bond amount for failure to sign the motion. The act also amends G.S. 15A-544.5(d)(4) to give the district attorney and board of education 20, rather than 10, days to file an objection to a motion to set aside a forfeiture. Effective for bail bonds executed on or after January 1, 2010, the act amends G.S. 15A-544(f), which has precluded the setting aside of a forfeiture if the surety or bail agent knew the defendant failed to appear on two previous occasions, to impose that bar only if the defendant failed to appear two or more times in the case for which the bond was executed *and* the release order issued by the judicial official indicated that the defendant had failed to appear two or more times. AOC-CR-200, the form release order, includes a box for the issuing judicial official (usually, a magistrate) to record that fact.

Bail bondsmen and runners. For changes to the criminal convictions that bar licensure, see “Sentencing, Probation, and Post-Trial Procedures: Collateral Consequences,” below.

Plea Procedures

Article 58 of G.S. Chapter 15A describes guilty plea procedures for superior court. Those procedures also apply in district court when the defendant pleads guilty to a Class H or I felony. See G.S. 7A-272 and G.S. 15A-1029.1. Two acts address those procedures.

Rejection of plea agreement. Under G.S. 15A-1023(b), a part of Article 58, a judge may reject a plea agreement in which the prosecutor has agreed to recommend a particular sentence. If a judge rejects the arrangement, he or she must advise the parties of the reasons for the rejection and give them an opportunity to modify the arrangement. If the arrangement is still unacceptable to the judge, the defendant is entitled to a continuance to the next session of court.

Effective for pleas accepted on or after December 1, 2009, S.L. 2009-179 (H 315) revises G.S. 15A-1023(b) to provide that if a judge rejects a plea arrangement, disclosed in open court as provided in G.S. 15A-1023(a), the rejection must be noted on the plea transcript and made part of the record. The act makes conforming changes to G.S. 15A-1026 concerning the record of proceedings. The new requirement is reflected in AOC-CR-300 (Oct. 2009) (transcript of plea), www.nccourts.org/forms/FormSearch.asp. Revised G.S. 15A-1023(b) does not require a notation in the record of out-of-court discussions of a proposed plea arrangement between the parties and judge. G.S. 15A-1021 continues to permit such discussions.

Transcript of plea form for guilty and no contest pleas. G.S. 15A-1022, also a part of Article 58 of G.S. Chapter 15A, requires the judge, in accepting a plea of guilty or no contest by a criminal defendant, to address the defendant personally, provide him or her with certain information (such as the maximum potential sentence), and make certain determinations (such as whether any improper pressure was exerted on the defendant). As a matter of constitutional law, a judge also must ensure that a guilty plea is knowing, voluntary, and intelligent. The transcript of plea form (AOC-CR-300) is intended to aid judges in taking guilty pleas by listing the items that the judge should cover with the defendant.

S.L. 2009-86 (H 1039) directs the AOC to revise the transcript of plea form so that the form specifically informs the defendant of additional consequences of a guilty or no contest plea. Although the act does not revise G.S. 15A-1022 to add these additional items to the statutorily required items, the act requires that the form include the following inquiries: (1) “Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?” and (2) “Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved?” These questions are intended to give the defendant notice of the limitations on appeals, in G.S. 15A-1444, and on the preservation period for biological evidence, in G.S. 15A-268, following a plea of guilty or no contest. The act requires that the form be available for pleas of guilty or no contest entered on or after October 1, 2009. The revised form is available at www.nccourts.org/forms/FormSearch.asp.

Jurisdiction and Venue

Authority over defendants in drug treatment courts. Superior court judges have been putting defendants in district court drug treatment court programs as part of probation sentences, creating jurisdictional questions when the defendant does not follow the treatment regimen and the district court is faced with revoking the probation. S.L. 2009-516 (H 1269) amends G.S. 7A-271, 7A-272, and 15A-1344 to provide that, when agreed upon by the senior resident superior court judge and chief district judge, district judges have jurisdiction to supervise such defendants and

revoke probation. The revocation hearing must be held in the county where the drug treatment court is located, although the wording of the statute establishing venue trails off at the end. New G.S. 15A-1344(a1) states that such proceedings must be held “in the county in which the drug treatment court.” That subsection was part of an earlier act, S.L. 2009-452 (S 851), and stated that the proceedings must be held in the county in which the court “is located.” The subsection was repealed and rewritten by S.L. 2009-516, and the final words were cut off. If a drug treatment court probationer covered by the act has his or her probation revoked in district court, appeal of that revocation is to the appellate division under new G.S. 7A-271(f).

The earlier act, S.L. 2009-452, also extended district court jurisdiction to superior court probationers in “therapeutic” courts and, further, authorized chief district judges and senior resident superior court judges to establish such programs by written notification to the AOC. The later act, S.L. 2009-516, removed the provisions in which therapeutic courts were treated the same as drug treatment courts, but it left dangling a new subsection (f) to G.S. 7A-272 providing a definition of therapeutic court that includes the language about establishment by notification to the AOC. Notwithstanding that provision, it appears that the authority to have a district court supervise superior court probationers applies only to those in drug treatment court programs, not locally established therapeutic courts.

Section 15.1 of the Appropriations Act of 2009, S.L. 2009-451 (S 202), as amended by S.L. 2009-575 (H 836), also addresses drug treatment courts, amending G.S. 7A-291 to provide that DWI treatment court programs are a type of drug treatment court under the North Carolina Drug Treatment Court Act.

Criminal law violations on federal lands. Effective April 30, 2009, S.L. 2009-20 (H 613) amends G.S. 104-7 to provide that the consent of the state of North Carolina is not granted to the United States for acquisition of land for an outlying landing field in a county having no existing military base at which aircraft squadrons are stationed and that exclusive jurisdiction over any such land acquired by the United States is not ceded to the United States for any purpose. For a discussion of the power of state and federal authorities to prosecute violations of criminal laws committed on lands owned by the United States, see ROBERT L. Farb, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* at p. 17 & n.60 (3d ed. 2003).

Venue of offense committed in High Point. Effective December 1, 2009, S.L. 2009-398 (H 1077) revises the authority of the superior and district court and magistrates in cases in which an offense is committed within the boundaries of a municipality that is within four counties—that is, High Point. The act revises G.S. 15A-131(c) to provide that for charges brought by municipal law enforcement officers, offenses committed within the corporate limits of the municipality but in a superior court district other than the one for which the municipality is the seat of superior court shall be disposed of in the municipality, with no allowance for objection by the defendant or district attorney. The act makes similar changes involving this municipality in G.S. 7A-199(c) (jurisdiction of district court) and G.S. 7A-293 (jurisdiction of magistrates).

Other Procedural Changes

Jury list. G.S. Chapter 9, Article 1, regulates the creation of jury lists for grand juries and trial (petit) juries. G.S. 9-4 requires that the jury list created for each county be filed with the county register of deeds and be kept under “lock and key.” Reflecting developments in technology, S.L. 2009-518 (S 293) amends G.S. 9-4, effective August 26, 2009, to allow the register of deeds to store an electronic copy of the jury list. The list remains available for public inspection.

Exemption from statutory copy costs. G.S. 7A-308(b1) provides that the clerk of court may not charge for copies requested by an attorney who has been appointed to represent an indigent person at state expense. Effective July 17, 2009, S.L. 2009-317 (H 447) amends that subsection by providing that the clerk likewise may not charge for copies requested by an attorney under contract with IDS, such as Prisoners Legal Services. This effect is specified in the title of the act, which states that the act extends the copy cost exemption to Prisoners Legal Services.

Certain court proceedings via videoconference. Effective July 1, 2009, S.L. 2009-270 (H 1438) directs the AOC, in consultation with the Department of Correction (DOC), to institute a pilot program in two counties and one DOC prison facility to test the feasibility of conducting certain court proceedings via videoconference or similar technology. The law also allows the AOC to conduct a similar pilot program in one or more county jails. Participating courts may, except in capital cases, conduct initial appearances, bail proceedings, and arraignments via videoconference with or without a defendant's consent. With the defendant's consent and a knowing and voluntary waiver of the right to appear in person (which may itself be taken via video), the court may accept and impose sentences on guilty pleas via videoconference and conduct hearings on motions and probation modification and revocation proceedings. The technology used in the program must allow the court and defendant to see and hear one another and must preserve the defendant's right to confidential communication with counsel. The North Carolina Rural Courts Commission, in cooperation with DOC, is assigned to study and report on the pilot's effectiveness and costs. Implementation of the program is conditioned on the receipt of grant funds that, as of the time of this writing, have not been awarded.

Preservation of biological evidence offered at trial. See "Innocence Initiatives," below.

Evidence

Remote Testimony by Child Witnesses

Background. In *Maryland v. Craig*, 497 U.S. 836 (1990), the United States Supreme Court upheld the constitutionality of a state statute allowing a child witness to testify via closed-circuit television and outside the physical presence of the defendant. The court held that the procedure did not violate the defendant's Sixth Amendment right to confront the witnesses against him. In upholding the statute, the *Craig* court required that certain findings be made before such a procedure could be employed. Under the authority of *Craig*, North Carolina courts have permitted such remote testimony. See *In re Stradford*, 119 N.C. App. 654 (1995). Effective for trials and hearings on or after December 1, 2009, S.L. 2009-356 (H 192) adds G.S. 15A-1225.1 to provide statutory authorization for remote testimony, with specific procedures for trial courts to follow.

Statutory requirements. The new statute provides that in criminal and juvenile delinquency cases (referred to in the statute as "criminal proceedings"), a child witness may testify outside the presence of the defendant or juvenile respondent if all of the following conditions are met.

- The child witness, defined as a person under the age of 16 at the time of testifying, meets the following two requirements (set forth in G.S. 15A-1225.1(b)(1) and (2)).
 - The child witness would suffer emotional distress by testifying in the defendant's presence, not by testifying in the open forum in general.
 - The child's ability to communicate with the trier of fact would be impaired.

- The child witness is competent to testify and testifies under oath or affirmation.
- The method used for remote testimony allows the judge, jury, and defendant or juvenile respondent to observe the demeanor of the child as if the child were testifying in open court.
- Counsel for the defendant or juvenile respondent is physically present where the child testifies, has a full and fair opportunity to cross-examine the child, and has the ability to communicate privately with the defendant or juvenile respondent during the remote session.

Upon motion by a party or on the court's own motion, supported by good cause, the court must hold an evidentiary hearing to determine whether to allow remote testimony. The statute states that the presence of the child witness is not required unless ordered by the court. An order allowing or disallowing remote testimony must state the court's findings of fact and conclusions of law and must detail the matters required by the new statute, including the method by which the child will testify, the individuals allowed to be present during the testimony, and any special conditions to facilitate cross-examination of the child. The statute does not indicate the standard of proof for allowing remote testimony—for example, preponderance of the evidence vs. clear and convincing evidence. *Compare* S.L. 2009-514, below (for remote testimony by person with a developmental disability or mental retardation, the standard is clear and convincing evidence).

Limitations of the new statute. The statute and uncodified portions of the act state several things the act does not do. First, G.S. 15A-1225.1(g) states that it does not apply if the defendant is representing him- or herself. It also provides, however, that if appointed counsel is assisting the defendant, only appointed counsel may be present where the child is testifying. This proviso may be difficult to implement in light of other criminal procedure principles. The North Carolina courts have held that a defendant must choose between representation by counsel and self-representation. There is no right to hybrid representation—that is, a defendant may not appear pro se and by counsel. When a defendant elects to represent him- or herself, the court may assign an attorney to act as “standby” counsel to advise the defendant as needed; but, the role of standby counsel is limited and ordinarily does not include cross-examining witnesses. Requiring standby counsel to step in for the defendant and conduct cross-examination, as apparently contemplated by the new statute, may violate the prohibition on hybrid representation and the defendant's decision, guaranteed by the constitution, to represent him- or herself. In juvenile delinquency proceedings, this issue will not arise because a juvenile always must appear through counsel (appointed or retained).

Second, G.S. 15A-1225.1(f)(2) states that it does not require a court in noncriminal proceedings—for example, abuse and neglect proceedings—to apply the standards required by the statute. The procedure still must comply with constitutional requirements, however. Although the Sixth Amendment right to confront witnesses, applicable to criminal and juvenile delinquency proceedings, has been held not to apply to noncriminal proceedings, the Due Process Clause still gives the respondent certain confrontation rights in such proceedings. *See, e.g., In re Pamela A.G.*, 134 P.3d 746 (N.M. 2006) (Confrontation Clause does not apply in abuse and neglect case, but Due Process requires that “parents be given a reasonable opportunity to confront and cross-examine a witness, including a child witness”).

Third, G.S. 15A-1225.1(e) states that the statute does not limit the court's authority under G.S. 15A-1225, which allows the judge to exclude (sequester) witnesses other than the defendant while other witnesses are testifying. It also permits the judge to allow the parent or guardian of a testifying child to be present even though the parent or guardian may subsequently be called as a witness.

Fourth, section 2 of the act, which is not codified in the new statute but is still part of the law enacted by the General Assembly, states that the statute does not abrogate any judicial rulings that prohibit a psychological evaluation of an unwilling witness. The North Carolina courts have held generally that a criminal defendant does not have the right, as part of criminal discovery, to require an unwilling witness to submit to a psychological examination. *See State v. Horn*, 337 N.C. 449 (1994) (trial judge may not compel a victim or witness to submit to a psychological examination without his or her consent, but trial judge may grant other relief if the person refuses to submit to a voluntary examination).

Last, G.S. 15A-1225.1(f)(1) provides that the statute does not preclude the introduction of statements of a child if permitted by law. Thus, an out-of-court statement by a child is still admissible, without the child's live testimony, if it satisfies Confrontation Clause requirements (or Due Process requirements in noncriminal proceedings) and North Carolina evidence rules.

Constitutional questions. The new statute will likely be challenged in light of the U.S. Supreme Court's interpretation of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004). Although a majority of the court in *Maryland v. Craig* approved remote testimony in specified circumstances, Justice Scalia dissented in typically strong language, arguing that the Confrontation Clause gives the defendant the right to cross-examine, face-to-face, witnesses against him or her and that remote testimony was not permissible under his reading of the Confrontation Clause. Justice Scalia later authored the *Crawford* decision, in which he led a majority of the Court in ruling that the Confrontation Clause restricted the introduction of out-of-court statements and in overruling the looser balancing test used in previous decisions. Some courts have found that *Crawford* does not bar remote testimony. *See* Jessica Smith, "Emerging Issues in Confrontation Litigation: A Supplement to *Crawford v. Washington*: Confrontation One Year Later" at 27 & nn. 135–37 (March 2007), www.sog.unc.edu/pubs/electronicversions/pdfs/crawfordsuppl.pdf. Neither the U.S. Supreme Court nor any North Carolina appellate courts have addressed the issue yet. *See also In re Court Rules*, 207 F.R.D. 89 (2002) (statement by Justice Scalia) (discussing proposed changes to Federal Rules of Criminal Procedure on remote testimony).

Assuming the new statute withstands a broad *Crawford* challenge, it also must comply with the limitations in *Maryland v. Craig*. One question is whether the statute would allow remote testimony in greater circumstances than those authorized by *Craig*. The new statute permits remote testimony by a child witness in any criminal or juvenile delinquency case in which the court finds that the child would otherwise suffer serious emotional distress, the child's ability to communicate with the trier of fact would be impaired, and other conditions of the statute are met. *Craig* used a similar test, but the case involved allegations of sexual abuse. It is an open question whether the U.S. Supreme Court would find that the defendant's Confrontation Clause rights, reinforced by *Crawford*, may be overridden in all criminal and juvenile delinquency cases and not just in a smaller subset of particularly sensitive cases.

Remote Testimony by Witnesses with Developmental Disabilities

Effective for trials and hearings held on or after December 1, 2009, S.L. 2009-514 (H 775) adds G.S. 15A-1225.2 to allow remote testimony by witnesses with developmental disabilities or mental retardation in circumstances similar to those in which child witnesses may give remote testimony, discussed above. G.S. 15A-1225.2 applies to criminal and juvenile delinquency cases. The act also adds Evidence Rule 616 to G.S. Chapter 8C, authorizing remote testimony in civil cases and special proceedings by witnesses with developmental disabilities or mental retardation. There are a few key differences between this act and the act authorizing remote testimony by child witnesses.

First, new G.S. 15A-1225.2 does not expressly require that the testimony be under oath or affirmation; however, Evidence Rule 603 requires all witnesses to testify under oath or affirmation, and the new statute contains no exemption from this requirement.

Second, the new statute requires that the judge find the conditions necessitating remote testimony by clear and convincing evidence. The statute on remote testimony by child witnesses does not specify the standard of proof.

Third, the new statute explicitly permits a party to waive the right to have counsel physically present where the witness testifies. The statute on testimony by child witnesses in criminal and juvenile delinquency cases does not contain such a provision.

Fourth, the new statute requires the court to ensure that counsel for all parties, except a pro se defendant, are physically present where the witness testifies (unless a party waives that right) and has a full and fair opportunity for examination and cross-examination of the witness. The meaning of this provision is unclear. Does it mean that the provisions allowing exclusion of the defendant do not apply to a pro se defendant? Or, does it mean that a court is allowed to exclude a pro se defendant? Other than this indirect reference to pro se defendants, new G.S. 15A-1225.2 does not address the question. New Evidence Rule 616 states that in civil cases and special proceedings, the court may limit or deny a pro se party from being physically present if the witness would suffer serious emotional distress thereby. (This provision merely restates the standard for allowing remote testimony under new Rule 616.) The statute on child witnesses, G.S. 15A-1225.1, provides that it does not apply to a pro se defendant unless the defendant is being assisted by a court-appointed attorney, in which case only the attorney may be present in the room where the witness testifies. (The potential problems with this approach are discussed above in connection with remote testimony by child witnesses.) The absence of such provisions for remote testimony by witnesses with a developmental disability or mental retardation in criminal or juvenile delinquency cases may suggest that a pro se defendant has a right to be physically present during the testimony. This interpretation would avoid the potential constitutional problems of denying a pro se defendant the right to be present during a witness's testimony.

Legislative Response to *Melendez-Diaz*

In *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527 (2009), the United States Supreme Court held that forensic laboratory reports are testimonial and thus subject to the Confrontation Clause analysis in *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, a testimonial statement by a person who does not testify at trial may not be admitted unless the person is unavailable and the defendant has had a prior opportunity for cross-examination. The effect of the *Melendez-Diaz* decision is that forensic laboratory reports and chemical analyst affidavits are inadmissible in lieu of live testimony of the analyst at trial unless one of the narrow exceptions identified in *Crawford* applies or the defendant waives his or her Confrontation

Clause rights. The Court suggested that a defendant may waive the right of confrontation under a simple notice-and-demand statute, under which a defendant would have to object before trial to the state's use of the report in lieu of live testimony. S.L. 2009-473 (S 252), effective for offenses committed on or after October 1, 2009, is North Carolina's response to the Court's suggestion, revising several statutes to create a notice-and-demand procedure. The affected statutes involve forensic lab reports, chemical analyses of blood or urine and of drugs, chain of custody statements, and chemical analysts' affidavits in district court. In essence, the statutes provide that if the state gives notice of its intent to offer the specified documents, the defendant has a certain number of days to object. If the defendant does not timely object, the state may offer the document without having the analyst testify in person. These procedures are analyzed in Jessica Smith, "The North Carolina General Assembly's Response to *Melendez-Diaz*" (Aug. 2009), www.sog.unc.edu/programs/crimlaw/melendez-diazsmithmemo.pdf.

Sentencing, Probation, and Post-trial Procedures

Sentencing

Change in points for prior record levels. Effective for offenses committed on or after December 1, 2009, S.L. 2009-555 (S 489) changes the number of points for the prior record levels used in felony sentencing. The new scheme expands the points in prior record level I to allow one prior conviction of a lower offense class and evens out the points in the remaining prior record levels, making each prior level span a four-point range—for example, 2 to 5 points for prior record level II. The prior record levels are as follows under amended G.S. 15A-1340.14(c):

- Level I: 0 to 1 point (was, 0 points)
- Level II: 2 to 5 points (was, 1 to 4 points)
- Level III: 6 to 9 points (was, 5 to 8 points)
- Level IV: 10 to 13 points (was, 9 to 14 points)
- Level V: 14 to 17 points (was, 15 to 18 points)
- Level VI: at least 18 points (was, 19 points)

Change in sentence lengths between prior record levels. Effective for offenses committed on or after December 1, 2009, S.L. 2009-556 (S 488) revises the felony sentencing punishment chart, in G.S. 15A-1340.17(c), to make the difference in sentence lengths between prior levels more proportionate. The act does this by using a 15 percent increment between prior record levels. The general effect of this approach is to shorten sentence lengths, although in some instances sentences are slightly longer. The new chart may be viewed at www.nccourts.org/Courts/CRS/Councils/spac/Documents/felonychart_12_01_09min_max_sentences.pdf.

Punishment for criminal contempt for failing to comply with child support order. G.S. 5A-12(a) specifies the punishments for criminal contempt. Unless otherwise indicated, criminal contempt is punishable by censure, imprisonment of up to 30 days, a fine of up to \$500, or any combination of the three. Effective for offenses committed on or after December 1, 2009, S.L. 2009-335 (S 817) revises G.S. 5A-12 to repeat those punishments for criminal contempt based on failing to comply with an order to pay child support and also to allow a sentence of imprisonment of up to 120 days for such conduct if the sentence is suspended on conditions reasonably related to the contemnor's payment of child support. Thus, a respondent who receives a suspended sentence

of 120 days under the new provision may be required to serve that much active time if he or she fails to satisfy the conditions of the suspended sentence.

Revised aggravating factor. Effective for offenses committed on or after December 1, 2009, S.L. 2009-460 (H 1098) adds search and rescue animals to the coverage of G.S. 15A-1340.16(d)(6a), which makes it an aggravating factor in felony sentencing if the offense was committed against or proximately caused serious harm or death to an animal listed in that subsection.

Probation, Post-release Supervision, and Parole

Several bills dealt with probation this session. Some of the summaries below were prepared by School of Government faculty member Jamie Markham, who specializes in probation issues.

Probation reform. S.L. 2009-372 (S 920), effective December 1, 2009, is the principal act addressing probation. For an analysis of the changes made by the act, see Jamie Markham, "Summary and Analysis of Session Law 2009-372 (S 920): Probation Reform" (Aug. 2009), www.sog.unc.edu/programs/crimlaw/Summary%20of%20Probation%20Reform%20_S%20920_.pdf. In short, the act does the following:

- Makes the following matters default conditions of probation:
 - Requires probationers, as a default regular condition of supervised probation, to submit to warrantless searches by a probation officer of the probationer's person, vehicle, or premises, and to submit to warrantless searches by a law enforcement officer of the probationer's person or vehicle if the officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon or explosive without court permission
 - Makes it a default regular condition of supervised probation that probationers may not use, possess, or control illegal drugs or controlled substances; associate with known or previously convicted users, possessors, or sellers; or be present at any place where drugs are sold, kept, or used
 - Sets out four new probation conditions that will apply by default to all probationers subject to intermediate punishment: perform community service at the probation officer's direction; not use, possess, or control alcohol; remain within the county of residence unless granted permission to leave; and participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer
- Clarifies existing law related to alleged violations of deferred prosecutions and to probation violation hearings held in the defendant's absence
- Gives credit for time spent on probation in tolled status when the charge that tolled the probation does not result in a conviction
- Gives probation officers limited access to certain probationers' records of juvenile adjudications for offenses that would be felonies if committed by an adult
- Removes statutory time limits for completion of community service ordered in impaired driving and shoplifting cases

Service of notice of violation of unsupervised probation. Effective December 1, 2009, S.L. 2009-411 (S 513) adds G.S. 15A-1344(b1) to require notice of a hearing in response to a violation of unsupervised probation to be made by personal delivery or by United States mail sent to the probationer's last known address. Notice by mail must be sent at least 10 days before any hearing and must state the nature of the violation. If the defendant does not appear in response to a mailed notice, the court may (1) terminate probation and enter appropriate orders to enforce any outstanding monetary obligations or (2) provide for other notice to the defendant as

authorized by Chapter 15A. The new subsection does not set out the court's options when a defendant fails to appear in response to a notice served by personal delivery. The law also amends G.S. 143B-262.4(f) to make a parallel change to the Department of Correction's community service program, clarifying that mailed notices under the program may be addressed to the last known address available to the preparer of the notice and reasonably believed to provide actual notice.

Transfer of misdemeanor to unsupervised probation. Effective July 1, 2009, S.L. 2009-275 (S 1089) amends G.S. 15A-1343(g) to allow a probation officer to transfer a misdemeanor from supervised to unsupervised probation if the probationer (1) is not subject to any special conditions of probation, (2) was placed on probation solely for the collection of court-ordered payments, and (3) is a low risk according to a Division of Community Corrections risk assessment. This transfer, which does not relieve the probationer of the obligation to make court-ordered payments, may be done without court authorization.

Pretrial and pre-hearing release for probationers. See "Pretrial and Trial Procedures: Pretrial Release," above.

Probationers on electronic house arrest. Effective for offenses committed on or after December 1, 2009, S.L. 2009-547 (S 726) amends G.S. 15A-1340.11(4a) and G.S. 15A-1343(b1)(3c) to provide that the court, in its sentencing order, may authorize a probationer on electronic house arrest (EHA) to leave the probationer's residence for employment, counseling, a course of study, vocational training, or other purposes. The amended statutes also authorize a probation officer to allow the probationer to leave the probationer's residence for purposes not authorized by the court if approved by the probation officer's supervisor.

For a discussion of the new offense of interfering with an electronic monitoring device, applicable to probationers and others, see "Pretrial and Trial Procedures: Pretrial Release," above.

Programs for community punishment sentences. Effective December 1, 2009, S.L. 2009-349 (S 1076) amends G.S. 143B-273.4 to expand eligibility for Criminal Justice Partnership Programs (CJPP) to defendants who receive a nonincarcerative community punishment sentence if, based on the results of a risk assessment, the Division of Community Corrections determines the defendant would benefit from program participation. CJPP programs, which consist of day-reporting centers, satellite substance abuse centers, and resource centers, are generally designed to address alcohol and drug dependencies and to provide structure and accountability to supervised offenders. Under existing law, only defendants sentenced to intermediate punishment and those on parole or post-release supervision have been eligible for CJPP programs. The new law retains G.S. 143B-273.4, which makes intermediate-sentenced defendants the priority population for CJPP programs. Notwithstanding the new law, a defendant sentenced to community punishment cannot be assigned to a CJPP day-reporting center (DRC) as a condition of probation at the time of sentencing, as doing so would convert the judgment into intermediate punishment under G.S. 15A-1340.11(6)(e). Under G.S. 15A-1344(a), however, a community-sentenced defendant can, upon a finding of a probation violation, be ordered to comply with conditions that would otherwise make the sentence an intermediate punishment, including assignment to a DRC. A community-sentenced defendant could, under the new law, presumably access CJPP programming other than as a condition of probation.

Probation and drug treatment courts. See "Pretrial and Trial Procedures: Jurisdiction and Venue," above.

Parole eligibility. As in past years, the Post-Release Supervision and Parole Commission is directed to analyze the amount of time each inmate who is eligible for parole has served compared

to the time served by offenders under structured sentencing for comparable crimes. For purposes of comparison, the commission must look at (1) the offense class that would have applied to the inmate's offense after the effective date of structured sentencing and (2) the maximum sentence a person in the presumptive range in prior record level VI would have received, although the maximum sentence the particular inmate could have received under structured sentencing could be lower depending on the inmate's prior record. See Section 19.8 of the Appropriations Act of 2009, S.L. 2009-451 (S 202), as amended by S.L. 2009-575 (H 836). The commission is to reinstate the parole process for each offender who has served more time than described in the act.

Postconviction Procedures

Open-file discovery in noncapital postconviction cases. G.S. 15A-1415(f) has allowed open-file discovery in capital postconviction cases—that is, cases in which a person has been convicted of a capital offense and sentenced to death. The statute gives the defendant the right to the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. See John Rubin, “1996 Legislation Affecting Criminal Law and Procedure,” *Administration of Justice Bulletin* No. 96/03 (Aug. 1996).

Effective for motions for appropriate relief made on or after December 1, 2009, S.L. 2009-517 (S 853) extends G.S. 15A-1415(f) to all defendants represented by counsel in postconviction proceedings in superior court. The statute continues to apply to capital defendants because capital postconviction proceedings are always in superior court and rarely would a capital defendant be without counsel in such proceedings. The statute also now applies to noncapital postconviction proceedings in superior court if the defendant is represented by counsel. This precondition is potentially significant in noncapital postconviction cases because, at least initially, prisoners often proceed pro se. The precondition appears to serve as a proxy for a determination that the case meets a minimum threshold of merit. Thus, counsel must agree to represent the defendant on a retained basis; Prisoners Legal Services must decide to take the case; or a court must appoint counsel under G.S. 7A-451(a)(3) and G.S. 15A-1420(b1)(2), which have been interpreted as requiring appointment of counsel for an indigent defendant when the claim is not frivolous. Until the defendant satisfies this precondition, the revised statute does not put the state to the burden of producing its files. The revised statute also states that a defendant represented by counsel in superior court is entitled to the files of prior trial and appellate counsel; however, an unrepresented defendant is likely entitled to those files in any event, as case files belong to the client, not the attorney. See 98 Formal Ethics Opinion 9 (July 16, 1998) (lawyer may not withhold file to extract payment of legal fees, retrieval costs, or copying costs).

The act requires postconviction counsel for a defendant to take an additional step before actually filing a motion for appropriate relief (MAR) in superior court. Under revised G.S. 15A-1420(a), the attorney must certify in writing that there is a sound legal basis for the motion and it is being made in good faith, that the attorney has notified the district attorney's office and attorney who initially represented the defendant of the motion, and that the attorney has reviewed the trial transcript or made a good faith determination that the relief sought does not require that the trial transcript be read in its entirety. An MAR in superior court may not be granted unless the attorney has complied with these certification requirements. The certification requirement does not apply to requests for discovery, however. Once a defendant has counsel in a postconviction case, the defendant is entitled to discovery as provided in G.S. 15A-1415(f).

Appointment of counsel for capital MARs. See “Capital Cases,” below.

Preservation of biological evidence after trial. See “Innocence Initiatives,” below.

Collateral Consequences

Licensed professional counselors. Effective October 1, 2009, S.L. 2009-367 (H 746) amends G.S. 90-340 to revise the grounds on which the Board of Licensed Professional Counselors may deny, suspend, or revoke a license or take other adverse action against a licensee. The statute has allowed adverse action based on a conviction of a felony or misdemeanor. The new statute narrows the misdemeanor ground to misdemeanors involving moral turpitude, misrepresentation, or fraud in dealing with the public, and misdemeanors relevant to the fitness to practice professional counseling or reflecting the inability to practice professional counseling with due regard for the health and safety of clients or patients. The act also adds G.S. 90-345 and G.S. 114-19.26 to enable the board to obtain a criminal history check of applicants and licensees under investigation by the board. New G.S. 90-345(c) states that a conviction is not an automatic bar to licensure but is considered by the board in conjunction with specific factors, such as the seriousness of the crime and its nexus to the job duties to be performed.

Dealing in precious metals. S.L. 2009-482 (H 1637) makes several changes to the regulations governing metal dealers, in Article 25 of G.S. Chapter 66. Effective October 1, 2009, the act amends G.S. 66-165(a) and (c) to bar a person from obtaining a permit to engage in the business of purchasing precious metals if the person has been convicted of certain offenses unless the person's citizenship rights have been restored for five years or longer. Previously, the statute barred the issuance of a permit for five years after conviction. Amended G.S. 66-165(b) also prohibits a person from working as an employee of a precious metal business if the person is subject to the above bar. The amended subsection requires employees to submit to a criminal history record check as a condition of employment.

Bail bondsmen and runners. Effective August 28, 2009, S.L. 2009-536 (S 458) amends the licensing requirements for bail bondsmen and runners in Article 71 of G.S. Chapter 58. Among other things, it adds G.S. 58-71-75 to require a criminal history check every other year of bail bondsmen and runners applying to renew their licenses. It also revises G.S. 58-71-80, which provides several discretionary grounds for the commissioner of insurance to revoke or deny a license, to add as a mandatory revocation or denial ground a conviction on or after October 1, 2009, of a misdemeanor drug offense under the North Carolina Controlled Substances Act, Article 5 of G.S. Chapter 90. The disqualification applies to a conviction within 24 months of the license application. The revised statute does not cover misdemeanor violations of other articles under G.S. Chapter 90, such as a drug paraphernalia violation under Article 5B of G.S. Chapter 90. Conviction of a felony remains a mandatory ground for revocation or denial of a license. For additional changes to the statutes governing bail bondsmen and runners, see S.L. 2009-566 (H 1166).

Other entities regulated by insurance commissioner. Effective for license applications on or after October 1, 2010, S.L. 2009-566 (H 1166), as amended by S.L. 2009-536 (S 458), adds G.S. 58-33-48 to require a criminal history record check for applicants for an insurance producer license. Effective October 1, 2009, the act amends G.S. 58-70-40(b), 58-69-60(a), and 58-35-22(a) to require collection agencies and individual proprietors, officers, and partners of motor clubs and insurance premium finance companies to report to the insurance commissioner any conviction of a crime involving dishonesty or breach of trust.

Expunctions

Two acts address expunctions of criminal proceedings. One act, S.L. 2009-577 (H 1329), consolidates the expunction statutes, clarifies some of the circumstances in which expunction is available, and expands in limited respects the opportunities for expunction. These changes apply

to expunctions involving proceedings against adults, not expunctions of juvenile proceedings, which continue to be governed by G.S. Chapter 7B (G.S. 7B-3200 through G.S. 7B-3202). The provisions are effective for petitions for expunctions filed on or after December 1, 2009. The different types of expunction available in North Carolina are discussed in John Rubin, "Expunction Guide: Types, Requirements, and Impact of 2009 Legislation," *Administration of Justice Bulletin* No. 2009/10 (Dec. 2009), www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0910.pdf.

The other act, S.L. 2009-510 (S 262), primarily addresses giving notice of expunctions to entities that have records to be expunged. This act was ratified by the General Assembly on August 11, 2009, the same date as S.L. 2009-577, and it changes in somewhat inconsistent ways some of the same statutes. For now, the inconsistency is of no effect because the second act is not effective until October 1, 2010. Because the General Assembly likely will revisit the provisions of S.L. 2009-510 before it takes effect, it is not summarized here.

Capital Cases

Racial Justice Act. Potentially one of the most significant pieces of criminal law legislation passed in 2009 is also one of the shortest, the North Carolina Racial Justice Act, S.L. 2009-464 (S 461), codified in new Article 101 of G.S. Chapter 15A (G.S. 15A-2010 through G.S. 15A-2012). G.S. 15A-2010 states the basic requirement of the legislation: "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." The remaining sections set forth the procedures for implementing this prohibition and are briefly described here.

New G.S. 15A-2011(a) states that a finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose a death sentence in the county, the prosecutorial district, the judicial division, or the state at the time the death sentence was sought or imposed. New G.S. 15A-2011(b) states that the evidence relevant to establishing that race was a significant factor may include statistical evidence and sworn testimony of one or more of the following: (1) that death sentences were sought or imposed significantly more frequently on individuals of one race than on another, (2) that death sentences were sought or imposed significantly more frequently as punishment for capital offenses against individuals of one race than on another, and (3) that race was a significant factor in decisions to exercise peremptory challenges during jury selection. The defendant has the burden of proving that race was a significant factor. The state may offer evidence in rebuttal of the defendant's claims or evidence, including statistical evidence.

New G.S. 15A-2012 establishes the hearing procedure for claims. G.S. 15A-2012(a) states that the defendant must raise the claim at the pretrial conference required by Rule 24 of the General Rules of Practice for Superior and District Courts or in postconviction proceedings. If the court finds that race was a significant factor as described in the statute, the court must order that a death sentence not be sought or that a death sentence that has been imposed be vacated and the defendant resentenced to life imprisonment without the possibility of parole. G.S. 15A-2012(b) states that notwithstanding the time limits for postconviction motions in Article 89 of G.S. Chapter 15A, a defendant may seek relief from a death sentence on the grounds set forth in the Racial Justice Act.

The act states that it is effective August 11, 2009, and applies retroactively. For defendants under a death sentence imposed before August 11, 2009, motions must be filed within one year of

August 11, 2009. For defendants whose death sentence is imposed on or after August 11, 2009, motions must be filed as provided in the Racial Justice Act.

Right to visit capital clients following court decision affecting their cases. G.S. 7A-451 describes the scope of entitlement to counsel in North Carolina, including in capital cases. Effective June 11, 2009, S.L. 2009-91 (H 1037) adds G.S. 7A-451(e1) to give defendants who have been sentenced to death the right to meet with their counsel when the North Carolina Supreme Court or any federal court files an opinion affirming or reversing the trial court in a case in which the defendant was sentenced to death or regarding a postconviction petition for relief from a death sentence. The new statute requires the Department of Correction (DOC), on the day the opinion or decision is filed or issued, to permit counsel to visit the defendant at the institution at which the defendant is confined for not less than one hour during regular business hours. The visit may take place outside regular business hours if the institution's administrator and the defendant's counsel agree. G.S. 7A-451(e1) also states that it does not limit the opportunity for counsel to consult in other circumstances with clients who have been sentenced to death and does not mandate that DOC permit a visit by an attorney if there is an emergency at the institution at which the defendant is confined.

Appointment of counsel for capital MAR. G.S. 7A-451(c) gives an indigent defendant who is under a sentence of death the right to have counsel appointed to litigate a motion for appropriate relief. The statute has required the defendant to apply to the superior court to determine whether he or she is indigent and entitled to counsel, although those findings were likely made at trial and on appeal and counsel then was assigned by the Office of Indigent Defense Services (IDS). Effective July 31, 2009, S.L. 2009-387 (H 506) amends G.S. 7A-451(c) and (c1) to have a defendant under sentence of death apply directly to IDS for counsel and to authorize IDS to appoint counsel if the defendant was previously adjudicated indigent for trial or direct appeal. If the defendant was not previously adjudicated indigent, IDS must request the superior court in the district where the defendant was indicted to determine whether the defendant is indigent.

Sex Offenders

Compared to previous sessions, the General Assembly enacted relatively little legislation on sex offenders in 2009. Next year may see greater changes. In 2006 Congress enacted the Adam Walsh Child Protection and Safety Act. Title I of the Adam Walsh Act is the Sex Offender Registration and Notification Act, which contains a new set of standards for sex offender registration. States had until July 27, 2009, to implement the standards, with up to two one-year extensions, or risk losing 10 percent of their Byrne Justice Assistance Grant funds. The 2009 deadline has been extended to July 27, 2010. For a discussion of the federal standards, see John Rubin, "2008 Legislation Affecting Criminal Law and Procedure," *Administration of Justice Bulletin* No. 2008/06, at pp. 10–12 (Nov. 2008), www.sog.unc.edu/programs/crimlaw/aoj.htm. The legislation enacted this year on sex offenders is summarized below.

No commercial driver's license to drive commercial passenger vehicle or school bus. S.L. 2009-491 (H 1117) adds G.S. 14-208.19 and adds and amends new statutes in G.S. Chapter 20 to disqualify a person who is required to register as a sex offender from driving a commercial motor vehicle that requires a commercial driver's license with a P or S endorsement—that is, an endorsement that qualifies the person to drive a commercial passenger vehicle or school bus. The new and amended statutes prohibit the issuance or renewal of such a license if the person is required to

register as a sex offender. The disqualification lasts for the length of the person's registration, and a person commits a Class F felony if he or she drives a commercial passenger vehicle or school bus and does not have a valid license because he or she is required to register as a sex offender.

New G.S. 20-37.14A requires the Division of Motor Vehicles (DMV) to search the statewide registry and National Sex Offender Public Registry to determine if an applicant for the license is required to register as a sex offender under North Carolina law. If DMV is unable to access the registries and the person is otherwise qualified to obtain the license, DMV must issue one based on the person's affidavit that he or she does not appear on either registry. A person who makes a false affidavit or knowingly swears or affirms falsely to any matter or requirements in G.S. 20-37.14A is guilty of a Class I felony under that statute.

The disqualification applies to anyone who is registered on or after December 1, 2009, except that it does not apply to a person who was issued a license before December 1, 2009, until the license expires and as long as the person does not commit a subsequent offense requiring registration. The criminal penalties for violations apply to offenses committed on or after December 1, 2009.

Permanent no contact order. Effective for offenses committed on or after December 1, 2009, S.L. 2009-380 (H 1255) adds G.S. 15A-1340.50 to authorize the court, at sentencing of a person convicted of an offense subject to sex offender registration, to impose a permanent no contact order prohibiting the sex offender from having future contact with the victim. The Administrative Office of the Courts has developed a form for this purpose, AOC-CR-620 (Dec. 2009), available at www.nccourts.org/Forms/FormSearch.asp. The sentencing judge must determine whether to issue such an order if the prosecutor requests one and must give the defendant the opportunity to show cause why an order should not issue. The victim has the right to be heard at the show cause hearing. If the judge finds that reasonable grounds exist for the victim to fear any future contact with the defendant, the judge must issue the no contact order; however, the judge may choose among different forms of relief identified in the statute (e.g., not following or having contact with the victim). The court may rescind the order on the victim's request or defendant's motion if the court finds that reasonable grounds for the victim to fear future contact with the defendant no longer exist. The new statute requires law enforcement officers to arrest a person, with or without a warrant, if they have probable cause to believe the person knowingly violated a permanent no contact order. A knowing violation is a Class A1 misdemeanor.

Sex offenders placed on probation or post-release supervision currently have as a mandatory condition of supervision that they "[n]ot communicate with, be in the presence of, or found in or on the premises of the victim of the offense." G.S. 15A-1343(b2)(3), G.S. 15A-1368.4(b1)(3). A lifetime no contact order, in effect, extends that prohibition beyond the period of formal supervision, albeit with a different enforcement mechanism. If considered a form of punishment, such an order would be for longer than the statutory maximum for the underlying offense. *Cf.* *State v. Orduna*, 129 Wash. App. 1026 (2005) (unpublished) ("The State concedes that the no-contact order erroneously extended beyond the statutory maximum for the crime.").

Indecent liberties with student and sex offender registration. Effective for individuals convicted or released from a penal institution on or after December 1, 2009, S.L. 2009-498 (H 209) amends G.S. 14-208.6(5) to add indecent liberties with a student as an offense designated as a "sexually violent offense" and therefore subject to sex offender registration. The addition of this offense likely eliminates any question about whether the offenses of rape and sex offense against a student are subject to sex offender registration. G.S. 14-208.6(5) has listed a violation of G.S. 14-27.7 (intercourse and sexual offense with certain victims) as a sexually violent offense, but when the

General Assembly made a violation of G.S. 14-27.7 subject to registration, that statute did not include any offenses against students. The General Assembly later amended G.S. 14-27.7 to add a new subsection (b) to that statute creating the offenses of rape and sex offense against a student, but G.S. 14-208.6(5) was not amended, leaving it unclear whether the General Assembly intended to make the new offenses subject to registration. Having designated the less serious offense of indecent liberties with a student as an offense subject to registration, the General Assembly has apparently ratified the interpretation that the more serious crimes of rape and sex offense against a student are subject to registration.

Appointment of counsel at satellite monitoring “bring-back” hearings. New G.S. 14-208.40B provides a procedure for returning to court a defendant convicted of an offense subject to registration if a court has not determined whether the defendant is required to submit to satellite monitoring. The statute did not explicitly give an indigent defendant the right to appointed counsel at these “bring-back” hearings, although a strong argument could be made that the General Assembly intended for counsel to be appointed and most courts have been appointing counsel. Effective July 31, 2009, S.L. 2009-387 (H 506) amends G.S. 7A-451(a) and G.S. 14-208.40B to give indigent defendants the right to counsel at bring-back hearings. As in other cases involving appointment of counsel, the court determines whether the person is entitled to counsel and, if so, assigns counsel in accordance with any rules adopted by the Office of Indigent Defense Services.

The act also amends G.S. 14-208.40B to provide that the district attorney, representing DOC, is responsible for scheduling bring-back-hearings. The statement that the district attorney represents DOC is somewhat unusual in that the district attorney ordinarily does not represent a specific organization or individual. More likely, the language was intended to convey that on request of DOC, which determines whether an offender is potentially subject to monitoring and needs to be returned to court, the district attorney is responsible for moving to schedule and handling the proceeding.

Solicitation of child by computer to commit an unlawful sex act. G.S. 14-202.3 has made it a felony (Class H or G depending on the circumstances) for a person 16 years of age or older to solicit a child by computer to engage in an unlawful sex act if the child is under 16 years old and at least three years younger than the defendant (or the defendant believed that to be so). Effective for offenses committed on or after December 1, 2009, S.L. 2009-336 (S 65) amends G.S. 14-202.3 to provide that a person commits the offense if the means of solicitation is a computer or any other device of electronic storage or transmission. The amended statute also makes it an offense only if the child is at least five, rather than at least three, years younger than the defendant. By changing the age differential, the act coordinates the elements of the offense, one of which is solicitation to commit an “unlawful” sex act, with North Carolina law on sex offenses. No North Carolina statutes make it unlawful for a person to engage in a sex act with a person under 16 when the age difference is merely three years (other than indecent liberties between children, which may serve as the basis of a juvenile petition only, not a criminal prosecution, because both parties must be under 16). The five-year age differential matches the age differential for indecent liberties under G.S. 14-202.1.

Protection against civil liability for commercial social networking sites. In 2008 the General Assembly enacted G.S. 14-202.5, to take effect May 1, 2009, prohibiting individuals required to register as sex offenders from accessing commercial social networking sites within the meaning of that statute. See S.L. 2008-218 (S 132). The General Assembly also enacted protections from civil liability for commercial social networking sites that comply in good faith with G.S. 14-208.15A, which imposes certain reporting requirements. See G.S. 14-208.15A(f) (describing immunity).

The General Assembly provided in G.S. 14-202.5A that a commercial social networking site could be held civilly liable if it failed to make reasonable efforts to prevent a registered sex offender from accessing its website. Implicitly, that statute precluded civil liability if the commercial site made reasonable efforts. Effective May 1, 2009, S.L. 2009-272 (H 1267) makes that protection explicit. The amended statute states that a commercial networking site that complies with G.S. 14-208.15A or makes other reasonable efforts to prevent a registered sex offender from accessing its website is not subject to civil liability. The statute still appears to allow a civil suit if a commercial networking site fails to take those steps.

Ban on sex offenders in locations used primarily by minors. In 2008 the General Assembly enacted a broad ban on where sex offenders may be present. The statute, G.S. 14-208.18, contained a technical flaw, stating that a person is subject to the ban “if the offense requiring registration is described in subsection (b) of this section.” Subsection (c) actually describes the covered offenses. Effective August 28, 2009, Section 5 of S.L. 2009-570 (S 220) changes the reference to subsection (c). For a discussion of the ban, see John Rubin, “2008 Legislation Affecting Criminal Law and Procedure,” *Administration of Justice Bulletin* No. 2008/06, at 5–6 (Nov. 2008), www.sog.unc.edu/programs/crimlaw/aoj.htm.

Innocence Initiatives

Preservation of Biological Evidence

Effective December 1, 2009, S.L. 2009-203 (H 1190), as amended by S.L. 2009-570 (S 220), makes several changes to the statutes governing the preservation of DNA and biological evidence and the defendant’s access to that evidence, in G.S. 15A-266 through G.S. 15A-270.1.

Definitions. The act adds a definition of *custodial agency* in G.S. 15A-266.2, defining it as a governmental entity in possession of evidence collected as part of a criminal investigation or prosecution. This new term is substituted for the undefined term “governmental entity” throughout the preservation statutes. For example, the new term includes the clerk of superior court when biological evidence is offered in a criminal proceeding. The duties of the clerk are discussed further below.

Pretrial discovery. Revised G.S. 15A-267 gives criminal defendants additional pretrial discovery rights. G.S. 15A-267(a) states that a defendant has a right of access, before trial, to a complete inventory of all physical evidence collected in connection with the investigation. Revised G.S. 15A-267(c) provides that upon a defendant’s motion that satisfies the requirements of that subsection, the court must (rather than “may” as under the previous version of the statute) order the State Bureau of Investigation (SBI) to perform DNA testing on biological material and, in specified cases, search the CODIS (Combined DNA Index System), the FBI’s national DNA database.

Preservation of biological evidence. G.S. 15A-268 has required that the government entity with custody of evidence preserve any physical evidence reasonably likely to contain biological evidence. The statute is amended to provide more specifics on implementation of this requirement.

New subsection (a2) requires the SBI to promulgate, no later than January 1, 2010, minimum guidelines for retaining and preserving evidence, which the SBI must review and update at least every two years thereafter. Law enforcement agencies and the Conference of Clerks of Superior Court must ensure that employees with responsibility for maintaining evidence receive the guidelines.

New subsection (a3) provides that when physical evidence is offered or admitted in a criminal proceeding, the presiding judge must ask the State and the defendant about the identity of the collecting agency, whether the evidence is reasonably likely to contain biological evidence, and whether the biological evidence is relevant to establishing the perpetrator's identity. If either party asserts that the evidence may have biological evidentiary value and the court so finds, the court shall instruct that the evidence be so designated in the court's records and that the evidence be preserved as required by G.S. 15A-268.

New subsection (a4) provides that if the court has designated evidence as biological evidence pursuant to subsection (a3), the clerk of superior court must preserve the evidence and, upon conclusion of the clerk's role as custodian, return the evidence to the collecting agency in a manner that assures chain of custody. The Administrative Office of the Courts (AOC) has advised clerks that if they do not have the capacity to preserve biological evidence, they may make a motion to the court, pursuant to Rule 14 of the General Rules of Practice for the Superior and District Courts, to return the evidence to the collecting agency.

New subsection (a5) provides that a defendant may not waive the duty to preserve without a court proceeding. *But compare* G.S. 15A-268(b) (allowing early disposal of evidence by custodian in specified circumstances, without court proceeding, if defendant does not respond to notice of intent to dispose of evidence).

New subsection (a7) provides that the custodial agency must prepare an inventory of biological evidence preserved in the defendant's case if requested by the defendant.

Length of preservation. Revised subsection (a6), formerly subsection (a2), sets forth the following preservation periods.

- In all cases in which a person is sentenced to life without parole, the evidence must be preserved until the person dies. This requirement applies regardless of whether the person was convicted on a guilty plea or after trial.
- Preservation is required for any homicide, sex offense, assault, kidnapping, burglary, robbery, arson, or other burning for which a Class B1 through E felony punishment is imposed. Thus, the statute does not require preservation for Class B1 through E felonies that typically would not involve biological evidence—for example, a Class C felony of embezzlement. The statute also does not cover lower level felonies; however, because the revised language is keyed to whether a person receives a Class B1 through E punishment, it appears to apply to a person sentenced as an habitual felon—which carries a Class C punishment—for a conviction of a lower level felony involving one of the specified offenses, such as a Class H felony assault. The periods of preservation are as follows.
 - For cases in which a person is convicted after a trial, the evidence must be preserved during the period of incarceration and any mandatory supervised release, including any period of sex offender registration, which in some instances could be for the person's life. (The General Assembly had stated, in repealed subsection (a2), that for conviction of an offense requiring sex offender registration, biological evidence had to be preserved during the period of incarceration and any period of mandatory supervised release or probation. The revised wording makes it clearer that the preservation requirement applies during the period of registration as well as during incarceration and any post-release supervision.)
 - For cases in which a person is convicted on a guilty plea, the evidence must be preserved for the earlier of three years from the date of conviction or until the person is released.

- Biological evidence collected as part of a criminal investigation of a homicide or rape in which no charges are filed must be preserved for the time that the crime remains unsolved. Because the term “rape” in North Carolina’s criminal statutes refers to vaginal intercourse only, technically the revised statute does not mandate that biological evidence involved in other sexual acts be preserved, but investigating agencies may certainly do so.

Early disposal of evidence. The governmental entity in possession of the evidence (now, custodial agency) has been allowed to dispose of evidence before the expiration of the required period under certain conditions. S.L. 2009-203 modifies the pertinent procedures, in G.S. 15A-268(b) through (e). Most importantly, a custodian may dispose of evidence in the circumstances described in G.S. 15A-268(b), without petitioning the court, if the defendant does not timely respond to a notice of intent to dispose of the evidence. If the defendant files a timely written request that the evidence not be destroyed, the court must hold a hearing to determine whether the evidence meets the criteria in G.S. 15A-268(d) and may be destroyed. G.S. 15A-268(e) provides that if the court allows early disposal of the evidence on the ground that the evidence has value for biological analysis, but it is of a size, bulk, or physical character as to render retention impracticable or it should be returned to its rightful owner, the court must require the custodial agency to return the evidence to the collecting agency. Before disposing of the evidence or returning it to its rightful owner, the collecting agency must take reasonable measures to preserve a portion of evidence likely to contain biological evidence, in a manner consistent with SBI guidelines and in a quantity sufficient to permit DNA testing. The court also may allow the defendant the opportunity to preserve the evidence.

Notwithstanding the above, new G.S. 15A-268(h) requires the retention of all records relating to the possession, control, storage, and destruction of evidence subject to preservation requirements.

Failure to preserve evidence when required. New G.S. 15A-268(g) provides that if an entity is asked to produce evidence that is required to be preserved and cannot do so, the chief evidence custodian of the custodial agency must provide an affidavit describing the efforts taken to locate the evidence and affirming that the evidence could not be located. If evidence has been destroyed, the court may conduct a hearing to determine whether obstruction of justice and contempt proceedings are in order. If the court finds that the destruction violated the defendant’s due process rights, the court shall enter an appropriate remedy, which may include dismissal of the charges.

New G.S. 15A-268(i) makes it a Class I felony in a noncapital case and Class H felony in a first-degree murder case for a person to

- knowingly and intentionally
- destroy, alter, conceal, or tamper with
- evidence required to be preserved under G.S. 15A-268
- with the intent to impair the integrity of the evidence, prevent it from being subject to DNA testing, or prevent production or use of the evidence.

Postconviction DNA testing. G.S. 15A-269 has allowed a defendant to make a motion for DNA testing before the trial court that entered the judgment of conviction against the defendant. As revised, the statute also provides that the defendant may move for the results to be searched against CODIS. The revised statute also provides that if the court orders testing, it is to be

conducted by an SBI-approved testing facility, agreed upon by the petitioner and the State and approved by the court.

In addition, amended G.S. 15A-269(c), which has required appointment of counsel for an indigent person who brings a motion for DNA testing, provides further that if the petitioner has filed pro se, the court must appoint counsel upon a showing that DNA testing may be material to the petitioner's claim of wrongful conviction. This addition appears to modify the circumstances under which the court must appoint counsel for an indigent person who makes a motion for DNA testing.

For further discussion of the procedures governing postconviction DNA testing, see Jessica Smith, "Post-Conviction Motions for DNA Testing and Early Disposal of Biological Evidence" (Oct. 2009), www.sog.unc.edu/faculty/smithjess/survival_guide.html.

Appeal. G.S. 15A-270.1 gives the defendant the right to appeal an order denying a motion for DNA testing, including by interlocutory appeal. As revised, the statute requires the court to appoint counsel for an indigent defendant.

Study committee. The act establishes the Joint Select Committee, with members appointed as provided in the act, to review matters related to the preservation of DNA and biological evidence and to report to the General Assembly by April 1, 2010.

Immunity in Innocence Commission Proceedings

Effective July 27, 2009, S.L. 2009-360 (H 937) adds new G.S. 15A-1468(a1) on immunity in proceedings before the North Carolina Innocence Commission. The title of the act states that it is "to provide that the North Carolina Innocence Commission may compel the testimony of a witness and the Commission Chair may grant limited immunity to the witness from prosecution for previous false statements made under oath in prior proceedings." The statute itself states essentially the following:

- The commission may compel the testimony of any witness.
- If a witness asserts his or her privilege against self-incrimination, the commission chair, in the chair's judicial capacity, may order the witness to testify or produce other information the chair determines is likely material to reach a correct factual determination in the case at hand.
- The commission chair may not order the witness to testify or produce other information that would incriminate the witness in the prosecution of any offense other than an offense for which the witness is granted immunity.
- The commission's order shall prevent a prosecutor from using the compelled testimony, or evidence derived therefrom, to prosecute the witness for previous false statements made under oath by the witness in prior proceedings.
- The prosecutor has a right to be heard by the commission chair before the chair issues the order.
- The immunity applies throughout all proceedings before the commission.
- The immunity shall not prohibit prosecution of statements made under oath unrelated to the commission's formal inquiry, prosecution of false statements made under oath during commission proceedings, or prosecution for any other crimes.

The scope of the immunity granted under these provisions appears limited or at least is not entirely clear, which may cause a witness before the commission, or counsel advising a witness, to proceed cautiously notwithstanding the new statute. The statute states in one place that the

commission chair may not order the witness to testify other than for “an offense for which the witness is granted immunity.” This language could be construed as granting the witness immunity for the offense under consideration—what is called “transactional” immunity. Such immunity would preclude the state altogether from prosecuting the witness for the offense under consideration. Other language, however, indicates that the General Assembly did not intend such a broad grant of immunity. The statute states elsewhere that the commission’s immunity order precludes the prosecutor from using the testimony to prosecute the witness for previous false statements in a previous proceeding. The act’s title states the same. The last clause of the statute states further that the immunity does not preclude the prosecution of other crimes. These provisions indicate that the witness does not receive immunity from prosecution for the offense under consideration (transactional immunity) or even immunity from use of the witness’s testimony in a later prosecution for the offense under consideration or other offenses—what is called “use” immunity. Rather, the new statute may only provide the witness immunity from prosecution for perjury in prior proceedings related to matters that are the subject of the commission’s inquiry. The U.S. Supreme Court has held that a person may not be compelled to relinquish his or her Fifth Amendment right against self-incrimination without at least receiving use immunity. *See Kastigar v. United States*, 406 U.S. 441 (1972).

The U.S. Supreme Court also has held that if a public authority compels a person to provide incriminating information under threat of sanction for not answering, the person receives use immunity by operation of law. *See Garrity v. New Jersey*, 385 U.S. 493 (1967). A witness who complied with a commission order to answer might be able to argue that he or she was compelled to answer and by operation of law received use immunity. The witness would be on firmer ground, however, if he or she declined to answer and the commission applied to the superior court to enforce its order. The statute does not specifically authorize the commission to seek superior court enforcement of its order, but that procedure is generally available to commissions and agencies. (The new statute states that the commission chair, in his or her judicial capacity, may order a witness to testify, but it is unclear whether the chair is authorized to hold a witness in contempt for refusing to comply with such an order.) In a proceeding before superior court, the commission and the witness could obtain clarification of the immunity the witness receives under the statute and the extent to which the witness must provide information to the commission. Alternatively, if directed to answer by the commission, the witness could initiate an application to superior court for clarification of his or her obligations.

Victims’ Rights

Forensic medical examination and benefits for victims of rape or sex offenses. G.S. 143B-480.2 has provided state funds, administered by the Assistance Program for Victims of Rape and Sex Offenses (Program), for forensic medical examinations of victims of rape or sexual offense, subject to certain limitations. The victim had to report the sexual assault to law enforcement and obtain an examination within 72 hours of the assault’s occurrence. And, payment to the examiner from state funds was limited to \$800, with the victim responsible for any additional costs. Effective July 27, 2009, S.L. 2009-354 (H 1342) repeals G.S. 143B-480.2 and rewrites G.S. 143B-480.1 to eliminate charges to the victim for these forensic medical examinations. Revised G.S. 143B-480.1 provides that a medical provider who accepts payment from the Program for a sexual assault examination may charge up to \$800 but that amount constitutes payment in full and the

provider may not charge the victim any additional amounts. The revised statute also contains no time limitation on the reporting of or examination for a sexual assault.

Repealed G.S. 143B-480.2 also authorized payments to victims for immediate and short-term medical expenses, ambulance services from the place of attack to a treatment provider, and mental health services. These provisions are not part of the statutes revised by the act. Revised G.S. 143B-480.1 directs the medical provider who performs the forensic examination to encourage victims to submit an application to the Crime Victims Compensation Commission for consideration of medical expenses beyond the forensic examination.

Compensation for crime victims. Effective July 27, 2009, S.L. 2009-354 (H 1342) amends G.S. 15B-10 to increase from \$7,500 to \$12,500 the amount the director of the Crime Victims Compensation Commission may award to a crime victim. For amounts exceeding \$12,500, the director makes a recommendation to the commission, which decides the amount of the award.

The act also amends G.S. 15B-11(b1) to require the director or commission to deny a claim upon finding contributory negligence by the victim that was a proximate cause of the person becoming a victim; however, contributory negligence that was not a proximate cause of the person becoming a victim is not an automatic basis for denial of a claim.

Financial identity theft protections. S.L. 2009-355 (S 1017), as amended by S.L. 2009-550 (H 274), adds Article 7, the Credit Monitoring Services Act, to G.S. Chapter 75 and makes several changes to G.S. 75-63 (security freeze on consumer's credit report) and G.S. 75-65 (protection from security breaches). As part of the act, new G.S. 15B-26 provides, effective October 1, 2009, that a creditor owed money for services provided to a victim as a result of a crime inflicted on the victim may not communicate any information about the debt to a consumer reporting agency while an application for an award from the Crime Victims Compensation Commission is pending. The act also amends G.S. 132-1.10, which protects against the disclosure of Social Security numbers and other personal identifying information, to provide that clerks of court and registers of deeds may, without a request from the affected person, remove Social Security and driver's license numbers from records posted on their public websites.

Law Enforcement Procedures

Statistics on use of deadly force by law enforcement. S.L. 2009-106 (H 266) requires the Division of Criminal Statistics of the North Carolina Department of Justice to collect, maintain, and publish annually information on the number of deaths from the use of deadly force by state or local law enforcement officers in the course and scope of their official duties, organized by law enforcement agency. The act applies to uses of deadly force resulting in death that occur on or after January 1, 2010.

Collection of traffic law enforcement statistics to prevent racial profiling. G.S. 114-10.01 requires the Division of Criminal Statistics to collect information on traffic law enforcement by law enforcement officers. The statute applies to state law enforcement officers, law enforcement officers of county sheriffs' and police departments, and law enforcement officers of municipal police departments over a certain size. Effective January 1, 2010, S.L. 2009-544 (S 464) amends the statute to provide that any agency subject to the statute that fails to submit the required information within 60 days of the close of each month is ineligible to receive any law enforcement grants available through the state until the information is submitted.

Care of minors after arrest of adult. Effective January 1, 2010, S.L. 2009-544 (S 464) adds G.S. 15A-401 to provide that when a law enforcement officer arrests an adult who is supervising minor children present at the time of the arrest, the minor children must be placed with a responsible adult approved by a parent or guardian of the children. If it is not possible to place the minor children in that manner, the officer must contact the county department of social services.

Dissemination of criminal intelligence information to schools. Effective December 1, 2009, S.L. 2009-93 (H 1327) adds G.S. 14-50.27A to allow a law enforcement agency to disseminate an assessment of criminal intelligence information to the principal of a public or private school when necessary to avoid imminent danger to the life of a student or employee or to public school property pursuant to 28 C.F.R. § 23.20. That section of the code of federal regulations addresses criminal intelligence systems operated with the support of federal funds, and it allows the dissemination of criminal intelligence information to government officials and certain other individuals when necessary to avoid imminent danger to life or property.

Emergency measures. G.S. 14-288.12 permits municipalities to enact ordinances allowing prohibitions and restrictions during a state of emergency. Effective June 19, 2009, S.L. 2009-146 (S 256) revises G.S. 14-288.12(b)(1) to provide that such prohibitions and restrictions may include compelling the evacuation of people from any stricken or threatened area within the governing body's jurisdiction.

Mutual aid agreements. Effective June 11, 2009, S.L. 2009-94 (H 1109) adds G.S. 160A-288(d)(5) to allow a company police agency of the Department of Agriculture and Consumer Services to enter into mutual aid agreements with other law enforcement agencies.

Private protective services. Chapter 74C of the General Statutes regulates private protective services such as security guards, private investigators, and other occupations described in the chapter. Effective October 1, 2009, S.L. 2009-328 (S 584) makes several changes to the chapter. Among other things, it provides in G.S. 74C-3(b) that a person engaged in computer or digital forensic services or network or system vulnerability testing is not subject to the chapter's licensing and other requirements. It amends G.S. 74C-7, which gives the attorney general the power to investigate wrongdoing by individuals licensed under the chapter. It makes such an investigation confidential and provides that it is not a public record under G.S. 132-1 until the investigation is complete and the report is presented to the Private Protective Services Board (Board). It recodifies in G.S. 74C-8.1 the criminal record check requirements for performing private protective services and requires the Board to keep confidential criminal record information it obtains from the Department of Justice. (It makes the same changes to the criminal record check requirements in G.S. 74D-2.1 for alarm systems businesses. A separate act, S.L. 2009-557 (S 1073), makes other changes to the Alarm Systems Licensing Act in Chapter 74D.) It amends G.S. 74C-12(a) to authorize the Board to deny, suspend, or revoke a license, registration, or permit on additional grounds. It also amends G.S. 74C-13(a) to require a licensee to register any individual carrying a firearm within 30 days of employment by the licensee and requires the individual to receive any training required by the Board before engaging in private protective services.

Juveniles

The General Assembly passed several acts relating to juveniles. Provisions that may have an impact in criminal proceedings are discussed below. For a full discussion of legislation relating to juveniles, see Janet Mason, "2009 North Carolina Legislation: Juvenile Law," *Juvenile Law Bulletin* No. 1 (Sept. 2009), www.sog.unc.edu/pubs/electronicversions/pdfs/jvlb0901.pdf.

Access to confidential information held by social services departments. G.S. 7B-302 has provided that social services departments must maintain the confidentiality of information they receive in connection with the receipt and assessment of reports of child abuse, neglect, or dependency. Effective October 1, 2009, S.L. 2009-311 (H 1449) adds subsection (a1) to detail the exceptions to confidentiality. Among other things, it provides that a juvenile's guardian ad litem or juvenile, including a juvenile who has reached age 18 or been emancipated, has the right to examine the information on request. See G.S. 7B-302(a1)(2). It also provides that a district or superior court judge presiding over a criminal or delinquency case must conduct an in camera review before releasing to the defendant or juvenile in that case any confidential records maintained by the department of social services. See G.S. 7B-302(a1)(4). This requirement does not apply to records the defendant or juvenile is otherwise entitled to under G.S. 7B-302(a1)(2). The review provisions implicitly confirm that when a criminal or juvenile delinquency case is pending, the criminal defendant or respondent juvenile has the right to request a judge presiding in that case to order release of information; the criminal defendant or respondent juvenile need not obtain an order of the district court in which the particular child abuse, neglect, or dependency matter is or was heard.

Access to juvenile court records. Effective December 1, 2009, as described in the act, S.L. 2009-545 (S 984) revises G.S. 7B-3000 to broaden access to court records of juvenile delinquency proceedings, providing greater access by law enforcement, prosecutors, magistrates, and the courts in specified circumstances. The revised statute and revised G.S. 7B-3001 also clarify that the juvenile's attorney as well as the juvenile have a right to examine and obtain, without a court order, copies of court records and law enforcement records and files concerning the juvenile. S.L. 2009-372 (S 920), effective December 1, 2009, as described in the act, further rewrites G.S. 7B-3000(b) to allow probation officers in the Division of Community Corrections of the Department of Correction to examine and obtain copies of the written parts of a juvenile's record in specified circumstances. These changes are discussed further in the legislative summary by Janet Mason, cited above.

Duty to report abuse, neglect, and dependency. Effective October 1, 2009, S.L. 2009-311 (H 1449) adds G.S. 7B-1700.1 to a part of the Juvenile Code relating to juvenile delinquency proceedings (Article 17, Screening of Delinquency and Undisciplined Complaints). The new statute provides that if a juvenile court counselor has cause to suspect that a juvenile is abused, neglected, or dependent or has died as the result of maltreatment, the juvenile court counselor must make a report to the county department of social services as required by G.S. 7B-301. Although inserted among the statutes on juvenile court counselors' responsibilities, the new statute also states that it applies to "any person." This provision is potentially problematic if construed as applying to an attorney representing a juvenile in a delinquency proceeding, as information gained in the course of representation is ordinarily confidential. By referring to G.S. 7B-301, the general duty-to-report statute, the new statute may incorporate the statutory exception in G.S. 7B-310 for information gained in the course of the attorney-client privilege, although the literal language of that statute applies to information gained in the course of an abuse, neglect, or dependency case. An attorney's ability to divulge confidential information obtained in the course of representing a

juvenile in a delinquency matter is subject to the constitutional right to counsel. *See generally In re Gault*, 387 U.S. 1 (1967) (recognizing constitutional right to counsel in juvenile delinquency proceedings); *State v. Ballard*, 333 N.C. 515, 522 (1993) (observing that the attorney-client privilege is critical to constitutionally effective assistance of counsel); *see also* North Carolina State Bar RPC 175 (Jan. 13, 1995) (opinion states that ethics rules do not require or prohibit reporting of child abuse, neglect, or dependency by attorney under G.S. 7A-453 and 7A-551 (now, G.S. 7B-301 and 7B-310); however, constitutional right to effective assistance of counsel may preclude reporting).

Involuntary Commitment

Audio-video examination of person subject to involuntary commitment. G.S. 122C-263 provides that, except in limited circumstances, a person must be examined by a physician or eligible psychologist after being taken into custody for a determination of whether he or she should be involuntarily committed. The law enforcement officer or other person who takes custody of the person must present him or her for an examination without unnecessary delay, and the examination must occur within 24 hours after the person is presented for examination. Effective July 17, 2009, S.L. 2009-315 (H 1189) amends G.S. 122C-263(c) to permit the person to be examined using “telemedicine” equipment and procedures—that is, via audio-video equipment. The revised statute states that the physician or eligible psychologist who examines a respondent by means of telemedicine must be satisfied to a reasonable medical certainty that the required determinations would not be different if the examination were done in person.

Termination of inpatient commitment if 24-hour facility is unavailable. When a petition is filed for involuntary commitment, a person ordinarily must be examined twice. A first examination is done locally, sometimes at a hospital emergency room. If the examining physician or psychologist finds grounds for commitment—that is, that the person is mentally ill and dangerous to self or others—the person is supposed to be transferred to a 24-hour facility for a second examination. Delays have occurred at this second step, however, because the state’s 24-hour facilities do not have sufficient beds or staff or are not equipped to deal with the person’s medical problems. Effective October 1, 2009, S.L. 2009-340 (H 243) formalizes, with some modifications, the practice in this situation.

First, the act revises G.S. 122C-261(d) to make explicit that a person may be temporarily detained under appropriate supervision following a first examination if a 24-hour facility is not available or equipped to take the person. The act does not detail who is responsible for providing appropriate supervision and maintaining custody of the person.

Second, the act revises G.S. 122C-263(d)(2) to make explicit that if a person is temporarily detained at the site of the first examination and a physician or eligible psychologist determines that the person no longer meets the criteria for inpatient commitment, the involuntary commitment proceedings must be terminated and the person released. If the physician or psychologist recommends outpatient commitment, the involuntary commitment proceedings are not terminated; a hearing in district court will take place to review the appropriateness of the recommendation, but pending the hearing the person must be released. In either instance, if a criminal case is pending and the defendant has not satisfied pretrial release conditions, the defendant would be returned to jail, not released outright.

Third, the act revises G.S. 122C-263(d)(2) to provide that if a person is temporarily detained at the site of the first examination for seven days after the issuance of the custody order, the commitment proceedings must be terminated. (A custody order is issued when a judicial official finds grounds for involuntary commitment proceedings; pursuant to that order, a law enforcement officer picks up the person and takes him or her to the first examination.) The revised statute allows new commitment proceedings to be initiated, however. Affidavits or examinations used to support the earlier commitment proceedings may not be used to support the new commitment proceedings, but another examination may be conducted to support a new petition. Thus, if the person's condition has not improved, a new petition may be filed and the person held at the first site for up to seven days based on the new situation.

Judicial Administration

Increases in costs. The Appropriations Act of 2009, S.L. 2009-451 (S 202), as amended by S.L. 2009-575 (H 836) (technical corrections act to the Appropriations Act of 2009), increases several costs in criminal and other cases. To view these changes, see the applicable chart at www.nccourts.org/Courts/Trial/Costs/.

Other matters in the appropriations act. The Appropriations Act of 2009 includes numerous other administrative matters that may have an impact in criminal cases, including appropriations, organizational changes, reporting requirements, and studies, effective July 1, 2009, except as otherwise indicated. For those interested in these matters, the bill may be viewed at www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S202v8.pdf, and the Joint Conference Committee Report on the Continuation, Expansion, and Capital Budgets may be viewed at www.ncleg.net/sessions/2009/budget/2009/JointConferenceCommitteeReport_SB202_2009_08_03.pdf. The most pertinent sections of the act for the criminal justice system and the courts are the following:

- Section 15: Judicial Department (including the Office of Indigent Defense Services)
- Section 16: Department of Justice
- Section 17: Department of Crime Control and Public Safety
- Section 18: Department of Juvenile Justice and Delinquency Prevention
- Section 19: Department of Correction
- Section 20A: Department of Administration (which includes certain domestic violence matters)
- Section 21: Department of Insurance (which regulates bail bondsmen)
- Section 26: Salaries and Benefits (including for Judicial Department employees)
- Section 27: Capital Appropriations

Studies bill. Effective September 10, 2009, S.L. 2009-574 (H 945) authorizes several studies relating to criminal law and the courts. The act authorizes studies in the following areas, to be conducted by the Legislative Research Commission unless otherwise indicated.

- Child support
 - Child support guidelines regarding child support arrearage that does not accrue for an incarcerated parent, including the impact of the arrearage on the nonincarcerated parent

- Incarcerated parents and their children (by the Joint Legislative Study Commission on Children and Youth Studies)
- Civil commitment
 - Whether current involuntary commitment statutes, in particular G.S. 122C-263(a), adequately protect the health and safety of people ordered to submit to examination and others during the period of examination
 - Practice and prevalence of shackling children en route to mental health commitment hearings (by the Joint Legislative Study Commission on Children and Youth Studies)
- Court administration
 - Feasibility and desirability of a system in which superior court judges are elected separately and vacancies are filled at the next election for a full eight-year term
 - Establishment of an Office of Prosecution Services to manage the budgetary aspects of the district attorney offices and related issues
 - Structure, organization, jurisdiction, procedures, and personnel of the Judicial Department and the General Court of Justice (by the North Carolina Courts Commission)
- Criminal law and procedure
 - Issues related to sexual abuse and violence
 - Superior court criminal case calendaring
 - Oversight and coordination of services to victims of sexual violence and whether sexual violence should be included as a focus area of the North Carolina Domestic Violence Commission (by the North Carolina Domestic Violence Commission, in consultation with other organizations)
 - Recognition and care of children using drugs for purposes other than legitimate health issues and whose parents appear to be providing the drugs
- Juvenile delinquency
 - Expanding the jurisdiction of the Department of Juvenile Justice and Delinquency Prevention to include individuals 16 and 17 years of age charged with crimes or infractions
 - Causes and effects of youth violence
- Law enforcement
 - Access by sheriffs to the Controlled Substances Reporting System maintained by the Department of Health and Human Services
 - Feasibility of creating an automated pawn transaction database system (by the Criminal Justice Information Network Governing Board)
 - Feasibility and implications of allowing candidates for law enforcement certification to be given credit toward completion of basic law enforcement training (by the Department of Justice)
- Motor vehicles
 - Issuance of limited driving privileges by the courts
- Sentencing and collateral consequences
 - Barriers facing ex-offenders in accessing jobs, housing, education, training, and other services and in reintegrating into society
 - Availability, use, and effectiveness of alternative punishments and the extent to which current sentencing laws contribute to the number of nonviolent offenders housed in correctional facilities
 - Prison overcrowding and feasibility of modifying sentences for nonviolent offenses

- Prison overcrowding and feasibility of postconviction and post-release bond programs that would allow bail bondsmen to bond out prisoners who have completed most of their active sentences
- Comprehensive reform of North Carolina's approach to community corrections (by the Department of Correction, in consultation with several other organizations and agencies)
- Establishment of the North Carolina Correctional and Probation Officer Education and Training Standards Commission (by the Department of Correction and Department of Justice)
- Evaluation of current prison population and identification of prisoners who are habitual offenders but whose felony offenses consist solely of Class H and I felonies, feasibility of reducing such prisoners' sentences, feasibility of amending habitual felon law to limit consideration of older Class F and G felonies, and other related issues (by the Post-Release Supervision and Parole Commission)

Other legislation on judicial administration. A summary of other legislation affecting judicial authority and administration, by School of Government faculty member Michael Crowell, is included in "2009 Legislation of Interest to Court Officials," www.sog.unc.edu/dailybulletin/summaries09/category04.html.

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