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**2011 Legislation Affecting Criminal Law and Procedure**
**for**
**Summer 2011 Judicial and Criminal Justice Conferences**
Includes legislation through June 4, 2011

Below is a summary of enacted legislation affecting criminal law and procedure. To obtain the text of the legislation, click on the link provided or go to the North Carolina General Assembly's website, www.ncleg.net. (Once there, click on session laws on the right side of the page and then 2011-2012 Session under Browse Session Laws.) Be careful to note the effective date of all new legislation.

1. **S.L. 2011-2 (H 18): Clarification of effective date of law authorizing restoration of firearms rights.** The act amends the effective date of S.L. 2010-108 (H 126), which allows people convicted of nonviolent felonies to apply for restoration of the right to possess firearms and creates an exception from firearms restrictions for white collar felony convictions. *See* John Rubin & Jim Drennan, *2010 Legislation Affecting Criminal Law and Procedure* (Aug. 2010), *available at* http://dailybulletin.unc.edu/summaries10/documents/Criminal%20Law%20and%20Procedure%20Legislation%202010.pdf. The 2010 act contained a standard effective-date clause used in criminal law legislation—that is, that the act applied to offenses committed on or after a particular date, in this instance February 1, 2011. This wording created some question whether the restoration procedure and exception applied to a person who committed an offense before that date. The 2011 amendment clarifies that the restoration procedure and exception takes effect February 1, 2011. Thus, whether the offense date is before or after February 1, a person is eligible for restoration of firearm rights if he or she was convicted of a nonviolent felony as defined in G.S. 14-415.4, completed his or her sentence at least twenty years ago, and otherwise meets the requirements for restoration. The act is effective March 5, 2011.

2. **S.L. 2011-6 (H 3): Good faith exception to exclusionary rule for violations of state law.** Effective for trials and hearings commencing on or after July 1, 2011, the act amends G.S. 15A-974 to provide a good-faith exception to the exclusionary rule for violations of Chapter 15A of the North Carolina General Statutes. G.S. 15A-974 has provided that evidence must be suppressed if it is obtained as result of a substantial violation of Chapter 15A. The amended statute states that evidence shall not be suppressed for such a violation if the person committing the violation acted under the "objectively reasonable, good faith belief" that the actions were lawful. Amended G.S. 15A-974 requires the court, in determining whether evidence must be suppressed for a violation of the U.S. Constitution, N.C. Constitution, or Chapter 15A, to make findings of fact and conclusions of law.

   In a section of the act not incorporated into the General Statutes, the General Assembly also requested that the N.C. Supreme Court reconsider and overrule its decision in *State v. Carter,* 322 N.C. 709 (1988). In that decision, our court held that the good faith exception to the exclusionary rule adopted by the U.S. Supreme Court for certain constitutional violations does not exist under

our state constitution.

For a more detailed analysis of both the act's application to violations of G.S. Chapter 15A and the scope of the good-faith exception to the exclusionary rule for constitutional violations, see Bob Farb, *New North Carolina Legislation on Good Faith Exception to Exclusionary Rules*, posting to North Carolina Criminal Law: UNC School of Government Blog (Mar. 23, 2011), *available at* http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2058f.

**3.** **S.L. 2011-12 (S 7): New controlled substance offenses**. Effective for offenses committed on or after June 1, 2011 (note that the effective date is earlier than the customary December 1 effective date for new offenses), the act adds four substances to the controlled substance schedules and creates new controlled substance offenses based on those substances, including trafficking offenses.

*Additional controlled substances.* Amended G.S. 90-89(5) includes three new substances as Schedule I controlled substances, which generally carry the most serious criminal penalties: 4-methylmethcathinone (also known as mephedrone): 3,4-Methylenedioxypyrovalerone (also known as MDPV); and a compound, other than buproprion, that is structurally derived from 2-amino-1-phenyl-1-propanone by modification in one of the specified ways. Amended G.S. 90-94 adds synthetic cannabinoids (as defined in new subsection (3) of G.S. 90-94) as a Schedule VI controlled substance.

*New controlled substance offenses.* Possession of any Schedule I controlled substance, including the above-described controlled substances, remains a Class I felony under G.S. 90-95(a)(3) and 90-95(d)(1), except that possession of one gram or less of MDPV is a Class 1 misdemeanor. Possession of synthetic cannabinoids *or* any mixture containing that substance are classified as follows under G.S. 90-95(a)(3) and 90-95(d)(4): a Class 3 misdemeanor for seven grams or less; a Class 1 misdemeanor for more than seven and up to 21 grams or less; and a Class I felony for more than 21 grams. Under G.S. 90-95(a)(1) and 90-95(b)(2), sale of synthetic cannabinoids is a Class H felony, and manufacture, delivery, or possession with intent to manufacture, sell, or deliver synthetic cannabinoids is a Class I felony, except the transfer of less than 2.5 grams of that substance *or* any mixture containing that substance for no remuneration does not constitute delivery.

*New trafficking offenses.* New G.S. 90-95(h)(3d) creates the offense of trafficking in MDPV, classified and punishable as follows: for 28 or more and less than 200 grams, a Class F felony with a mandatory prison term of 70 to 84 months and a minimum $50,000 fine; for 200 or more and less than 400 grams, a Class E felony with a mandatory prison term of 90 to 117 months and a minimum $100,000 fine; and for 400 grams or more, a Class C felony with a mandatory prison term of 225 to 279 months and a minimum $250,000 fine. New G.S. 90-95(h)(3e) creates the offense of trafficking in mephedrone, with the same classes and punishments for the same quantities as for MDPV. New G.S. 90-95(h)(1a) creates the offense of trafficking in synthetic cannabinoids, classified and punishable as follows based on dosage units (defined as three grams of the substance *or* any mixture of the substance): for more than 50 and less than 250 dosage units, a Class H felony with a mandatory prison term of 25 to 30 months and a minimum $5,000 fine; for 250 or more and less than 1250 dosage units, a Class G felony with a mandatory prison

term of 35 to 42 months and a minimum $25,000 fine; for 1250 or more dosage units and less than 3750 dosage units, a Class F felony with a mandatory prison term of 70 to 84 months and a minimum $50,000 fine; and for more than 3750 dosage units, a Class D felony with a mandatory prison term of 175 to 219 months and a minimum $200,000 fine.

**4.** **S.L. 2011-19 (H 27): SBI crime lab and related changes.** Effective March 31, 2011 except as noted below, the act adds and modifies several statutes regarding the State Bureau of Investigation (SBI) Laboratory and forensic testing. The laboratory remains a part of the SBI, but it is renamed the State Crime Laboratory (State Crime Lab) and G.S. 114-16 is revised to direct the SBI to employ a sufficient number of skilled people to render a reasonable service to the "public and criminal justice system" (was, "prosecuting officers of the State").

*Advisory board.* New G.S. 114-16.1 establishes a sixteen-member North Carolina Forensic Science Advisory Board within the Department of Justice, which consists of the State Crime Lab Director and fifteen members appointed by the Attorney General. The appointments must conform to the requirements in the new statute—for example, one member must be the Chief Medical Examiner, another must be a scientist with an advanced degree and experience in forensic chemistry, and the like. The new advisory board may review State Crime Lab operations, make recommendations and, on request of the Lab Director, review analytical work, reports, and conclusions of scientists employed by the Lab. This last category of review is confidential as provided in new G.S. 114-16.1(f).

*Studies and protocols on bias and error.* An uncodified section of the act (that is, a provision that will not appear in the General Statutes but still has the force of law) directs the SBI to seek collaborative opportunities and grant funds for research programs on human observer bias and sources of human error in forensic examinations and directs the State Crime Lab to develop standard operating procedures to minimize potential bias and human error.

*Professional certification.* An uncodified section of the act requires forensic science professionals at the State Crime Lab to obtain individual certification consistent with international and ISO standards no later than June 1, 2012, unless no certification is available.

*Ombudsman.* An uncodified section of the act, effective July 11, 2011, creates the position of ombudsman in the State Crime Lab within the North Carolina Department of Justice. The act states that the primary purpose of the position is to work with defense counsel, prosecutorial agencies, criminal justice system stakeholders, law enforcement officers, and the general public to ensure that State Crime Lab practices and procedures are consistent with state and federal law, best forensic practices, and the interests of justice. The ombudsman must mediate complaints between the SBI and others and regularly attend meetings of the district attorneys, district and superior court judges, public defenders, Advocates for Justice, and Bar criminal law sections.

*Admissibility of forensic analysis and chemical analysis of blood or urine.* G.S. 8-58.20 has allowed a lab report of a written forensic analysis to be admitted without the testimony of the analyst if certain procedures are followed. The act amends the statute to add that for a forensic analysis to be admissible under that statute, it must be performed by a lab that is accredited as specified in the amended statute. The act makes similar changes to G.S. 20-139.1(c2) on the admissibility of a chemical analysis of blood or urine without the testimony of the analyst.

*Discovery.* Amended G.S. 15A-903(a)(1), which requires the State to make available to the defendant its complete files as defined in the statute, states that "[w]hen any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes." Amended G.S. 15A-903(c) requires all public and private entities that obtain information related to the investigation of the crimes committed or the prosecution of the defendant to disclose such information to the referring prosecutorial agency for disclosure to the defendant. New G.S. 15A-903(d) makes it a Class H felony for a person to willfully omit or misrepresent evidence or information required to be disclosed under G.S. 15A-903(a)(1) or required to be provided to the State under G.S. 15A-903(c); and makes it a Class 1 misdemeanor to willfully omit or misrepresent evidence or information required to be disclosed pursuant to any other provision of "this section" (meaning G.S. 15A-903).

5. **S.L. 2011-21 (S 20): Proprietary schools.** Effective July 1, 2011, the act amends several provisions regulating proprietary schools, including the definition of proprietary schools in G.S. 115D-87. Amended G.S. 115D-96 continues to make it a Class 3 misdemeanor to operate a proprietary school, under the amended definition, without a license or bond.

6. **S.L. 2011-22 (H 29): Retrieval of killed or wounded big game animal.** Effective October 1, 2011, the act amends G.S. 113-291.1, which regulates the taking of wild animals and birds, to permit the retrieval of a killed or wounded big animal if done with (1) a portable light source, (2) a single dog on a leash, (3) a .22 caliber rimfire pistol, archery equipment, or handgun otherwise lawful for that hunting season, (4) from one-half hour after sunset until 11 p.m. if necessary, and (5) without use of a motorized vehicle.

7. **S.L. 2011-29 (S 248): Update of archaic disability language.** Effective April 7, 2011, the act updates several provisions to update language describing disabilities (for example, the term "incompetent person" replaces "lunatic," a person "unable to speak" replaces "dumb," and "physically disabled" replaces "physically defective"). Affected provisions that involve criminal law and procedure are North Carolina Rule of Evidence 601 (competency of witnesses) and G.S. 14-113 (obtaining money by false representation of physical disability).

8. **S.L. 2011-37 (H 59): No EMS credentials for sex offenders.** Effective April 12, 2011, the act adds G.S. 131E-159(h) providing that a person who is required to register as a sex offender under G.S. Chapter 14, Article 27A, may not be granted emergency medical services (EMS) credentials. The new statute does not require revocation of credentials for a person who currently has them, but it prohibits renewal of credentials. The new statute states that it applies to a person required to register and to a person "who was convicted of an offense which would have required registration if committed at a time when such registration would have been required by law."

9. **S.L. 2011-42 (H 234): Prospective jurors who are hearing-impaired or have other disabilities.** Effective July 1, 2011, the act revises G.S. 9-3, which describes the qualifications of prospective

jurors, to delete the requirement that a juror must be able to hear the English language; the statute continues to require that a juror understand English. The act also adds G.S. 9-6.1(b) to allow a person summoned as a juror who has a disability and wishes to be excused, deferred, or exempted to make the request without appearing in person by filing a signed statement of the ground for the request. The request must be submitted to the chief district court judge of the district, or the district court judge or trial court administrator designated by the chief district court judge, at least five business days before the date on which the person has been summoned to appear. Revised G.S. 9.6.1(a), which allows a person who is 72 years or older to make a similar request, requires submission of the request at least five business days, instead of five days, before the person's scheduled appearance.

**10.** **S.L. 2011-56 (S 406): Repeal of requirement of permit for crossbow.** Effective April, 28, 2011, the act revises G.S. 14-402 to eliminate the prohibition on selling, giving away, transferring, purchasing, or receiving a crossbow without a permit. The act also repeals G.S. 14-406.1, which set forth the procedure for manufacturers, wholesale dealers, and retailers to obtain a permit for the purchase and receipt of crossbows. The act does not change the permit requirements and procedures for pistols, contained in Article 52A of G.S. Ch. 14.

**11.** **S.L. 2011-60 (H 215): "The Unborn Victims of Violence Act/Ethen's Law."** Effective for offenses committed on or after December 1, 2011, the act adds a new Article 6A, "Unborn Victims" (G.S. 14-23.1 through 14-23.8) to G.S. Chapter 14, creating several new criminal offenses. The act repeals G.S. 14-18.2 (injury to pregnant woman). An "unborn child" is defined in new G.S. 14-23.1 as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."

New G.S. 14-23.2 creates the offense of "murder of an unborn child," which can be committed in three ways. A person who unlawfully causes the death of an unborn child is guilty of a Class A felony, punishable by life without parole, if the person willfully and maliciously commits an act with the intent to cause the death of the unborn child or causes the death of the unborn child in the perpetration or attempted perpetration of any criminal offense in G.S. 14-17. A person who unlawfully causes the death of an unborn child is guilty of an offense subject to the same punishment as second-degree murder if the person commits an act causing the death of the unborn child that is inherently dangerous to human life and is done so recklessly and wantonly that it reflects disregard of life. Under new G.S. 14-23.3, a person commits the offense of "voluntary manslaughter of an unborn child," a Class D felony, if the person unlawfully causes the death of an unborn child by an act that would be voluntary manslaughter if it resulted in the death of the mother. Under new G.S. 14-23.4, a person commits the offense of "involuntary manslaughter of an unborn child," a Class F felony, if the person unlawfully causes the death of an unborn child by an act that would be involuntary manslaughter if it resulted in the death of the mother. Under new G.S. 14-23.5, a person commits the offense of "assault inflicting serious bodily injury on an unborn child," a Class F felony, if the person commits a battery on the mother of the unborn child and the child is subsequently born alive and, as a result of the battery, suffered serious bodily injury as defined in new G.S. 14-23.5(b). Under new G.S. 14-23.6, a person commits

the offense of "battery on an unborn child," a Class A1 misdemeanor and a lesser-included offense of G.S. 14-23.5, if the person commits a battery on a pregnant woman.

The above statutes state that each of these offenses is a separate offense. An uncodified provision in the act states that a prosecution for or conviction under the act is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct. New G.S. 14-23.8 states that except for an offense under G.S. 14-23.2(a)(1), which requires an intent to cause the death of the unborn child, an offense under the new article does not require proof that the defendant knew or should have known "that the victim of the underlying offense was pregnant" or that the defendant intended to cause "the death of, or bodily injury, to the unborn child."

New G.S. 14-23.7, "Exceptions," states that the new article shall not be construed to permit prosecution of: a lawful abortion pursuant to G.S. 14-45.1; diagnostic testing or therapeutic treatment pursuant to usual and customary standards of medical practice; and acts by a pregnant woman, including acts resulting in a miscarriage or stillbirth as defined in new G.S. 14-23.7(3)a. and b. An uncodified provision in the act states that it shall not be construed to impose criminal liability on an expectant mother who is the victim of acts of domestic violence, as defined in G.S. Chapter 50B, that cause injury or death to her unborn child.

The act contains a severability clause, providing that a finding of invalidity of any provision in the act does not affect other provisions or applications of the act that can be given effect without the invalid provision or application.

**12. S.L. 2011-61 (H 219): Name change by sex offender; venue for petition to terminate registration.** The act amends several statutes to track name changes by people required to register as sex offenders. On the initial registration form, a registrant must indicate his or her name and any aliases at the time of conviction. *See* G.S. 14-208.7(b)(1a). A registrant who changes his or her name must report the change to the registering sheriff within three business days of the change. *See* G.S. 14-208.9. And, when periodically re-verifying his or her registration information, a registrant must indicate any name change. *See* G.S. 14-208.9A(a)(3)c. New G.S. 14-208.14(4a) requires the Division of Criminal Statistics to maintain its public database so as to allow access to a registrant's name, any aliases, and any legal name changes. These provisions apply to any person who continues to be required to register on or after December 1, 2011, whether the person's registration obligation begins before or after that date; however, a registrant is not in violation of the new requirements if the person provides the required information at the first required verification on or after December 1, 2011. Effective May 3, 2011, the act also revises G.S. 101-5 to state explicitly that the clerk of court may not grant a name change to a person required to register as a sex offender. (In 2008, the General Assembly enacted G.S. 14-202.6 and G.S. 101.6(c) to prohibit a person required to register as a sex offender from obtaining a name change under G.S. Chapter 101. *See* G.S. 14-202.6, 101-6(c); *see also* John Rubin, *2008 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06, at p. 10 (Nov. 2008), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0806.pdf.)

Effective for petitions filed on or after December 1, 2011, the act revises G.S. 14-208.12A(a) on the venue for the filing of a petition to terminate registration requirements. If the reportable conviction is for an offense that occurred in North Carolina, the petition is to be filed in the district where the person was convicted of the offense. If the reportable conviction is for an offense that occurred in another state, the petition is to be filed in the district where the person resides; for out-of-state convictions, the petitioner also must notify the sheriff of the county of conviction of the petition and include an affidavit attesting to such notice and containing the mailing address and contact information of the sheriff.

**13.** **S.L. 2011-62 (H 270): Changes to conditions of probation and repeal of tolling provision.** Effective for people placed on probation on or after December 1, 2011, the act makes the following changes to regular conditions of probation under G.S. 15A-1343(b):

- It deletes the requirement in G.S. 15A-1343(b)(1) that the probationer remain within the jurisdiction of the court and replaces it with a requirement that the probationer remain accessible to the probation officer by making his or her whereabouts known to the officer and not leaving the county of residence or the State of North Carolina without written permission by the court or probation officer.
- It repeals G.S. 15A-1343(b)(11), which provided that "[a]t a time to be designated by the probation officer, visit with his probation officer [at] a facility maintained by the Division of Prisons."
- It revises G.S. 15A-1343(b)(13), which deals with warrantless searches, to eliminate reference to drug testing, and adds G.S. 15A-1343(b)(16), which requires the probationer to supply a breath, urine, or blood specimen for analysis of the possible presence of prohibited drugs or alcohol when requested by his or her probation officer for purposes directly related to the probation supervision. The new subdivision also provides that the probationer may be required to reimburse the Department of Correction for the costs of a positive test.

The act also authorizes additional special conditions of probation. New G.S. 15A-1343(b1)(9b) authorizes conditions that prohibit street gang activity; new G.S. 15A-1343(b1)(9c) authorizes a condition allowing the probation officer to require the probationer to participate in Project Safe Neighborhood activities.

Last, the act repeals G.S. 15A-1344(g), which was enacted in 2009 and addressed the tolling of probation if a probationer is charged with new crimes. *See* Jamie Markham, Summary and Analysis of Session Law 2009-373 (S 920): Probation Reform at p. 8 (Aug. 4, 2009), *available at* . http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Summary%20of%20Probation%20Reform%20_S%20920__0.pdf. With the repeal of G.S. 15A-1344(g) this legislative session, and the deletion in 2009 of any reference to tolling in G.S. 15A-1344(d), the probation statutes no longer contain any tolling provision for probationers charged with new crimes. Thus, the period of probation continues to run during the pendency of new criminal charges. Because the act applies to people placed on probation on or after December 1, 2011, people placed on probation before then would appear to be subject to the current tolling procedures in G.S. 15A-1344(g) for any new criminal

charges during the period of their probation.

14. **S.L. 2011-63 (H 316): Jurisdiction of General Assembly special police.** Effective May 3, 2011, the act amends G.S. 120-32.2 to give General Assembly special police additional statewide powers. For example, the amended statute authorizes them to conduct a criminal investigation throughout the state of a threat of physical violence against the General Assembly, a member or staff of the General Assembly, or their immediate family. The amended statute, along with amended G.S. 120-19.2(d), also gives General Assembly special police statewide jurisdiction to serve a subpoena issued by the General Assembly or committee of the General Assembly.

15. **S.L. 2011-64 (S 49): Increased penalty for speeding in school zone.** Effective for offenses committed on or after August 25, 2011, the act increases the penalty to $250 (was, a minimum of $25) for the infraction of speeding in a school zone under G.S. 20-141.1 and 20-141(e1).

16. **S.L. 2011-68 (H 407): Elimination of safety helmet requirement for off-road ATV use.** In 2005, the General Assembly adopted various safety measures for the operation of all-terrain vehicles (ATVs), including a requirement that riders wear safety helmets and eye protection. *See* S.L. 2005-282 (S 189). Effective for offenses committed on or after October 1, 2011, the act revises G.S. 20-171.19 to require the wearing of a helmet and eye protection on public streets and highways and public vehicular areas only. The act adds a new subsection (a1) to G.S. 20-171.19 requiring a rider under age 18 to wear a helmet and eye protection while operating an ATV off a public street or highway or public vehicular area. Thus, riders 18 years of age are older are not required to wear this safety equipment during off-road use. G.S. 20-171.22(c) continues to allow riders 16 years of age or older to operate ATVs without wearing helmets or eye protection on ocean beach areas where ATVs are permitted.

17. **S.L. 2011-95 (H 222): Electric vehicles in carpool lanes.** Effective May 26, 2011, the act amends G.S. 20-146.2 to allow a plug-in electric vehicle, as defined in new G.S. 20-4.01(28a), to travel in a high occupancy vehicle lane regardless of the number of passengers in the vehicle as long as the vehicle is able to travel at the posted speed limit.

18. **S.L. 2011-100 (H 280): County law enforcement service district.** Effective May 31, 2011, the act amends G.S. 153A-301(a)(10) to authorize a board of county commissioners to establish a law enforcement service district if the population of the county is 900,000 or more (was, 500,000), less than 10% of the population of the county is in an unincorporated area, and the county has interlocal agreements with the municipalities in the county for the provision of law enforcement services in the unincorporated areas of the county. This statute has allowed for a single police department in Mecklenburg County, covering the county and the city of Charlotte. The changes in the population requirements continue to limit application of the statute to Mecklenburg County.