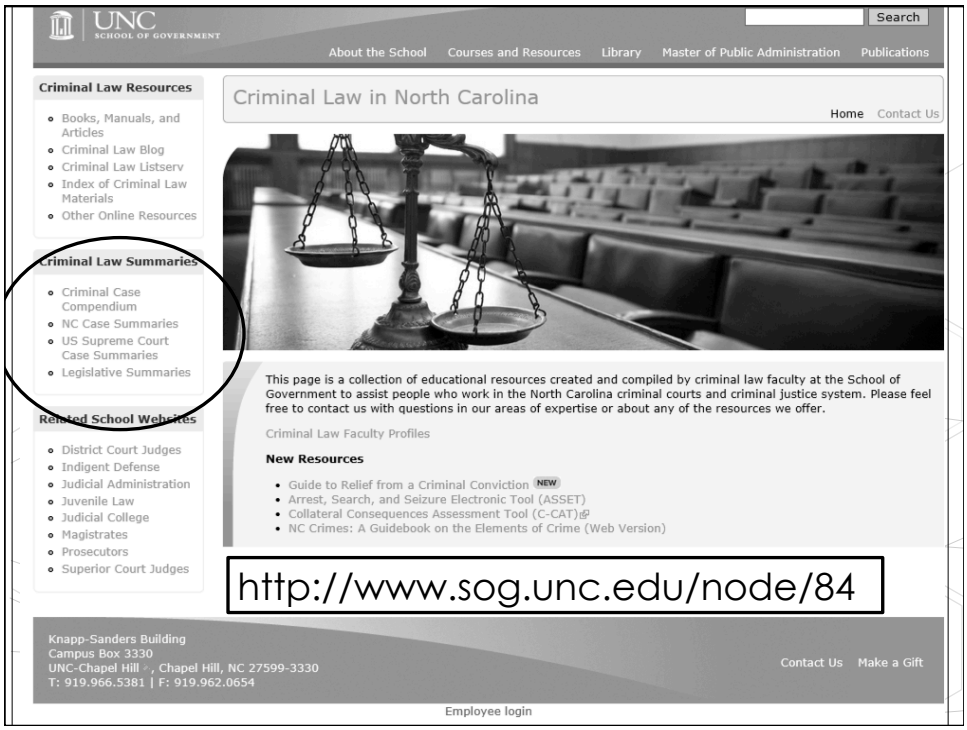
Winter Criminal Law Webinar

John Rubin & Alyson Grine
UNC School of Government
December 13, 2013



Topics

- Sentencing and probation
- Search and seizure
- Criminal procedure
- Confrontation and evidence
- Criminal offenses

SENTENCING & PROBATION

Class 3 Misdemeanors (pp. 25-26 of Legislation)

DWLR (non-DWI revocation)

Worthless checks

Shoplifting

Marijuana possession

Second-degree trespass

Alcohol possession by 19/20 year old

New G.S. 15A-1340.23(d)

- "Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine."

CLASS	PRIOR CONVICTION LEVEL			
	I	II		III
	No Prior Convictions	One to Four Prior Convictions		Five or More Prior Convictions
A1	C/I/A 1 - 60 days	C/I/A 1 - 75 days		C/I/A 1 - 150 days
1	C 1 - 45 days	C/I/A 1 - 45 days		C/I/A 1 - 120 days
2	C 1 - 30 days	C/I 1 - 45 days		C/I/A 1 - 60 days
3	C Fine Only* 1 - 10 days	One to Three Prior Convictions	Four Prior Convictions	C/I/A 1 - 20 days
		C Fine Only* 1 - 15 days	C/I 1 - 15 days	

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

Indigent Defense Education

www.indigentdefense.unc.edu

Appointment of Counsel for Class 3 Misdemeanors

Prepared by John Rubin
November 2013

As part of the 2013 Appropriations Act, the General Assembly enacted a new punishment scheme for Class 3 misdemeanors, limiting the punishment to a fine for many defendants. *See* Section 18B.13 of S.L. 2013-360 (S 402). The change applies to offenses committed on or after December 1, 2013.

In addition to changing the punishment for Class 3 misdemeanors, the 2013 Appropriations Act reclassified some Class 1 and 2 misdemeanors as Class 3 misdemeanors and some Class 3 misdemeanors as infractions. *See* Sections 18B.14 and 18B.15 of S.L. 2013-360 (S 402), as amended by Sections 4–6 of S.L. 2013-385 (S 182). The punishment for offenses reclassified as Class 3 misdemeanors is likewise limited to a fine for many defendants. (For a complete list of the affected offenses, see Robert L. Farb, 2013 Legislation Affecting Criminal Law and Procedure at p. 25–26.)

The change in punishment for these Class 3 misdemeanors significantly affects the right to appointed counsel because the right to counsel for misdemeanors depends on the allowable punishment. The questions and answers below explore the impact of the change. The discussion addresses the details of the legislation, cases interpreting the right to counsel in misdemeanor cases, and the policy adopted by the Office of Indigent Defense Services (IDS) in response to the legislation. *See* Appointment and Payment of Counsel in Class 3 Misdemeanor Cases (Office of Indigent Defense Services, Dec. 1, 2013) (hereinafter IDS Policy). Some questions do not have definitive answers. The opinions expressed below are those of the author.

Readers may scroll through the discussion or click on the following hyperlinks to go directly to the portion of the discussion that interests them.

Questions

- May court appoint counsel if the defendant has fewer than four prior convictions?

Questions

- May the court appoint counsel for a defendant who is in custody on a Class 3 misdemeanor?

Questions

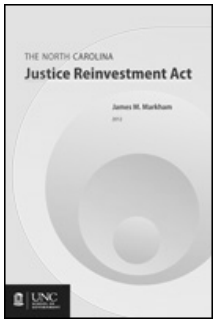
- May the court impose a sentence of imprisonment if the defendant was not afforded counsel for a Class 3 misdemeanor and subsequently fails to pay the fine?
  - *United States v. Pollard*, 389 F.3d 101, 105 (4th Cir. 2004); *United States v. Rios-Cruz*, 376 F.3d 303, 305 (5th Cir. 2004)
  - *Robinson v. State*, 669 S.E.2d 588 (S.C. 2008)

Limit on Court's Authority to Revoke

- Court may only *revoke* probation for:
  - New criminal offense
  - Absconding (under new statutory condition)
  - Offenders who have already received two prior "CRV" confinement periods
- Probation may only be revoked with notice of revocation-eligible violation (or waiver)

PROBATION

- **Notice**
  - State. v. Tindall, 742 S.E.2d 272 (2013)
  - State v. Kornegay, p. 26
- **Appeal**
  - State v. Romero, p. 26
    - **No right to appeal CRV**



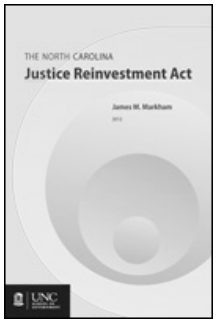
Related Legislation

- No. 22, p 7-8: CRV must be served sequentially
- No. 96, p. 33:
  - "If a defendant waives a revocation hearing [in district court], the finding of a violation of probation, activation of sentence, or imposition of special probation may not be appealed to the superior court." G.S. 15A-1347 (pv's on or after 12/1/2013)

PROBATION

- **Appeal**
  - State v. Romero, p. 26
    - **No right to appeal CRV**
  - State v. Pennell, p. 26

We hold that Defendant may, on appeal from revocation of probation, attack the jurisdiction of the trial court, either directly or collaterally.



Leg. 54, p. 15

SESSION LAW 2013-210
HOUSE BILL 641

AN ACT TO PROVIDE THAT A COURT HAS THE DISCRETION TO DETERMINE WHETHER TO GRANT A CONDITIONAL DISCHARGE FOR A FIRST OFFENSE OF CERTAIN DRUG OFFENSES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-96(a) reads as rewritten:

"(a) Whenever any person who has not previously been convicted of (i) any felony offense under any state or federal laws; (ii) any offense under this Article; or (iii) an offense under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules I through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.22, or (ii) a felony under G.S. 90-95(a)(3), the court shall, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may ~~require.~~ require, unless the court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To

SEARCH & SEIZURE

State v. Knudsen, p. 3

State v. Knudsen, cont'd.

NCSC

State v. Kochuk, p. 6

State v. Derbyshire, p. 5
Temp. Stay Allowed

State v. Coleman, p. 5

Hello, 911? I want to report a cup of beer in a gold Toyota sedan, license plate number VST-8773 parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive.

State v. Coleman, cont'd.

1) Tip did not allege crime!
2) Officer's mistaken belief that tip alleged crime was not objectively reasonable. (*State v. Heien,* 737 S.E.2d 351 (2012))
3) Even if it was reasonable, tip was <u>not</u> sufficiently reliable.
   - Defendant not identified or described
   - No information concerning Defendant's future actions
   - No way for officer to assess Tipster's credibility

State v. Blankenship, p. 4

NCSC

State v. Heien, p. 4

CRIMINAL PROCEDURE

Pretrial Release

No. 29
p. 9

No. 73
p. 18-19

Appeals and Post-Conviction

- 15A-1115(a) deleted, which provided for right to appeal infraction to superior court
- 15A-1335 amended
  - "This section shall not apply when a defendant, on direct review or collateral attack, succeeds in having a plea of guilty vacated."

No. 96, p. 33

Temp. Stay

Discovery

State v. Cooper, pp. 8-9

State v. Marino, p. 9

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  xhtml">
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  Type" content=
7         "text/html; charset=us-
  ascii" />
8         <script type="text/
  javascript">
9             function reDo() {top.
  location.reload();}
10            if (navigator.appName ==
  'Netscape') {top.onresize = reDo;}
11            dom=document.
  getElementById;
12        </script>
13    </head>
```

CONFRONTATION

Leg. p. 27: Fee for Experts

- G.S. 7A-304(a)(11) and (12)
- $600
- On conviction
- Where crime lab employee testified about chemical or forensic analysis

United States v. Jackson, 390 U.S. 570 (1968)

State v. Craven, p. 13

Testing Analyst
(not available at trial)

Testifying Analyst

Ortiz-Zape, p. 11

NCSC

Testing Analyst
(not available at trial)

Testifying Analyst

Nevada v. Jackson (p. 15)

- Does a defendant have the right under the Confrontation Clause to offer extrinsic evidence to impeach a witness?

Character Evidence

Tatum-Wade (p. 18)

- D is a trusting person

Walston (p. 18-19)

- D is respectful and interacts positively with children

Frady, p. 17

Sexual Abuse Testimony

Impermissible

- That sexual abuse occurred if no physical evidence
- That child is telling the truth

Permissible

- That child exhibited symptoms consistent with child abuse

Disclosure consistent with child abuse

Lay vs. Expert Testimony

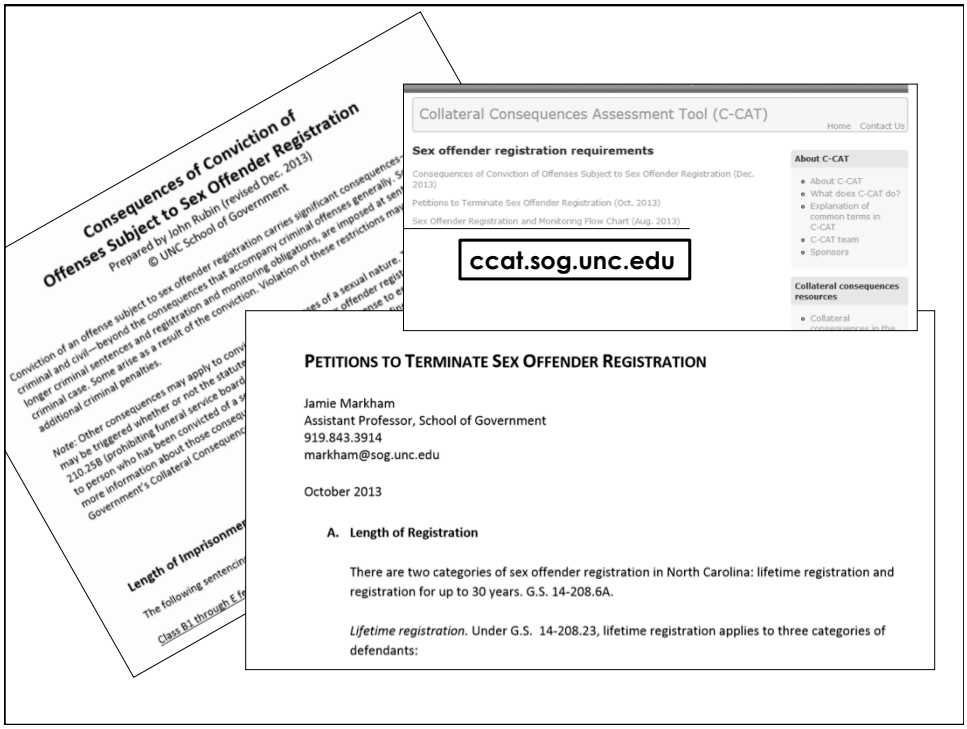
Jackson (p 15-16)

- Testimony by officer about how device tracked D's location with combination of GPS signals and cell phone triangulation

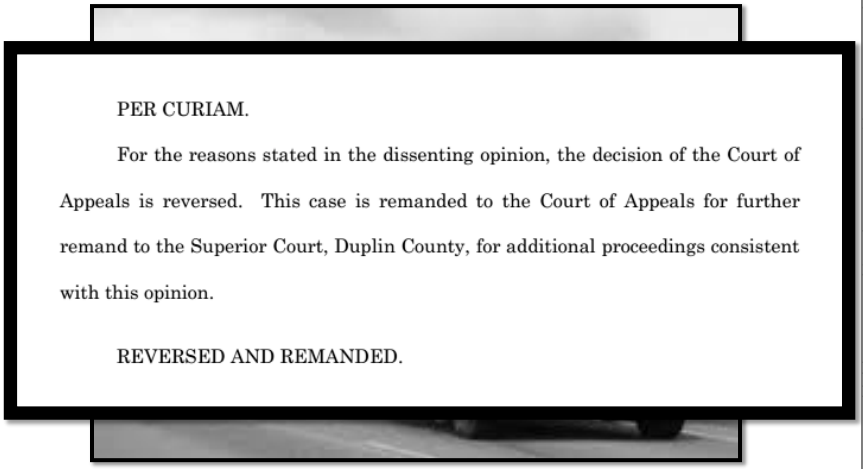
Storm (p. 18)

- Testimony by licensed clinical social worker that D appeared depressed with flat affect

CRIMINAL OFFENSES



State v. McKenzie



PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Duplin County, for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

State v. Poole, p. 21

In light of the 2009 amendments to Chapter 50B clarifying that a "valid protective order" includes *ex parte* orders and reading N.C. Gen.Stat. § 14–269.8(a) in conjunction with § 50B–3.1, we conclude that a "protective order" includes an *ex parte* or emergency order for purposes of N.C. Gen.Stat. §§ 14–269.8 and 50B–3.1.

State v. Barnes, p. 15

Prostitution Offenses

- Effective for offenses on or after Oct. 1, 2013
- "Sexual act" includes more than intercourse
- First offender conditional discharge and dismissal
- Increased penalties for solicitation and "John" school

Evaluation

Thanks for attending! Please complete our evaluation:
https://unc.az1.qualtrics.com/SE/?SID=SV_cwhAi90xWRNibcN

Bonus Material

Capacity and Commitment

- Deadline for hearing on capacity after release and at "earliest practicable time" for trial if capable
- Dismissal mandatory if unlikely to gain capacity
  - Also if defendant has been deprived of liberty for maximum or 5/10 years
- Dismissal with leave repealed

S.L. 2013-18, p. 1-2

Sex Offender Cases

- Sex offender residency restrictions (S.L. 2013-28, p. 3 of legislative handout)
- PJC for sexual battery is not an offense subject to registration (Walters v. Cooper, pp. 27-28)
  - But, final conviction on appeal to appellate division is subject to registration (S v. Smith, p. 27)

Evaluation

Thanks for attending! Please complete our evaluation:
https://unc.az1.qualtrics.com/SE/?SID=SV_cwhAi90xWRNibcN

2013 Legislation Affecting Criminal Law and Procedure

Robert L. Farb, © UNC School of Government

Revised November 2013

Each ratified act discussed here is identified by its chapter number in the session laws and 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 bills may be viewed on the General Assembly's website at http://www.ncleg.net/.

1. **S.L. 2013-3 (H 66): Captivity licenses and permits.** Effective March 6, 2013, the act: (1) amends G.S. 113-274(c)(1b) to authorize the Wildlife Resources Commission to issue a temporary permit to possess wild animals and birds for scientific, exhibition, or other purposes; (2) exempts from Article 1 (Civil Remedy for Protection of Animals) of G.S. Chapter 19A the taking and holding in captivity of a wild animal by a licensed sportsman for use or display in an annual, seasonal, or cultural event, as long as the animal is captured from the wild and returned to the wild at or near the area where it was captured; and (3) amends G.S. 19A-2 to provide that the venue for any action shall be only in the superior court in the county where a violation is alleged to have occurred.

2. **S.L. 2013-6 (H 19): Disorderly conduct at a funeral.** Effective for offenses committed on or after December 1, 2013, the act amends G.S. 14-288.4(a)(8), the disorderly conduct offense at a funeral or memorial service. The impermissible conduct will apply within two hours (now, one hour) preceding, during, or after the funeral or memorial service, and will be prohibited within 500 feet (now, 300 feet) of the ceremonial site, location of the funeral or memorial service, or the family's processional route. A violation of this subdivision is increased from a Class 2 misdemeanor to a Class 1 misdemeanor for a first offense, from a Class 1 misdemeanor to a Class I felony for a second offense, and from a Class I felony to a Class H felony for a third or subsequent offense.

3. **S.L. 2013-18 (S 45): Capacity to proceed amendments.** Effective for offenses committed on or after December 1, 2013, the act makes the following changes concerning a defendant's capacity to proceed: (1) amends G.S. 15A-1002(b)(1), which will be re-codified as G.S. 15A-1002(b)(1a) (and the introductory paragraph in current G.S. 15A-1002(b) will be re-codified as G.S. 15A-1002(b)(1)), to make clear that the court at a hearing after a local examination may call the appointed examining expert with or without the request of the State or the defendant; (2) amends G.S. 15A-1002(b)(2) to limit an examination at a State facility to a defendant charged with a felony (previously also allowed for a misdemeanor after a local examination); (3) adds new G.S. 15A-1002(b)(4) to provide that a judge who orders a state or local examination must release specified confidential information to the examiner after providing the defendant with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary for the hearing and unavailable from any other source; records must be withheld from public inspection; (4) amends G.S. 15A-1002(b1) to require findings of fact in a court order on capacity to proceed and to provide that the State and the defendant may stipulate that the defendant is capable of proceeding—but they cannot stipulate that the defendant lacks the capacity to proceed; (5) adds new G.S. 15A-1002(b2) to specify when examiner reports must be completed and provided to the court, with provisions for extensions of time for good cause; (6) amends G.S. 15A-1004(c) (defendant found incapable of proceeding and placed in facility after involuntary civil commitment) to require the court to order the defendant to be examined to determine whether he or she has the capacity to proceed before released from custody; (7) amends G.S. 15A-1006 (return of defendant for trial when determined by institution or individual having custody of defendant that he or she has gained capacity to proceed)

to include written notice of that fact to clerk, district attorney, defendant's attorney, and sheriff; (8) amends G.S. 15A-1007 (supplemental hearings) to set time limit for district attorney to calendar hearing and, if court determines that the defendant has gained the capacity to proceed, specifies standards for calendaring case for trial and continuances; (9) substantially revises G.S. 15A-1008 (dismissal of charges) and repeals G.S. 15A-1009 (dismissal with leave) to specify the circumstances when dismissed charges can or cannot be refiled; (10) amends G.S. 122C-54(b) (mental examination of criminal defendant as ordered under G.S. 15A-1002) to require that the report must contain a treatment recommendation, if any, and an opinion whether there is a likelihood that the defendant will gain the capacity to proceed; and (11) adds new G.S. 122C-278 to provide that whenever a respondent had been committed to either inpatient or outpatient treatment after being found to be incapable of proceeding and referred by a court for civil commitment proceedings, he or she shall not be discharged from a hospital or institution or an outpatient commitment case terminated until the respondent had been examined for capacity to proceed and a report filed with the clerk of court under G.S. 15A-1002.

Effective April 3, 2013, requires Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services by December 1, 2013, to adopt (1) rules to require forensic evaluators appointed under G.S. 15A-1002(b) to meet specified requirements (training to be credentialed as certified forensic evaluator and attend continuing education seminars); and (2) guidelines for treatment of those who are involuntarily committed after a determination of incapacity to proceed.

4. **S.L. 2013-23 (S 20): Limited immunity for certain drug-related and alcohol-related offenses.** Effective April 9, 2013, the act provides limited immunity as follows:

Drug-related overdose treatment. Adds new G.S. 90-96.2 to provide that a person acting in good faith who seeks medical assistance for an individual experiencing a "drug-related overdose" (defined in the act) shall not be prosecuted for: (1) misdemeanor possession of a controlled substance under G.S. 90-95(a)(3), (2) a felony violation of G.S. 90-95(a)(3) for possessing less than one gram of cocaine or heroin, or (3) misdemeanor possession of drug paraphernalia under G.S. 90-113.22, if the evidence for prosecution of these offenses was obtained as a result of the person seeking medical assistance for the drug-related overdose. Also provides that a person who experiences a drug-related overdose and is in need of medical assistance shall not be prosecuted for the same offenses set out above if the evidence for prosecution of these offenses was obtained as a result of the drug-related overdose and the need for medical assistance. Provides that the immunity set out above does not bar the admissibility of any evidence obtained in connection with the investigation and prosecution of other crimes committed by the person who otherwise qualifies for the immunity.

Treating overdose with opioid antagonist. Adds new G.S. 90-106.2 to provide that a "practitioner" (defined in G.S. 90-87(22) to include doctor, dentist, etc.) acting in good faith and exercising reasonable care may directly or by standing order prescribe an "opioid antagonist" (defined as naloxone hydrochloride) to (1) a person at risk of experiencing an opiate-related overdose, or (2) a family member, friend, or other person in a position to assist such a person. Provides that as an indicator of the practitioner's good faith, the practitioner before prescribing the opioid may require a written communication with specified information from the recipient of the prescription. Sets out the standard for administering the opioid by the person who receives it. Provides immunity from civil and criminal liability for actions authorized by this new law for (1) a practitioner who prescribes the opioid, and (2) the person who administers the opioid.

Person under 21 possessing or consuming alcoholic beverages. Adds new G.S. 18B-302.2 to provide that a person under the age of 21 shall not be prosecuted for a violation of G.S. 18B-302 for the possession or consumption of alcoholic beverages if law enforcement, including campus police,

became aware of a person's possession or consumption of alcohol solely because he or she was seeking medical assistance for another individual, and the person (1) acted in good faith, on a reasonable belief that he or she was the first to call for assistance, (2) used his or her own name when contacting authorities, and (3) remained with the individual needing medical assistance until help arrived.

5. **S.L. 2013-24 (S 33): Occupational licensing board's denial of applicant with criminal record.** Effective for applications for licenses issued by occupational licensing boards submitted on or after July 1, 2013, the act adds new G.S. 93B-8.1 to provide, unless the law governing a board is otherwise, it shall not automatically deny a license based on an applicant's criminal history. If the board may deny a license based on the applicant's conviction of a crime or commission of a crime involving fraud or moral turpitude, and the applicant's verified record shows one or more convictions, the board may deny the license if it finds the denial is warranted after considering the following factors: (1) level and seriousness of the crime; (2) date of the crime; (3) applicant's age at the time of the crime; (4) circumstances of the crime, if known; (5) nexus between the criminal conduct and applicant's prospective duties; (6) applicant's prison, jail, probation, rehabilitation, and employment records since the crime was committed; (7) applicant's later commission of a crime; and (8) affidavits or other written documents, including character references. Provides that board may deny a license if the applicant refuses to consent to a criminal history record check or the use of fingerprints or other identifying information required by North Carolina or national repositories of criminal histories. The act does not apply to the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission.

6. **S.L. 2013-28 (S 123): Sex offender residency restrictions.** Effective April 16, 2013, the act clarifies the applicability of G.S. 14-208.16, which prohibits a registered sex offender from knowingly residing within 1,000 feet of a school or child care center. The act amends G.S. 14-208.16(a) to provide that the residency prohibition applies to any registrant who did not establish his or her residence before August 16, 2006, by purchasing or leasing it before that date or by residing with an immediately family member who did so. The introductory language to the bill states that the new language was added to correct law enforcement officials' mistaken belief that the residency restriction did not apply to a registrant if he or she resided with an immediate family member who had established residence before August 16, 2006—even if the registrant himself or herself did not move in with the family member until after that date. The act also amends S.L. 2006-247, replacing references in that legislation to the date that the residency restriction would become law with "August 16, 2006," the specific date on which that portion of the legislation in fact became law.

7. **S.L. 2013-33 (S 122): Add human trafficking conviction to list that requires sex offender registration.** Effective for offenses committed on or after December 1, 2013, the act amends G.S. 14-208.6(5) (definition of "sexually violent offense") to include a conviction of human trafficking under G.S. 14-43.11 if the offense was committed against (1) a minor less than 18 years old, or (2) any person with the intent that the person be held in sexual servitude. The convicted defendant would be required to register as a sex offender.

8. **S.L. 2013-35 (H 75): Increase punishments for various felony child abuse offenses; enter child abuse finding on judgment.** Effective for offenses committed on or after December 1, 2013, the act amends G.S. 14-318.4 to increase punishments for various felony child abuse offenses as follows: (1) from a Class E to a Class D felony for serious physical injury under subsection (a); (2) from a Class E

to a Class D felony for an act of prostitution under subsection (a1); (3) from a Class E to a Class D felony for a sexual act under subsection (a2); (4) from a Class C to a Class B2 felony for serious bodily injury or impairment of mental or emotion function under subsection (a3); and (5) from a Class H to a Class G felony for a willful act or grossly negligent omission showing reckless disregard for human life under subsection (a5). Effective for judgments entered on or after December 1, 2013, the act amends G.S. 15A-1382.1 to provide that when a defendant is found guilty of (1) an offense involving child abuse, or (2) an offense involving assault or any of the acts defined in G.S. 50B-1(a) (acts of domestic violence) and the offense was committed against a minor, the judge must indicate on the judgment form that the case involved child abuse. The clerk of court must ensure that the official record of the defendant's conviction includes the court's determination, so that any inquiry will reveal that the offense involved child abuse.

9. **S.L. 2013-41 (H 388): Docketing judgments for attorneys' fees for partially indigent defendants.** G.S. 7A-455 provides that if an indigent person is financially able to pay a portion of the value of legal services rendered by assigned counsel, the public defender, or the appellate defender, and other necessary expenses, the court must order the partially indigent person to pay that portion to the clerk of superior court for transmission to the State treasury. The act, effective May 2, 2013, (1) amends G.S. 7A-455(c), which provides that a judgment must be docketed on the later of (i) the date the conviction becomes final if the indigent person is not ordered as a probation condition to pay for the costs of counsel, or (ii) the date on which the indigent's person probation is terminated, revoked, "or expires" (act adds quoted language); and (2) amends G.S. 7A-455(d) to require specified attorneys and guardian ad litem to make "reasonable efforts" (act adds quoted language) to obtain the social security number of the person against whom a judgment is entered, and adds to the required certification in the application for services rendered by them that the social security number cannot be obtained with reasonable efforts.

10. **S.L. 2013-42: Name change requirements.** Amends G.S. 101-2(d) to allow an application for changing the name of a minor child to be filed without the consent of both living parents for three reasons, including that a parent may file an application on behalf of the minor without the consent of the other parent who has been convicted of a: (a) felony or misdemeanor child abuse; (b) indecent liberties with a minor under G.S. 14-202.1; (c) rape or any other sexual offense under Article 7A of G.S. Chapter 14; (d) incest under G.S. 14-78; or (e) assault, communicating a threat, or any other crime of violence. Amends G.S. 101-5(a)(2) to require that a state or national criminal history record check for an application of a person who wants to change his or her name be conducted within 90 days of the date of the application by the SBI, FBI, or a Channeler approved by the FBI, but this requirement does not apply to a name change application for a minor less than 16 years old. Amends G.S. 101-5(e)(1) to provide that if the name change is not a public record under G.S. 101-2(c) (applicant is a participant in address confidentiality under G.S. Chapter 15C or is a victim of domestic violence, sexual offense, or stalking), the clerk must notify the State Registrar, but the State Registrar must not notify the register of deeds in the applicant's county of birth or the registration office of the state of birth. Effective for applications for name changes filed on or after October 1, 2013.

11. **S.L. 2013-47 (S 117): Murder under G.S. 14-17 includes when child who is born alive but dies from injuries inflicted before child's birth.** Effective for offenses committed on or after December 1, 2013, the act amends G.S. 14-17 to provide that it shall constitute murder when a child is born alive but dies as a result of injuries inflicted before the child was born alive (the act essentially codifies existing common law). Provides that prosecutions for offenses committed before the effective date

of this act are not abated or affected by this act, and statutes and the common law that would be applicable but for this act shall remain applicable to offenses not described in the act, whether the offense is charged due to a child being born alive and who dies or who is born alive with injuries resulting from injuries inflicted before being born alive. Also provides that the act shall not be construed to apply to an unintentional act or omission committed by the child's birth mother during the pregnancy that culminated in the child's birth.

12. **S.L. 2013-52 (H 149): Criminalizing failure to report missing child or child victim and other acts.** Effective for offenses committed on or after December 1, 2013, the act creates various offenses that criminalize the failure to report a missing child or child victim and other acts.

Failing to report disappearance of child to law enforcement. Adds new G.S. 14-318.5 to provide that a parent or any other person providing care to or supervision of a child who knowingly or wantonly fails to report the disappearance of a child under 16 years old to law enforcement commits a Class I felony. A person who reasonably suspects the disappearance of a child under 16 years old and reasonably suspects the child may be in danger must report those suspicions to law enforcement within a reasonable time; a violation of this duty to report is a Class 1 misdemeanor. The term "disappearance of a child" means that the parent or other person providing supervision of a child does not know the location of the child and has not had contact with the child for a 24-hour period. Provides that if a child is absent from school, a teacher is not required to report the child's absence to law enforcement under this statute if the teacher complies with the reporting provisions under Article 26 of G.S. Chapter 115C.

"Grossly negligent omission" in felony child abuse offenses. Amends G.S. 14-318.4 (felony child abuse offenses) to provide that "grossly negligent omission," a term used in some of the offenses, includes the failure to report a child as missing to law enforcement under G.S. 14-318.5.

Child care facility report of missing child. Amends G.S. 110-102.1(a), which requires child care facility operators and staff to immediately report a missing child to law enforcement, (1) to change the age of the child from under 18 years old to under 16 years old, and (2) to make clear that the duty to report in this statute exists notwithstanding the provisions of G.S. 14-318.5.

Failing to notify law enforcement of death of child or secretly burying child. Adds new subsection (a1) to G.S. 14-401.22 to provide that a person who, with the intent to conceal the death of a child under 16 years old, fails to notify a law enforcement authority of the death or secretly buries or otherwise secretly disposes of a dead child's body commits a Class H felony. Also provides that a person who violates subsection (a1), knowing or having reason to know the body or human remains are of a person who did not die of natural causes, commits a Class D felony.

Amendments to offense of false reports to law enforcement agencies or officers. Amends G.S. 14-225 (false reports to law enforcement agencies or officers) to make the Class 2 misdemeanor offense apply to any false, deliberately misleading or unfounded report (underlined word added). Provides that a violation of the statute is a Class H felony if the false, deliberately misleading, or unfounded report relates to a law enforcement investigation involving the disappearance of a child under 16 years old as provided in G.S. 14-318.5 (see summary of this new statute above) or a child victim of a Class A, B1, B2, or C felony offense.

Criminal offenses created for failing to report abuse, neglect, etc. Amends G.S. 7B-301 (duty to report abuse, neglect, dependency, or death due to maltreatment) to provide that a person or institution who knowingly or wantonly fails to report the case of a juvenile as required by the statute, or who knowingly or wantonly prevents another person from making a required report, commits a Class 1 misdemeanor. Also provides that a director of social services who receives a report of sexual abuse of a juvenile in a child care facility and who knowingly fails to notify the State Bureau of Investigation of the report commits a Class 1 misdemeanor.

13. **S.L. 2013-53 (S 91): Expunctions and applications for employment and admission to educational institutions.** Effective May 17, 2013, this act amends G.S. 15A-145.4 (expunction of records for first offenders under 18 years old at time of commission of nonviolent felony) and G.S. 15A-145.5 (expunction of certain misdemeanors and felonies; no age limitation) to provide that a person whose administrative action has been vacated by an occupational licensing board pursuant to an expunction under these statutes may then reapply for licensure and must satisfy the board's then current education and preliminary licensing requirements to obtain licensure.

    Effective December 1, 2013, this act adds new G.S. 15A-153 with the following provisions. Subsection (b) protects against prosecutions for perjury or false statements for failing to acknowledge specified expunged information except as provided in subsection (e). Subsection (c) prohibits an employer or educational institution from requiring in an application for employment or admission, interview, or otherwise, that an applicant provide information about an arrest, criminal charge, or criminal conviction that has been expunged. This provision does not apply to any state or local law enforcement agency authorized under G.S. 15A-151 to obtain confidential information for employment purposes. Subsection (d) requires a state or local government that requests disclosure of information from an applicant for employment about an arrest, criminal charge, or criminal conviction to first advise the applicant that state law allows the applicant to not refer to an arrest, charge, or conviction that has been expunged. An application shall not be denied solely because of the applicant's refusal or failure to disclose expunged information. Subsection (e) provides that the provisions of subsection (d) do not apply to an applicant or licensee seeking or holding any certification issued by the Criminal Justice Education and Training Standards Commission or the Sheriffs Education and Training Standards Commission; it specifically requires a person pursuing certification to disclose felony convictions expunged under G.S. 15A-145.4 and all convictions expunged under G.S. 15A-145.5. Subsection (f) provides for civil penalties for employer violations of subsection (c), effective for violations that occur on or after December 1, 2013. Provides that G.S. 15A-153 shall not be construed to create a private cause of action against any employer or its agents or employees, educational institutions or their agents or employees, or state or local government agencies, officials, or employees.

14. **S.L. 2013-70 (H 456) and S.L. 2013-270 (S 288): Domestic violence review teams authorized in three additional counties.** The legislature in 2009 enacted S.L. 2009-52, applicable to Mecklenburg County only, that authorized the establishment of a multidisciplinary Domestic Violence Fatality Prevention and Protection Review Team to identify and review domestic violence-related deaths, including homicides and suicides, and facilitate communication among the various agencies and organizations involved in domestic violence cases. S.L. 2013-70, effective June 11, 2013, amends S.L. 2009-52 to authorize the establishment of review teams in Alamance and Pitt counties, and makes other changes. S.L. 2013-270, effective July 18, 2013, amends S.L. 2013-70 to add Wake County to its provisions.

15. **S.L. 2013-76 (H 829): Authorize certain ABC permittees to sell malt beverages in specified containers for consumption off the permitted premises.** This act amends G.S. 18B-1001, effective June 12, 2013, to authorize the Alcoholic Beverage Control Commission to allow the retail sale of malt beverages in a cleaned, sanitized, resealable container (known as a growler) that is filled or refilled and sealed for consumption off the premises, by on-premises malt beverage permittees, off-premises malt beverage permittees, and wine shop permittees. The commission must adopt rules concerning the sanitation of growlers by January 1, 2014.

16. **S.L. 2013-83 (H 610): Expand number of stadiums and ballparks where malt beverages may be sold during professional sporting events by a retail permittee.** This act amends G.S. 18B-1009, effective June 12, 2013, to specify that Chapter 18B of the General Statutes does not prohibit the sale for consumption during professional sporting events of malt beverages by a retail permittee under specified circumstances in the seating areas of stadiums, ballparks, and other similar public places with a seating capacity of 3,000 or more (the prior version of this statute required a seating capacity of 60,000 or more and in a municipality with a population greater than 450,000). It requires the ABC Commission to adopt rules for the suspension of alcohol sales in the latter portion of professional sporting events to protect public safety.

17. **S.L. 2013-88 (S 634): Increase penalties for interfering with gas, water, or electric meters or lines.** This act, effective for offenses committed on or after December 1, 2013, amends G.S. 14-151 (interfering with gas, electric, and water meters or lines) to increase the punishment from a Class 2 misdemeanor to a Class 1 misdemeanor. It makes a second or subsequent violation a Class H felony. A violation that results in "significant property damage" or "public endangerment" (these terms are not defined) is a Class F felony. A violation that results in the death of another is a Class D felony unless the conduct is covered under some other provision providing greater punishment. Makes clear that water meters and connections are covered by the statute. Incorporates in substantial part the provisions of G.S. 14-151.1 into G.S. 14-151 and repeals G.S. 14-151.1.

18. **S.L. 2013-89 (S 210): Chief district court judge may appoint chief magistrate.** This act amends G.S. 7A-146, effective June 12, 2013, to authorize a chief district court judge to appoint a full-time magistrate in a county to serve as chief magistrate for that county for an indefinite term and at the judge's pleasure.

19. **S.L. 2013-90 (S 252): Punishment increased for employee of registrant or practitioner who embezzles controlled substances.** This act, effective for offenses committed on or after December 1, 2013, amends G.S. 90-108(b) to increase the punishment from a Class I to a Class G felony for an intentional violation of G.S. 90-108(a)(14), which involves the embezzlement of controlled substances by an employee of a registrant or practitioner (doctor, dentist, pharmacy, etc.).

20. **S.L. 2013-95 (H 25): Felony to break or enter building with intent to terrorize or injure occupant.** This act amends G.S. 14-54, effective for offenses committed on or after December 1, 2013, to add new subsection (a1) to provide that it is a Class H felony when a person breaks or enters a building with the intent to terrorize or injure an occupant.

21. **S.L. 2013-97 (H 142): Public access to certain information maintained by campus police agencies of private, nonprofit institutions of higher education.** This act, effective June 12, 2013, adds new G.S. 74G-5.1 to provide that books, papers, documents, records of criminal investigations or of criminal intelligence information, or other records maintained by a campus policy agency affiliated with a private, nonprofit institution of higher education are not public records under G.S. 132-1. However, it also provides that certain information must be allowed to be inspected, subject to federal legal provisions. This information is similar to that listed under G.S. 132-1.4(c) for public law enforcement agencies, with the addition of the daily log of crimes reported to the agency that is maintained pursuant to specified federal law and regulations.

22. **S.L. 2013-101 (H 361): Technical and clarifying changes to Justice Reinvestment Act of 2011.** This act, effective for offenses committed on or after October 1, 2013, corrects three errors in the listing

of maximum sentences in the chart of Class B1 through E felonies that appears in G.S. 15A-1340.17(e). Effective June 12, 2013, it makes technical and clarifying changes to the Justice Reinvestment Act of 2011, including the provisions in G.S. 15A-1344(d2) that confinement in response to probation violations must be 90 consecutive days (underlined word added by the act). For a more detailed discussion of this session law, see Jamie Markham, *More Justice Reinvestment Clarifications Become Law,* North Carolina Criminal Law (UNC School of Government, June 26, 2013), http://nccriminallaw.sog.unc.edu/?p=4330.

23. **S.L. 2013-105 (H 532): Operating ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol.** This act, effective for offenses committed on or after December 1, 2013, amends G.S. 20-138.2B to prohibit operating an ambulance, other emergency medical services vehicle, firefighting vehicle, or law enforcement vehicle on a highway or public vehicular area after consuming alcohol or while alcohol remains in the person's body. Provides that the statute does not apply to law enforcement officers acting in the course of, and within the scope of, their official duties.

24. **S.L. 2013-109 (H 813): Definition of banned synthetic cannabinoids expanded.** This act, effective for offenses committed on or after July 1, 2013, amends G.S. 90-94(3) to expand the definition of synthetic cannabinoids that are illegal to manufacture, possess, sell, deliver, etc. See the specific wording of the revised definition in the act, which includes tetramethylcyclopropanoylindoles. Contains a savings clause for prosecutions of offenses committed before the act's effective date.

25. **S.L. 2013-114 (H 533): Authorize company police officers in three counties who are employed by a facility to use reasonable force to keep respondent in facility where doctor or psychologist will conduct examination under involuntary commitment process.** Effective June 18, 2013, this local act amends G.S. 122C-251, applicable only to Ashe, Cumberland, and Wilkes counties, to authorize company police officers employed by a facility to use, after the transporting law enforcement officer has left the facility, appropriate and reasonable force to keep a respondent at the facility and, if pursuant to a continuous and immediate pursuit, to return the respondent to the facility, where a doctor or psychologist will conduct pursuant to a court order an examination under the involuntary commitment process under G.S. 122C-261(d), 122C-263(a), or 122C-263(d)(2).

26. **S.L. 2013-123 (H 24): Amendments to regular probation condition that defendant attend and complete domestic violence abuser treatment program.** Effective for defendants placed on supervised or unsupervised probation on or after December 1, 2013, this act amends G.S. 15A-1343(b)(12) (regular condition of probation that defendant attend and complete domestic violence abuser treatment program). For supervised probation, the probation officer must forward a copy of the judgment to the treatment program, the program must notify the probation officer if the defendant fails to participate or is discharged for violating the program or its rules, and the probation officer must file a violation report and notify the district attorney. For unsupervised probation, the defendant must notify the district attorney and treatment program of his or her choice of program if the program has not previously been selected, the district attorney must forward a copy of the judgment to the treatment program, and if the defendant fails to participate or is discharged for violating the program or its rules, the program must notify the district attorney. The act, effective June 19, 2013, changes the effective date of Section 2 (which amended G.S. 15A-1382.1), S.L. 2012-39, to make the section apply to judgments entered on or after December 1, 2012 (which effectively means that active sentence judgments since December 1, 2012, must indicate whether the offense involved domestic violence).

27. **S.L. 2013-124 (H 29): Enhanced punishments for certain pseudoephedrine and methamphetamine offenses.** This act is effective for offenses committed on or after December 1, 2013. Amended G.S. 90-95(d1) provides that unauthorized possession of a pseudoephedrine product is a Class H felony if the person has a prior conviction for possession or manufacture of methamphetamine. Amended G.S. 15A-1340.16D provides that if a person is convicted of manufacture of methamphetamine under G.S. 90-95(b)(1a) and a minor under 18 years old or a disabled adult resided on the property used for manufacturing methamphetamine, or was present at the location where methamphetamine was being manufactured, the minimum term to which the defendant is sentenced for that felony is increased by 24 months; if both a minor and a disabled or elder adult resided there or was present at the location, the minimum sentence is increased by 48 months. It sets out the calculation of the maximum sentence and that the punishments are cumulative as specified in the act. The act specifies how an indictment must allege the enhanced sentencing factors.

28. **S.L. 2013-133 (H 611): Expunge suspensions and revocations on driving record of limited permittee or provisional licensee under certain circumstances.** Effective for reinstatements occurring on or after December 1, 2013, this act amends G.S. 20-13.2(c1) to provide that if the Division of Motor Vehicles restores a permit or license that was revoked due to ineligibility for a driving eligibility certificate under G.S. 20-11(n)(1), the DMV must expunge any record of revocation or suspension from the person's driving record. However, an expungement is not allowed if the person has had a prior expungement.

29. **S.L. 2013-139 (H 762): Amend procedural requirements concerning bail bonds.** This act, effective December 1, 2013, amends the definition of "bail bond" in G.S. 15A-531(4) to provide that a bail bond signed by a surety as defined in G.S. 15A-531(8)a. (an insurance company, when a bail bond is executed by a bail agent on its behalf) and G.S. 15A-531(8)b. (a professional bondsman, when a bail bond is executed by the bondsman or a runner on his or her behalf) is considered the same as a cash deposit for all purposes. Under prior law, only a bail bond signed by a bail agent for an insurance company was considered the same as a cash deposit. The act makes other procedural changes, which involve service of paperwork.

30. **S.L. 2013-144 (S 124): Class F felony to discharge firearm within building or other enclosure with intent to incite fear.** This act, effective for offenses committed on or after December 1, 2013, adds new G.S. 14-34.10 to provide, unless covered under some other law providing greater punishment, that a person commits a Class F felony when the person willfully and wantonly discharges or attempts to discharge a firearm within any occupied building, structure, motor vehicle, or other conveyance, etc., with the intent to incite fear in another.

31. **S.L. 2013-147 (H 850): No charge if person informs officer of presence of hypodermic needle before search.** This act, effective for offenses committed on or after December 1, 2013, amends G.S. 90-113.22 (possession of drug paraphernalia) to provide that an officer, before searching a person or the person's premises or vehicle, may ask if the person possesses a hypodermic needle or other sharp object that may cut or puncture the officer or whether such an object is on the premises or in the vehicle. If the person informs the officer of the presence of such an object before the search, the person may not be charged with or prosecuted for possession of drug paraphernalia. The exemption from charge and prosecution does not apply to any other drug paraphernalia found during the search.

32. **S.L. 2013-148 (H 879): Person who serves full term as grand juror is not required to serve again as grand juror or juror for six years.** This act, effective January 1, 2014, amends G.S. 15A-622 and makes conforming changes to G.S. 9-3 and 9-7 to provide that a person who serves a full term as a grand juror is not required to serve again as a grand juror or juror for six years.

33. **S.L. 2013-152 (S 222): Revisions to North Carolina Controlled Substances Reporting System Act.** This act revises various provisions of Article 5E of Chapter 90 of the General Statutes, the North Carolina Controlled Substances Reporting System Act. Effective June 19, 2013, the act revises G.S. 90-113.74(c)(5) to require the Department of Health and Human Resources to release data in the reporting system to a sheriff, police chief, or their designated deputy or police investigator who is assigned to investigate the diversion and illegal use of prescription medication or pharmaceutical products identified as Schedule II through V controlled substances and who is engaged in a bona fide specific investigation concerning the enforcement of laws governing licit drugs pursuant to a lawful court order specifically issued for that purpose.

34. **S.L. 2013-154 (S 306): Repeal of North Carolina Racial Justice Act and other changes concerning capital punishment.** This act, effective June 19, 2013, repeals the North Carolina Racial Justice Act (Article 101 of G.S. Chapter 15A) and makes other changes relating to capital punishment.

    North Carolina Racial Justice Act. The Racial Justice Act, enacted in 2009, provided a procedure for a defendant to prove that race was a significant factor in decisions to seek or to impose a death sentence. If a court made such a finding, it was required to order that a death sentence not be sought or imposed or that a death sentence already imposed be vacated and the defendant be resentenced to life imprisonment without the possibility of parole.

    This act provides that the repeal is retroactive (other than for a defendant already resentenced, see below) and applies to any motion for appropriate relief filed before the act's effective date, noted above. The act states that all such motions are void. The repeal does not apply to a court order that resentenced a defendant to life imprisonment without parole before the effective date, if the order is affirmed on appellate review and becomes a final order. However, the repeal is applicable if the order is vacated on appellate review.

    Health care professional's assistance with execution. The act adds new G.S. 15-188.1 to provide that any assistance with an execution by any licensed health care professional, including, but not limited to, physicians, nurses, and pharmacists, shall not be a cause for any disciplinary or corrective measures by any board, commission, etc., that regulates the practice of health care professionals. The statute states that the infliction of the punishment of death by administration of required lethal substances shall not be construed to be the practice of medicine. Conforming changes are made to statutes regulating particular health professionals.

    Time for execution. The act amends G.S. 15-194 to provide that the Attorney General of North Carolina must provide written notification to the Secretary of the Department of Public Safety of the occurrence of events (termination of certain court proceedings, failure to file motions, etc.) set out in the statute not more than 90 days from that occurrence. The Secretary must immediately schedule a date for execution not less than 15 days or more than 120 days from the date of receiving notification from the Attorney General. The Attorney General must submit a written report to the Joint Legislative Oversight Committee on Justice and Public Safety by April 1, 2014, and thereafter annually on October 1 on the status of all pending postconviction capital cases. The chairs of this committee may modify these dates.

    Manner of execution and people designated to execute death sentence. The act amends G.S. 15-188 to provide that the mode of execution is the administration of an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the person is dead,

and that procedure shall be determined by Secretary of the Department of Public Safety, who must ensure compliance with federal and state constitutions (the prior version of the statute described the substance as a lethal quantity of an ultrashort acting barbiturate in combination with a chemical paralytic agent until the person was dead).

The act amends G.S. 15-190 to require the warden to report to the Joint Legislative Oversight Committee on Justice and Public Safety by April 1, 2014, and thereafter annually on October 1 on the status of the people required to be named and designated by the warden to execute death sentences. The report must confirm that the required people are properly trained and ready to serve as an execution team. The chairs of this committee may modify the reporting dates set out above.

35. **S.L. 2013-155 (S 387): Changes involving Commissioner of Agriculture and department's law enforcement functions.** This act, effective July 1, 2013, makes several changes. Amended G.S. 143-166.8 (motor vehicle laws applicable to state parks and forests road system) to authorize the Commissioner of Agriculture to establish a lower speed limit than 25 miles per hour in the state forests road system as specified in the statute. The Commissioner may by rule establish parking areas and provide for the removal of illegally parked motor vehicles in the state forests road system. The statute previously vested the preceding powers with the Secretary of Environment and Natural Resources. Amended G.S. 106-65 provides that the Commissioner of Agriculture has the right of entry on the premises of any place where entry is necessary to enforce the provisions of Article 4H (bedding) of G.S. Chapter 106 or the rules adopted by the Board of Agriculture. If consent for entry is not obtained, an administrative inspection warrant must be obtained under G.S. 15-27.2.

36. **S.L. 2013-158 (S 443): Disposition of firearms amendments.** This act amends several statutes involving the disposition of firearms, effective September 1, 2013, and applicable to any firearm found or received by a local law enforcement agency on or after that date and to any judicial order for the disposition of any firearm on or after that date. Amended G.S. 15-11.1(b1)(3), 15-11.2(e), and 14-269.1(4) make clear that a firearm is to be destroyed under these provisions if the firearm does not have a legible, unique identification number or is unsafe for use because of wear, damage, age, or modification. Amended G.S. 15-11.2 deletes the authority of a person who found a firearm and turned it over to a law enforcement agency to claim the firearm if it remains unclaimed by a person who may be entitled to it. Amended G.S. 15-11.2(d) transfers the authority to dispose of an unclaimed firearm from a judge to the head of the law enforcement agency and makes several changes concerning how the firearm may be disposed of, including the sale at a public auction to people licensed as firearms collectors, dealers, importers, or manufacturers.

37. **S.L. 2013-164 (S 528): Clarify oath of petit jurors.** This act, applicable to oaths taken on or after October 1, 2013, amends G.S. 9-14 to require jurors to take (1) the oath required by Section 7 of Article VI of the Constitution of North Carolina, by swearing or affirming to support the Constitution of the United States and the Constitution and laws of North Carolina, and (2) the oath required by G.S. 11-11.

38. **S.L. 2013-165 (S 530): Prohibit distribution to minor of tobacco-derived products and vapor products.** This act, effective for offenses committed on or after August 1, 2013, amends G.S. 14-313 to prohibit the distribution of tobacco-derived products and vapor products to minors. It amends the definition of "tobacco product" to include tobacco-derived product, vapor product, or components of a vapor product, and it adds definitions of "tobacco-derived product" (noncombustible product derived from tobacco that contains nicotine and is intended for human

consumption) and "vapor product" (noncombustible product that includes an electronic cigarette, cigar, cigarillo, and pipe). The act requires a person who engages in distributing tobacco products through the Internet or other remote sales methods to perform an age verification through an independent, third-party age verification service as specified in the act. The act also makes clear that the sale of cigarette wrapping papers is included in the offense requiring proof of age.

39. **S.L. 2013-166 (S 539): County jury commission may obtain date of birth information from election board; no public access to dates of birth of prospective jurors.** This act, effective June 19, 2013, amends G.S. 163-82.10B to allow a county jury commission to obtain the dates of birth of registered voters from the board of elections to prepare the master jury list in its county. Amended G.S. 9-4(b) provides that public access to juror information is limited to the alphabetized list of the names, and dates of birth of prospective jurors (as well as addresses) are confidential and not subject to disclosure without a court order.

40. **S.L. 2013-167 (S 542): Long-term care facilities must require applicants for employment and certain employees to submit to testing for controlled substances.** This act, effective October 1, 2013, adds new G.S. 131D-45 (adult care homes) and G.S. 131E-114.4 (nursing homes) to provide that an offer for employment to an applicant is conditioned on the applicant's consent to an examination and screening for controlled substances. It also authorizes these employers to require random examination and screening for controlled substances as a condition of continued employment, as well as requiring examination and screening when the employer has reasonable grounds to believe an employee is an abuser of controlled substances.

41. **S.L. 2013-169 (S 583): New and revised definitions for statutes regulating secondary metals recyclers.** This act, effective June 19, 2013, amends definitions in G.S. 66-420 involving the regulation of sales and purchases of metal as follows: (1) revises the definition of "card cash system" to mean a system of payment that provides payment in cash or in a form other than cash and when providing payment in the form of cash (i) captures a photograph of the seller when the payment is received, and (ii) uses an automated cash dispenser, including but not limited to an automated teller machine; and (2) adds a definition of "copper" to include nonferrous metals, including but not limited to copper wire, copper clad steel wire, copper pipe, bars, sheeting, tubing, and pipe fittings, and insulated copper wire; but it does not include brass and bronze alloys, lead nickel, zinc, or items not containing a significant quantity of copper.

42. **S.L. 2013-170 (S 584): Amendment to filing false lien statute.** This act, effective for offenses committed on or after December 1, 2013, amends G.S. 14-118.6 (filing false lien or encumbrance against real or personal property of public officer or employer on account of performance of official duties) to include an immediate family member of the public officer or employee, defined as a spouse or child.

43. **S.L. 2013-171 (S 630): Amendments to laws concerning disposition of blood and urine samples, admissibility of reports after notice and demand, and expunction of DNA samples taken after arrest.** This act adds new subsection (h) (disposition of blood and urine evidence involving implied consent offenses) to G.S. 20-139.1, effective June 19, 2013, to provide that any blood or urine sample subject to chemical analysis for the presence of alcohol, a controlled substance, etc., may be destroyed by the analyzing agency 12 months after the case is filed or is concluded in the trial court and not appealed, whichever is later, without notice to the parties. However, if a motion to preserve the evidence has been filed by either party, the evidence must remain in the custody of the

analyzing agency or the agency that collected the sample until the entry of a court order concerning its disposition.

Effective for proceedings held on or after December 1, 2013, the act amends various statutes allowing the admissibility of a laboratory report, affidavit, or statement to clarify that they "shall" (prior law used "may") be admissible without the necessity of testimony if the defendant or attorney fails to file a written objection. These statutes are: G.S. 8-58.20(f) (forensic evidence); G.S. 8-58.20(g) (chain of custody); G.S. 20-139.1(c1) (chemical analysis of blood or urine); G.S. 20-139.1(c3) (chain of custody); G.S. 20-139.1(e1) (chemical analyst's affidavit in district court); G.S. 90-95(g) (chemical analysis for controlled substance); and G.S. 90-95(g1) (chain of custody).

Effective for verification forms received by the SBI on or after December 1, 2013, the act amends G.S. 15A-266.3A(k) (DNA sample after arrest for certain offenses) to provide that the SBI must, within 90 days (prior law, 30 days) of receipt of a verification form, comply with the duties set out in the statute concerning the possible expunction of the defendant's DNA record and samples.

44. **S.L. 2013-190 (S 8): Fine increased for unauthorized parking in private parking lots in certain counties and cities.** This act amends G.S. 20-219.2 (which applies only to specified counties and cities; see G.S. 20-219.2(c)) to increase the fine for unauthorized parking in private parking lots and other violations of the statute from not more than $100.00 to not less than $150.00. The act is effective for violations committed on or after December 1, 2013.

45. **S.L. 2013-191 (S 25): Military members on active duty outside North Carolina considered residents for hunting, fishing, etc., licenses.** This act, effective July 1, 2013, amends G.S. 113-130(4) to provide that military members on active duty outside North Carolina are considered North Carolina residents for the purpose of obtaining hunting, fishing, trapping, and special activity licenses.

46. **S.L. 2013-194 (S 285): Requirements changed for laboratories providing chemical analyses for blood or urine under G.S. 20-139.1.** Effective June 26, 2013, this act amends G.S. 20-139.1 (chemical analyses for implied consent offenses, such as DWI) to repeal the requirement in subsection (c2) that a laboratory providing chemical analyses of blood or urine under G.S. 20-139.1 be accredited by an accrediting body that requires conformance to forensic specific requirements and that is a signatory to a specified international laboratory agreement. The act also provides that a laboratory approved for chemical analysis by the Department of Health and Human Services includes any hospital laboratory approved by the department pursuant to a program resulting from a specified federal law. Amended G.S. 8-58.20 makes clear that its provisions do not apply to chemical analyses under G.S. 20-139.1. [Note: Although a later session law, Session Law 2013-338 (S 200), purported to delay the accrediting requirement for a laboratory providing chemical analyses of blood or urine under G.S. 20-139.1, this later session law had no legal effect because Session Law 2013-194 (S 285) had already repealed the accrediting requirement and had amended G.S. 8-58.20 to make clear that its provisions do not apply to chemical analyses under G.S. 20-139.1.]

47. **S.L. 2013-195 (S 461): Allow third-party commercial driver's license skills testing.** This act amends G.S. 20-137.13, effective July 1, 2013, to require the Division of Motor Vehicles to allow a third party to administer a skills test for driving a commercial motor vehicle any day of the week. The act also amends G.S. 20-7(f)(5) to allow the DMV to issue an applicant a temporary driving certificate valid for 60 days (current law is 20 days) for a commercial driver's license.

48. **S.L. 2013-196 (S 494): Authorize community service as a discretionary condition of post-release supervision and amend voting procedures of Post-Release Supervision and Parole Commission.**

This act amends G.S. 15A-1368.4(c) (conditions of post-release supervision), effective June 26, 2013, to authorize the Post-Release Supervision and Parole Commission to impose a condition of community service on a supervisee who was a Class F through Class I felon and has failed to fully satisfy an order for restitution, reparation, or costs imposed as part of the sentence. However, the commission may not impose this condition if it determines that the supervisee has the financial resources to satisfy the order. Effective for actions taken by the commission on or after June 26, 2013, the act amends G.S. 143B-721(d) to provide that a three-member panel of the commission may set the terms and conditions for post-release supervision under G.S. 15A-1368.4 and may decide questions of violations, including issuance of warrants. If there is a tie vote by the full commission, the chair shall break the tie with an additional vote.

49. **S.L. 2013-198 (H 219): Substitute "child born out of wedlock" for "illegitimate" child and "bastardy" in criminal and civil statutes.** This act, effective June 26, 2013, amends criminal and civil statutes to remove references to "illegitimate" child and "bastardy" and replace them with "child born out of wedlock."

50. **S.L. 2013-201 (H 322): Division of Motor Vehicles may waive skills test for commercial driver's license for retired or discharged military members under certain circumstances.** This act, effective June 26, 2013, amends G.S. 20-37.13(c1) to allow the Division of Motor Vehicles to waive the skills test for a commercial driver's license for a retired or discharged member of an active or reserve component of the military if the member meets the conditions set out in new G.S. 20-37.13(c1)(3)c.

51. **S.L. 2013-203 (H 891): District attorney authorized to petition court to freeze assets of defendant charged with exploitation of elder or disabled adult.** This act, effective for offenses committed on or after October 1, 2013, amends G.S. 14-112.2 to provide if a defendant is charged with exploitation of an elder or disabled adult that involves funds, assets, or property valued more than $5,000, the district attorney may file a petition in the pending criminal case to freeze the assets in the amount of 150 percent of their alleged value for use as restitution to the victim. The standard of proof to support the petition is by clear and convincing evidence. New G.S. 14-112.3 sets out the procedure for filing the petition. It also provides that in any proceeding to release the assets filed by a motion of the defendant or other person claiming an interest in the assets, the State must prove that the defendant is about to, intends to, and did divest himself or herself of the assets in a manner that would make the defendant insolvent for restitution. A court must vacate the order to freeze assets if the criminal charge is voluntarily dismissed or the defendant is found not guilty.

52. **S.L. 2013-205 (H 333): Amendments to sex offender statutes involving registration and residency.** This act, effective June 26, 2013, amends G.S. 14-208.11(a)(1) (sex offender's failure to register) to include within the offense of willfully failing to register, the failure to register with the sheriff in the county designated by the defendant under G.S. 14-208.8 as his or her expected county of residence. Amended G.S. 14-208.11 effectively provides that a defendant arrested for violating the statute must be prosecuted in the prosecutorial district that includes the sheriff's office in the county where the defendant failed to register. If the arrest is made outside the prosecutorial district, the defendant must be transferred to the custody of the sheriff of the county where the defendant failed to register.

53. **S.L. 2013-209 (H 597): Official shield for bail bondsmen and runners.** This act, effective June 26, 2013, amends G.S. 58-71-40 to authorize a licensee (bail bondsmen and runners) while engaged in official duties to possess and display a shield designed as specified in the act. A shield deviating from

the design requirements is unauthorized and its possession is a violation of the statute (which would be a Class 1 misdemeanor under G.S. 58-71-185).

54. **S.L. 2013-210 (H 641): Judge given discretion under certain circumstances whether to impose deferment and probation for first drug offense under G.S. 90-96(a).** G.S. 90-96(a) provides that a court for a first offense of certain drug offenses must, without entering a judgment of guilty and with the defendant's consent, defer proceedings and place the defendant on probation with a later discharge of the defendant and dismissal of the charge if the defendant complies with its terms and conditions. This act, effective for offenses committed on or after December 1, 2013, removes the requirement of deferment and probation if the court determines with a written finding and the district attorney's agreement that a conditional discharge for the defendant is inappropriate for factors related to the offense.

55. **S.L. 2013-225 (H 343): Change in default priority order in which monetary obligations imposed in criminal and infraction judgments must be satisfied.** Section 6 of this act, effective June 30, 2013 (which effectively means Monday, July 1, 2013), changes the default priority order under G.S. 7A-304(d) in which monetary obligations imposed in criminal and infraction judgments must be satisfied. The Administrative Office of the Courts has issued a memorandum on this complex provision, which is available at http://nccourts.org/Courts/Trial/Documents/court_costs_memo-interim_criminal-2013.pdf, and readers interested in this subject should consult the memorandum.

56. **S.L. 2013-229 (S 264): Nuisance law amendments.** Article 1 of G.S. Chapter 19 authorizes the Attorney General, district attorney, local government, or private citizen to bring a civil action to abate nuisances involving buildings and places used for illegal sales of drugs, obscenity, or alcohol, prostitution, etc. This act, effective for nuisance actions filed on or after July 3, 2013, amends G.S. 19-1 to: (1) state that the activity sought to be abated need not be the sole purpose of the building for it to constitute a nuisance; and (2) provide that a nuisance action may not be brought against a place or business that is subject to regulation under G.S. Chapter 18B (regulation of alcoholic beverages) when the basis for the action is a violation of the laws and regulations of the chapter concerning the possession or sale of alcoholic beverages.

57. **S.L. 2013-230 (S 377): Allow governor to temporarily suspend routine weight inspections of trucks during emergency.** This act, effective July 3, 2013, amends G.S. 166A-19.70 to authorize the governor to direct the Department of Public Safety to temporarily suspend under G.S. 20-118.1 the weighing of vehicles to transport livestock, poultry, or crops from designated counties in an emergency area or if there exists an imminent threat of severe economic loss of livestock, poultry, or widespread or severe damage to crops ready to be harvested. The act states that it does not permit the operation of a vehicle when a law enforcement officer has probable cause to believe the vehicle is creating an imminent hazard to public safety.

58. **S.L. 2013-231 (S 568): Allow restricted driver's license for person using bioptic telescopic lenses.** The act, effective July 3, 2013, amends G.S. 20-7 to authorize a person using bioptic telescopic lenses to obtain a regular Class C driver's license if the person satisfies specified conditions. The person is permitted to operate a motor vehicle only during the period beginning one-half hour after sunrise and ending one-half hour before sunset. However, the act allows operation between one-half hour before sunset and ending one-half hour after sunrise under certain circumstances.

59. **S.L. 2013-233 (S 712): Allow homebound to apply for special photo identification card without personal appearance.** This act, effective July 1, 2014, provides if a person has a doctor's letter certifying that a severe disability causes the person to be homebound, the Division of Motor Vehicles must adopt rules allowing an application for or a renewal of a special photo identification card under G.S. 20-37.7 without a personal appearance. Amended G.S. 20-37.7(c) requires that the card must include a color photo of the card holder.

60. **S.L. 2013-237 (H 209): Consent domestic violence protective order may be entered without factual findings and legal conclusions if parties agree.** This act, effective for orders entered on or after October 1, 2013, amends G.S. 50B-3 to provide that a consent domestic violence protective order may be entered without findings of fact and conclusions of law if the parties agree in writing to do so. The order will be valid and enforceable the same as an order entered with factual findings and legal conclusions.

61. **S.L. 2013-241 (H 626): Notice to law enforcement agency of certain information about vehicles that have been towed.** This act, applicable to violations committed on or after December 1, 2013, adds new G.S. 20-219.20 to provide that when a vehicle is towed at the request of a person other than the vehicle owner or operator, the tower must provide—before moving the vehicle—specified information (vehicle description, place from which towed and where it will be stored, contact information for owner to retrieve vehicle) to the local law enforcement agency by telephoning the agency. Notification may be provided within 30 minutes of moving the vehicle if the vehicle is impeding the flow of traffic or otherwise jeopardizing the public welfare so immediate towing is necessary. This statute does not apply when a vehicle is towed at a law enforcement officer's direction or from a private lot where signs are posted under G.S. 20-219.2(a). A violation of this statute is an infraction with a penalty of not more than $100.00.

62. **S.L. 2013-243 (H 656): Revision of laws involving seizure, forfeiture, and sale of motor vehicles used in commission of felony eluding arrest.** This act, effective for offenses committed on or after December 1, 2013, repeals the current provisions in G.S. 20-141.5(g) through (j) concerning the seizure, forfeiture, and sale of a motor vehicle driven by the defendant while committing felony eluding arrest under G.S. 20-141.5(b) or (b1). It amends G.S. 20-28.2 (definitions and forfeiture order), 20-28.3 (seizure, impoundment, and forfeiture), 20-28.4(a) (release of seized motor vehicle at trial's conclusion), 20-28.8 (reports to be sent to DMV), and 20-54.1 (forfeiture of right of registration of all motor vehicles registered in convicted defendant's name) currently applicable to the seizure, forfeiture, and sale of motor vehicles involved with impaired driving offenses, to include felony eluding arrest, and the procedures are made substantially similar to those for impaired driving, except for pretrial release of the motor vehicle to the defendant owner under G.S. 20-28.3(e2). Amended G.S. 20-28.3(l) provides that if the underlying offense is felony eluding arrest and the defendant's conviction is for misdemeanor eluding arrest, whether or not the reduced charge is by plea agreement, the defendant must be ordered to pay as restitution to the county school board, motor vehicle owner, or the lienholder the cost paid or owed for the towing and storage of the motor vehicle.

63. **S.L. 2013-244 (H 784): Worthless check amendments.** This act, effective for offenses committed on or after December 1, 2013, amends G.S. 14-107(a) and (b) (worthless check offenses) to make these offenses applicable when the defendant had previously presented the check or draft for the payment of money or its equivalent. Amended G.S. 14-107.1 (prima facie evidence in worthless check cases) provides that the reason for dishonor may be indicated with terms that include, but are

not limited to: “insufficient funds,“ “no account,“ “account closed,“ “NSF,“ “uncollected,“ “unable to locate,“ “stale dated,“ “postdated,“ “endorsement irregular,“ “signature irregular,“ “nonnegotiable,“ “altered,“ “unable to process,“ “refer to maker,“ “duplicate presentment,“ “forgery,“ “noncompliant,“ or “UCD noncompliant.“ The act makes similar changes to G.S. 6-21.3 (civil remedies for returned check).

64. **S.L. 2013-274 (H 982): Medicaid subrogation crime amended.** This act, among other changes to G.S. 108A-57 (Medicaid subrogation statute), amends the Class 1 misdemeanor in subsection (b) for a person seeking or having obtained assistance under Medicaid for himself, herself, or another to willfully fail to disclose to the county social services department or its attorney and to the Department (underlined words added; “Department” means the Department of Health and Human Services) the identity of any person or organization against whom the recipient of assistance has a right to recovery. The act is effective July 18, 2013, and applies to (1) Medicaid claims that arise on or after that date, and (2) Medicaid claims arising before that date for which the Department has not been paid in full.

65. **S.L. 2013-275 (H 783): Pyrotechnic exhibition law amendments.** The act, effective July 18, 2013, makes various amendments to statutes (G.S. 14-410, 14-413, 58-82A-3, and 58-82A-25) governing the exhibition of pyrotechnics. Among them are amendments to G.S. 14-410 to allow pyrotechnics to be exhibited, manufactured, etc.: (1) as a special effect by a production company for a motion picture production if the motion picture set is closed to the public or is separated from the public by a minimum of 500 feet; or (2) for pyrotechnic or proximate audience display instruction consisting of classroom and practical skills training approved by the Office of State Fire Marshal.

66. **S.L. 2013-276 (H 137): Reward money increased that Governor may offer to apprehend fugitive or provide information leading to arrest and conviction.** This act, effective July 18, 2013, amends G.S. 15-53 and G.S. 15-53.1 to increase from $10,000 to $100,000 the amount of a reward the Governor may offer and pay to a person who apprehends a fugitive or provides information leading to the arrest and conviction of a person.

67. **S.L. 2013-277 (H 161): Mandatory retirement age for magistrates.** This act, effective January 1, 2015, and applicable to people whose terms of office as magistrates begin on or after that date, amends G.S. 7A-170 to provide that a magistrate may not continue in office beyond the last day of the month in which the magistrate reaches the mandatory retirement age for justices and judges as specified in G.S. 7A-4.20 (last day of month in which justice or judge attains his or her seventy-second birthday).

68. **S.L. 2013-283 (H 296): Hunting, trapping, and fishing license fees increased.** This act makes several changes to the wildlife laws, including increasing fees for many hunting, trapping, and fishing licenses, effective August 1, 2014. Effective January 1, 2015, these statutory fees will remain at the levels existing on that date until the rules required to be adopted become effective. The act requires the Wildlife Resources Commission to adopt rules to establish fees for hunting, trapping, fishing, and activity licenses issued and administered by the commission. It provides that a rule to increase fees above January 1, 2015, levels may not increase a fee in excess of the average increase in the Consumer Price Index for All Urban Consumers over the preceding five years. The statutory fees for these licenses will expire when the commission’s rules are adopted.

69. **S.L. 2013-284 (H 327): New aggravating factor in non-capital sentencing involving defendant who is firefighter or rescue squad worker.** This act makes many changes to the Firefighters' and Rescue Squad Workers' Pension Fund. It also adds new G.S. 15A-1340.16(d)(9a), effective for offenses committed on or after December 1, 2013, to make it a statutory aggravating factor in non-capital sentencing that the defendant is a firefighter or rescue squad worker, and the offense is directly related to service as a firefighter or rescue squad worker.

70. **S.L. 2013-286 (H 345): Increase punishment for misuse of 911 system.** This act makes the punishment for all violations of G.S. 14-111.4 (misuse of 911 system) a Class 1 misdemeanor, effective for offenses committed on or after December 1, 2013. The current statute provides that a violation is a Class 3 misdemeanor, but certain aggravated acts constitute a Class 1 misdemeanor.

71. **S.L. 2013-288 (H 358): Offenses involving state retirement systems.** This act creates and amends offenses involving the various state retirement systems in G.S. Chapters 135, 128, and 120. It creates new G.S. 135-111.1 to make the fraudulent receipt of a decedent's Disability Income Plan allowance a Class 1 misdemeanor and deletes references in G.S. 135-18.11 to the plan or a disability benefit. It amends statutes in each retirement system that involve the fraudulent receipt of a decedent's retirement allowance to make the Class 1 misdemeanor violation apply to fraudulently receiving money as a result of a beneficiary's death as well as a retiree's death. The act is effective for offenses committed on or after December 1, 2013.

72. **S.L. 2013-293 (H 428): Stopped school bus law changes.** This act, effective for offenses committed on or after December 1, 2013, makes several changes involving the stopped school bus violations under G.S. 20-217. It retains the punishment as a Class 1 misdemeanor but requires the payment of a minimum $500 fine. It also requires a minimum $1,250 fine for the Class I felony offense when the defendant also strikes a person, and a minimum $2,500 fine for the Class H felony offense when striking a person results in that person's death. It establishes various driver's license revocations for committing the misdemeanor and felony violations in G.S. 20-217. It provides that a person whose driver's license is revoked for a violation is also disqualified under G.S. 20-17.4 from driving a commercial motor vehicle for the time period in which the license remains revoked. The defendant's failure to pay fine or costs imposed for a violation will result in the Division of Motor Vehicles withholding the registration renewal of a motor vehicle registered in the defendant's name. The act states that the General Assembly encourages local school boards to use the proceeds of any fines collected for violations of G.S. 20-217 to purchase automated camera and video recording systems to install on school buses to help detect and prosecute violators.

73. **S.L. 2013-298 (S 316): Pretrial release amendments.** This act, effective for proceedings to determine pretrial release conditions occurring on or after December 1, 2013, makes several changes to pretrial release provisions. It adds new G.S. 15A-533(f) to provide that there is a rebuttable presumption that no condition of release will reasonably assure the appearance of the defendant as required and the community's safety if a judicial official finds there is reasonable cause to believe that the defendant committed a felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm, and the official also finds (1) the offense was committed while the defendant was on pretrial release for another felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm, or (2) the defendant has previously been convicted of a felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm and not more than five years have elapsed since the date of conviction or the defendant's release for the offense, whichever is later. A defendant considered for bond under this provision may only

be released by a district or superior court judge, and the judge must find there is a reasonable assurance that the person will appear for trial and release does not pose an unreasonable risk of harm to the community. The act amends G.S. 15A-534(d1) to raise from $500 to $1,000 the minimum amount of the secured bond under the subsection if no bond had yet been required for the charges. The act adds new G.S. 15A-534(d3) to provide that when pretrial release conditions are being determined for a defendant who is charged with an offense and the defendant is currently on pretrial release for a prior offense, the judicial official must require a secured appearance bond in an amount at least double the amount of the most recent prior secured or unsecured bond for the charges or, if no bond has yet been required for the charges, in the amount of $1,000.

74. **S.L. 2013-300 (S 399): Proposed constitutional amendment to allow waiver of jury trial in non-capital trial with consent of judge.** The act proposes a constitutional amendment to be submitted to the voters at the statewide general election to be held on November 4, 2014. If the majority of the votes cast are in favor of the amendment, it would become effective December 1, 2014, and apply to criminal offenses arraigned in superior court on or after that date. The amendment would revise Section 24 (right of jury trial in criminal cases), Article I of the North Carolina Constitution to allow a defendant in a non-capital trial in superior court to waive jury trial in writing or on the record and with the consent of the trial judge, subject to procedures prescribed by the General Assembly. The act amends G.S. 15A-1201 (if amendment is approved), effective on the same date and in the same manner as the constitutional amendment, to conform it to the language of the constitutional amendment with the additional provision that the waiver of jury trial must be made knowingly and voluntarily.

75. **S.L. 2013-301 (S 465): Felony offense to sell, purchase, install, possess, etc., an automated sales suppression device.** This act, effective for offenses committed on or after December 1, 2013, adds a new G.S. 14-118.7 to prohibit the sale, purchase, installation, possession, etc., of an automated sale suppression device, zapper, or phantom-ware. A violation is a Class H felony with a minimum $10,000 fine. An "automated sales suppression device or zapper" is defined as a software program that falsifies the electronic records of electronic cash registers and other point-of-sale systems, including transaction data and reports. "Phantom-ware" is defined as a hidden programming option embedded in the operating system of an electronic cash register or hardwired into the electronic cash register that can be used to create a second set of records or may eliminate or manipulate transaction records, which may or may not be preserved in digital formats, to represent the true or manipulated record of transactions in the electronic cash register. Any person who violates this statute is liable for all taxes, fees, penalties, and interest due to the State as the result of the use of these devices and must forfeit to the State as an additional penalty all profits associated with the sale or use of the devices.

76. **S.L. 2013-303 (H 450): Bail procedure established when confinement is imposed as punishment for criminal contempt and notice of appeal has been given.** This act, applicable to confinement imposed for criminal contempt on or after December 1, 2013, amends G.S. 5A-17 to provide that a person found in criminal contempt who has given notice of appeal may be retained in custody for not more than 24 hours from the time of imposition of confinement without a bail determination being made by a judicial official (district court judge if confinement imposed by clerk or magistrate, superior court judge if confinement imposed by district court judge; superior court judge other than the superior court judge that imposed confinement). If the designated judicial official has not acted within 24 hours, any judicial official must act to hold the bail hearing.

77. **S.L. 2013-308 (H 635): Allow court clerk or magistrate to issue by fax or email transmission an involuntary commitment custody order to 24-hour facility when respondent is located there.** This act, effective October 1, 2013, amends G.S. 122C-261(d) to provide if the affiant is a physician or psychologist at a 24-hour facility who recommends inpatient commitment, the respondent is physically present there, and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for inpatient commitment, then the clerk of magistrate may issue an order by fax or a scanned order by email to the physician, psychologist, or "designee" (defined as on-site police security personnel at the 24-hour facility) to take the respondent into custody and proceed according to G.S. 122C-266 (inpatient commitment). The revised statute specifies notice to the respondent, signing the custody order, returning the order, and the required training that must be completed by physicians, psychologists, and designees before the fax or email procedure may be used with a particular physician, psychologist, or designee.

78. **S.L. 2013-312 (H 828) Criminal history checks of applicants for licensure as physical therapists and assistants.** This act, effective October 1, 2013, amends various aspects of the physical therapy practice act, including adding the requirement that applicants for licensure as physical therapists and physical therapy assistants must consent to a criminal history check. Refusal to consent is a ground to deny licensure. The act also adds new G.S. 114-19.33 to allow the Department of Justice to provide the Board of Physical Therapy Examiners with a criminal history record of applicants for licensure from state and national repositories.

79. **S.L. 2013-323 (H 26), amended by S.L. 2013-410 (H 92): Chop shop activity law amendments.** This act, effective for offenses committed on or after December 1, 2013, amends G.S. 14-72.7 (chop shop activity) (1) to increase the punishment from a Class H felony to a Class G felony, and (2) to add "reasonable grounds to believe" as an alternative to "knows" or "knowing" in proving the offenses set out in subsection (a) of the statute. The act amends G.S. 20-62.1 (purchase of vehicles for purposes of scrap or parts only), effective for reports and transactions occurring on or after December 1, 2013, and for offenses committed on or after that date, to increase the punishment set out in subsection (c) from a Class 1 misdemeanor to a Class I felony with a mandatory minimum $1,000 fine (current law provides for a Class 1 misdemeanor for a first offense and a Class I felony for a second or subsequent offense). Amended G.S. 20-62.1(a)(1) requires that the record of a purchase must be maintained on a form, or in a format, as approved by the Division of Motor Vehicles (DMV) (underlined words added) and makes other changes. New G.S. 20-62.1(a)(1a) requires a purchaser to verify with the DMV whether or not the motor vehicle has been reported stolen. New G.S. 20-62.1(a1) requires, within 72 hours of each day's close of business, a secondary metals recycler or salvage yard purchasing a motor vehicle under subsection (a) to submit specified information to the National Motor Vehicle Title Information System (NMVTIS) or report the required information to a third-party consolidator as long as the consolidator reports the information to NMVTIS. New G.S. 20-62.1(b1) provides that the information obtained by the DMV under the statute shall be made available only to law enforcement agencies and is not a public record under G.S. 132-1.

80. **S.L. 2013-337 (S 140): Exploitation of disabled or older adult amendments.** This act amends G.S. 14-112.2, effective for offenses committed on or after December 1, 2013. It replaces the definition of "elder adult" (person 60 years older or older unable to provide for specified services) with "older adult" (person 65 years old or older) and substitutes "older adult" for "elder adult" throughout the statute. It amends G.S. 14-112.2(c) to insert the introductory language as "unlawful for a person to

knowingly, by deception or intimidation . . .” in place of “unlawful for a person, who knows or reasonably should know that an elder adult or disabled adult lacks the capacity to consent . . . .”

The act makes the following changes, effective December 1, 2013: (1) amended G.S. 53B-4 (access to financial records) includes within its provisions a subpoena delivered to a financial institution by a county social services director or law enforcement agency investigating a credible report of financial exploitation of a disabled or older adult; (2) amended G.S. 108A-14 requires a county social services director to receive and evaluate reports of financial exploitation of disabled adults and to investigate credible reports of financial exploitation; (3) new Article 6A of G.S. Chapter 108A imposes a duty on a financial institution under certain circumstances to report information that a disabled or older adult is the victim or target of financial exploitation and authorizes a law enforcement agency or county social services department to obtain a subpoena directing a financial institution to provide financial records of a customer who is a disabled or older adult.

81. **S.L. 2013-338 (S 200): Extend time for local forensic science labs to obtain accreditation.** This act, effective July 23, 2013, amends the effective date of sections 7 and 8 of S.L. 2011-19 to effectively delay for local forensic science laboratories until July 1, 2016, the requirement that a forensic analysis under G.S. 8-58.20 must be performed by a laboratory accredited by a specified accrediting body. [Note: Although this act also purports to delay the accrediting requirement for a chemical analysis of blood or urine under G.S. 20-139.1(c2), Session Law 2013-194 (S 285) had already repealed the accrediting requirement for that chemical analysis and additionally had made clear that G.S. 8-58.20 did not apply to an analysis under G.S. 20-139.1(c2). Thus, Session Law 2013-338 only applies to a forensic analysis under G.S. 8-58.20 and does not apply to an analysis under G.S. 20-139.1(c2).]

82. **S.L. 2013-341 (S 407): DMV to implement statewide electronic lien system.** This act, effective July 23, 2013, adds new G.S. 20-58.4A to require the Division of Motor Vehicles no later than July 1, 2014, to implement a statewide electronic lien system to process the notification, release, and maintenance of security interests and certificate of title data where a lien is notated, through electronic means instead of paper documents otherwise required by G.S. Chapter 20.

83. **S.L. 2013-345 (S 455): Increase penalties for violation of seed law.** This act, effective for violations committed on or after December 1, 2013, amends G.S. 106-277.24 to change the punishment for the Class 3 misdemeanor of violating a provision of Article 31 (agricultural and vegetable seeds) of G.S. Chapter 106 by increasing the fine from not more than $500 to a fine of not more than $10,000. Provides that the fine shall not apply to a retailer concerning a transaction when the seed sold by a retailer was acquired by the retailer in a sealed container or package, or the retailer did not have reasonable knowledge that the seed sold was in violation of the Article. In determining the amount of the fine, the court must consider the retail value of the seed sold in violation of the law, and in cases involving the unlawful sale of seed protected under federal law, the court must order the payment of restitution to any injured party for any losses incurred as a result of the unlawful sale.

84. **S.L. 2013-346 (S 488): Criminal record check authorized for applicant for license renewal as nursing home administrator.** This act, effective July 23, 2013, amends various provisions of the Nursing Home Administrator Act. It amends G.S. 90-288.01(b) to authorize the State Board of Examiners for Nursing Home Administrators to require in its discretion a criminal history record check of an applicant for license renewal as a nursing home administrator.

85. S.L. 2013-348 (S 659): Amendments of impaired driving and open container laws to conform with federal funding requirements. This act is effective for offenses committed on or after October 1, 2013.

Background of this session law. Federal law requires that a portion of federal highway funds that would otherwise be apportioned to a state be reserved from a state that has not enacted both a repeat intoxicated driver law and an open container law. 23 U.S.C. Sections 154(c)(2), 164(b)(2). Such laws must require, among other consequences, that an individual convicted of a second or subsequent offense for driving while impaired install an ignition interlock system on each motor vehicle he or she owns or operates. They also must require that a person convicted of a second impaired driving offense be required to perform at least 30 days of community service or be imprisoned for at least five days. A person convicted of a third or subsequent impaired driving offense must be required to perform at least sixty days of community service or serve at least ten days of imprisonment. Open container laws must prohibit the possession of any open alcoholic beverage container or the consumption of any alcoholic beverage in the passenger area of any motor vehicle (as that term is defined by federal law). S.L. 2013-348 amends several provisions of Chapter 20 to satisfy these minimum requirements.

Ignition interlock. The act amends G.S. 20-17.8 (restoration of a license after certain driving while impaired convictions; ignition interlock) in subsection (c1) to provide that the Commissioner of Motor Vehicles must not issue a license to a person subject to the statute until presented with proof of the installation of an ignition interlock system in all registered vehicles owned by the person. Formerly, a person was not required to install ignition interlock on a vehicle he or she owned if DMV determined that another member of the person's family relied on the vehicle and the vehicle was not in the possession of the person subject to the ignition interlock requirement. This exception applied, for example, when the college-age child of a parent convicted of impaired driving and subject to ignition interlock drove a vehicle owned by the parent while residing in a different location from the parent. Amendments to G.S. 20-17.8(c1) require that DMV determine a waiver of the ignition interlock requirement under the family-member exception on a case-by-case basis following an assessment of financial hardship to the person subject to the restriction.

Amendments also require the Commissioner to cancel the driver's license of a person subject to the statute if he or she registers a motor vehicle he or she owns without an installed ignition interlock system or removes a system from a motor vehicle he or she owns, other than when changing ignition interlock providers or selling the vehicle. The act deletes the last sentence of G.S. 20-17.8(f), which required a court, on finding that the aforementioned family-member exception to ignition interlock applied, to find the person not guilty of driving while license revoked for violating the conditions under G.S. 20-17.8(c1). It also amends G.S. 20-17.8(l) to provide that the medical exception to ignition interlock applies only to people required to have ignition interlock based on an alcohol concentration of 0.15 or more and not to people required to have ignition interlock because of a prior conviction or an Aggravated Level One impaired driving sentence.

Punishment. The act amends G.S. 20-179(h) (level two punishment for various DWI convictions) to provide that if the defendant is subject to level two punishment based on grossly aggravating factors in G.S. 20-179(c)(1) (prior conviction) or (c)(2) (driving while license revoked), the prior DWI conviction occurred within five years before the date of the offense for which the defendant is being sentenced, and the judge suspends all active terms of imprisonment and imposes abstention from alcohol as verified by a continuous alcohol monitoring system, then the judge must also impose as a special probation condition that the defendant must complete 240 hours of community service.

Community service parole. The act amends G.S. 15A-1371(h) to provide that prisoners serving sentences for impaired driving are eligible for community service parole *after serving the minimum sentence required by G.S. 20-179* (italicized words added). Requirement (4) in setting out community

service parole eligibility is amended so it reads that the prisoner has served one-half of his minimum sentence, *at least 10 days if sentenced to Level One punishment or at least seven days if sentenced to Level Two punishment* (italicized words added).

Definition of "motor vehicle" in transporting open container of alcoholic beverages. The act revises the definition of "motor vehicle" for the offense of transporting an open container of alcoholic beverages (G.S. 20-138.7) so it means any vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways and includes mopeds. The current definition includes only those motor vehicles that North Carolina law requires to be registered, whether the motor vehicle is registered in North Carolina or another jurisdiction.

School of Government faculty member Shea Denning contributed to the major portion of the summary of S.L. 2013-348 (S 659).

86. S.L. 2013-349 (S 344): Issuing titles for vintage cars. This act, effective July 23, 2013, amends G.S. 20-53(e) (title application for out-of-state vehicle that is 35 model years old or older) to provide that if an inspection and verification is not conducted by the License and Theft Bureau of the Division of Motor Vehicles within 15 days after receiving a request and the inspector does not have probable cause to believe that the ownership document or public vehicle identification number presented does not match the vehicle, the vehicle is considered to have satisfied all inspection and verification requirements and title must issue to the owner within 15 days thereafter. If an inspection and verification is timely performed and the vehicle passes the inspection and verification, title must issue within 15 days of the date of the inspection.

87. S.L. 2013-360 (S 402): 2013 Appropriations Act, as amended by S.L. 2013-363 (H 112), S.L. 2013-380 (H 936), and S.L. 2013-385 (S 182). The 2013 Appropriations Act, as amended by S.L. 2013-363 (H 112), S.L. 2013-380 (H 936), and S.L. 2013-385 (S 182), addresses several financial, legal, and organizational matters for law enforcement, the court system, and corrections. Below is a brief rundown. All references are to S.L. 2013-360 and sections within it unless otherwise noted. The act is effective July 1, 2013, except as otherwise noted. The discussion generally does not review the appropriation decreases and increases and personnel changes made by the General Assembly. For a breakdown of these changes, see Justice and Public Safety, Section I, of the Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets for Senate Bill 402 (July 21, 2013). For changes in court costs, see the Administrative Office of the Courts memoranda posted at http://www.nccourts.org/Courts/Trial/Costs/.

Unmanned government aircraft prohibited until July 1, 2015, unless approved by state official. Section 7.16 provides that no state or local governmental entity or officer may procure or operate an unmanned aircraft system or disclose personal information about any person acquired through operating such a system unless the State Chief Information Officer (SCIO) approves an exception specifically granting disclosure, use, or purchase. If the SCIO determines there is a requirement for an unmanned aircraft system for use by state or local agencies, planning may begin for its possible development, implementation, and operation. If the SCIO decides to plan for a system program, a proposal covering issues set out in the section must be provided by March 1, 2014, to specified legislative committees and the Fiscal Research Division.

Volunteer school safety resource officer program. Section 8.45, effective December 1, 2013, authorizes sheriffs (new G.S. 162-26) and chiefs of police (new G.S. 160A-288.4) to establish a volunteer school safety resource officer program to provide nonsalaried special deputies or law enforcement officers to serve in public schools. A volunteer must have prior experience as either (i) a sworn law enforcement officer, or (ii) a military police officer with a minimum of two years' service. The statutes specify training requirements. The volunteer has the power of arrest while

performing official duties. Amended G.S. 14-269.2(g) exempts the volunteer from the prohibition in the section against possessing specified weapons on a campus or other educational property.

DSS study on reporting child abuse. Section 12C.7 requires the Division of Social Services (DSS) of the Department of Health and Human Services to study the policies and procedures for reporting child abuse. DSS must review specified topics, including reports of child abuse in child care facilities, how reports of child abuse are received, the number of inaccurate reports DSS annually receives, the number of children DSS has placed in child protective services pursuant to a report, etc. DSS must report the results of its study and any recommendations to the Joint Legislative Committee on Health and Human Services and the Fiscal Division by April 1, 2014.

Inmate and probationer matters. Section 16.11 provides that the Post-Release Supervision and Parole Commission, with the assistance of the North Carolina Sentencing and Policy Advisory Commission, must analyze the amount of time each inmate who is eligible for parole on or after July 1, 2014, has served compared to the time served by offenders under the Structured Sentencing Act for comparable crimes and must determine whether the inmate has served more time in custody than the inmate would have served had he or she received the maximum sentence under structured sentencing. The commission must reinitiate the parole review process for each inmate who has served more time than the inmate would have under structured sentencing. The post-release commission must report to specified legislative committees by April 1, 2014, which must include the number of parole-eligible inmates reconsidered under this section and the number who were actually paroled.

HIV testing of inmates (section 16C.15). New G.S. 148-19.2, effective July 1, 2013, provides that any person sentenced to imprisonment and committed to the Division of Adult Correction must be tested to determine whether the person is HIV positive. Each inmate who has not previously tested positive must also be tested not less than once every four years from the date of the inmate's initial testing, and also before the inmate's release from custody except if the inmate has been tested within the prior year. All inmates in custody on July 1, 2013, who have not been previously tested must be tested by October 1, 2013.

Electronic monitoring fees (section 16C.16). Amended G.S. 15A-1343(c2), applicable to people placed on house arrest with electronic monitoring as a probation condition on or after September 1, 2013, adds a daily fee for electronic monitoring that reflects the actual cost of providing the monitoring. The daily fees must be remitted to the Department of Public Safety to cover its costs to provide the monitoring. A $90 one-time fee for the monitoring device and the daily fee are made applicable to subsection (a1) (community and intermediate probation conditions), and the daily fee is added to subsection (b1) (special probation conditions), which already required the $90 one-time fee for the device. Amended G.S. 15A-1368.4(e)(13), effective July 1, 2013, provides that a post-release supervisee must pay a $90 one-time fee for electronic monitoring and a daily fee that reflects the actual cost of providing the monitoring. For more detailed information about these provisions, see the AOC memoranda at the website address provided at the beginning of this session law's summary. Note: This summary reflects additional changes made by Section 6.7, Session Law 2013-363 (H 112).

North Carolina State Crime Laboratory. Section 17.3 provides that the laboratory, in conjunction with the School of Government and the Conference of District Attorneys, must develop a training curriculum for district attorneys to include instruction on fundamentals of laboratory forensic science disciplines, the lab's electronic information system, and its case management guidelines. Section 17.6 transfers the laboratory and the DNA Database and Databank from the State Bureau of Investigation for relocation elsewhere within the Department of Justice, as determined by the Attorney General. Section 17.6 amends G.S. 132-1.4(b)(1), which defines "records of criminal investigations" in the public records law, to include within the definition any

records, worksheets, reports, or analyses prepared or conducted by the state crime laboratory at the request of any public law enforcement agency in connection with a criminal investigation.

Office of Indigent Defense Services. Section 18A.2 provides that the office may use up to $2.15 million in appropriated funds during the 2013-2015 biennium to expand existing offices, create new public defender offices, to establish regional public defender programs, or to create positions within existing public defender programs to handle cases in adjacent counties or districts. Section 18A.4 requires the office to issue a request for proposals from private law firms or not-for-profit legal representation organizations for the provision of all classes of legal cases for indigent clients in all judicial districts. Section 18A.5, effective August 1, 2013, amends G.S. 7A-498.7(b) to change the authority to appoint public defenders from the Commission on Indigent Defense Services to the senior resident superior court judge in a particular district. Section 18A.6 amends G.S. 7A-498.7 to provide that when a public defender determines in a case that a conflict of interest exists in the office, the public defender whenever practical may request the appointment of an assistant public defender from another public defender office in the region, rather than obtaining private assigned counsel.

Conference of District Attorneys funds for local toxicology analyses in DWI cases. Section 18B.4 provides that of the funds appropriated to the Judicial Department, $500,000 is allocated to the conference to allow district attorneys to obtain toxicology analyses from local hospitals for defendants charged with DWI whose conduct did not result in serious injury or death.

Minutes maintained by clerk of superior court to record convening and adjournment of district court as well as superior court. Section 18B.8, effective January 1, 2014, amends G.S. 7A-109(a1) to require the clerk of superior court to record the date and time of each convening, recess, and adjournment of court in both district and superior court. This provision effectively adds district court to the duties the clerk has already been performing in superior court.

General punishment changes for Class 3 misdemeanors. Section 18B.13 amends G.S. 15A-1340.23, effective for offenses committed on or after December 1, 2013, to revise the misdemeanor sentencing Prior Conviction Levels for Level II from "1-15 days C/I" to "1-15 days C if one to three prior convictions" and "1-15 days C/I if four prior convictions." It also provides that unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine. Although it is not clear whether the provision in G.S. 15A-1340.21(d) (multiple prior convictions obtained in one court week count as only one prior conviction to determine the prior conviction level), applies to the new provision mentioned in the prior sentence (fine only for Class 3 misdemeanor when no more than three prior convictions), it would appear the better interpretation is that it does. The new provision is located in the same statute as the table of prior convictions levels, to which G.S. 15A-1340.21(d) clearly applies, and the likely legislative intent is to apply it to the new fine-only provision, particularly because the legislature intended to significantly reduce the number of indigent defendants who qualify for appointed counsel. (Note: The effective date of these changes is noted above as offenses committed on or after December 1, 2013. The actual language is "becomes effective December 1, 2013," which could mean the changes apply to pending cases on December 1, 2013, as well as offenses committed on or after December 1, 2013. However, the immediate sentence after this language provides a savings clause for prosecutions "for offenses committed before the effective date," which clearly shows that the legislature intended for the decreased punishment provisions to apply only to offenses committed on or after December 1, 2013.)

Offenses reclassified to Class 3 misdemeanors or infractions. Sections 18B.14 and 18B.15, effective for offenses committed on or after December 1, 2013, reclassified certain Class 1 or Class 2 misdemeanors to Class 3 misdemeanors or misdemeanors to infractions. The reclassified Class 3 misdemeanors and infractions are listed below.

Class 3 misdemeanors

G.S. 14-106 (obtaining property for worthless check)
G.S. 14-107(d)(1) (simple worthless check)
G.S. 14-167 (failure to return hired property)
G.S. 14-168.1 (conversion by bailee, lessee, etc.)
G.S. 14-168.4(a) (failure to return rental property)
G.S. 20-28(a) (driving while license revoked) except it remains a Class 1 misdemeanor if the driver's license was originally revoked for an impaired driving revocation
G.S. 20-35(a1) (failure to obtain driver's license before driving motor vehicle, 20-7(a))
G.S. 20-35(a1) (failure to comply with driver's license restrictions, 20-7(e))
G.S. 20-35(a1) (permitting person's motor vehicle to be operated by unlicensed person, 20-34)
G.S. 20-111(1) (driving vehicle on highway, or knowingly permit person's vehicle to be driven on highway, when vehicle is not registered with DMV or does not display current registration plate)
G.S. 20-111(2) (display, possess, etc., registration card, title certificate, or registration plate knowing it to be fictitious or to have been canceled, revoked, etc., or willfully display expired license or registration plate on vehicle knowing it to be expired)
G.S. 20-127(d)(1) (applying tinting to vehicle's window that does not meet window tinting restrictions)
G.S. 20-127(d)(2) (driving a vehicle on a highway or public vehicular area that has window not meeting window tinting restrictions)
G.S. 20-141(j1) (speeding either more than 15 m.p.h. or more than speed limit or over 80 m.p.h.)
G.S. 20-313(a) (registered motor vehicle owner operating or permitting vehicle to be operated without insurance)

Infractions

G.S. 20-35(a2) (failing to possess valid license while driving motor vehicle, 20-7(a))
G.S. 20-35(a2) (operating motor vehicle with expired license, 20-7(f))
G.S. 20-35(a2) (failing to notify DMV of address change for driver's license, 20-7.1)
G.S. 75A-6.1(c) (violation of rule governing navigational lighting adopted by Wildlife Resources Commission)
G.S. 75A-13.1 (violations concerning skin and scuba divers)
G.S. 75A-13.3(c3) (vessel livery that fails to provide basic safety instruction)
G.S. 75A-17(f) (no-wake speed violation)
G.S. 75A-18(a) (violation of Article 1, G.S. Ch. 75A, except as otherwise provided)
G.S. 20-176(a1) (failing to carry registration card in vehicle, 20-57(c))
G.S. 20-176(a1) (failing to sign vehicle registration card, 20-57(c))
G.S. 20-176(a1) (failing to notify DMV of address change for vehicle registration card, 20-67)
G.S. 113-135(a) (fishing without a license under G.S. 113-174.1(a) and G.S. 113-270.1B(a))

Expunction fees. Section 18B.16, applicable to petitions for expunctions filed on or after September 1, 2013, amends G.S. 15A-145 (expunctions of records for first offenders under 18 for misdemeanor conviction), G.S. 15A-145.1 (expunction of records for first offenders under 18 for gang offenses), G.S. 15A-145.2 (expunction of records for first offenders under 21 for drug offenses), G.S. 15A-145.3 (expunction of records for first offenders under 21 for toxic vapors offenses), and G.S. 15A-145.4 (expunctions of records for first offenders under 18 for nonviolent felony), to set or

to increase the fee for filing a petition to $175. The expunction petition fee of $175 also applies to G.S. 15A-146 (expunction of records for not guilty or dismissed charge), but only for an expunction petition for a charge that was dismissed due to compliance with a deferred prosecution agreement. The clerk of superior court must remit $122.50 of each fee to the Department of Justice (DOJ) for its costs and $52.50 of each fee to the Administrative Office of the Courts (AOC) for its costs. The DOJ and AOC must jointly report to a specified legislative committee by September 1 of each year concerning expunctions, the report to include the number and types of expunctions granted during the reporting fiscal year and other specified matters. For more detailed information about these provisions, see the AOC memoranda at the website address provided at the beginning of this session law's summary.

New court costs for expert witnesses providing testimony about chemical or forensic analysis at trial. Section 18B.19, effective for fees assessed or collected on or after August 1, 2013, adds new G.S. 7A-304(a)(11) (expert witness employed by State Crime Laboratory) and 7A-304(a)(12) (expert witness employed by crime laboratory operated by local government or governments) to require a district or superior court judge, upon conviction of a defendant, to require the defendant to pay $600 to be remitted to the Department of Justice or local government unit, respectively, in a case in which the expert witness testified about a completed chemical analysis under G.S. 20-139.1 or a forensic analysis under G.S. 8-58.20. This fee is in addition to any costs assessed under G.S. 7A-304(a)(7) or (8). For more detailed information about these provisions, see the AOC memoranda at the website address provided at the beginning of this session law's summary.

Superior and district court districts reorganized. Section 18B.22 amends G.S. 7A-41(a) (superior court districts) to add Anson and Richmond counties and one additional judgeship to district 16A (which will now consist of Anson, Richmond, Scotland, and Hoke counties), removes Anson and Richmond counties and one judgeship from district 20A (which will now consist of Stanly County only), and switches district 19D (Moore County) from the fifth to the fourth judicial division. The section specifies how judgeships are filled and elections in the 2016 general election.

Amended G.S. 7A-133(a) (district court districts) combines districts 6A and 6B into a single district 6 and the combined number of judgeships for the new district is reduced from six to four. Anson and Richmond counties are added to district 16A (which also includes Scotland and Hoke counties) and the number of judgeships are increased from three to six for the revised district. Anson and Richmond counties are removed from district 20A and the number of judgeships for the revised district (which will now consist of Stanly County only) is reduced from four to two. One judgeship is added to district 21 (Forsyth County). The section specifies how judgeships are filled and at which general election.

District attorneys and prosecutorial districts reorganized. Section 18.22 amends G.S. 7A-60 (district attorneys and prosecutorial districts) to combine prosecutorial districts 6A and 6B into district 6 with a district attorney and ten assistant district attorneys. It creates a new prosecutorial district 16C, composed of Anson and Richmond counties and with a district attorney and six assistant district attorneys. Anson and Richmond counties are removed from prosecutorial district 20A, which will now consist of Stanly County only, with a district attorney and the number of assistant district attorneys for this district is reduced from eleven to five. The section specifies how the district attorney positions are filled at the 2014 general election.

88. **S.L. 2013-363 (H 112): 2013 Appropriations Act amendments.** This act's pertinent amendments to the 2013 Appropriations Act are included in the summary of the appropriations act, above.

89. **S.L. 2013-366 (S 353): Abortion law amendment and motor vehicle law amendment.** This act includes several provisions concerning abortions and an unrelated provision involving motor vehicle

law. Amended G.S. 14-45.1 (when abortion not unlawful), effective August 28, 2013, includes a nurse and other health care provider to a provision that allows a doctor on moral, ethical, or religious grounds to refuse to perform or participate in medical procedures that result in an abortion. Amended G.S. 20-154 (unsafe movement), effective for violations committed on or after October 1, 2013, provides that a person violating subsection (a) that results in a crash causing property damage in excess of $5,000 or serious bodily injury to a motorcycle operator or passenger commits an infraction and must be assessed a fine not less than $750. The violation is treated as a failure to yield the right-of-way to a motorcycle for assessing points under G.S. 20-16(c). A judge may also order a driver's license suspension for not more than 30 days, with the option of granting a limited driving privilege.

90. S.L. 2013-368 (S 683): Amendments to human trafficking and prostitution offenses, Fair Sentencing Act parole, Structured Sentencing Act aggravating factors, and related matters.

Parole eligibility for Fair Sentencing Act sentences. This act amends G.S. 15A-1371(a) (parole eligibility) , effective July 29, 2013, to provide that a prisoner sentenced under the Fair Sentencing Act for a Class D through Class J felony, who meets the criteria established under the statute, is eligible for parole consideration after completing service of at least 20 years imprisonment less any credit allowed under applicable state law.

Effective date for provisions discussed below. The provisions discussed below are effective for offenses committed on or after October 1, 2013, and provide a savings clause for prosecutions of offenses committed before that date.

Human trafficking and related offenses. The act amends G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), and G.S. 14-43.13 (sexual servitude) to (i) provide an alternative mental element to "knowingly" in proving these offenses by showing the defendant acted "in reckless disregard of the consequences," and (ii) provide that mistake of age or consent of the minor is not a defense. It increases the punishment for a violation of G.S. 14-43.13 from a Class F felony to a Class D felony.

Repealed statutes. The act repeals G.S. 14-190.18 (promoting prostitution of minor), 14-190.19 (participating in prostitution of minor), 14-204.1 (loitering for purpose of engaging in prostitution), 14-205 (venue for prostitution prosecution), 14-207 (degrees of guilt of prostitution), and 14-208 (punishment for prostitution offenses).

Prostitution offenses. Amended G.S. 14-203 adds several new and revised definitions, including the definition of "prostitution" as the performance of, offer of, or agreement to perform vaginal intercourse, any sexual act or sexual contact as defined in G.S. 14-27.1, for the purpose of sexual arousal or gratification for any money or other consideration. Amended G.S. 14-204 provides that prostitution is a Class 1 misdemeanor, authorizes conditional discharge for a first offender, and provides immunity for a minor (a person under 18), who instead must be treated as an undisciplined juvenile as set out in the statute. New G.S. 14-205.1 (solicitation of prostitution) is a Class 1 misdemeanor for a first offense, a Class H felony for a second or subsequent offense, a Class G felony for a person 18 or older who willfully solicits a minor, and a Class E felony for a person who willfully solicits a person who is severely or profoundly mentally disabled. The act also adds new G.S. 14-205.2 (patronizing a prostitute) and new G.S. 14-205.3 (promoting prostitution). New G.S. 14-205.4 (probation conditions) authorizes a court to order a convicted defendant to be examined for sexually transmitted diseases, and it also provides that a female convicted of any of these prostitution offenses and placed on probation must be under the care or charge of a female probation officer.

Electronic surveillance amendments. Amended G.S. 15A-290(c) (offenses for which electronic surveillance is authorized) adds the offenses of G.S. 14-43.11 (human trafficking), 14-43.12

(involuntary servitude), 14-43.13 (sexual servitude), 14-205.2(c) and (d) (patronizing prostitute who is minor or mentally disabled person), and 14-205.3(b) (promoting prostitution of minor or mentally disabled person).

Deferred prosecution; motion for appropriate relief. Amended G.S. 15A-1341 (deferred prosecution) provides that a defendant whose prosecution is deferred under G.S. 14-204(c) (minor charged with prostitution) may be placed on probation (but note that G.S. 14-204(c) provides immunity from prosecution). Amended G.S. 15A-1415(b) (motion for appropriate relief may be made more than ten days after entry of judgment) adds a defendant who seeks to have a conviction vacated who was convicted of a first offense under G.S. 14-204 that was not dismissed under G.S. 14-204(b) and the defendant's participation in the offense was as a victim of human trafficking, sexual servitude, or the federal trafficking victims protection law. See also new G.S. 15A-1416.1, which provides the substantive grounds for the motion for appropriate relief.

Expunction of conviction. New G.S. 15A-145.6 provides an expunction for a defendant convicted of a prostitution offense who was a victim of human trafficking, sexual servitude, or a severe form of trafficking under the federal trafficking victims protection law, and satisfies other specified conditions.

Crime victim compensation, restitution, and related matters. Amended G.S. 15B-2 includes a person as a claimant under the Crime Victims Compensation Act who was convicted of a first offense under G.S. 14-204 and whose participation in the offense was the result of having been a victim of human trafficking, sexual servitude, or a severe form of trafficking under the federal trafficking victims protection law. New G.S. 14-43.20: (i) mandates specified restitution to a victim of human trafficking, involuntary servitude, or sexual servitude, (ii) authorizes the Department of Health and Human Services to provide or fund emergency services and assistance to a victim, (iii) requires the Attorney General, a district attorney, or a law enforcement officer, to certify to federal authorities that a victim is willing to cooperate with an investigation so the victim, if eligible, may qualify for an immigrant visa and access to federal benefits, but cooperation is not required of a victim who is under 18 years old, and (iv) provides that a defendant who commits a violation of G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), and G.S. 14-43.13 (sexual servitude) is subject to the property forfeiture provisions under G.S. 14-2.3.

Definition of "abused juveniles." Amended G.S. 7B-101(1) adds the following offenses to the definition of "abused juveniles": G.S. 14-205.3(b) (promoting prostitution of minor or mentally disabled person), G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), and G.S. 14-43.13 (sexual servitude).

Sex offender registration law amendment. Amended G.S. 14-208.6(5) adds the following offenses to the definition of "sexually violent offense" in the sex offender registration law: G.S. 14-205.2(c) and (d) (patronizing prostitute who is minor or mentally disabled person), and G.S. 205.3(b) (promoting prostitution of minor or mentally disabled person).

Investigative grand jury. Amended G.S. 15A-622 authorizes an investigative grand jury for the offenses of G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), G.S. 14-43.13 (sexual servitude).

N.C. Human Trafficking Commission. Amended G.S. 143A-55.10 (North Carolina Human Trafficking Commission) modifies the membership and terms of the commission, deletes the December 31, 2014, termination date of the commission, and provides that from the funds available to the Department of Justice, the Attorney General must allocate monies to fund the commission's work.

New Structured Sentencing Act aggravating factors. The act adds the following Structured Sentencing Act aggravating factors to G.S. 15A-1340.16(d): (1) the offense is a violation of G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude)

and involved multiple victims, and (2) the offense is a violation of the same statutes and the victim suffered serious injury as a result of the offense.

91. **S.L. 2013-369 (H 937): Firearm law amendments.** This act makes many changes to firearm laws, with varying effective dates as indicated below.

Armed habitual felon. Effective for offenses committed on or after October 1, 2013, new Article 3D (G.S. 14-7.35 through 14-7.41), G.S. Chapter 14, creates the status of armed habitual felon that occurs if a defendant has been convicted (including guilty and no contest pleas) of a firearm-related felony offense in any court in the United States. A "firearm-related felony" is defined as a felony committed in which the person used or displayed a firearm while committing a felony. If a defendant is convicted of a second firearm-related felony that was committed after the conviction of the first firearm-related felony, and is found to be an armed habitual felon, then the defendant is punished for the second firearm-related felony as a Class C felon with a minimum sentence of not less than 120 months imprisonment. The procedures for charging and trying the principal (second) felony and the status of armed habitual felon are similar to the current law concerning habitual felon. (Note: Some statutes in Article 3D contain terms that are inconsistent with the definition of "firearm-related felony" and thus they should be treated as surplusage and disregarded. The term "threatened" use or display of a firearm appears in G.S. 14-7.36, the term "threatening" the use or display of a firearm appears in G.S. 14-7.40(b), and the term "deadly weapon" appears in G.S. 14-7.40(b). All of these terms are inconsistent with the definition of "firearm-related felony" and the legislative intent to focus on a felony in which the person used or displayed a firearm while committing a felony.)

Enhanced sentence for using firearm or deadly weapon. Effective for offenses committed on or after October 1, 2013, amended G.S. 15A-1340.16A (enhanced sentence when defendant used, displayed, etc., firearm or deadly weapon) is broadened to include all felonies instead of just Class A through E felonies. If the felony conviction is for a Class A through E felony, the minimum term of imprisonment must be increased by 72 months (current law, 60 months), if a Class F or G felony, increased by 36 months, if a Class H or I felony, increased by 12 months.

Judgment to indicate if felony conviction involved use or display of firearm. Effective for judgments for felony convictions entered on or after October 1, 2013, new G.S. 15A-1382.2 requires that if a sentencing judge determines that the defendant used or displayed a firearm while committing a felony, the judge must include that fact when entering the judgment.

Expanded places where concealed handgun permit holders may possess handguns. The following changes are effective for offenses committed on or after October 1, 2013. New G.S. 14-269(a2) (carrying concealed weapon) allows a person with a concealed handgun permit, reciprocity for out-of-state permit, or a law enforcement federal exemption recognized under G.S. 14-415.25, to possess a handgun if it is in a closed compartment or container in the person's locked vehicle that is in a parking lot owned or leased by state government. New G.S. 14-269.2(i) (weapon on educational property) allows a person with a concealed handgun permit or exempt from needing a permit, if he or she is an employee of a UNC institution or community college, or private college that has not prohibited possession of a handgun under this provision, to possess a handgun in the employee's detached single-family residence on the campus or in a closed compartment or container in the person's locked vehicle that is in a parking lot of the institution where the employee is employed and resides (also allows a person without a permit to possess a handgun in the employee's residence or vehicle under limited circumstances). New G.S. 14-269.2(j) allows possession of a handgun by an employee of a public or nonpublic school under similar circumstances as in G.S. 14-269.2(i). New G.S. 14-269.2(k) allows a person with a permit or exempt from needing a permit to have a handgun in a closed compartment or container within the person's locked vehicle

or in a locked container securely affixed to the person's vehicle. Amended G.S. 14-269.3 (carrying weapon into assemblies and establishments where alcoholic beverages are sold and consumed) to exempt from its prohibitions a person with a concealed handgun permit, reciprocity for out-of-state permit, or a law enforcement federal exemption recognized under G.S. 14-415.25, but not if the possessor or controller of the premises posts a conspicuous notice prohibiting a concealed handgun. Amended G.S. 14-269.4 (6) (exemption from prohibition of weapons in courthouse and certain state property) adds a person with a law enforcement federal exemption recognized under G.S. 14-415.25 who has a firearm in a closed compartment or container in the person's locked vehicle or in a locked container securely affixed to the person's vehicle. Amended G.S. 14-277.2 (weapons at parades prohibited) exempts a person with a concealed handgun permit, reciprocity for out-of-state permit, or a law enforcement federal exemption recognized under G.S. 14-415.25, unless a person possessing or controlling the premises prohibits carrying a concealed handgun.

Prohibiting child under 12 from possessing dangerous firearm. Amended G.S. 14-316 (unlawful for child under 12 to possess dangerous firearm except with parent or guardian's permission), effective for offenses committed on or after October 1, 2013, applies the statute's prohibition to any person (not just a parent, guardian, etc.), prohibits "access to" as well as possession of a firearm, and permits access to or possession with the permission of the child's parent or guardian.

Limitation on local ordinances prohibiting carrying concealed weapon. Amended G.S. 14-415.23, effective for offenses committed on or after October 1, 2013, deletes a local government's authority to prohibit the legal carrying of concealed handguns on playgrounds, greenways, and biking or walking paths, and clarifies the extent of its authority to prohibit them at certain recreational facilities such as athletic fields and swimming pools.

Mental commitment and other weapon bars. The following changes are effective October 1, 2013. Amended G.S. 122C-54(d1) requires the clerk of superior court to cause a record of various determinations or findings to be transmitted to the National Instant Criminal Background Check System (NICS) within 48 hours (excluding weekends or holidays) after receiving notice of them: specified involuntary commitments, not guilty of by reason of insanity, incompetent to proceed to trial, etc. Amended G.S. 122C-54.1 (restoration process to remove mental commitment bar) makes various changes, including the standard that the petitioner must prove: he or she will not be likely to act in a manner dangerous to public safety and the granting of relief would not be contrary to the public interest.

Permits issued by sheriff and other related matters. Amended G.S. 14-415.17, effective October 1, 2013, makes confidential and not a public record under G.S. 132-1 the list of concealed handgun permit holders and the information collected by the sheriff to process an application. This information is available to local enforcement agencies on request, and the State Bureau of Investigation must make the information available to officers and clerks of court on a statewide system. Amended G.S. 14-415.18, effective October 1, 2013, requires the sheriff to revoke a concealed handgun permit of a permittee who is adjudicated guilty of or receives a PJC for a crime that would have disqualified the permittee from initially receiving a permit. Amended G.S. 14-406, effective October 1, 2013, makes dealer records confidential and not a public record, but they must be made available on request of law enforcement agencies. Amended G.S. 14-404 (issuance or refusal of pistol permit), effective October 1, 2013, requires a sheriff to keep a list of all permit denials with the specific reasons for the denials. The list may not include information that would identify the denied applicant; the list is a public record. The sheriff must notify the applicant of the approval or denial of a permit within 14 days (current law, 30 days) of the date of the permit application. Effective October 1, 2013, the sheriff must revoke a pistol permit on the occurrence of an event or condition or the applicant's inability to meet a requirement after the issuance of a permit that would have originally resulted in the denial of a permit. Effective July 1, 2014, new G.S.

14-404(c1) provides that judicial findings, court orders, or other factual matters relevant to any disqualifying conditions for a pistol permit in G.S. 14-404(c) must be reported to the National Instant Criminal Background Check System (NICS) by the clerk of superior court within 48 hours (excluding weekends or holidays) after receipt of a copy of a judicial determination or finding. Amended G.S. 14-405, effective October 1, 2013, provides that pistol permit records maintained by the sheriff are confidential and not public records under G.S. 132-1, but must be made available on request of law enforcement agencies.

Court official provisions. Amended G.S. 14-269(b), effective for offenses committed on or after October 1, 2013, exempts from the offense of carrying a concealed weapon judges, magistrates, court clerks, and registers of deeds who have a concealed handgun permit as long as they don't have alcohol or unlawful controlled substances in their bodies; the weapon must be secured in a locked compartment when it is not on the official's person. Amended G.S. 14-415.27, effective October 1, 2013, adds judges, magistrates, and elected court clerks and registers of deeds to the provision allowing prosecutors and their investigators with concealed handgun permits to carry concealed handguns in the areas listed in G.S. 14-415.11(c).

Punishment increased for certain concealed handgun permit offenses. Amended G.S. 14-415.21, effective for offenses committed on or after October 1, 2013, increases from a Class 2 misdemeanor to a Class 1 misdemeanor a violation of the concealed handgun permit prohibitions in G.S. 14-415.22(c)(8) (on private premises where notice that carrying handgun is prohibited) and (c2) (while consuming alcohol or unlawful controlled substances).

Taking wildlife with firearm with silencer. Amended G.S. 113-291.1(c), effective for offenses committed on or after October 1, 2013, deletes the Class 1 misdemeanor for taking wildlife with a firearm equipped with a silencer.

92. **S.L. 2013-370 (S 18): Locksmith license offense.** This act amends several provisions involving the licensing of locksmiths. Effective for offenses committed on or after December 1, 2013, amended G.S. 74F-3 (prohibiting performance of locksmith services without a license) increases the punishment for a violation from a Class 3 to a Class 1 misdemeanor and provides that a second or subsequent offense is a Class I felony.

93. **S.L. 2013-377 (S 626): Authority to enter motor vehicle to save animal.** This act amends several provisions concerning animal shelters. Effective July 29, 2013, new G.S. 14-363.3 provides that an animal control officer, animal cruelty investigator, law enforcement officer, firefighter, or rescue squad worker who has probable cause to believe that an animal is confined in a motor vehicle under conditions that are likely to cause suffering, injury, or death to the animal due to endangering conditions such as heat, cold, etc., may enter the motor vehicle by any reasonable means after making a reasonable effort to locate the owner or other person responsible for the animal. This statute does not apply to the transportation of horses, cattle, sheep, swine, poultry, or other livestock.

94. **S.L. 2013-379 (H 675): Maximum time period to dispense Schedule II controlled substance with written prescription.** This act amends G.S. 90-106(d), effective for acts occurring on or after October 1, 2013, to provide that a Schedule II controlled substance may not be dispensed pursuant to a written prescription more than six months after the date it was prescribed.

95. **S.L. 2013-380 (H 936): Wildlife law amendments.** This act adds new G.S. 113-294.1, effective July 1, 2013, to create the Wildlife Poacher Reward Fund in the Office of the State Treasurer to pay rewards to people who provide information to the Wildlife Resources Commission (hereinafter, commission)

or to law enforcement authorities that results in the arrest and conviction of people who have committed criminal offenses involving the taking, injury, destruction, etc., of wildlife resources. The commission must adopt rules to administer the fund.

The following provisions are effective for offenses committed on or after December 1, 2013. (Note: Some amendments to wildlife offenses in this act are discussed in the summary of S.L. 2013-360 (S 402), above, and are not repeated here.) Amended G.S. 15A-1343(b1) (special probation condition requiring defendant to provide compensation for taking wildlife resources) authorizes the court to order the defendant to compensate an agency for any reward paid for information leading to the defendant's arrest and conviction. Amended G.S. 75A-10 provides that the punishment for the Class 2 misdemeanor of impaired boating under subsection (b1) includes a fine of not less than $250. Amended G.S. 75A-16.2 (required boating safety education) provides that the fine for an infraction is $50. Amended G.S. 75A-18 (penalties) provides that (1) except as otherwise provided in Chapter 75A, a person who violates a rule adopted by the commission is responsible for an infraction and must pay a $50 fine, and (2) a person responsible for an infraction under Chapter 75A may not be assessed court costs. Amended G.S. 113-294 increases the minimum fine to $250 in subsections (a), (d), (m), (r), and (s), and to $500 in subsections (b) and (e). New G.S. 113-294(c3) provides that a person who unlawfully takes, possesses, etc., an elk is guilty of a Class 1 misdemeanor punishable by a fine of not less $2,500. New G.S. 113-294(d1) provides that a person who unlawfully takes, possesses, etc., a deer from land posted under G.S. 14-159.7 without written permission of the landowner, lessee, etc. is guilty of a Class 2 misdemeanor punishable by a fine of not less $500.

96. **S.L. 2013-385 (H 182): Changes to various rights to appeal and post-conviction matters.** This act's ratification clause in section 7 is not clear how it applies to each section of the session law, so this summary makes a judgment how a court would interpret the meaning of the clause. Effective for violations committed on or after December 1, 2013, amended G.S. 15A-1115 deletes subsection (a) that provided a defendant with the right to appeal from district court to superior court for a trial de novo when the defendant denied responsibility for an infraction in district court and was found responsible. Effective for probation violations occurring on or after December 1, 2013, amended G.S. 15A-1347 provides that if a defendant waives a probation hearing in district court, a finding of a probation violation, activation of a sentence, or imposition of special probation may not be appealed to superior court. Effective for resentencing hearings held on or after December 1, 2013, amended G.S. 15A-1335 (resentencing after appellate review) provides that the statute does not apply when a defendant on direct review or collateral attack succeeds in having a guilty plea vacated. Effective for motions for appropriate relief filed on or after December 1, 2013, the act deletes G.S. 15A-1420(b2), which sets timelines for the processing in district and superior court of a motion for appropriate relief involving noncapital cases. (Note: This act's criminal punishment amendments in sections 4 through 6 to the 2013 Appropriations Act are included in the summary of the appropriations act, S.L. 2013-360 (S 402), above.)

97. **S.L. 2013-387 (S 321): Governor may fill district court judge vacancy without being required to appoint from local bar's nominations; payment of medical care of prisoners.** This act amends G.S. 7A-142, effective August 23, 2013, to provide that a vacancy in the office of district court judge shall be filled for the unexpired term by the appointment of the Governor. The judicial district bar must nominate five people for consideration by the Governor. (The prior version of this statute required the Governor to make the appointment from the nominations submitted by the judicial district bar.) There are other changes in the procedure for nominating candidates.

New G.S. 153A-225.2 (payment of medical care of prisoners), effective September 1, 2013, provides that counties must reimburse those providers and facilities providing "requested or emergency care" outside of the local confinement facility the lesser amount of either a rate of 70 percent of the provider's then-current prevailing charge or two times the then-current Medicaid rate for any given service. It provides that a county is not prohibited from contracting with a provider at different rates. The term "requested or emergency care" is defined to include all medically necessary and appropriate care provided to a person from the time the person presents to the provider or facility in the custody of county law enforcement officers until the time the person is safely transferred back to the care of county law enforcement officers or medically discharged to another community setting, as appropriate. Amended G.S. 153A-225(a), effective August 23, 2013, provides that a local confinement facility's plan for the provision of medical care of prisoners in the facility may utilize Medicaid coverage for inpatient hospitalization or for other Medicaid services allowable for eligible prisoners, provided the plan includes a reimbursement process that pays to the State the State portion of the costs, including the costs of the services provided and any administrative costs directly related to the services to be reimbursed, to the State's Medicaid program.

98. **S.L. 2013-389 (S 368): Local jail felony escape offense is expanded; pistol permit fee is changed.** This act amends G.S. 14-256 (escape from a local confinement facility), effective for offenses committed on or after December 1, 2013, to expand the Class H felony offense of escape from a local confinement facility to include a person charged with a felony who has been committed to the facility pending trial. Amended G.S. 14-404(e), effective for fees collected on or after August 1, 2013, provides that the sheriff must charge on receipt of an application for a pistol permit a fee of $5 for each permit requested (underlined words added). The fee under the prior statute applied on issuing the permit and did not specify that the fee was for each permit.

99. **S.L. 2013-392 (S 470): Consumption of beer and unfortified wine prohibited on premises when permit is suspended or revoked.** This act adds subsection (a1) to G.S. 18B-300, effective for offenses committed on or after December 1, 2013, to prohibit (with a limited exception) the consumption of beer or unfortified wine on the premises of a business during the period of time that an on-premises permit issued to the business authorizing the sale and consumption of beer or unfortified wine has been suspended or revoked by the ABC commission.

100. **S.L. 2013-403 (H 565): Criminal history record check for real estate appraiser applicants.** This act amends G.S. 93E-1-6, effective January 1, 2014, to provide that the refusal of applicants for various licenses as real estate appraisers to consent to a criminal history record check may constitute grounds for denial of an application. The North Carolina Appraisal Board must ensure that the state and national criminal history of an applicant is checked and must provide specified information to the North Carolina Department of Justice.

101. **S.L. 2013-404 (H 652): Judicial discipline amendments.** This act, effective August 23, 2013, makes several changes to judicial discipline. It amends G.S. 7A-374.2 and 7A-376 to transfer from the Judicial Standards Commission to the North Carolina Supreme Court the authority to issue a public reprimand of a judge. The commission's role is changed to recommending a public reprimand to the supreme court. Amended G.S. 7A-377 provides that if after an investigation the commission concludes that disciplinary proceedings should be instituted, the notice, statement of charges, answer, and all other pleadings remain confidential (prior law provided that they were not confidential). Disciplinary hearings, commission recommendations to the supreme court, along with

the record that is filed, are confidential (prior law provided that they were not confidential). After the issuance of a public reprimand, censure, suspension, or removal by the supreme court, the notice and statement of charges filed by the commission, along with the answer and all other pleadings, and the commission recommendations along with the filed record, are no longer confidential. The act repeals G.S. 7A-378, which had provided that a commission recommendation for censure, suspension, or removal of a supreme court justice must be made to and then decided by a panel of seven judges of the North Carolina Court of Appeals (the effect of the repeal is have the decision be made by the supreme court).

102. **S.L. 2013-406 (H 417): Obstruction of state agency internal auditor is a misdemeanor.** This act makes several changes to internal auditing statutes applicable to large state departments and the state university system. New G.S. 143-749, effective for offenses committed on or after December 1, 2013, provides that it is a Class 2 misdemeanor when an officer, employee, or agent of a state agency willfully makes to a state agency internal auditor or designated representative any false, misleading, or unfounded report for the purpose of interfering with the performance of an audit, special review, or investigation or hinders or obstructs the state agency internal auditor or designated representative in performing their duties.

103. **S.L. 2013-407 (H 476): Underground utility safety act misdemeanor.** This act creates new Article 8A (Underground Utility Safety and Damage Prevention Act) of G.S. Chapter 87, and repeals Article 8. New G.S. 87-125, effective for activities occurring on or after October 1, 2014, provides that a person who falsely claims that an emergency exists requiring an excavation or demolition is guilty of a Class 3 misdemeanor.

104. **S.L. 2013-410 (H 92): Revised definitions of "all-terrain vehicle" and "utility vehicle."** This act, effective August 23, 2013, revises two definitions in G.S. 20-4.01. "All-terrain vehicle or ATV" is a motorized vehicle 50 inches or less in width that is designed to travel on three or more low-pressure tires and manufactured for off-highway use, but it does not include a golf cart, utility vehicle, or a riding lawn mower. "Utility vehicle" is a motor vehicle that is (i) designed for off-road use, and (ii) used for general maintenance, security, agricultural, or horticultural purposes, but it does not include an all-terrain vehicle, golf cart, or riding lawn mower.

105. **S.L. 2013-413 (H 74): Child care providers' criminal history checks; amendment to reptile investigation statute.** This act, effective August 23, 2013, adds new G.S. 110-90.2 (child care providers' criminal history checks), to provide that the check of state and national repositories that is directed to the State Bureau of Investigation must be completed with 15 business days of the request from the Department of Health and Human Services. If the check shows the provider has no criminal history as defined by subdivision (a)(3), the department must determine the provider's fitness within 15 calendar days of receipt of the results. If the check reveals a criminal history as defined by this subdivision, the department must make a determination within 30 business days.

Amended G.S. 14-419 (investigation of suspected violations; seizure and examination of reptiles; dispositions of reptiles) requires that the investigation must include consulting with the North Carolina Museum of Natural Sciences or the North Carolina Zoological Park to identify appropriate and safe methods to seize a reptile. Consultation is not required if there is an immediate risk to public safety. It also provides that euthanasia is authorized for a seized reptile that is a venomous reptile, large constricting snake, or crocodilian for which antivenin is not readily available.

106. **S.L. 2013-415 (H 15): Law enforcement agencies added to statutes in Chapter 20 involving use of red or blue lights, inapplicable speed limits, etc.** This act, effective October 1, 2013, amends G.S. 20-125(b) (law enforcement vehicles must have special lights, sirens, or horn) to (i) make the subsection apply to vehicles owned or operated (previously, owned and operated) by the specified agencies, (ii) add vehicles of two agencies, the Division of Parks and Recreation and the North Carolina Forest Service, and (iii) add firefighting and other emergency response by the vehicle to the law enforcement purpose set out in the subsection. Amended G.S. 20-130.1 (use of red or blue lights) adds vehicles of the following agencies or entities that are allowed to use red or blue lights under specified circumstances: Division of Marine Fisheries, Division of Parks and Recreation, North Carolina Forest Service, and official members or Teams of REACT International, Inc. Amended G.S. 20-145 (when speed limit not applicable) adds the vehicles of the following agencies under specified circumstances: Division of Parks and Recreation and North Carolina Forest Service. Amended G.S. 20-156(b) (driver to yield right-of-way to law enforcement, fire department, and other vehicles using warning signal by light and siren) and amended G.S. 20-157(a) (driver of vehicle must move to right on approach of law enforcement, fire department, and other vehicles using warning signal by light and siren) add vehicles of the following agencies under specified circumstances: Division of Marine Fisheries, Division of Parks and Recreation, and North Carolina Forest Service.

107. **S.L. 2013-417 (H 392): Criminal record checks and sharing arrest warrant status of applicants and recipients of public assistance programs; drug screening and testing for Work First Program assistance.** This act adds new G.S. 108A-26.1 and 108A-26.2, effective October 1, 2013, to require a county social services department (1) to the extent allowed by federal and state law, to check criminal histories of applicants or recipients at the time of benefits renewal, to verify whether applicants or recipients under Part 2 (Work First Program) or Part 5 (Food and Nutrition Services) are fleeing to avoid prosecution, confinement after conviction, etc., or violation of a probation or parole condition, and (2) to not grant public assistance under Part 2 or Part 5 if the department receives information that the applicant or recipient of program assistance is subject to arrest under an outstanding arrest warrant based on violating probation or parole conditions or from a felony charge. New G.S. 114-19.34, effective October 1, 2013, requires the North Carolina Department of Justice, to the extent allowed by federal law, to provide the county social services department, on its request under G.S. 108A-26.1, with the criminal history of an applicant or recipient from state or national criminal history repositories. Amended G.S. 108A-29.1, effective August 1, 2014, requires the Department of Health and Human Services to require a drug test to screen each applicant for or recipient of Work First Program assistance whom the department reasonably suspects is engaged in the illegal use of controlled substances.

108. **S.L. 2013-418 (H 786): Require Department of Public Safety to study problem of illegal immigration.** This act, effective September 4, 2013, includes within its provisions a requirement that the North Carolina Department of Public Safety conduct a study, in conjunction with specified agencies, industries, and others, of the potential impact on public safety, the state economy, and illegal immigration of adopting any or all of the following: (1) increase penalties for crimes concerning the possession, manufacture, or sale of false driver's licenses and other identification documents; (2) create a rebuttable presumption against the pretrial release of undocumented aliens who commit serious crimes; (3) require a secured appearance bond as a condition of pretrial release for undocumented aliens who have committed serious crimes; (4) require undocumented alien prisoners to reimburse the state for the cost of their incarceration after conviction of a crime; (5) establish reasonable suspicion to guide law enforcement officers in conducting immigration status checks when conducting a lawful stop, detention, or arrest; (6) prohibit the use of consular

documents as a valid means of establishing a person's identity by a judicial official, law enforcement officer, or other state official; (7) implement a process for undocumented aliens to obtain a temporary driving privilege; and (8) adopt measures that have been adopted in other states to combat illegal immigration. The department must report its findings and recommendations to the chairs of the Joint Legislative Oversight Committee on Justice and Public Safety no later than March 1, 2014.

Appendix 2-1
Summary of 2013 Legislation

Background

During the 2013 legislative session the General Assembly made several changes to the statutes governing capacity determinations and the ensuing proceedings for involuntary commitment of a person found incapable to proceed. *See* S.L. 2013-18 (S 45). The changes, which apply to offenses committed on or after December 1, 2013, grew out of a study committee, co-chaired by Senator Shirley Randleman, a former Superior Court Clerk who had encountered the difficulties described below. The study committee consisted of representatives from the courts, prosecution, law enforcement, defense bar, mental health system, and School of Government as well as members of both the House and Senate.

Under the current statutes, if the judge finds that a person is incapable to proceed in the criminal case, the judge may refer the person for civil commitment proceedings. The proceedings then focus primarily on whether the person meets the criteria for commitment—for inpatient commitment, whether the person is mentally ill and dangerous to self and others. Generally, once a person no longer meets the criteria for commitment, the commitment terminates and the criminal case resumes. If the person has not met pretrial release conditions, he or she returns to jail. Termination of commitment does not necessarily ensure that the person is capable of proceeding in the criminal case, however. Although the person's mental health may have improved during the commitment process, his or her condition may deteriorate after returning to jail, rendering him or her incapable of proceeding in the criminal case. Or, even though released from commitment, the underlying conditions that rendered the person incapable of proceeding in the criminal case may not have been fully addressed. In those circumstances, the capacity-commitment process begins again, with the person cycling through a capacity evaluation, commitment if found incapable, release to jail if no longer subject to commitment, and so on.

In various ways, the legislative changes seek to better integrate the criminal capacity and civil commitment procedures without altering the basic criteria for commitment. To be involuntarily committed and treated in a state psychiatric facility, the person still must meet the mental illness and dangerousness requirements for commitment. The revised statutes do not authorize commitment on the basis that a person is incapable of proceeding; nor do they specifically authorize treatment of a person's incapacity during commitment. However, the revised statutes seek to increase communication between criminal and civil court participants; generate more information about the defendant's capacity to proceed before commitment terminates; expedite proceedings to avoid ping-ponging of defendants between the criminal justice and mental health systems; and set more definite termination dates for the proceedings. Below are highlights of the legislative changes.

Review of Legislative Changes

All of the changes described below are effective for offenses committed on or after December 1, 2013. (They are also described in the body of this chapter where applicable.)

Requirement of recommendation in report. If a capacity examination concludes that a defendant is incapable of proceeding, the report must indicate whether the person is likely to gain capacity and include a treatment recommendation for addressing the person's incapacity, which presumably will be available to and can be considered by treating professionals during the commitment process. *See* G.S. 122C-54(b). The revised statute does not specifically authorize treatment or medication to restore capacity. An uncodified section of the legislation directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt guidelines for the treatment of people who are involuntarily committed after a determination of incapacity to proceed.

Elimination of second capacity examination in misdemeanor cases. In misdemeanor cases, only local examiners may perform court-ordered capacity examinations. The court may no longer order a capacity examination at a state hospital following a local examination, *See* G.S. 15A-1002(b)(1a) and (2) [current subsection (1) is recodified as subsection (1a)]. This change may free up resources to meet the requirement, discussed below, that capacity examinations be conducted before a person is released from commitment. An uncodified section of the legislation directs the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to adopt rules requiring forensic evaluators appointed under G.S. 15A-1002(b) to meet specified requirements, such as training to be credentialed as a certified forensic evaluator and attendance at continuing education seminars.

Release of confidential records. The judge who orders a capacity examination must order the release of relevant confidential information to the examiner, including the warrant or indictment, the law enforcement incident report, and the defendant's medical and mental health records. The defendant is entitled to notice and an opportunity to be heard before release of the records. *See* G.S. 15A-1002(b)(4). The subsection also states that it does not relieve the court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment.

Hearing and findings. Revised G.S. 15A-1002(b)(1a) states that the court may call the examiner appointed under that subsection to testify at a capacity hearing with or without the request of the parties. This revision does not appear to change existing law. Revised G.S. 15A-1002(b1) requires the court to make findings of fact to support its determination of capacity or incapacity to proceed; this subsection also states that the parties may stipulate that the defendant is capable of proceeding but may not stipulate to incapacity.

Time limits on completion of reports. The examiner who performs the capacity examination must submit his or her report within specified time limits—for example, in a felony case, within thirty days of completion of the examination. *See* G.S. 15A-1002(b2). The statute allows the court to grant extensions of time for good cause up to a maximum limit. The statute does not set deadlines for the holding of the examinations, however.

Notice to sheriff. The covering statement that must accompany a capacity examination report, indicating the examiner's opinion about capacity, must be provided to the sheriff who has custody of the defendant. The sheriff does not receive the report itself. *See* G.S. 15A-1002(d).

Capacity examinations during commitment. If a person is found incapable of proceeding and involuntarily committed, either on an inpatient or outpatient basis, a capacity examination must be conducted before commitment is terminated and the person discharged. G.S. 122C-278. This provision does not authorize continued hospitalization or outpatient treatment solely on the basis that a person is incapable of proceeding; the person still must meet the criteria for involuntary commitment on an inpatient or outpatient basis.

Revised G.S. 15A-1004(c) appears to contain a broader re-examination requirement. That statute, as revised, states that if the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary commitment, the court "shall also order that the defendant shall be examined to determine whether the defendant has the capacity to proceed prior to release from custody." A defendant may be in the "custody" of a hospital within the meaning of the revised statute when he or she is taken to a 24-hour facility for a second examination to determine the appropriateness of commitment or, in the case of an offense designated as violent, when taken directly to a 24-hour facility for examination. Such a requirement would be broader than the one in G.S. 122C-278, which requires a re-examination of capacity only after the person is actually committed.

Reporting on status of defendant. If the defendant gains capacity after being committed, the institution having custody of the defendant must provide written notice to the clerk of court (not merely "notice" as under the previous version of the statute). The clerk, in turn, must provide written notice to the district attorney, defendant's attorney, and sheriff, which is a new requirement. G.S. 15A-1006.

The revised statutes also require that reports of re-examination be provided according to the terms of G.S. 15A-1002. *See* G.S. 15A-1004(c) ("A report of the examination shall be provided pursuant to G.S. 15A-1002."). G.S. 15A-1002 has required and continues to require that examiners provide reports of their examinations to the court and defense attorney. It has been less clear when examiners may provide reports to prosecutors. G.S. 15A-1002(d) has permitted and continues to permit disclosure of the report to the prosecutor if the question of the defendant's capacity "is raised at any time." The language and legislative history of G.S. 15A-1002(d) suggest, however, that this phrase contemplates disclosure only if capacity is questioned after the initial examination and further court proceedings are necessary, at which the examination report is a central consideration. Central Regional Hospital and possibly other examiners do not share this view and routinely provide a copy of the examination report to the court, defense attorney, and prosecutor at the same time (unless the defense attorney has obtained a specific order from the court limiting disclosure). Re-examination reports will likely be disclosed in the same fashion (unless defense counsel obtains an order limiting disclosure).

Supplemental hearings on capacity. After receiving notice that the defendant has gained the capacity to proceed, the district attorney must calendar a supplemental hearing on capacity within thirty days. G.S. 15A-1007(a). This hearing requirement applies when the defendant is found incapable, is committed, and is later released from commitment. It also appears to apply when the defendant is found incapable, is referred for commitment proceedings, and is found not to be subject to commitment.

Expedited trial. If the court determines in a supplemental hearing that the defendant has gained the capacity to proceed, the case must be calendared for trial at the earliest practicable time. Continuances of more than sixty days beyond the trial date may be granted only in extraordinary circumstances and when necessary for the proper administration of justice. G.S. 15A-1007(d).

Repeal of dismissal with leave. G.S. 15A-1009 has permitted prosecutors to dismiss cases "with leave" if a person is found incapable to proceed. This provision has proved troublesome because agencies and programs have viewed the criminal case as still pending, which may disqualify the defendant from receiving or obtaining funding for needed treatment and services. The legislation repeals the statute. A prosecutor still may take a voluntary dismissal.

Mandatory dismissal. G.S. 15A-1008 has allowed but not required the court to dismiss the charges against an incapable defendant on any of the grounds indicated in that statute. The biggest change to the statute is that dismissal is mandatory, not discretionary, if any of the grounds exist. The substance of the second ground, but not the first and third, was also changed to specify the length of imprisonment required to mandate dismissal.

An incapable defendant is entitled to dismissal under the revised statute if:

1. it appears to the satisfaction of the court that the defendant will not gain the capacity to proceed;
2. the defendant has been deprived of his or her liberty, as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, for a period equal to or greater than the maximum permissible term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged; or
3. five years have expired in the case of a misdemeanor, and ten years have expired in the case of a felony, calculated from the date of the determination of incapacity to proceed.

If the ground for dismissal is 2., the dismissal is "without leave." This phrasing apparently means that the case is dismissed with prejudice and cannot be refiled. If the ground for dismissal is 1. or 3., the dismissal is "without prejudice to the refiling of the charges" by the giving of written notice by the prosecutor. The "without prejudice" phrasing appears to distinguish a dismissal under either 1. or 3. from a dismissal with leave, discussed above. When a case is dismissed with leave, the case may be viewed as still pending. A dismissal without prejudice to refiling, in contrast, contemplates that the State may refile the charges but, until it does so, no case is pending. Defense counsel seeking to arrange for treatment and other services may need to educate involved agencies and programs about the meaning of a dismissal without prejudice. In seeking a dismissal order on ground 1. or 3., defense counsel also may want to ask the court to indicate explicitly in the order that the case is no longer pending on entry of the order.

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Criminal Law Case Update

2013 Winter Criminal Law Webinar

(Includes cases decided between June 3, 2013 and November 19, 2013)

The summaries are drawn from criminal case summaries prepared by School of Government faculty members Jessica Smith, Jamie Markham, and Jeff Welty. To view all of the summaries, go to http://www.sog.unc.edu/node/488. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

Investigation Issues

Grounds for Seizure

(1) Defendant was seized when uniformed officers, one in a police cruiser and the other on a bicycle, blocked defendant's continued movement on the sidewalk; (2) Seizure was not supported by reasonable suspicion when based on defendant getting into car with cup and then getting out of car after police officer drove past

State v. Knudsen, __ N.C. App. __, 747 S.E.2d 641 (Aug. 20, 2013). Two Winston-Salem officers, on patrol downtown at 11:00 p.m. on a summer night, noticed the defendant get into, and start, a car "while holding a cup that looked similar to cups that were commonly used at downtown bars to serve mixed drinks." One of the officers rode past the car on his bicycle and peered in the window. The defendant and his companion subsequently exited the vehicle and began to walk down the sidewalk, with the defendant still carrying the cup. The bicycle officer positioned himself on the sidewalk in the pedestrians' path, and the other officer, who was driving a cruiser, pulled into a parking lot just behind the bicycle officer in such a way as to block access to the lot. As the defendant approached the bicycle officer, the latter asked "what do you have in the cup?" The defendant said he had water in the cup, which proved true. The defendant eventually was charged with driving while impaired. He pled guilty to that offense in district court, appealed, and in superior court filed a "Motion to Dismiss for Lack of Reasonable Suspicion."

The superior court judge granted the motion, ruling (1) that the defendant was seized when the officers blocked the defendant's normal path of pedestrian travel in a way that would have made a reasonable person feel that he was not free to go, and (2) that the officers lacked reasonable suspicion for the stop. The State appealed, and the court of appeals affirmed, finding that the trial court did not err in concluding that the officers seized the defendant. The court noted that the two officers were armed and in uniform, and took an obvious interest in the defendant. Then, the bicycle officer "imped[ed] Defendant's continued movement along the sidewalk," and the officer in the cruiser also "blocked the sidewalk" before the first officer "demanded" that the defendant state what he had in his cup. The court concluded that a reasonable person would not feel free to leave under these circumstances.
The court of appeals also determined that the seizure was not supported by reasonable suspicion. The officers observed the defendant walking down the sidewalk with a clear plastic cup in his hands filled with a clear liquid. The defendant entered his vehicle, remained in it for a period of time, and then exited his vehicle and began walking down the sidewalk, where he was stopped. The officers stopped and questioned the defendant because he was walking on the sidewalk with the cup and the officers wanted to know what was in the cup.

See Jeff Welty, Seizure by Blocking One's Path, North Carolina Criminal Law Blog (August 22, 2013), available at http://nccriminallaw.sog.unc.edu/?p=4427.

Vehicle Stops

Traffic stop was not unduly prolonged and defendant's consent to search vehicle after purpose of initial stop was met was valid; consent was valid even though officer did not inform defendant of purpose of search

State v. Heien, __ N.C. __, 749 S.E.2d 278 (Nov. 8, 2013). The court per curiam affirmed the decision below, *State v. Heien*, __ N.C. App. __, 741 S.E.2d 1 (2013). Over a dissent the court of appeals had held that a valid traffic stop was not unduly prolonged and as a result the defendant's consent to search his vehicle was valid. The stop was initiated at 7:55 am and the defendant, a passenger who owned the vehicle, gave consent to search at 8:08 am. During this time, the two officers discussed a malfunctioning vehicle brake light with the driver, discovered that the driver and the defendant claimed to be going to different destinations, and observed the defendant behaving unusually (he was lying down on the backseat under a blanket and remained in that position even when approached by an officer requesting his driver's license). After each person's name was checked for warrants, their licenses were returned. The officer then requested consent to search the vehicle. The officer's tone and manner were conversational and non-confrontational. No one was restrained, no guns were drawn and neither person was searched before the request to search the vehicle was made. The trial judge properly concluded that the defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. The court of appeals also had held, again over a dissent, that the defendant's consent to search the vehicle was valid even though the officer did not inform the defendant that he was searching for narcotics.

Tip from anonymous informant was insufficient to provide reasonable suspicion for traffic stop

State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (Oct. 15, 2013). Officers did not have reasonable suspicion to stop the defendant based on an anonymous tip from a taxicab driver. The taxicab driver anonymously contacted 911 by cell phone and reported that a red Mustang convertible with a black soft top, license plate XXT-9756, was driving erratically, running over traffic cones and continuing west on a specified road. Although the 911 operator did not ask the caller's name, the operator used the caller's cell phone number to later identify the taxicab driver as John Hutchby. The 911 call resulted in a "be on the lookout" being issued; minutes later officers spotted a red Mustang matching the caller's description, with "X" in the license plate, heading as indicated by the caller. Although the officers did not observe the defendant violating any traffic laws or see evidence of improper driving that would suggest impairment, the officers stopped the defendant. The defendant was charged with DWI. The court began: [T]he officers did not have the opportunity to judge Hutchby's credibility firsthand or confirm whether the tip was reliable, because Hutchby had not been previously used and the officers did not meet him face-to-face. Since the officers did not have an opportunity to assess his credibility, Hutchby was an anonymous informant. Therefore, to justify a warrantless search and seizure, either the tip must have possessed sufficient indicia of reliability or the officers must have corroborated the tip.
The court went on to find that neither requirement was satisfied**.**

Seizure occurred when defendant stopped her vehicle after fire truck following her flashed its red lights and activated its siren

State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (Sept. 3, 2013), *review allowed*, __ N.C. __, __ S.E.2d __ (Nov. 7, 2013). (1) A seizure occurred when the defendant stopped her vehicle after a fire truck following behind her flashed its red lights and activated its siren. The fireman took this action after observing the defendant, among other things, weave out of her lane of traffic and almost hit a passing bus. (2) The court remanded to the trial court for findings of fact and conclusions of law regarding whether the fireman was acting as a state agent or a private person when the seizure occurred. (3) Whether the fireman lacked the statutory authority to stop the defendant's vehicle is irrelevant to whether the stop violated the Fourth Amendment. The court noted that the US Supreme Court has consistently applied traditional standards of reasonableness to searches or seizures effectuated by

government actors who lack state law authority to act as law enforcement officers. Thus, if on remand the trial court determines that the fireman was a government actor, it should then determine whether the stop was constitutionally permissible by determining whether the stop was supported by reasonable articulable suspicion. (4) The trial court erred by holding that the fireman's stop was justified under G.S. 15A-404, which allows for a citizen's arrest when there is probable cause that certain crimes have been committed. Although reasonable suspicion may have supported a stop in this case, the evidence did not support a finding of probable cause. (5) If on remand the trial court finds that the stop was illegal, it should address whether evidence stemming from the defendant's later arrest by the police is admissible under the inevitable discovery and independent source doctrines. One judge concurred in part and dissented in part. This judge concurred with the conclusion that that stop was a seizure and that the fireman was not authorized to stop the defendant under G.S. 15A-404. He dissented however because he found that the fireman was a state actor and that the stop violated the NC Constitution.

No reasonable suspicion for traffic stop under "weaving plus" analysis where there was one instance of weaving combined with two other factors not sufficiently uncommon as to constitute "plus" factors

State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (Aug. 6, 2013), *temp. stay allowed*, __ N.C. __, 747 S.E.2d 524 (Aug. 27, 2013). In this DWI case, the trial court held that the officer lacked reasonable suspicion to stop the defendant's vehicle. At 10:05 pm on a Wednesday night an officer noticed that the defendant's high beams were on. The officer also observed the defendant weave once within his lane of travel. When pressed about whether he weaved out of his lane, the officer indicated that "just . . . the right side of his tires" crossed over into the right-hand lane of traffic going in the same direction. The State presented no evidence that the stop occurred in an area of high alcohol consumption or that the officer considered such a fact as a part of her decision to stop the defendant. The court characterized the case as follows: "[W]e find that the totality of the circumstances . . . present one instance of weaving, in which the right side of Defendant's tires crossed into the right-hand lane, as well as two conceivable "plus" factors — the fact that Defendant was driving at 10:05 on a Wednesday evening and the fact that [the officer] believed Defendant's bright lights were on before she initiated the stop." The court first noted that the weaving in this case was not constant and continuous. It went on to conclude that driving at 10:05 pm on a Wednesday evening and that the officer believed that the defendant's bright lights were on "are not sufficiently uncommon to constitute valid 'plus' factors" to justify the stop under a "weaving plus" analysis.

Tip from a citizen caller that there was a cup of beer in defendant's car, which was parked at a gas station, did not provide reasonable suspicion for traffic stop

State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (June 18, 2013). An officer lacked reasonable suspicion to stop the defendant's vehicle. A "be on the lookout" call was issued after a citizen caller reported that there was a cup of beer in a gold Toyota sedan with license number VST-8773 parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive. Although the complainant wished to remain anonymous, the communications center obtained the caller's name as Kim Creech. An officer responded and observed a vehicle fitting the caller's description. The officer followed the driver as he pulled out of the lot and onto Wake Forest Road and then pulled him over. The officer did not observe any traffic violations. After a test indicated impairment, the defendant was charged with DWI. Noting that the officer's sole reason for the stop was Creech's tip, the court found that the tip was not reliable in its assertion of illegality because possessing an open container of alcohol in a parking lot is not illegal. It concluded: "Accordingly, Ms. Creech's tip contained no actual allegation of criminal activity." It further

found that the officer's mistaken belief that the tip included an actual allegation of illegal activity was not objectively reasonable. Finally, the court concluded that even if the officer's mistaken belief was reasonable, it still would find the tip insufficiently reliable. Considering anonymous tip cases, the court held that although Creech's tip provided the license plate number and location of the car, "she did not identify or describe defendant, did not provide any way for [the] Officer . . . to assess her credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions."

Adopting dissenting opinion from Court of Appeals, North Carolina Supreme Court held that weaving over dotted white line between lanes followed by drifting to right side of right lane provided reasonable suspicion for a traffic stop.

State v. Kochuk, __ N.C. __, 742 S.E.2d 801 (June 13, 2013). For the reasons stated in the dissenting opinion below, the court reversed and found that an officer had reasonable suspicion for a stop. In the opinion below, *State v. Kochuk*, __ N.C. App. __, 741 S.E.2d 327 (Nov. 6, 2012), the court of appeals, over a dissent, affirmed the trial court's order granting the defendant's motion to suppress all evidence obtained as a result of a vehicle stop. Relying on *State v. Fields*, 195 N.C. App. 740 (2009) (weaving alone is insufficient to support a reasonable suspicion that the defendant was driving while impaired), the trial court had determined that the officer lacked reasonable suspicion for the stop. The officer saw the defendant's vehicle cross over the dotted white line causing both passenger side wheels to enter the right lane for three to four seconds. He also observed the defendant's vehicle drift to the right side of the right lane "where its wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." The court of appeals found these movements were "nothing more than weaving" and thus under *Fields*, the stop was improper. The dissenting judge believed that the officer had reasonable suspicion under *State v. Otto*, __ N.C. __, 726 S.E.2d 824 (2012).

Investigatory stop of vehicle registered in name of person with suspended license was lawful where officers were unable to determine the identity of the driver prior to the stop

State v. Hernandez, __ N.C. App. __, 742 S.E.2d 825 (June 4, 2013). An investigative stop of the defendant's vehicle was lawful. Officers stopped the defendant's vehicle because it was registered in her name, her license was suspended, and they were unable to determine the identity of the driver.

Grounds for Search

Officers lacked probable cause to conduct a warrantless search of a passenger in a vehicle based on, among other things, odor of marijuana on driver's side of vehicle

State v. Malunda, __ N.C. App. __, 749 S.E.2d 280 (Nov. 5, 2013). The trial court erred by concluding that the police had probable cause to conduct a warrantless search of the defendant, a passenger in a stopped vehicle. After detecting an odor of marijuana on the driver's side of the vehicle, the officers conducted a warrantless search of the vehicle and discovered marijuana in the driver's side door. However, officers did not detect an odor of marijuana on the vehicle's passenger side or on the defendant. The court found that none of the other circumstances, including the defendant's location in an area known for drug activity or his prior criminal history, nervousness, failure to immediately produce identification, or commission of the infraction of possessing an open container of alcohol in a motor vehicle, when considered separately or in combination, amounted to probable cause to search the defendant's person.

(1) DNA cheek swab as part of booking procedures did not violate Fourth Amendment; processing DNA from swab did not intrude on defendant's privacy in such a manner as to render DNA identification unconstitutional

Maryland v. King, 569 U.S. __ (June 3, 2013). The defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures. When the defendant was arrested in April 2009 for menacing a group of people with a shotgun and charged in state court with assault, he was processed for detention in custody at a central booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to the Maryland DNA Collection Act (Maryland Act). His DNA record was uploaded into the Maryland DNA database and his profile matched a DNA sample from a 2003 unsolved rape case. He was subsequently charged and convicted in the rape case. He challenged the conviction arguing that the Maryland Act violated the Fourth Amendment. The Maryland appellate court agreed. The Supreme Court reversed. The Court began by noting that using a buccal swab on the inner tissues of a person's cheek to obtain a DNA sample was a search. The Court noted that a determination of the reasonableness of the search requires a weighing of "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." It found that "[i]n the balance of reasonableness . . . , the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest." The Court noted in particular the superiority of DNA identification over fingerprint and photographic identification. Addressing privacy issues, the Court found that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one." It noted that a gentle rub along the inside of the cheek does not break the skin and involves virtually no risk, trauma, or pain. And, distinguishing special needs searches, the Court noted: "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial . . . his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen." The Court further determined that the processing of the defendant's DNA was not unconstitutional. The information obtained does not reveal genetic traits or private medical information; testing is solely for the purpose of identification. Additionally, the Maryland Act protects against further invasions of privacy, by for example limiting use to identification. It concluded:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

Miranda

Initial pre-*Miranda* confession was involuntary; the factors contributing to involuntariness were imputed to a subsequent post-*Miranda* confession

State v. Martin, __ N.C. App. __, 746 S.E.2d 307 (Aug. 6, 2013). The defendant's confession was involuntary. The defendant's first confession was made before *Miranda* warnings were given. The officer then gave the defendant *Miranda* warnings and had the defendant repeat his confession. The trial court suppressed the defendant's pre-*Miranda* confession but deemed the post-*Miranda* confession admissible. The court disagreed, concluding that the circumstances and tactics used by the officer to induce the first confession must be imputed to the post-*Miranda* confession. The court found the first confession involuntary, noting that the defendant was in custody, the officer made misrepresentations and/or deceptive statements, the officer made promises to induce the confession, and the defendant may have had an impaired mental condition.

State's introduction at trial of evidence of defendant's silence during a non-custodial interview did not violate the Fifth Amendment

Salinas v. Texas, 570 U.S. __ (June 17, 2013). Without being placed in custody or receiving *Miranda* warnings, the defendant voluntarily answered an officer's questions about a murder. But when asked whether his shotgun would match shells recovered at the murder scene, the defendant declined to answer. Instead, he looked at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began "to tighten up." After a few moments, the officer asked additional questions, which the defendant answered. The defendant was charged with murder and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. The defendant was convicted and on appeal asserted that this argument violated the Fifth Amendment. The Court took the case to resolve a lower court split over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a non-custodial police interview as part of its case in chief. In a 5-to-4 decision, the Court held that the defendant's Fifth Amendment claim failed. Justice Alito, joined by the Chief Justice and Justice Kennedy found it unnecessary to reach the primary issue, concluding instead that the defendant's claim failed because he did not expressly invoke the privilege in response to the officer's question and no exception applied to excuse his failure to invoke the privilege. Justice Thomas filed an opinion concurring in the judgment, to which Justice Scalia joined. In Thomas's view the defendant's claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.

Pretrial and Trial Procedure

Discovery

Trial court abused discretion by excluding testimony by defense expert as sanction for discovery violation

State v. Cooper, __ N.C. App. __, 747 S.E.2d 398 (Sept. 3, 2013), *temp. stay allowed*, __ N.C. __, 748 S.E.2d 530 (Sept. 20, 2013). (1) In this murder case, the trial court abused its discretion by excluding, as a discovery sanction, testimony by defense expert Masucci. The defendant offered Masucci after the trial court precluded the original defense expert, Ward, from testifying that key incriminating computer files

had been planted on the defendant's computer. The State made no pretrial indication that it planned to challenge Ward's testimony. At trial, the defendant called Ward to testify that based upon his analysis of the data recovered from the defendant's laptop, tampering had occurred with respect to the incriminating files found on the defendant's computer. The State successfully moved to exclude this testimony on the basis that Ward was not an expert in computer forensic analysis. The defendant then quickly located Masucci, an expert in computer forensic analysis, to provide the testimony Ward was prevented from giving. The State then successfully moved to exclude Masucci as a sanction for violation of discovery rules. The only State's evidence directly linking the defendant to the murder was the computer file evidence. Even if the defendant violated the discovery rules, the trial court abused its discretion with respect to the sanction imposed and violated the defendant's constitutional right to present a defense. (2) The trial court erred by failing to conduct an in camera inspection of discovery sought by the defense regarding information related to FBI analysis of the computer files. The trial court found that FBI information was used in counterterrorism and counterintelligence investigations and that disclosure would be contrary to the public interest. The court held that the trial court's failure to do an in camera review constituted a violation of due process. It instructed that on remand, the trial court "must determine with a reasonable degree of specificity how national security or some other legitimate interest would be compromised by discovery of particular data or materials, and memorialize its ruling in some form allowing for informed appellate review."

See John Rubin, What are Permissible Discovery Sanctions Against the Defendant, North Carolina Criminal Law (September 24, 2013), available at http://nccriminallaw.sog.unc.edu/?p=4455.

Trial court did not err by denying defendant's motion in DWI prosecution to examine Intoximeter source code

State v. Marino, __ N.C. App. __, 747 S.E.2d 633 (Aug. 20, 2013). The defendant was pulled over for speeding and subsequently arrested for impaired driving. He submitted to a breath test on the Intoxilyzer EC/IR II, and his first and second breath samples registered alcohol concentrations of .11 and .10, respectively. Marion filed a motion seeking an order that the source code for the Intoximeter was material, relevant and necessary for his defense. The trial court denied the motion, and defendant was convicted at trial. The jury returned a special verdict finding him guilty under both the appreciable impairment and per se impairment prongs of G.S. 20-138.1(a). The defendant appealed, and the court of appeals affirmed, holding that the trial court did not err by denying his motions to examine the Intoximeter source code. The court rejected the defendant's argument that the source code was *Brady* evidence, reasoning that he failed to show that it was favorable and material. The court noted that the jury found the defendant guilty under both prongs of the DWI statute; thus he failed to show that having the source code would have affected the outcome of his case. The court also rejected the defendant's argument that under *Crawford* and the confrontation clause he was entitled to the source code. (2) The court held that the defendant had no statutory right to pretrial discovery and rejected the defendant's argument that G.S. 15A-901 violated due process. The court noted, however, that the defendant did have discovery rights under *Brady.*

See Shea Denning, State v. Marino Finds No Error in Denying Defendant Source Code, North Carolina Criminal Law (August 21, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4426.

(1) Trial court did not err by refusing to provide defendant with internal investigation report regarding a non-testifying lead detective; (2) Trial court did not err by excluding evidence of guilt of another

State v. McCoy, __ N.C. App. __, 745 S.E.2d 367 (Aug. 6, 2013). (1) The trial court did not err by refusing to provide defense counsel with an internal investigation report prepared by the police department's Office of Professional Standards and Inspections regarding a lead detective in the investigation. During the trial prosecutors learned of an ongoing internal investigation of the detective. The State informed the trial court and defense counsel of this and decided not to call the detective as a witness. The trial court examined the report in camera and issued an oral ruling noting that the report detailed a problem in the detective's life that could have affected his job performance. However, it found that there was no evidence that the detective was experiencing the problem at the time of the investigation in question. The trial court noted that the report suggests that the detective may not have been honest in his internal investigation disclosures but again found no connection to the case at hand. The court of appeals held that the trial court did not violate the defendant's constitutional rights by refusing to disclose the contents of the report to counsel. The court found that it was unable to conclude that the report was material "when the State was able to prove its case through the testimony of other law enforcement officers and without [the] Detective . . . ever taking the stand." (2) Trial court did not err by excluding defense evidence of guilt of another where the evidence was "sheer conjecture" and was not inconsistent with the defendant's guilt.

Capacity

Trial court erred by failing to order capacity hearing *sua sponte* where there was substantial evidence indicating that defendant may not have been competent to proceed

State v. Ashe, __ N.C. App. __, 748 S.E.2d 610 (Oct. 1, 2013), *temp. stay allowed*, __ N.C. __, 749 S.E.2d 69 (Oct. 18, 2013). The trial court erred by failing to sua sponte order a hearing to evaluate the defendant's competency to stand trial. Although no one raised an issue of competency, a trial court has a constitutional duty to sua sponte hold a competency hearing if there is substantial evidence indicating that the defendant may be incompetent. Here, that standard was satisfied. The defendant proffered evidence of his extensive mental health treatment history and testimony from a treating psychiatrist showing that he has been diagnosed with paranoid schizophrenia, anti-social personality disorder, and cocaine dependency in remission. Additionally, his conduct before and during trial suggests a lack of capacity, including, among other things, refusing to get dressed for trial and nonsensically interrupting. The court rejected the remedy of a retrospective competency hearing and ordered a new trial.

Pleas

Plea was valid despite unenforceable provision preserving right to appeal transfer of juvenile case to superior court

State v. Tinney, __ N.C. App. __, 748 S.E.2d 730 (Sept. 17, 2013). The defendant's plea was valid even though the plea agreement contained an unenforceable provision preserving his right to appeal the transfer of his juvenile case to superior court. Distinguishing cases holding that the inclusion of an invalid provision reserving the right to obtain appellate review of a particular issue rendered a plea agreement unenforceable, the court noted that in this case the defendant had ample notice that the provision was, in all probability, unenforceable and he elected to proceed with his guilty plea in spite of this. Specifically, he was so informed by the trial court.

Evidence

Authentication

State failed to properly authenticate photographs used in photographic lineups

State v. Murray, __ N.C. App. __, 746 S.E.2d 452 (Aug. 20, 2013). In this drug case where the defendant denied being the perpetrator and suggested that the drugs were sold by one of his sons, the State failed to properly authenticate two photographs used in photographic lineups as being of the defendant's sons. An informant involved in the drug buy testified that he had purchased drugs from the people depicted in the photos on previous occasions but not on the occasion in question. The State then offered an officer to establish that the photos depicted the defendant's sons. However, the officer testified that he wasn't sure that the photos depicted the defendant's sons. Given this lack of authentication, the court also held that the photos were irrelevant and should not have been admitted.

Confrontation Clause

(1) Statements were non-testimonial where store manager privately notified store's loss prevention coordinator about loss of property; (2) assertions by store manager in a receipt for evidence form were non-testimonial

State v. Call, __ N.C. App. __, 748 S.E.2d 185 (Oct. 1, 2013). (1) In a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were non-testimonial. The loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter. The court stated:

> [The] statement was not made in direct response to police interrogation or at a formal proceeding while testifying. Rather, [the declarant] privately notified his colleague . . . about a loss of product at the Wal-Mart store. This statement was made outside the presence of police and before defendant was arrested and charged. Thus, the statement falls outside the purview of the Sixth Amendment. Furthermore, [the] statement was not aimed at defendant, and it is unreasonable to believe that his conversation with [the loss prevention coordinator] would be relevant two years later at trial since defendant was not a suspect at the time this statement was made.

(2) Any assertions by the assistant manager contained in a receipt for evidence form signed by him were non-testimonial. The receipt—a law enforcement document—established ownership of the baby formula that had been recovered by the police, as well as its quantity and type; its purpose was to release the property from the police department back to the store.

No confrontation clause violation occurred when an expert in forensic science testified to her opinion that the substance at issue was cocaine and that opinion was based upon the expert's independent analysis of testing performed by another analyst in her laboratory.

State v. Ortiz-Zape, __ N.C. __, 743 S.E.2d 156 (June 27, 2013). Reversing the court of appeals' decision

in an unpublished case, the court held that no confrontation clause violation occurred when an expert in forensic science testified to her opinion that the substance at issue was cocaine and that opinion was based upon the expert's independent analysis of testing performed by another analyst in her laboratory. At trial the State sought to introduce Tracey Ray of the CMPD crime lab as an expert in forensic chemistry. During voir dire the defendant sought to exclude admission of a lab report created by a non-testifying analyst and any testimony by any lab analyst who did not perform the tests or write the lab report. The trial court rejected the defendant's confrontation clause objection and ruled that Ray could testify about the practices and procedures of the crime lab, her review of the testing in this case, and her independent opinion concerning the testing. However, the trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The court of appeals reversed, finding that Ray's testimony violated the confrontation clause. The NC Supreme Court disagreed. The court viewed the US Supreme Court's decision in *Williams v. Illinois* as "indicat[ing] that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts." Noting that when an expert gives an opinion, the expert opinion itself, not its underlying factual basis, constitutes substantive evidence, the court concluded:

> Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely "surrogate testimony" parroting otherwise inadmissible statements.

(quotations and citations omitted). Turning to the related issue of whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder, the court stated:

> Machine-generated raw data, typically produced in testing of illegal drugs, present a unique subgroup of . . . information. Justice Sotomayor has noted there is a difference between a lab report certifying a defendant's blood-alcohol level and machine-generated results, such as a printout from a gas chromatograph. The former is the testimonial statement of a person, and the latter is the product of a machine. . . . Because machine-generated raw data, if truly machine-generated, are not statements by a person, they are neither hearsay nor testimonial. We note that representations[ ] relating to past events and human actions not revealed in raw, machine-produced data may not be admitted through "surrogate testimony." Accordingly, consistent with the Confrontation Clause, if of a type reasonably relied upon by experts in the particular field, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion.

(quotations and citations omitted). Turning to the case at hand, the court noted that here, the report of the non-testifying analyst was excluded under Rule 403; thus the only issue was with Ray's expert opinion that the substance was cocaine. Applying the standard stated above, the court found that no

confrontation violation occurred. Providing additional guidance for the State, the court offered the following in a footnote: "we suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule . . . 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies." Finally, the court held that even if error occurred, it was harmless beyond a reasonable doubt given that the defendant himself had indicated that the substance was cocaine.

See Jessica Smith, The NC Supreme Court's Recent Substitute Analyst Cases, North Carolina Criminal Law (July 10, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4351.

Applying *Ortiz-Zape* (above)

State v. Brewington, __ N.C. __, 743 S.E.2d 626 (June 27, 2013). Reversing the court of appeals, the North Carolina Supreme Court held that no *Crawford* violation occurred when the State proved that the substance at issue was cocaine through the use of a substitute analyst. The seized evidence was analyzed at the SBI by Assistant Supervisor in Charge Nancy Gregory. At trial, however, the substance was identified as cocaine, over the defendant's objection, by SBI Special Agent Kathleen Schell. Relying on Gregory's report, Schell testified to the opinion that the substance was cocaine; Gregory's report itself was not introduced into evidence. Relying on *Ortiz-Zape* (above), the court concluded that Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony.

Applying *Ortiz-Zape* (above)

State v. Hurt, __ N.C. __, 743 S.E.2d 173 (June 27, 2013). In another substitute analyst case, the court per curiam and for the reasons stated in *Ortiz-Zape* (above), reversed the court of appeals' decision in *State v. Hurt*, 208 N.C. App. 1 (2010) (applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case and holding that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts pertaining to DNA analysis).

Admission of lab reports through the testimony of a substitute analyst violated defendant's confrontation clause rights where testifying analyst did not give her own independent opinion, but merely recited the opinion of non-testifying testing analysts that substances were cocaine

State v. Craven, __ N.C. __, 744 S.E.2d 458 (June 27, 2013). The court held that admission of lab reports through the testimony of a substitute analyst (Agent Schell) violated the defendant's confrontation clause rights where the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that merely recited the opinion of non-testifying testing analysts that the substances at issue were cocaine. Distinguishing *Ortiz-Zape* (above), the court held that here the State's expert did not testify to an independent opinion obtained from the expert's own analysis but rather offered impermissible surrogate testimony repeating testimonial out-of-court statements made by non-testifying analysts. With regard to the two lab reports at issue, the testifying expert was asked whether she agreed with the non-testifying analysts' conclusions. When she replied in the affirmative, she was asked what the non-testifying analysts' conclusions were and the underlying reports were introduced into evidence. The court concluded: "It is clear . . . that Agent Schell did not offer—or even purport to offer—her own independent analysis or opinion [of the] . . . samples. Instead, Agent Schell merely

parroted [the non-testifying analysts'] . . . conclusions from their lab reports." Noting that the lab reports contained the analysts' certification prepared in connection with a criminal investigation or prosecution, the court easily determined that they were testimonial. The court went on to find that this conclusion did not result in error with regard to the defendant's conspiracy to sell or deliver cocaine conviction. As to the defendant's conviction for sale or delivery of cocaine, the six participating Justices were equally divided on whether the error was harmless beyond a reasonable doubt. Consequently, as to that charge the Court of Appeals' decision holding that the error was reversible remains undisturbed and stands without precedential value. However, the court found that the Court of Appeals erroneously vacated the conviction for sale or delivery and that the correct remedy was a new trial.

Any confrontation clause violation that occurred with regard to the use of substitute analyst testimony was harmless beyond a reasonable doubt where the defendant testified that the substance at issue was cocaine

State v. Williams, __ N.C. __, 744 S.E.2d 125 (June 27, 2013). Reversing the court of appeals, the court held that any confrontation clause violation that occurred with regard to the use of substitute analyst testimony was harmless beyond a reasonable doubt where the defendant testified that the substance at issue was cocaine. When cocaine was discovered near the defendant, he admitted to the police that a man named Chris left it there for him to sell and that he had sold some that day. The substance was sent to the crime lab for analysis. Chemist DeeAnne Johnson performed the analysis of the substance. By the time of trial however, Johnson no longer worked for the crime lab. Thus, the State presented Ann Charlesworth of the crime lab as an expert in forensic chemistry to identify the substance at issue. Over objection, she identified the substance as cocaine. The trial court also admitted, for the purpose of illustrating Charlesworth's testimony, Johnson's lab reports. At trial, the defendant reiterated what he had told the police. The defendant was convicted and he appealed. The court of appeals reversed, finding that Charlesworth's substitute analyst testimony violated the defendant's confrontation rights. The NC Supreme Court held that even if admission of the testimony and exhibits was error, it was harmless beyond a reasonable doubt because the defendant himself testified that the seized substance was cocaine.

Defendant failed to preserve confrontation clause objections, but even if preserved the objections would lack merit under *Ortiz-Zape*

State v. Brent, __ N.C. __, 743 S.E.2d 152 (June 27, 2013). Reversing the Court of Appeals, the court held that by failing to make a timely objection at trial and failing to argue plain error in the Court of Appeals, the defendant failed to preserve the question of whether substitute analyst testimony in a drug case violated his confrontation rights. The court noted that at trial the defendant objected to the testimony related to the composition of the substance only outside the presence of the jury; he did not object to admission of either the expert's opinion or the raw data at the time they were offered into evidence. He thus failed to preserve the issue for review. Furthermore, the defendant failed to preserve his challenge to admission of the raw data by failing to raise it in his brief before the Court of Appeals. Moreover, the court concluded, even if the issues had been preserved, under *Ortiz-Zape* (above), the defendant would lose on the merits.

Equally divided North Carolina Supreme Court left undisturbed court of appeals' opinion that no *Crawford* violation occurred.

State v. Hough, __ N.C. __, 743 S.E.2d 174 (June 27, 2013). With one Justice not taking part in the decision and the others equally divided, the court, per curiam, left undisturbed the decision below, *State v. Hough*, 202 N.C. App. 674 (Mar. 2, 2010). In the decision below, the court of appeals held that no *Crawford* violation occurred when reports done by non-testifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters. [Author's note: Because the Justices were equally divided, the decision below, although undisturbed, has no precedential value.]

Notice was proper under G.S. 90-95(g) (notice and demand statute) even though it did not contain proof of service or a file stamp

State v. Burrow, __ N.C. App. __, 742 S.E.2d 619 (June 4, 2013). In this drug trafficking case, notice was properly given under the G.S. 90-95(g) notice and demand statute even though it did not contain proof of service or a file stamp. The argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute. The notice was stamped "a true copy"; it had a handwritten notation that saying "ORIGINAL FILED," "COPY FAXED," and "COPY PLACED IN ATTY'S BOX." The defendant did not argue that he did not in fact receive the notice.

Confrontation clause does not entitle criminal defendants to introduce extrinsic evidence for impeachment purposes

Nevada v. Jackson, 569 U.S. __ (June 3, 2013). The Court reversed the Ninth Circuit, which had held that the defendant, who was convicted of rape and other crimes, was entitled to federal habeas relief because the Nevada Supreme Court unreasonably applied clearly established Supreme Court precedent regarding a criminal defendant's constitutional right to present a defense. At his trial, the defendant unsuccessfully tried to introduce extrinsic evidence that the victim previously reported that the defendant had assaulted her but that the police had been unable to substantiate those allegations. The state supreme court held that this evidence was properly excluded. The Ninth Circuit granted habeas relief. The Court reversed, noting in part that it "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes" (emphasis in original).

Hearsay

(1) Trial court properly admitted data obtained from an electronic surveillance device worn by defendant; (2) Officer properly gave lay witness testimony about operation of device and tracking data retrieved from server

State v. Jackson, __ N.C. App. __, 748 S.E.2d 50 (Sept. 17, 2013). (1) The trial court properly admitted data obtained from an electronic surveillance device worn by the defendant and placing him at the scene. The specific evidence included an exhibit showing an event log compiled from data retrieved from the defendant's device and a video file plotting the defendant's tracking data. The court began by holding that the tracking data was a data compilation and that the video file was merely an extraction of that data produced for trial. Thus, it concluded, the video file was properly admitted as a business record if the tracking data was recorded in the regular course of business near the time of the incident and a proper foundation was laid. The defendant did not dispute that the device's data was recorded in the regular course of business near the time of the incident. Rather, he asserted that the State failed to establish a proper foundation to verify the authenticity and trustworthiness of the data. The court

disagreed noting that the officer-witness established his familiarity with the GPS tracking system by testifying about his experience and training in electronic monitoring, concerning how the device transmits data to a secured server where the data was stored and routinely accessed in the normal course of business, and how, in this case, he accessed the tracking data for the defendant's device and produced evidence introduced at trial. (2) An officer properly gave lay witness testimony. In a case where data from the defendant's electronic monitoring device was used to place him at the crime scene, the officer-witness testified regarding the operation of the device and tracking data retrieved from the secured server. When questioned about specific tracking points in the sequence of mapped points, he identified the date, time, accuracy reading, and relative location of the tracking points.

Identification

Out-of-court show-up identification was not impermissibly suggestive

State v. Jackson, __ N.C. App. __, 748 S.E.2d 50 (Sept. 17, 2013). An out-of-court show-up identification was not impermissibly suggestive. Police told a victim that they "believed they had found the suspect." The victim was then taken to where the defendant was standing in a front yard with officers. With a light shone on the defendant, the victim identified the defendant as the perpetrator from the patrol car. For reasons discussed in the opinion, the court held that the show-up possessed sufficient aspects of reliability to outweigh its suggestiveness.

Opinion Testimony

Trial court committed reversible error in murder trial by ruling that the defendant's expert was not qualified to give expert testimony that incriminating computer files had been planted on the defendant's computer.

State v. Cooper, __ N.C. App. __, 747 S.E.2d 398 (Sept. 3, 2013), *temp. stay allowed*, __ N.C. __, 748 S.E.2d 530 (Sept. 20, 2013). In this murder case, the trial court committed reversible error by ruling that the defendant's expert was not qualified to give expert testimony that incriminating computer files had been planted on the defendant's computer. Temporary internet files recovered from the defendant's computer showed that someone conducted a Google Map search on the laptop while it was at the defendant's place of work the day before the victim was murdered. The Google Map search was initiated by someone who entered the zip code associated with the defendant's house, and then moved the map and zoomed in on the exact spot on near a nearby road where the victim's body later was found. Applying the old version of NC Evidence Rule 702 and the *Howerton* test, the court found that the trial court erred by concluding that the defendant's expert was not qualified to offer the relevant expert testimony. It went on to conclude that this error deprived the defendant of his constitutional right to present a defense.

Trial court did not commit plain error by allowing the State's medical experts to testify that the victim's injuries were consistent with previous cases involving intentional injuries and were inconsistent with previous cases involving accidental injuries

State v. Perry, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child homicide case, the trial court did not commit plain error by allowing the State's medical experts to testify that their review of the medical records and other available information indicated that the victim's injuries were consistent with

previously observed cases involving intentionally inflicted injuries and were inconsistent with previously observed cases involving accidentally inflicted injuries. The defendant asserted that these opinions rested "on previously accepted medical science that is now in doubt" and that, because "[c]urrent medical science has cast significant doubt" on previously accepted theories regarding the possible causes of brain injuries in children, there is currently "no medical certainty around these topics." The court rejected this argument, noting that there was no information in the record about the state of "current medical science" or the degree to which "significant doubt" has arisen with respect to the manner in which brain injuries in young children occur.

Trial court committed reversible error by allowing State's expert to give opinion that child victim had been sexually abused in the absence of a proper foundation

State v. Frady, __ N.C. App. __, 747 S.E.2d 164 (Aug. 6, 2013), *temp. stay allowed*, __ N.C. __, 747 S.E.2d 247 (Aug. 26, 2013). In this child sex case, the trial court committed reversible error by allowing the State's medical expert to testify to the opinion that the victim's disclosure was consistent with sexual abuse where there was no physical evidence consistent with abuse. In order for an expert medical witness to give an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse. Without physical evidence, expert testimony that sexual abuse has occurred is an impermissible opinion regarding credibility. Although the expert in this case did not diagnose the victim as having been sexually abused, she "essentially expressed her opinion that [the victim] is credible."

Amended N.C. Evid. R. 702 applies to cases where the indictment is filed on or after October 1, 2011

State v. Gamez, __ N.C. App. __, 745 S.E.2d 876 (July 16, 2013). (1) In criminal cases, the amendment to N.C.Evid. R. 702, which is "effective October 1, 2011, and applies to actions commenced on or after that date" applies to cases where the indictment is filed on or after that date. The court noted that it had suggested in a footnote in a prior unpublished opinion that the trigger date for applying the amended Rule is the start of the trial but held that the proper date is the date the indictment is filed. Here, the defendant was initially indicted on 17 May 2010, before the 1 October 2011 effective date. Although a second bill of indictment was filed on 12 December 2011 and subsequently joined for trial, the court held that the criminal proceeding commenced with the filing of the first indictment and that therefore amended Rule 702 did not apply. (2) In a child sex case decided under pre-amended R. 702, the trial court did not abuse its discretion by admitting expert opinion that the victim suffered from post-traumatic stress disorder when a licensed clinical social worker was tendered as an expert in social work and routinely made mental health diagnoses of sexual assault victims. The court went on to note that when an expert testifies the victim is suffering from PTSD, the testimony must be limited to corroboration and may not be admitted as substantive evidence.

Trial court committed plain error in counterfeit controlled substance trial by admitting evidence identifying a substance based solely upon an expert's visual inspection

State v. Hanif, __ N.C. App. __, 743 S.E.2d 690 (July 2, 2013). In a counterfeit controlled substance case, the trial court committed plain error by admitting evidence identifying a substance as tramadol hydrochloride based solely upon an expert's visual inspection. The State's witness Brian King, a forensic chemist with the State Crime Lab, testified that after a visual inspection, he identified the pills as tramadol hydrochloride. Specifically he compared the tablets' markings to a Micromedex online

database. King performed no chemical analysis of the pills. Finding that *State v. Ward*, 364 N.C. 133 (2010), controlled, the court held that in the absence of a scientific, chemical analysis of the substance, King's visual inspection was insufficient to identify the composition of the pills.

(1) Trial court did not err in murder case by excluding testimony of social worker who briefly observed defendant that he "appeared noticeably depressed with flat affect"; (2) Defendant failed to preserve for appellate review trial court's omission of diminished capacity and voluntary intoxication from final mandate to the jury

State v. Storm, __ N.C. App. __, 743 S.E.2d 713 (July 2, 2013). (1) In a murder case, the trial court did not err by excluding testimony of Susan Strain, a licensed social worker. Strain worked with the defendant's step-father for several years and testified that she occasionally saw the defendant in the lobby of the facility where she worked. The State objected to Strain's proffered testimony that on one occasion the defendant "appeared noticeably depressed with flat affect." The trial court allowed Strain to testify to her observation of the defendant, but did not permit her to make a diagnosis of depression based upon her brief observations of the defendant some time ago. The defendant tendered Strain as a lay witness and made no attempt to qualify her as an expert; her opinion thus was limited to the defendant's emotional state and she could not testify concerning a specific psychiatric diagnosis. The statement that the defendant "appeared noticeably depressed with flat affect" is more comparable to a specific psychiatric diagnosis than to a lay opinion of an emotional state. Furthermore Strain lacked personal knowledge because she only saw the defendant on occasion in the lobby, her observations occurred seven years before to the murder, she did not spend any appreciable amount of time with him, and the defendant did not present any evidence to indicate Strain had any personal knowledge of his mental state at that time. (2) By failing to object to the omission of diminished capacity and voluntary intoxication from the trial court's final mandate to the jury instructions on murder, the defendant failed to preserve this issue for appellate review. The trial court had instructed on those defenses per the pattern instructions. The defendant never requested that the final mandate for murder include voluntary intoxication and diminished capacity. The court went on to reject the defendant's argument that this constituted plain error.

Character Evidence

Trial court erred by excluding evidence of defendant's truthful character in tax evasion case.

State v. Tatum-Wade, __ N.C. App. __, 747 S.E.2d 382 (Aug. 20, 2013). In this tax evasion case, the trial court erred by excluding the defendant's character evidence. The facts indicated that the defendant believed advice from others that by completing certain Sovereign Citizen papers, she would be exempt from having to pay taxes. The defendant's witness was permitted to testify to the opinion that the defendant was a truthful, honest, and law-abiding citizen. However, the trial court excluded the witness's testimony regarding the defendant's trusting nature. The court agreed with the defendant that her character trait of being trusting of others was pertinent to whether she willfully attempted to evade paying taxes. The court found the error harmless.

(1) Trial court erred by excluding evidence of defendant's positive interaction with children in child sex case; (2) Trial court incorrectly denied defense counsel's request to make a proffer of excluded character evidence; (3) Trial court committed prejudicial error by identifying the prosecuting

witnesses as "victims" in jury instructions; (4) Where superseding indictment is used, the effective date of amendment to Rule 702 is the date the superseding indictment is filed

State v. Walston, __ N.C. App. __, 747 S.E.2d 720 (Aug. 20, 2013), *temp. stay allowed*, __ N.C. __, 747 S.E.2d 590 (Sept. 9, 2013). In a child sex case, the trial court committed prejudicial error by excluding opinion testimony that the defendant was respectful around children and interacted in a positive way with children. The court reasoned:

> Testimony of Defendant's character for respectful treatment of children is relevant because it has a tendency to make the existence of "any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence of character for respectful treatment of children tends to make the facts central to the charges, that Defendant committed, inter alia, first-degree statutory rape of a child, less probable than they would be without such evidence. Testimony of this character trait is therefore relevant and "pertinent."

Slip Op. at p. 10 (citation omitted). (2) The trial court incorrectly denied defense counsel's request to make a proffer of excluded character evidence. (3) The trial court committed prejudicial error by identifying the prosecuting witnesses as "victims" rather than "alleged victims" in its jury instructions. The court noted that in this case an issue before the jury was whether any sexual assault occurred two decades earlier as alleged in the indictment and the defense objected to the relevant language at trial. (4) For purposes of applying the effective date of the amendment to Rule 702 (the amended rule applies to actions "arising on or after" 1 October 2011), in a case where a superseding indictment is used, the relevant date is the date the superseding indictment is filed, not the filing date of the original indictment.

Preservation for Appeal

Objection to evidence at trial under Rule 403 did not preserve Rule 404(b) argument for appeal

State v. Howard, __ N.C. App. __, 742 S.E.2d 858 (June 18, 2013). Over a dissent, the court dismissed the defendant's appeal where the defendant objected to the challenged evidence at trial under Rule 403 but on appeal argued that it was improper under Rule 404(b). The court stated: "A defendant cannot 'swap horses between courts in order to get a better mount[.]'" The dissenting judge believed that the defendant preserved his argument and that the evidence was improperly admitted.

Crimes

Assault

Evidence was sufficient to establish assault by strangulation

State v. Lowery, __ N.C. App. __, 743 S.E.2d 696 (July 2, 2013). The evidence was sufficient to establish assault by strangulation. The victim testified that the defendant strangled her twice; the State's medical expert testified that the victim's injuries were consistent with strangulation; and photographic evidence showed bruising, abrasions, and a bite mark on and around the victim's neck. The court rejected the defendant's arguments that the statute required "proof of physical injury beyond what is inherently

caused by every act of strangulation" or extensive physical injury.

Driving While Impaired

Failure to comply with certificate requirement of G.S. 15A-1432(e) deprived Court of Appeals of jurisdiction over State's appeal of superior court's affirmation of district court's judgment

State v. Bryan, __ N.C. App. __, __ S.E.2d __ (Nov. 5, 2013). Because the State failed to file a certificate as required by G.S. 15A-1432(e), the appellate court lacked jurisdiction over the appeal. In district court the defendant moved to dismiss his DWI charge on speedy trial grounds. When the district court issued an order indicating its preliminary approval of the defendant's motion, the State appealed to superior court. The superior court remanded to the district court for additional factual findings. Once the superior court received further findings of fact, it affirmed the district court's preliminary order and remanded the case to district court with orders to affirm the dismissal. After the district court issued its final judgment, the State again appealed and the superior court affirmed the district court's judgment. The court determined that G.S. 15A-1432(e), not G.S. 15A-1445(a)(1), applied to the State's appeal to the appellate division. Because the State failed to comply with G.S. 15A-1432(e)'s certificate requirement, the court had no jurisdiction over the appeal.

Prosecution for DWI does not violate double jeopardy where defendant was previously subject to one-year disqualification of commercial driver's license

State v. McKenzie, __ N.C. __, __ S.E.2d __ (Oct. 4, 2013). For the reasons stated in the dissenting opinion below, the court reversed *State v. McKenzie*, __ N.C. App. __, 736 S.E.2d 591 (Jan. 15, 2013), which had held, over a dissent, that prosecuting the defendant for DWI violated double jeopardy where the defendant previously was subjected to a one-year disqualification of his commercial driver's license under G.S. 20-17.4.

Evidence of a BAC of .09 was sufficient to survive motion to dismiss impaired driving charge despite evidence that machine may have had margin of error of .02

State v. Marley, __ N.C. App. __, 742 S.E.2d 634 (June 4, 2013). In an impaired driving case, evidence that the defendant's BAC was .09 was sufficient to survive a motion to dismiss, notwithstanding evidence that the machine may have had a margin of error of .02. The court concluded: "Defendant's argument goes to the credibility of the State's evidence, not its sufficiency to withstand defendant's motion to dismiss. Such an argument is more appropriately made to the jury at trial, and not to an appellate court."

Drug Offenses

(1) Trial court did not err by denying defendant's motion to dismiss charges of possession of a controlled substance in a local confinement facility; (2) Trial court erred by entering judgment for defendant's convictions for both possession of a controlled substance in a local confinement facility and simple possession of marijuana

State v. Barnes, __ N.C. App. __, 747 S.E.2d 912 (Sept. 17, 2013). (1) Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession of a

controlled substance on the premises of a local confinement facility. The defendant first argued that the State failed to show that he intentionally brought the substance on the premises. The court held that the offense was a general intent crime. As such, there is no requirement that a defendant has to specifically intend to possess a controlled substance on the premises of a local confinement facility. It stated: "[W]e are simply unable to agree with Defendant's contention that a conviction . . . requires proof of any sort of specific intent and believe that the relevant offense has been sufficiently shown to exist in the event that the record contains evidence tending to show that the defendant knowingly possessed a controlled substance while in a penal institution or local confinement facility." The court also rejected the defendant's argument that his motion should have been granted because he did not voluntarily enter the relevant premises but was brought to the facility by officers against his wishes. The court rejected this argument concluding, "a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question." Following decisions from other jurisdictions, the court reasoned that while a voluntary act is required, "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance." The court also concluded that the fact that officers may have failed to warn the defendant that taking a controlled substance into the jail would constitute a separate offense, was of no consequence. (2) The trial court erred by entering judgment for both simple possession of a controlled substance and possession of a controlled substance on the premises of a local confinement facility when both charges stemmed from the same act of possession. Simple possession is a lesser-included offense of the second charge.

See Jeff Welty, When an Arrestee "Brings" Drugs to the Jail, North Carolina Criminal Law (September 25, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4469.

DVPO, Violation of

Trial court erred by dismissing an indictment charging the defendant with violating an ex parte domestic violence protective order (DVPO) as statutory amendments after State v. Byrd rendered ex parte orders entered under Chapter 50B valid protective orders

State v. Poole, __ N.C. App. __, 745 S.E.2d 26 (July 2, 2013). The trial court erred by dismissing an indictment charging the defendant with violating an ex parte domestic violence protective order (DVPO) that required him to surrender his firearms. The trial court entered an ex parte Chapter 50B DVPO prohibiting the defendant from contacting his wife and ordering him to surrender all firearms to the sheriff. The day after the sheriff served the defendant with the DVPO, officers returned to the defendant's home and discovered a shotgun. He was arrested for violating the DVPO. The trial court granted the defendant's motion to dismiss, finding that under *State v. Byrd,* 363 N.C. 214 (2009), the DVPO was not a protective order entered within the meaning of G.S. 14-269.8 and that the prosecution would violate the defendant's constitutional right to due process. The State appealed. The court concluded that *Byrd* was not controlling because of subsequent statutory amendments and that the prosecution did not violate the defendant's procedural due process rights.

Larceny

(1) Cumulative value of goods taken is evidence of a conspiracy to steal goods of that value; (2) State presented sufficient evidence that the value of the stolen boat batteries was more than $1,000

State v. Fish, __ N.C. App. __, 748 S.E.2d 65 (Sept. 17, 2013), *temp. stay allowed*, __ N.C. __, 748 S.E.2d 532 (Sept. 30, 2013). (1) In a case in which the defendant was charged with conspiracy to commit felony larceny, the trial court did not err by denying the defendant's motion to submit a jury instruction on conspiracy to commit misdemeanor larceny. The court determined that evidence of the cumulative value of the goods taken is evidence of a conspiracy to steal goods of that value, even if the conspirators' agreement is silent as to exact quantity. Here, the evidence showed that the value of the items taken was well in excess of $1,000. (2) The State presented sufficient evidence that the fair market value of the stolen boat batteries was more than $1,000 and thus supported a conviction of felony larceny.

(1) A larceny was from the person when the defendant stole the victim's purse from her shopping car; (2) Trial court erred by sentencing the defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny

State v. Sheppard, __ N.C. App. __, 744 S.E.2d 149 (July 2, 2013). (1) A larceny was from the person when the defendant stole the victim's purse, which was in the child's seat of her grocery store shopping cart. At the time, the victim was looking at a store product and was within hand's reach of her cart; additionally she realized that the larceny was occurring as it happened, not some time later. (2) The trial court erred by sentencing the defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny. Larceny from the person and larceny of goods worth more than $1,000 are not separate offenses, but alternative ways to establish that a larceny is a Class H felony. While it is proper to indict a defendant on alternative theories of felony larceny and allow the jury to determine guilt as to each theory, where there is only one larceny, judgment may only be entered for one larceny.

Sex Offenses and Offenders

(1) Sentencing of defendant for first-degree statutory rape and incest did not violate double jeopardy; (2) Trial court did not err by ordering defendant to enroll in lifetime SBM for defendant convicted of first-degree statutory rape

State v. Marlow, __ N.C. App. __, 747 S.E.2d 741 (Sept. 17, 2013). (1) The defendant was 21. He sexually abused his much younger half-sisters. He was charged with and convicted of, inter alia, first-degree rape and incest. Among other issues, he argued on appeal that the trial court violated his double jeopardy rights for sentencing him for both offenses. The court of appeals disagreed. It stated that under Missouri v. Hunter, 459 U.S. 359 (1983), a defendant may not be punished twice for the same offense in the same proceeding, unless there is clear legislative intent to support the double punishment. Whether two crimes constitute the same offense is determined under the Blockburger same elements test. The court ruled that first-degree statutory rape and incest are distinct offenses because statutory rape "requires a showing of the victim's and the defendant's age, while the elements of incest can be proven without any reference to age, and incest requires a familial relationship that is not required for one to be convicted of statutory rape." The court cited State v. Etheridge, 319 N.C. 34 (1987), which ruled that incest is not a lesser-included offense of statutory rape. The defendant argued that the 2002 addition of subsection (b) to the incest statute, G.S. 14-178, rendered the two offenses the same; that subsection provides that incest is a B1 felony (it is normally an F) when the victim is under 13 and the defendant is at least 12 and at least four years older than the victim. (In essence, the defendant argued that first-degree statutory

rape is a lesser included offense of the B1 incest offense, as the latter includes all the elements of the former and the additional element of a familial relationship.) The court of appeals ruled that "the elements of incest remained unchanged following the amendment," which established only a "punishment and sentencing scheme" that "is only applicable after the elements of incest have been established." (2) Where the defendant was convicted of first-degree statutory rape the trial court did not err by ordering the defendant to enroll in lifetime SBM upon release from imprisonment. The offense of conviction involved vaginal penetration and force and thus was an aggravated offense.

Social Networking Prohibition for Sex Offenders Unconstitutional

State v. Packingham, __ N.C. App. __, 748 S.E.2d 146 (Aug. 20, 2013), *review allowed*, __ N.C. __, __ S.E.2d __ (Nov. 7, 2013). The court held that G.S. 14-202.5, proscribing the crime of accessing a commercial social networking Web site by a sex offender, is unconstitutional. The court held that the statute violated the defendant's First Amendment Rights, finding that the content-neutral regulation of speech was not narrowly tailored, and that it is unconstitutionally vague on its face and overbroad as applied.

See Jamie Markham, Social Networking Prohibition for Sex Offenders Facially Unconstitutional, North Carolina Criminal Law (August 20, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4424.

Forced self-penetration supports a sex offense conviction

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). Deciding an issue of first impression, the court held that the defendant's act of forcing the victim at gunpoint to penetrate her own vagina with her own fingers constitutes a sexual act supporting a conviction for first-degree sexual offense.

See Jessica Smith, Forced Self-Penetration Supports a Sex Offense Conviction, North Carolina Criminal Law (September 24, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4468.

Other Offenses

Intimidating witnesses statute G.S. 14-226(a) applied to prospective witness

State v. Shannon, __ N.C. App. __, __ S.E.2d __ (Nov. 19, 2013). Over a dissent, the court extended G.S. 14-226(a) (intimidating witnesses) to apply to a person who was merely a prospective witness. The local DSS filed a juvenile petition against the defendant and obtained custody of his daughter. As part of that case, the defendant was referred to the victim for counseling. The defendant appeared at the victim's office, upset about a letter she had written to DSS about his treatment. The defendant grabbed the victim's forearm to stop her and stated, in a loud and aggravated tone, that he needed to speak with her. The defendant asked the victim to write a new letter stating that he did not require the recommended treatment; when the victim declined to do so, the defendant "became very loud." The victim testified, among other things, that every time she wrote a letter to DSS, she was "opening [her]self up to have to testify" in court. The court found the evidence sufficient to establish that the victim was a prospective witness and thus covered by the statute.

Defenses

(1) Trial court did not err by denying motion to dismiss homicide charge on grounds of perfect self-defense; (2) Trial court did not commit plain error by instructing jury that defendant was not entitled to perfect self-defense if he was found to be the aggressor

State v. Presson, __ N.C. App. __, 747 S.E.2d 651 (Aug. 20, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss homicide charges. The defendant argued that the evidence showed perfect self-defense. Noting that there was some evidence favorable to the defendant as to each of the elements of perfect self-defense, the court concluded that there was also evidence favorable to the State showing that the defendant's belief that it was necessary to kill was not reasonable, and that defendant was the aggressor or used excessive force. (2) The trial court did not commit plain error by instructing the jury that the defendant would lose the right to self-defense if he was the aggressor. The defendant had argued that the State failed to put forth evidence that the defendant was the aggressor.

(1) Self-defense is only relevant to felony-murder if it is a defense to the underlying felony; (2) Trial court did not err by failing to include self-defense instruction on felony-murder charges because it specifically referenced self-defense instructions given on the underlying assault offenses

State v. Evans, __ N.C. App. __, 747 S.E.2d 151 (Aug. 6, 2013). (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges that were based on the underlying offenses of attempted robbery. Self-defense is only relevant to felony-murder if it is a defense to the underlying felony. The court continued: "We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself." (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges based on underlying assault offenses. The trial court gave the full self-defense instructions with respect to the assault charges. It then referenced these instructions, and specifically the self-defense instructions, in its instructions concerning felony-murder based upon the assault charges. Taken as a whole, this was not error.

Sentencing

Trial court did not err by finding that defendant had a liberty interest in having sentence reduction credits applied to his 80-year life-sentence and by distinguishing case from *Jones v. Keller*

State v. Bowden, __ N.C. App. __, 747 S.E.2d 617 (Aug. 20, 2013), *temp. stay allowed*, __ N.C. __, 747 S.E.2d 589 (Sept. 9, 2013). (1) In a case involving a life-sentenced inmate from the 1970s, the trial court did not err by finding that the defendant had a liberty interest in having appropriate sentence reduction credits applied to his 80-year life-sentence for all purposes, including calculation of his unconditional release date. The inmate committed his crimes at a time when G.S. 14-2 defined a life sentence as a term of 80 years. Based on good time, gain time, and merit time credit accumulated between 1975 and 2009, the inmate completed his 80-year life sentences in 2009. (2) The trial court did not err by distinguishing the defendant's case from *Jones v. Keller*, 364 N.C. 249 (2010), in which the Supreme Court held that life sentenced inmates convicted of first-degree murder were not entitled to have sentence reduction credits applied to their unconditional release date. Unlike *Jones*, competent record evidence in Bowden's case showed that corrections officials actually applied sentence reduction credits toward the defendant's unconditional release date, informed him that his sentence had expired, and

prepared him for release. By reference to a series of emails between corrections officials, the court rejected the State's argument that the Department of Correction (DOC) never actually applied sentence reduction credits to the defendant's unconditional release date. (3) Having found that DOC actually awarded the sentence reduction credits to Bowden, the trial court did not err by finding that DOC's revocation of the credits violated the Ex Post Facto Clause and due process. Judge McCollough filed a concurring opinion reaching the same result through application of the law of the case doctrine, based on the timing and sequence of prior appellate orders related to Mr. Bowden.

G.S. 15A-1335 was not applicable

State v. Wray, __ N.C. App. __, 747 S.E.2d 133 (Aug. 6, 2013). G.S. 15A-1335 did not apply when on retrial the trial court sentenced the defendant for a different, more serious offense.

Defendant who was under 18 years old at the time of a murder and was convicted under the felony-murder rule must be resentenced to life imprisonment with parole

State v. Pemberton, __ N.C. App. __, 743 S.E.2d 719 (July 2, 2013). Under *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the trial court violated the defendant's constitutional right to be free from cruel and unusual punishment by imposing a mandatory sentence of life imprisonment without the possibility of parole upon him despite the fact that he was under 18 years old at the time of the murder. Because the defendant was convicted of first-degree murder solely on the basis of the felony-murder rule, he must be resentenced to life imprisonment with parole in accordance with G.S. 15A-1340.19B(a).

Trial court erred by sentencing defendant in the aggravated range where the evidence supporting the aggravating factor was necessary to support an element of the underlying offense

State v. Facyson, __ N.C. App. __, 743 S.E.2d 252 (June 4, 2013), *review allowed*, __ N.C. __, 748 S.E.2d 317 (Oct. 3, 2013). In a murder case, the trial court erred by sentencing the defendant in the aggravated range where the evidence supporting the aggravating factor was the same evidence necessary to support an element of the underlying offense. The trial court submitted to the jury the G.S. 15A-1340.16(d)(2) aggravating factor that "[t]he defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." The trial court instructed the jury that it could find the defendant guilty of second-degree murder if he murdered the victim acting himself or "together with other persons." The verdict sheet did not require the jury to indicate the theory on which it found the defendant guilty. The court concluded: "We cannot speculate as to the basis of the jury's verdict, and we must resolve the ambiguity in favor of defendant by assuming that the aggravated sentence imposed was based on the same evidence necessary to establish an element of the underlying offense."

Probation

(1) Trial court lacked jurisdiction to revoke defendant's probation where there was no evidence that violation report was filed before termination of defedant's probation; (2) legality of a condition of probation can only be re-litigated if the issue is raised no later than the hearing at which probation is revoked

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Nov. 19, 2013). (1) The trial court erred by revoking the

was a "de facto revocation" for purposes of G.S. 15A-1347.

See Jamie Markham, No Appeal of Confinement in Response to Violation, North Carolina Criminal Law (July 16, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4356.

Defendant placed on probation for offense committed before effective date of Justice Reinvestment Act (JRA) could not be revoked for absconding for actions that occurred after JRA became effective

State v. Nolen, __ N.C. App. __, 743 S.E.2d 729 (July 2, 2013). The defendant was placed on probation for attempted drug trafficking in 2010. In June 2012 her probation officer filed a violation report alleging that on June 15, 2012, she violated the condition that she "remain within the jurisdiction of the court" by not being present during a home visit. The officer alleged that the defendant made her whereabouts unknown, "therefore absconding supervision." At the ensuing violation hearing the court found that the defendant had absconded and revoked her probation.

On appeal, the defendant argued that because her alleged violation occurred after December 1, 2011, the JRA limited the court's authority to revoke to new criminal offenses, absconding under G.S. 15A-1343(b)(3a), and violations occurring after she served two periods of confinement in response to violation (CRV). Her probation officer alleged that she "absconded," but the defendant pointed out that she was not subject to G.S. 15A-1343(b)(3a). That condition didn't exist when she was placed on probation in 2010, and the legislation creating it applied only to offenses committed on or after December 1, 2011.

The court agreed with the defendant and reversed the trial court. The mere fact that the probation officer called the violation "absconding" was not sufficient to make it eligible for revocation. After Justice Reinvestment, a violation of the "remain within the jurisdiction" condition such as the defendant's is a technical violation, subject at most to CRV. To be revoked for absconding, a person must be subject to the revocation-eligible absconding condition. And to be subject to that condition, the person must be on probation for an offense that occurred on or after December 1, 2011.

See Jamie Markham, Court of Appeals Decides an Absconding Donut Hole Case, North Carolina Criminal Law (July 8, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4342.

Sex Offender Registration and Satellite-Based Monitoring

Sex offender registration is required upon conviction for a reportable offense even when an appeal is pending

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Nov. 5, 2013). The trial court did not err by requiring the defendant to report as a sex offender after he was convicted of sexual battery, a reportable conviction. The court rejected the defendant's argument that because he had appealed his conviction, it was not yet final and thus did not trigger the reporting requirements.

A PJC entered upon a conviction for a reportable offense does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the registration statute

Walters v. Cooper, __ N.C. __, 748 S.E.2d 144 (Oct. 4, 2013). The court per curiam affirmed the decision below, *Walters v. Cooper,* __ N.C. App. __, 739 S.E.2d 185 (Mar. 19, 2013), in which the court of appeals had held, over a dissent, that a PJC entered upon a conviction for sexual battery does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the sex offender registration statute.

Trial court erred by ordering lifetime sex offender registration and lifetime SBM for defendant convicted of first-degree sexual offense

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). The trial court erred by ordering lifetime sex offender registration and lifetime SBM because first-degree sexual offense is not an "aggravated offense" within the meaning of the sex offender statutes.

Post-Conviction

A case resolving an issue of first impression did not effect a significant change in the law as required for an MAR under G.S. 15A-1415(b)(7)

State v. Harwood, __ N.C. App. __, 746 S.E.2d 445 (Aug. 6, 2013). Declining to address whether *State v. Garris*, 191 N.C. App. 276 (2008), applied retroactively, the court held that the defendant's MAR was subject to denial because *Garris* does not constitute a significant change in the substantive or procedural law as required by G.S. 15A-1415(b)(7), the MAR ground asserted by the defendant. When *Garris* was decided, no reported NC appellate decisions had addressed whether the possession of multiple firearms by a convicted felon constituted a single violation or multiple violations of G.S. 14-415.1(a). For that reason, *Garris* resolved an issue of first impression. The court continued: "Instead of working a change in existing North Carolina law, *Garris* simply announced what North Carolina law had been since the enactment of the relevant version of [G.S.] 14-415.1(a)." As a result, it concluded, "a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to [G.S.] 15A-1415(b)(7)." It thus concluded that the trial court lacked jurisdiction to grant relief for the reason requested and properly denied the MAR.

(1) State could appeal trial court's order granting MAR on the basis of newly discovered evidence; (2) expert's misrepresentations regarding qualifications constituted newly discovered evidence; (3) at MAR hearing, trial court properly excluded expert who did not testify at original trial

State v. Peterson, __ N.C. App. __, 744 S.E.2d 153 (July 16, 2013). (1) Under G.S. 15A-1445, the State could appeal the trial court's order granting the defendant's MAR on the basis of newly discovered evidence. (2) In this murder case, the trial court properly granted the defendant a new trial on the basis of newly discovered evidence. At trial one of the State's most important expert witnesses was SBI Agent Duane Deaver, who testified as an expert in bloodstain pattern analysis. Deaver testified that the victim was struck a minimum of four times before falling down stairs. Deaver stated that, based on his bloodstain analysis, the defendant attempted to clean up the scene, including his pants, prior to police arriving and that defendant was in close proximity to the victim when she was injured. (2) The court held that Deaver's misrepresentations regarding his qualifications (discussed in the opinion) constituted newly discovered evidence entitling the defendant to a new trial. (3) At the MAR hearing, the trial court properly excluded the State's expert witness, who did not testify at the original trial. The court viewed

defendant's probation where the State failed to present evidence that the violation report was filed before the termination of the defendant's probation. As a result, the trial court lacked jurisdiction to revoke. (2) The court declined to consider the defendant's argument that the trial court had no jurisdiction to revoke his probation in another case because the sentencing court failed to make findings supporting a probation term of more than 30 months. It reasoned that a defendant cannot re-litigate the legality of a condition of probation unless he or she raises the issue no later than the hearing at which his probation is revoked.

Trial court lacked jurisdiction to extend the defendant's probation after his original probation period expired

State v. High, __ N.C. App. __, __ S.E.2d __ (Nov. 5, 2013). The trial court lacked jurisdiction to extend the defendant's probation after his original probation period expired. Although the probation officer prepared violation reports before the period ended, they were not filed with the clerk before the probation period ended as required by G.S. 15A-1344(f). The court rejected the State's argument that a file stamp is not required and that other evidence established that the reports were timely filed.

A defendant may attack the jurisdiction of the trial court on appeal from revocation of probation

State v. Pennell, __ N.C. App. __, __ S.E.2d __ (Aug. 6, 2013). Addressing contradicting case law, the court stated a general rule that a defendant may, on appeal from revocation of probation, attack the jurisdiction of the trial court, either directly or collaterally. Here, in his appeal from the probation revocation, the defendant argued that the indictment was defective; the court found his appeal to be proper.

Trial court lacked jurisdiction to revoke probation for violation not alleged in report

State v. Kornegay, __ N.C. App. __, 745 S.E.2d 880 (July 16, 2013). The trial court lacked jurisdiction to revoke the defendant's probation and activate his sentence. Although the trial court revoked on grounds that the defendant had committed a subsequent criminal offense, such a violation was not alleged in the violation report. Thus, the defendant did not receive proper notice of the violation. Because the defendant did not waive notice, the trial court lacked jurisdiction to revoke.

Defendant has no right to appeal CRV

State v. Romero, __ N.C. App. __, 745 S.E.2d 364 (July 16, 2013). The defendant was a felony probationer who committed technical violations of probation in 2012. In response, the court ordered a 90-day CRV. The defendant appealed, but the State filed a motion to dismiss the appeal on the grounds that there is no statutory right to appeal a CRV. The court of appeals agreed with the State. The court noted that G.S. 15A-1347 allows a probationer to appeal only when the court "activates a sentence or imposes special probation." Because CRV is neither of those things, and because a defendant's right to appeal is purely a creation of state statute, the court concluded that there is no right to appeal a CRV. The court rejected the defendant's argument that imposition of a CRV is a final judgment of a superior court, generally appealable under G.S. 7A-27(b). In a footnote, the court declined to express any opinion about whether a different rule would apply to a so-called terminal CRV—that is, one that uses up the defendant's entire remaining suspended sentence. Slip op. at 6 n. 1. Mr. Romero had additional time left to serve on his 6–8 and 18–22 month felony sentences, and so the court didn't need to consider whether his 90-day CRV

the State's position as "trying to collaterally establish that the jury would have reached the same verdict based on evidence not introduced at trial." It concluded that the trial court properly excluded this evidence:

> Defendant's newly discovered evidence concerned Agent Deaver, arguably, the State's most important expert witness. Thus, the State could have offered its own evidence regarding Agent Deaver's qualifications, lack of bias, or the validity of his experiments and conclusions. Furthermore, the State was properly allowed to argue that the evidence at trial was so overwhelming that the newly discovered evidence would have no probable impact on the jury's verdict. However, the State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the jury at the time of trial. Thus, the trial court did not err in prohibiting the introduction of this evidence at the MAR hearing.

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Appointment of Counsel for Class 3 Misdemeanors

Prepared by John Rubin
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As part of the 2013 Appropriations Act, the General Assembly enacted a new punishment scheme for Class 3 misdemeanors, limiting the punishment to a fine for many defendants. *See* Section 18B.13 of S.L. 2013-360 (S 402) [1]. The change applies to offenses committed on or after December 1, 2013.

In addition to changing the punishment for Class 3 misdemeanors, the 2013 Appropriations Act reclassified some Class 1 and 2 misdemeanors as Class 3 misdemeanors and some Class 3 misdemeanors as infractions. *See* Sections 18B.14 and 18B.15 of S.L. 2013-360 (S 402) [1], as amended by Sections 4–6 of S.L. 2013-385 (S 182) [2]. The punishment for offenses reclassified as Class 3 misdemeanors is likewise limited to a fine for many defendants. (For a complete list of the affected offenses, see Robert L. Farb, 2013 Legislation Affecting Criminal Law and Procedure [3] at p. 25–26.)

The change in punishment for these Class 3 misdemeanors significantly affects the right to appointed counsel because the right to counsel for misdemeanors depends on the allowable punishment. The questions and answers below explore the impact of the change. The discussion addresses the details of the legislation, cases interpreting the right to counsel in misdemeanor cases, and the policy adopted by the Office of Indigent Defense Services (IDS) in response to the legislation. *See* Appointment and Payment of Counsel in Class 3 Misdemeanor Cases [4] (Office of Indigent Defense Services, Dec. 1, 2013) (hereinafter IDS Policy). Some questions do not have definitive answers. The opinions expressed below are those of the author.

Readers may scroll through the discussion or click on the following hyperlinks to go directly to the portion of the discussion that interests them.

A. GENERALLY

1. What is the new rule for Class 3 misdemeanor punishments?

The new rule appears in G.S. 15A-1340.23(d). Effective for offenses committed on or after December 1, 2013, the statute provides: "Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine."

This change means that all defendants in prior conviction level I (no prior convictions) and some defendants in prior conviction level II (one to four prior convictions) are subject to a fine only for a Class 3 misdemeanor unless another statute provides otherwise for the offense.

2. What effect does the new rule have on appointment of counsel?

As a result of the change, in many cases the defendant will not have the right to appointed counsel. For misdemeanors, a defendant has a Sixth Amendment right to counsel only if an active or suspended sentence of imprisonment is imposed. The formulation of this right has developed over a series of U.S. Supreme Court decisions. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972) (recognizing basic right to counsel in misdemeanor cases); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (in misdemeanor cases, "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel"); *Alabama v. Shelton*, 535 U.S. 654 (2002) (indigent defendant has right to appointed counsel in misdemeanor case if court imposes suspended sentence of imprisonment). In contrast, the Sixth Amendment guarantees the right to counsel to any indigent person accused of a felony, regardless of the possible punishment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

North Carolina law provides indigent criminal defendants with a slightly broader right to counsel. G.S. 7A-451(a)(1) provides for appointed counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars . . . or more, is likely to be adjudged." This provision will not come into play for most Class 3 misdemeanors if the defendant has three or fewer prior convictions: under the new punishment scheme for Class 3 misdemeanors, imprisonment is generally impermissible; and under other structured sentencing rules, the maximum fine is usually limited to $200.

3. Why did the General Assembly make the change?

A key goal was to reduce the costs of appointed counsel. The Joint Conference Committee Report [5] on the 2013 Appropriations Act, p. I 10, indicates that the General Assembly reduced the indigent defense budget by $2 million per year in light of the change in the punishment scheme for Class 3 misdemeanors and the reclassification of some misdemeanors as Class 3 misdemeanors. The report states: "With no possibility of incarceration, these offenses do not require legal counsel." Whether the changes will generate this savings is not yet known.

IDS proposed that minor criminal offenses be reclassified as infractions to save on counsel fees and avoid the collateral

consequences of conviction of even a minor offense. *See* Reclassifying Minor Misdemeanors As Infractions [6] (IDS, Feb. 2013). The proposal was based on a previous study of misdemeanors conducted by IDS at the General Assembly's request. *See* FY 11 Reclassification Impact Study [7] (IDS, Mar. 2011). The General Assembly reclassified as infractions some of the 31 misdemeanors identified by IDS but chose to reclassify the majority of the identified offenses as Class 3 misdemeanors and adopted the new fine-only punishment scheme.

4. Do these changes apply to juveniles in delinquency proceedings?

No. New G.S. 15A-1340.23(d) is part of the Criminal Procedure Act, which applies to adult criminal defendants only. It does not override the automatic right to counsel for juveniles in G.S. 7B-2000.

B. AUTHORIZED PUNISHMENTS

5. What punishments are permissible for a Class 3 misdemeanor?

If a defendant has three or fewer prior convictions, the court may impose a fine or, in the rare instance when a statute specifically authorizes it, a greater punishment. G.S. 15A-1340.23(d). In fine-only cases, the usual structured sentencing rules apply, capping the fine at $200 unless another statute provides for a greater fine. G.S. 15A-1340.23(b). Among the most commonly-charged Class 3 misdemeanors, only one statute (littering) allows a greater punishment. *See* Question no. 22, below.

If a defendant has four or more prior convictions, the court may impose the usual punishments under structured sentencing, including an active or suspended sentence of imprisonment to the extent permissible. The remainder of the discussion in this part concerns Class 3 misdemeanor cases when the defendant has three or fewer prior convictions.

6. Is a sentence of active or suspended sentence of imprisonment permissible?

No. If the defendant has three or fewer prior convictions (and no statute permits otherwise), the court may not impose an active or suspended sentence of imprisonment for a Class 3 misdemeanor.

7. Are costs permissible?

The imposition of costs on conviction (pursuant to G.S. 7A-304) remains permissible because it is not a criminal punishment; costs are therefore not subject to the punishment limitation for Class 3 misdemeanors.

8. Are attorneys' fees permissible?

For the same reasons as in the preceding answer, the imposition of attorneys' fees on conviction (pursuant to G.S. 7A-455) remains permissible because it is not a criminal punishment. The issue will still arise in cases in which a defendant is convicted of a Class 3 misdemeanor because a defendant will sometimes be charged with a greater offense, for which the right to counsel applies, and be convicted of a Class 3 misdemeanor. Although convicted of an offense for which the punishment is limited to a fine, the defendant is entitled to counsel based on the original charge, and the State is entitled to recoup attorneys' fees following conviction. *See* G.S. 7A-455(c) (authorizing recoupment if the defendant is convicted). Imposition of the attorney appointment fee (under G.S. 7A-455.1) is permissible for the same reason. *See also State v. Webb*, 358 N.C. 92 (2004) (finding that appointment fee is cost).

9. Is restitution permissible?

Restitution is a criminal punishment but, if authorized for a specific offense, is permissible for a Class 3 misdemeanor under the exception in new G.S. 15A-1340.23(d). For example, if a defendant is convicted of a worthless check offense in violation of G.S. 14-107, whether a Class 3 misdemeanor or a higher class of offense, the court may require the defendant to make restitution to the victim as provided in G.S. 14-107(e).

For offenses for which restitution is not specifically authorized, the authority to order restitution is not as clear. G.S. 15A-1340.34 governs restitution generally. Subsection (b) states that the sentencing court must order restitution if the offense is subject to the Crime Victims' Rights Act (G.S. 15A-830 through G.S. 15A-841). No Class 3 misdemeanors are subject to the Crime Victims' Rights Act. Subsection (c) of G.S. 15A-1340.34 states that for other offenses the court may order restitution "in addition to any other penalty authorized by law." This general provision may or may not be sufficient to authorize restitution because new G.S. 15A-1340.23(d) allows a punishment other than a fine only if provided for a "specific offense."

Assuming restitution is permissible, a restitution order may be difficult to enforce. Because a suspended sentence is impermissible, restitution cannot be made a condition of probation. Because no Class 3 misdemeanors are subject to the Crime Victims' Rights Act, an order for restitution cannot be enforced as a civil judgment. *See* G.S. 15A-1340.38(a) (authorizing civil judgment for restitution in excess of $250 for offenses subject to Crime Victims' Rights Act). Whether an order of restitution may be enforced by contempt is unclear. *See* Question no. 30, below (discussing whether court may impose imprisonment for failure to pay fine).

10. Is a sentence of "time served" permissible?

A sentence of time served would appear to be permissible for a Class 3 misdemeanor because such a sentence imposes no additional punishment than the time already served before conviction; for an in-custody defendant, the sentence actually terminates confinement. Further, to accommodate this practice, North Carolina's structured sentencing statutes contain an exception for time served for misdemeanors when an active punishment is not otherwise authorized, allowing imposition of a term of imprisonment "equal to or less than the total amount of time the offender has already spent committed to or in confinement . . . as a result of the charge that culminated in the sentence." G.S. 15A-1340.20(c1).

Whether the General Assembly intended to permit a sentence of time served, however, may depend on whether such a sentence is constitutionally permissible without affording counsel to the defendant. The General Assembly adopted the new punishment scheme for Class 3 misdemeanors to reduce counsel costs. If counsel is required when the court imposes a sentence of time served, the General Assembly may not have intended to allow such a sentence.

Some decisions have found that a sentence of time served does not trigger the right to counsel. The cases have arisen in the context of whether a court may enhance a sentence for a later offense based on an earlier misdemeanor conviction in which

an unrepresented defendant received a sentence of time served. The decisions found that the earlier conviction did not violate the defendant's right to counsel and could be used for enhancement purposes. The courts reasoned that a sentence of time served does not impose a term of imprisonment as a result of an uncounseled conviction; rather, the period of incarceration served by the defendant resulted from the defendant's inability to post bond before trial. *See Glaze v. South Carolina*, 621 S.E.2d 655 (S.C. 2005); *Nicholson v. State*, 761 So. 2d 924 (Miss. Ct. App. 2000); *see also State v. Dunning*, 995 So. 2d 1162 (Fl. Ct. App. 2008) (following *Glaze*) [subsequent decisions interpreting Florida's state constitution may have limited the holding in *Dunning*].

Some decisions have reached a contrary conclusion, refusing to enhance a later offense based on a prior uncounseled conviction imposing a sentence of time served. Those decisions refuse to distinguish between a sentence of imprisonment satisfied by credit for time already served and a sentence of imprisonment to be served following conviction. *See State v. O'Neill*, 746 N.E.2d 654 (Ohio Ct. App. 2000); *United States v. Cook*, 36 F.3d 1098 (6th Cir. 1994) (unpublished).

A judge may avoid these constitutional issues by inquiring whether a defendant is willing to proceed without counsel and, if so, obtaining a waiver of counsel. A judge also could impose a nominal fine and enter judgment without using the term "time served." Under either approach, a judge should advise an unrepresented defendant who is in custody that he or she is entitled to counsel if he or she does not enter a plea and remains in custody. *See* Question no. 25, below (discussing right of pretrial detainee to counsel).

11. Is a deferred prosecution permissible?

Yes. Although a defendant who receives a deferred prosecution may be placed on probation, with conditions, the arrangement is not part of a judgment and sentence, which are deferred. If the defendant violates the terms of the arrangement, the State may resume the prosecution. *See* G.S. 15A-1341(a1). If the defendant is convicted, the court then would have to sentence the defendant in conformity with the fine-only restrictions in new G.S. 15A-1340.23(d).

12. Is the conditional discharge procedure in G.S. 90-96 permissible?

Yes, for reasons similar to the reasons discussed in the preceding question about deferred prosecutions. A defendant who receives a conditional discharge under G.S. 90-96—for example, for a Class 3 misdemeanor possession of marijuana offense—is placed on probation without entry of judgment or sentence. If the defendant violates the terms of the arrangement, the court then would have to impose a sentence consistent with the fine-only provisions in new G.S. 15A-1340.23(d).

C. DETERMINING PRIOR CONVICTIONS

13. How should prior convictions be counted?

Prior convictions should probably be counted according to the usual structured sentencing rules—that is, multiple convictions count as one conviction if from the same session of district court (usually, one day) or the same week of superior court. *See* G.S. 15A-1340.21(d). The reason is that the new punishment limitation for Class 3 misdemeanors is located in G.S. 15A-1340.23, the statute containing the table of prior conviction levels for misdemeanor sentencing, to which the prior-conviction counting rule in G.S. 15A-1340.21(d) clearly applies.

14. When should prior convictions be determined?

Prior convictions should be determined before counsel is appointed. Without evidence that the defendant has four or more prior convictions, the defendant is not entitled to have counsel appointed. (Exceptions exist when a statute authorizes a sentence of imprisonment or a fine of $500 or more (see Question no. 22, below) or the defendant is in custody (see Question no. 25, below).) The AOC form on appointment of counsel reflects this approach, requiring that the court determine the defendant's prior convictions when appointing counsel. AOC-CR-224, Order of Assignment or Denial of Counsel [8] (Dec. 2013).

15. May counsel be appointed pending a determination of prior record?

No. Without evidence of four or more prior convictions, the defendant is not entitled to counsel (unless an exception applies). A practice of appointing counsel in Class 3 misdemeanor cases pending a determination of prior convictions would undermine the General Assembly's intent, as it would effectively allow appointment for all Class 3 misdemeanors. IDS's policy [4] states that it is not authorized to compensate an attorney appointed to represent a defendant on a Class 3 misdemeanor unless the court has determined that the defendant has four or more prior convictions (or one of the exceptions for appointment applies).

16. Who has the burden of producing evidence of the defendant's prior record for purposes of appointment of counsel?

The new punishment scheme does not explicitly address the issue, but as a practical matter the burden may fall to the State. Ultimately, the State has the burden of establishing the grounds for punishment. In this context, if the State wants the court to impose a sentence greater than a fine, it has to prove that the defendant has four or more prior convictions (except in the rare instance when a statute authorizes a greater punishment without four or more priors). If the State wants the option of seeking a punishment greater than a fine, the court must have the defendant's record early enough in the case to support a finding that the defendant is eligible for such a sentence and thus eligible for counsel. Although the new statute does not preclude a court from obtaining prior record information from other sources, if the court does not have the necessary information it may not appoint counsel and the State may not seek a higher punishment.

17. May the court require the defendant or defense counsel to disclose whether a defendant has four or more prior convictions?

No. A defendant may not be required to surrender one constitutional right (the right not to incriminate himself or herself) to obtain the benefit of another constitutional right (the right to appointed counsel). *See generally Simmons v. United States*, 390 U.S. 377, 394 (1968). Requiring defense counsel to provide prior record information about a client would infringe on the client's right to maintain the confidentiality of information obtained by the attorney in the course of representation. *See* Rev'd Rules of Prof'l Conduct R. 1.6 (duty of confidentiality); 1998 Formal Ethics Opinion 5 (1998) (recognizing

confidentiality of information about client's prior convictions and citing related ethics opinions).

18. Must the State allege the prior convictions in the charging document and prove them at trial beyond a reasonable doubt?

No. The State is not statutorily or constitutionally required to allege prior convictions in this context. The prior convictions are not elements of the offense; nor do they elevate a Class 3 misdemeanor to an offense of a higher class. Rather, they place the defendant in a higher prior conviction level for a Class 3 misdemeanor. (For convictions that elevate an offense to a different class and are thus an element of the higher offense, such as a fourth worthless check offense under G.S. 14-107(d)(1), the State must allege the priors in the charging document. G.S. 15A-924(a)(5); G.S. 15A-928.)

19. If the court later obtains evidence that the defendant has four or more prior convictions, may the court appoint counsel and impose a sentence greater than a fine?

Yes, if timely. The evidence would have to be presented, and the appointment decision made, before commencement of trial or acceptance of a guilty plea, when jeopardy attaches. After jeopardy attaches, the court may not start the proceedings over again to appoint counsel. And, appointing counsel for purposes of sentencing, after trial or plea, would not cure the earlier absence of counsel.

Before attachment of jeopardy, the court may consider additional evidence of the defendant's prior record and reconsider appointment of counsel, subject to speedy trial and due process protections against undue delay in prosecution of the case. Due process as well as Sixth Amendment concerns also may require a continuance for newly appointed counsel to consult with the client and determine how to proceed.

D. WAIVER OF COUNSEL

20. Is a waiver of counsel required in Class 3 misdemeanor cases in which a person is subject to a fine only?

No. A waiver is not required because the person is not entitled to have counsel appointed.

21. Is a waiver of retained counsel required in such cases?

No. If a defendant does not have a right to appointed counsel, the court need not obtain a waiver of retained counsel.

A person has the right to retain and appear through counsel, however, if he or she wishes to do so. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) (observing that a criminal defendant has the "right to spend his own money to obtain the advice and assistance of . . . counsel") (citation omitted). A court may not unreasonably interfere with that right. For example, if a person wants to retain counsel, a court may not require the person to proceed without giving the person a reasonable opportunity to do so. *See generally* 3 Wayne R. LaFave et al., Criminal Procedure § 11.4(c) (3d ed. 2007).

E. APPOINTMENT OF COUNSEL IN PARTICULAR TYPES OF CASES

22. For what Class 3 misdemeanors is appointment of counsel permissible without evidence that the defendant has four or more prior convictions?

Of the Class 3 misdemeanors that resulted in 50 or more convictions in the past year (*see* James M. Markham, North Carolina Structured Sentencing Handbook 2013–14 (UNC School of Government 2013)), none specifically authorize a sentence of imprisonment. Only one authorizes a fine of $500 or more—littering in an amount of 15 pounds or less and for a non-commercial purpose in violation of G.S. 14-399(c). For that offense, a court may impose a fine of $250 to $1,000 and community service. Accordingly, if the court finds it likely that it will impose a fine of $500 or more, the defendant would have a statutory right to counsel under G.S. 7A-451(a)(1).

A few other commonly charged Class 3 misdemeanors carry criminal and civil consequences beyond a fine, but those consequences do not authorize appointment under the current state of the law. For a Class 3 misdemeanor worthless check offense, the court may order restitution. G.S. 14-107.1(e). Although restitution could be well over $500—a person's first three worthless check offenses are classified as Class 3 misdemeanors if they involve an amount of $2,000 or less—restitution is not a fine and itself would not authorize appointment of counsel.

For a first offense of shoplifting in violation of G.S. 14-72.1, a Class 3 misdemeanor, any term of imprisonment may be suspended on condition that the defendant perform community service. Similarly, for possession of 1/2 ounce of marijuana or less in violation of G.S. 90-95(a)(3), any sentence of imprisonment must be suspended. These statutes do not necessarily allow the court to impose a sentence of imprisonment, however. Read in conjunction with the new punishment restrictions in G.S. 15A-1340.23(d), the court may impose a sentence of imprisonment only if the defendant has four or more prior convictions and then would have to follow the provisions on suspending a sentence of imprisonment. Accordingly, the shoplifting and marijuana provisions do not themselves authorize punishment other than a fine.

Some offenses that would otherwise be Class 3 misdemeanors are in a higher offense class for a second or subsequent offense. For example, a second offense of driving a commercial vehicle after consuming alcohol is punishable as a misdemeanor (without a specific class) under the sentencing provisions in G.S. 20-179 for impaired driving. *See* G.S. 20-138.2A. Because a second offense is not a Class 3 misdemeanor, the defendant would be entitled to counsel as in other cases involving higher classes of misdemeanors.

Several statutes authorize revocation of a person's license to drive on conviction of a Class 3 misdemeanor. The most common is driving while licensed revoked (DWLR), now a Class 3 misdemeanor if the person's license was revoked for other than an impaired driving revocation. G.S. 20-28(a). (If a DWLR is based on an impaired driving revocation, the offense is a Class 1 misdemeanor and not subject to the fine-only restrictions for Class 3 misdemeanors.) Other Class 3 misdemeanors also may result in revocation of a person's license to drive. *See* G.S. 18B-302(i) (purchase or attempted purchase of alcoholic beverage by 19 or 20 year old results in revocation under G.S. 20-17.3(2)); G.S. 20-138.7 (second offense of transporting open container of alcohol results in revocation under G.S. 20-17(a)(12)); G.S. 20-141(j1) (speeding more than 15 mph over limit or over 80 mph results in revocation under G.S. 20-16.1). The possible impact of these consequences on appointment of counsel is discussed in Question no. 29, below.

23. To obtain a conviction of the Class 1 misdemeanor version of DWLR, must the State allege and prove that the DWLR was based on an impaired driving revocation?

Yes. The General Assembly has created two DWLR offenses: one based on an impaired driving revocation, a Class 1 misdemeanor; and the other based on any other revocation, a Class 3 misdemeanor. Although the two appear in the same statute, G.S. 20-28(a), they are separate offenses. If the State wants to prosecute the Class 1 misdemeanor offense, it must allege in the charging document and prove at trial beyond a reasonable doubt all the elements of the offense, including the impaired driving revocation. *See* G.S. 15A-924(a)(5) (pleading must allege all elements of offense). If the State fails to allege the impaired driving revocation in the charging document, the court's jurisdiction is limited to the general Class 3 misdemeanor version of DWLR, which is subject to the fine-only provisions in new G.S. 15A-1340.23(d).

24. May the court require counsel to represent a person without compensation for an offense for which a person does not have the right to appointed counsel?

A court may have the inherent authority to do so in some circumstances, but the limits of the authority have not been tested in North Carolina. In one case, the court held that counsel representing a defendant sentenced to death could be required, without compensation, to file a certiorari petition to the U.S. Supreme Court. *See In re Hunoval*, 294 N.C. 740 (1977) (rejecting attorney's argument that he was not an eleemosynary institution—that is, a charitable institution [cert. petitions are now compensated as provided in the IDS rules]). The extent to which the North Carolina courts would extend this ruling to other contexts is unclear. Requiring counsel to proceed without compensation has been the subject of challenges in other states, a subject beyond the scope of this discussion.

25. May the court appoint counsel if the defendant is arrested on a Class 3 misdemeanor and cannot make bond?

Yes. Whether detained before trial or after conviction, an inmate has a due process right to meaningful access to the courts. *See, e.g., Bourdon v. Loughren*, 386 F.3d 88 (2d Cir. 2004). A state satisfies this right by ensuring adequate legal assistance to inmates. The assistance does not necessarily have to be in the form of appointed counsel; it could be in the form of other legal resources, such as a law library. Because inmates in most North Carolina jails do not have access to such legal resources, IDS's policy [4] authorizes appointment of counsel for an indigent defendant while in custody on a Class 3 misdemeanor charge to ensure that the defendant has meaningful access to the courts to defend against the charge. The appointment would be made as in other cases involving defendants held in custody on misdemeanor charges—for example, at first appearance in districts that hold first appearances on misdemeanors. *See also* G.S. 7A-453 (requiring authority having custody of person held in custody for more than 48 hours without counsel to notify clerk of court or IDS designee [the public defender in districts with a public defender]).

IDS's policy and the AOC appointment form, AOC-CR-224 [8] (Dec. 2013), provide that this type of appointment constitutes a limited appearance pursuant to G.S. 15A-141(3) and G.S. 15A-143 and that the representation ends if the defendant makes bond or the court unsecures the bond; however, while the defendant is in custody, the appointed attorney may handle all aspects of the case and is not limited to working solely on the defendant's release.

Some judicial districts in North Carolina have revised their bond policies to provide that if a defendant is arrested for a Class 3 misdemeanor, the judicial official should set an unsecured bond except as otherwise specified (an exception might apply if the defendant is arrested for failing to appear on a Class 3 misdemeanor). Such a policy avoids the prospect of a person being held in custody for an offense for which the court can impose no jail time if the person is convicted.

26. Is a person entitled to counsel if sentenced to "time served"?

See Question no. 10, above.

27. Is a person statutorily entitled to counsel if he or she is charged with more than one Class 3 misdemeanor and the aggregate fine is $500 or more?

Probably not. In other contexts, the courts have refused to aggregate charges for purposes of finding a right that does not exist for individual charges. *See Lewis v. United States*, 518 U.S. 322 (1996) (under Sixth Amendment rule that a defendant is entitled to jury trial for misdemeanor punishable by six months or more, U.S. Supreme Court holds that defendant charged with multiple misdemeanors, none of which individually carries a sentence of more than six months of imprisonment, does not have right to jury trial); *State v. Speights*, 280 N.C. 137 (1971) (before U.S. Supreme Court clarified that defendants have right to appointed counsel for misdemeanors carrying sentence of imprisonment, North Carolina Supreme Court held that defendant charged with multiple misdemeanors, each of which carried a sentence of six months or less, did not have right to counsel).

28. Is a person statutorily entitled to counsel if he or she is charged with an infraction that carries a penalty of $500 or more?

No. The statutory right to counsel applies to criminal cases carrying a fine of $500 or more. An infraction is a noncriminal violation of law. G.S. 14-3.1.

29. Is a person entitled to counsel because of the collateral consequences of a Class 3 misdemeanor?

Under the current state of the law in North Carolina, no. Some state courts have suggested that their state constitutions may require appointment of counsel because of the collateral consequences that attach to a criminal conviction, which can have a serious and longstanding impact. *See City of Pendleton v. Standerfer*, 688 P.2d 68 (Or. 1984) (en banc), *abrogated on other grounds*, *State v. Probst*, 124 P.3d 1237 (Or. 2005); *Alexander v. City of Anchorage*, 490 P.2d 910 (Alaska 1971); *see also Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding under U.S. Constitution that noncitizen defendant has right to effective assistance of counsel because of immigration consequences of conviction). The most common collateral consequence for a conviction of a Class 3 misdemeanor is revocation of a person's license to drive. Conviction of a Class 3 misdemeanor also may lead to other collateral consequences, including restrictions on occupational licensing and housing. *See* Collateral Consequences Assessment Tool [9] (C-CAT) (School of Government, 2013); *see also* Sejal Zota and John Rubin, Immigration Consequences of a Criminal Conviction in North Carolina [10] § 3.3D, at p. 34, & § 3.4A, at p. 38

(School of Government, 2008) (conviction of possession of Class 3 misdemeanor amount of marijuana may result in immigration consequences in some circumstances).

Collateral consequences have not yet been recognized by North Carolina appellate decisions as affording a person a right to counsel. In conversations with the author, IDS has indicated that until a North Carolina appellate court rules that a defendant is entitled to counsel because of the collateral consequences of a conviction, it is not authorized to compensate counsel.

F. CONSEQUENCES OF FINE-ONLY SENTENCES

30. If the court imposes a fine only, may the court impose a sentence of imprisonment for failure to pay the fine?

The law is unsettled. G.S. 15A-1361 through G.S. 15A-1365 contain sentencing procedures for cases in which the court imposes a fine. One of the procedures, in G.S. 15A-1362(c), is no longer available for Class 3 misdemeanors if the defendant has three or fewer prior convictions (and no other statute authorizes a punishment greater than a fine). G.S. 15A-1362(c) provides that when a court orders a defendant to pay a fine other than as a condition of probation, it may at the time it enters the fine impose a sentence to be served in the event the defendant defaults. It is unlikely that the General Assembly intended to allow courts to impose this type of judgment, which amounts to a suspended sentence of imprisonment for which the defendant would have a right to counsel. *See also* 3 Wayne R. LaFave et al., Criminal Procedure § 11.2(a), at 616–17 (3d ed. 2007) (noting that several courts have found that conditional sentence imposed on uncounseled misdemeanor conviction, even if conditioned only on payment of money, is constitutionally impermissible).

G.S. 15A-1364 provides for an alternative sentencing possibility if the court finds that a defendant has defaulted on payment of a fine. It authorizes the court to impose a sentence of imprisonment of up to 30 days if the defendant fails to pay a fine in a case in which the court's original judgment did not specify an active or suspended sentence of imprisonment. This procedure is comparable to contempt. The permissible length of such a sentence exceeds the maximum permissible sentence for Class 3 misdemeanors generally.

It is unclear whether this procedure is permissible under the new fine-only provisions. Some cases suggest that a court may not impose a sentence of imprisonment in a criminal case if it did not afford counsel to the defendant when he or she was convicted. Thus, under federal law, a court may impose stand-alone conditions of probation, without a suspended sentence of imprisonment. Because the stand-alone conditions do not involve a sentence of imprisonment, the court is not required to afford counsel to the defendant when it imposes the conviction. However, some federal courts, including the Fourth Circuit, have indicated that the failure to afford counsel to the defendant when he or she was convicted precludes a court from later imposing a sentence of imprisonment for that conviction. These cases suggest that the absence of a specific suspended sentence at the time of conviction is not determinative. *See United States v. Pollard*, 389 F.3d 101, 105 (4th Cir. 2004) ("We also acknowledge, as did the Fifth Circuit, that the actual imposition of a prison term upon revocation of probation may pose Sixth Amendment problems if the defendant was uncounseled for the underlying conviction that led to probation."); *United States v. Rios-Cruz*, 376 F.3d 303, 305 (5th Cir. 2004); *see also Robinson v. State*, 669 S.E.2d 588 (S.C. 2008) (finding that court could not enhance later offense with uncounseled misdemeanor conviction, for which defendant was sentenced to public service, because defendant subsequently was required to serve jail time for failing to complete public service).

If a court finds it permissible to impose imprisonment for a defendant's failure to pay a fine, the court would have to afford counsel to the defendant at the non-payment proceeding. This requirement is part of the guarantee of counsel in misdemeanor cases involving imprisonment. *See also Hammock v. Bencini*, 98 N.C. App. 510 (1990) (recognizing right to appointed counsel for criminal contempt if imprisonment is likely to be imposed); *McBride v. McBride*, 334 N.C. 124 (1993) (recognizing similar right for civil contempt).

31. May a fine be docketed and collected as a civil judgment?

Yes. G.S. 15A-1365 continues to authorize that procedure if the court finds the defendant has defaulted in payment.

32. Is a person's license to drive subject to revocation for failing to pay a fine for a motor vehicle offense?

Yes. G.S. 20-24.1 continues to require revocation of a person's license to drive for failing to pay a fine for a motor vehicle offense.

33. If the defendant was not afforded counsel when convicted of a fine-only misdemeanor, may the conviction be used to enhance the defendant's sentence for a later offense?

Yes. An uncounseled misdemeanor conviction, valid because no term of imprisonment was imposed, may be used to enhance a sentence for a subsequent offense. *Nichols v. United States*, 511 U.S. 738 (1994).

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