



2007 Legislation Affecting Criminal Law and Procedure

by John Rubin*

Innocence Initiatives	2
Lineups	2
Interrogations	5
DNA Testing	6
Sex Offender Registration and Satellite Monitoring	8
Satellite Monitoring	8
Other Sex Offender Changes	14
Criminal Discovery and Related Procedures	14
Open-File Discovery Changes	15
Other Discovery Mechanisms	17
Criminal Offenses and Related Matters	19
Domestic Violence	19
Weapons	20
Drug and Alcohol Offenses	21
Offenses of a Sexual Nature	22
Theft Offenses	23
Offenses Related to Animals	25
Regulatory Offenses	26
Motor Vehicles	27
Other Criminal Offenses	28
Law Enforcement	30
Bail Bonds	31
Sentencing and Other Consequences	32
Immigration and Related Issues	33
Juvenile Delinquency Proceedings	35
Court Administration	35

* John Rubin is a School of Government faculty member specializing in criminal law and procedure.

As in past years, the General Assembly passed numerous acts in the field of criminal law and procedure, touching on an array of issues. The most significant acts in the 2007 session concerned procedure. In three initiatives intended to help guard against conviction of innocent people, the General Assembly established new requirements for pretrial eyewitness identification procedures and interrogations and revised the requirements for DNA testing and preservation of evidence containing DNA. The General Assembly also revised the open-file discovery law passed in 2004, contracting it in minor respects and reinforcing it in others. In another major act, the General Assembly addressed the procedures for requiring sex offenders to enroll in the satellite monitoring program, established during the 2006 legislative session. These and other criminal law and procedure acts are discussed in this bulletin. Legislation related to criminal law and procedure that deal with court administration, motor vehicles, and juvenile delinquency proceedings are discussed briefly in this bulletin; readers interested in more information about those subjects should look at the applicable chapters of the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2007, which may be viewed online at www.sog.unc.edu/pubs/nclegis/nclegis2007/index.html.

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

Innocence Initiatives

Two companion bills address investigative procedures in criminal cases. One, S.L. 2007-421 (H 1625), creates a new Article 14A in G.S. Chapter 15A (G.S. 15A-284.50 through 15A-284.53), called the Eyewitness Identification Reform Act, to address lineup procedures. The second, S.L. 2007-434 (H 1626), creates a new Article 8 in G.S. Chapter 15A (G.S. 15A-211), Electronic Recording of Interrogations, to address interrogations in homicide cases. Both acts are an outgrowth of efforts to assure the reliability of convictions, reflected in, among other things, the passage of open-file discovery requirements in 2004 and the creation of the Innocence Inquiry Commission in 2006. The purpose statements of the two acts reflect their origins. *See* G.S. 15A-284.51 (the purpose of the eyewitness identification procedures is “to help solve crime, convict the guilty, and exonerate the innocent in criminal procedures”); G.S. 15A-211(a) (purpose of requiring electronic record of interrogations is “to eliminate disputes about interrogations, thereby improving prosecution of the guilty while affording protection to the innocent and increasing court efficiency”).

Lineups

Coverage. Due Process prohibits identification procedures that are impermissibly suggestive. To implement Due Process protections, the U.S. Supreme Court has held that courts must look at the totality of the circumstances to determine whether the identification procedure was improper and subject to suppression, but the court has not required that officers follow any particular procedures.¹ Concerns have been voiced, however, about the reliability of eyewitness identification procedures. In 1999, the U.S. Department of Justice issued a research report suggesting that certain procedures—

1. *See* *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972). A person also has a Sixth Amendment right to have counsel present at a live lineup when held at or after adversary judicial proceedings have begun. *See* *Kirby v. Illinois*, 406 U.S. 682 (1972).

such as “double-blind, sequential” lineups, described below—could improve the reliability of eyewitness identification. *See* Eyewitness Evidence: A Guide for Law Enforcement at 8–9, posted at www.ncjrs.gov/pdffiles1/nij/178240.pdf. In 2006, the North Carolina Actual Innocence Commission, established by North Carolina Supreme Court Chief Justice I. Beverly Lake, likewise recommended the use of double-blind, sequential lineups. *See* North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification, posted at www.ncids.org/News%20&%20Updates/Eyewitness%20ID.pdf. Consistent with these recommendations, the Eyewitness Identification Reform Act (“Eyewitness Act”), S.L. 2007-421, supplements existing Due Process protections and requires state and local law enforcement officers to follow specific procedures when conducting lineups. The procedures must be followed beginning with offenses committed on or after March 1, 2008.

The term *lineup* includes live lineups and photo lineups. A live lineup is defined as a procedure in which a group of people is displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime. A *photo lineup* is defined as a procedure in which an array of photographs is displayed to an eyewitness for the same purpose. The Eyewitness Act does not mention “show-ups”—that is, the presentation of a single suspect to an eyewitness for possible identification. This procedure is frowned upon because it is particularly suggestive, but it has been permitted under the Due Process clause when necessary for law enforcement objectives—for example, when the show-up is held shortly after the crime was committed and an immediate identification is needed to solve a crime quickly.² The omission of show-ups from the Eyewitness Act suggests that they may be permissible when necessary and when not employed to avoid the new lineup requirements.

Requirements. The requirements for lineups under the Eyewitness Act are contained in G.S. 15A-284.52. The principal ones are as follows:

- A lineup must be conducted by an independent administrator, defined as a person who is not participating in the investigation of the criminal offense and who is unaware of which person in the lineup is a suspect [G.S. 15A-284.52(a)(3), 15A-284.52(b)(1)]. This procedure is known as a double-blind lineup because neither the witness nor the officer conducting the lineup knows who the suspect is. For photo lineups, certain alternative methods may be used instead of an independent administrator, such as an automated computer program. G.S. 15A-284.52(c).
- Individuals or photos in a lineup must be presented to witnesses sequentially, with each individual or photo presented to the witness separately and then removed before the next individual or photo is presented. A sequential lineup may reduce the possibility, present in lineups in which a group of people is shown at the same time, that the witness will compare the people in the lineup and pick the person who most closely matches the suspect. The combination of an independent administrator and sequential presentation is known as a double-blind, sequential lineup.
- Before a lineup is conducted, the eyewitness must receive certain instructions, including that the perpetrator may or may not be present in the lineup and that the investigation will continue whether or not an identification is made. The eyewitness must acknowledge receipt of the instructions in writing and, if the eyewitness refuses to sign, the lineup administrator must note the refusal.

2. *See* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 212 (3d ed. 2003) (noting that a show-up is a suggestive identification procedure that normally should be avoided but that it may be permissible in an emergency or soon after a crime is committed); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (“The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . .”).

- At least five fillers (non-suspects) must be included in lineups and, if the eyewitness has previously viewed a photo or live lineup in connection with the identification of another suspect in the case, the fillers in the lineup containing the current suspect must be different from the fillers in prior lineups.
- If the eyewitness identifies a person in the lineup as the perpetrator, the lineup administrator must seek and document a clear statement from the eyewitness about the eyewitness's confidence level that the person is the perpetrator. The eyewitness may not be provided any information concerning the person before the lineup administrator obtains the eyewitness's confidence statement.
- Unless it is not practical, a video record of live identification procedures must be made. If a video record is not practical, the reasons must be documented, and an audio record must be made. If an audio record also is not practical, the reasons must be documented, and the lineup administrator must make a written record of the lineup.
- Whether the record is by video, audio, or writing, the record must include specified information, including the identification or nonidentification results, confidence statement, the names of everyone present at the lineup, and the words used by the eyewitness in any identification.

Remedies. G.S. 15A-284.52(d) sets forth the remedies for a violation of the Eyewitness Act. First, failure to comply with any of the requirements of G.S. 15A-284.52 “shall be considered by the court in adjudicating motions to suppress eyewitness identification.” Thus the court must take a violation into account, but a violation does not necessarily require suppression. It appears that the court is to consider whether a violation constitutes a substantial statutory violation, requiring suppression under G.S. 15A-974. The court also may consider whether a failure to follow the specified procedures affects the reliability of the identification, requiring suppression under the Due Process “totality of the circumstances” test. The statute does not explicitly address the question, but presumably the court also may consider whether a failure to follow the lineup requirements tainted a subsequent identification, rendering that identification inadmissible.³

Second, the failure to comply with any requirement is admissible in support of any claim of eyewitness misidentification as long as the evidence is otherwise admissible. Thus as part of the case at trial, a defendant may offer evidence of a failure to follow the requirements to show that an eyewitness's identification is unreliable.

Third, when evidence of compliance or noncompliance has been presented at trial, the jury must be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of an eyewitness identification. This provision suggests that, in support of an eyewitness identification, the state may present evidence at trial that it complied with the eyewitness identification procedures (if the evidence is otherwise admissible under the Confrontation Clause and North Carolina Rules of Evidence).

Training and reference materials. G.S. 15A-284.53 directs the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission, in consultation with the Department of Justice, to create educational materials and conduct training programs on how to conduct lineups in compliance with the new Eyewitness Act.

3. *See generally* Simmons v. United States, 390 U.S. 377 (1968) (stating constitutional standard for determining whether impermissible pretrial identification procedure affected later identification—that is, pretrial procedure must have been “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification”).

Interrogations

The Fifth Amendment prohibits involuntary confessions, which the courts treat as inherently unreliable, the product of unacceptable police practices, and inadmissible. To help ensure that confessions are voluntary, the courts have required *Miranda* warnings at the outset of custodial interrogations. Some state courts and state legislatures have also required that interrogations be electronically recorded as a matter of state law,⁴ but electronic recording is not among the protections that have been recognized under the U.S. Constitution.⁵ Effective for interrogations on or after March 1, 2008, S.L. 2007-434 requires that interrogations be electronically recorded in certain cases as a matter of North Carolina law.

Coverage. G.S. 15A-211, the only section in the new article on electronic interrogations, provides that the new article applies to “custodial interrogations in homicide investigations at any place of detention.” This phrase imposes four preconditions for the recording requirement—the person must be in “custody,” presumably within the meaning of the constitutional definition of custody (arrest or its functional equivalent); the person must be “interrogated,” again presumably within the meaning of the constitutional definition of interrogation (for example, routine booking questions ordinarily would not constitute interrogation); the investigation must be a “homicide” investigation, which presumably includes any level of homicide (murder, manslaughter, or death by vehicle); and the interrogation must take place at a place of detention, defined in G.S. 15A-211(c) as a jail, police or sheriff’s station, correctional or detention facility, holding facility for prisoners, or other facility where persons are held in connection with criminal charges. In light of this last requirement, an interrogation at a person’s home or other location that does not constitute a place of detention would not be subject to the electronic recording requirement even if the person was under arrest or otherwise in custody.

Recording. If an interrogation of a suspect meets the above criteria, an electronic recording must be made of the entire interrogation. An electronic recording may be an audio or visual recording. If the recording is visual, the camera must be placed so that it films both the interrogator and the suspect. The recording must begin with the officer’s advice of the person’s constitutional rights and end only when the interview has completely finished. Brief recesses, requested by the person in custody or the officer, need not be recorded, but the recording must reflect the starting time of the recess and resumption of the interrogation.

Remedies. G.S. 15A-211 contains several provisions on the effect of compliance or noncompliance with the recording requirements. First, the statute describes the effect on the admissibility of statements that were not recorded. These provisions are similar to the provisions in the Eyewitness Act, discussed above. A failure to comply “shall be considered” by the court in adjudicating a motion

4. *See, e.g.,* Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) (unexcused failure to electronically record custodial interrogation conducted in place of detention violates suspect’s right to due process under Alaska Constitution, and any statement thus obtained is generally inadmissible); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (“in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention”); 725 ILL. COMP. STAT. § 5/103-2.1 (under Illinois statute, statement of accused as result of custodial interrogation at police station or other place of detention is presumed inadmissible as evidence in criminal proceeding for homicide unless electronic recording is made of custodial interrogation and recording is substantially accurate and not intentionally altered); TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (subject to certain exceptions, Texas statute provides that no oral statement of an accused made as result of custodial interrogation is admissible against the accused in a criminal proceeding).

5. *See* United States v. Montgomery, 390 F.3d 1013 (7th Cir. 2004) (recognizing that U.S. Supreme Court has not required recording of electronic interrogations as matter of federal constitutional law).

to suppress a statement made by the defendant; a failure to comply is admissible in support of a claim that the defendant's statement was involuntary or unreliable if the evidence is otherwise admissible; and when evidence of compliance or noncompliance has been presented at trial, the jury must be instructed that it may consider credible evidence of compliance or noncompliance in determining whether the defendant's statement was voluntary and reliable. (This last provision probably does not mean that the jury decides whether the statement was "voluntary" within the meaning of the Fifth Amendment requirement of voluntariness, which is a question of law for the court to determine in ruling on a motion to suppress.)

Second, the new statute describes the effect of noncompliance on subsequent statements. It states that if the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded as required, any statements subsequently made by the defendant that are recorded may be questioned concerning their voluntariness and reliability.

Third, the statute provides that in a homicide prosecution, the state may present as evidence against the defendant a statement that was recorded as required if the statement is otherwise admissible. It is not clear how this provision adds to the state's right to introduce statements of the defendant that are otherwise admissible.

Fourth, the statute provides that if the state failed to comply with the recording requirements, it may show by clear and convincing evidence that the statement was voluntary and reliable and that the officer had good cause for not electronically recording the interrogation in its entirety. Good cause includes, among other things, the suspect's refusal to have the interrogation recorded and unforeseeable equipment failures.

Last, the statute provides that it does not preclude the admission of certain listed statements, such as spontaneous statements not made in response to questioning and statements made during arrest processing in response to routine questions.

Retention of recording. The state must retain the electronic recording of a defendant convicted of an offense related to the interrogation until one year after the completion of all appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief under state law or habeas corpus proceeding under federal law. This provision may not establish a definite time limit on retention because under G.S. 15A-1415 some claims may be raised in a motion for appropriate relief at any time. *Compare* S.L. 2007-539 (H 1500), discussed below, which sets specific time limits on retention depending on the type of offense.

DNA Testing

In 2001 the General Assembly enacted legislation giving criminal defendants the right to obtain DNA tests, analysis of DNA tests, and biological evidence on which DNA tests could be conducted. *See* John Rubin, 2001 *Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2002/02 at 4-5 (Jan. 2002), posted at www.sog.unc.edu/programs/crimlaw/aoj200202.pdf. Effective March 1, 2008, S.L. 2007-539 (H 1500) revises those provisions to clarify various issues, including when a defendant may obtain DNA testing, who must maintain evidence on which testing may be conducted, and how long authorities must retain evidence.

G.S. 15A-267(c) has provided that the court may order the State Bureau of Investigation (SBI) to perform DNA tests on the defendant's motion before trial if the biological material was not previously DNA tested and certain other conditions are met. S.L. 2007-539 expands the opportunity of a person to obtain DNA testing by providing that the biological material must not have been

previously tested or more accurate testing procedures are now available that were not available at the time of the previous testing and there is a reasonable possibility of a different result.

G.S. 15A-268 has directed the government entity that collected evidence containing DNA to preserve a sample of the evidence for the period of time that a defendant convicted of a felony is incarcerated. The act revises that section in several ways. First, it adds a broad definition of *biological evidence*, which includes any item containing blood, semen, hair, saliva, skin, tissue, or other identifiable biological evidence, whether present on clothing, bedding, or other evidence or on a slide, swab, test tube, or similar item. Second, the revised statute requires that any government entity “in custody of evidence shall preserve any physical evidence that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution.” Previously, the statute required the government entity that “collects” the evidence in the course of a criminal investigation to preserve a “sample.” This change clarifies that clerks of court who have custody of exhibits or other evidence must preserve the evidence. It also requires that all physical evidence that contains biological evidence be preserved, not just a sample of the evidence, which ensures that complete and accurate testing can be done if it becomes necessary. Third, the revised statute requires that the evidence be preserved in a manner that is reasonably calculated to prevent contamination or degradation, that maintains a continuous chain of custody, and that is secure, with sufficient documentation to locate the evidence. Fourth, the revised statute specifies different lengths of time that biological evidence must be preserved depending on the type of case and plea. For example, for felonies other than those requiring sex offender registration, the evidence must be preserved for three years after the date of conviction if the defendant was convicted on a guilty plea. Previously, the evidence had to be preserved in all felony cases for the period the defendant was incarcerated.

G.S. 15A-268 also has specified a procedure for government entities to follow if they wished to destroy evidence before the end of the required period of preservation. Under that procedure, the government entity had to notify various persons, including the defendant, and the defendant had ninety days to request that the material not be destroyed for one of a number of specified reasons. The act revises that section to require the government entity to follow the notice procedures *and* to petition the court for an order allowing early destruction of the evidence. The court may order early destruction following a hearing and the finding of specified facts (for example, the material has no significant value for biological analysis and is of a size, bulk, or physical characteristic not usually retained by the governmental entity and cannot practically be retained by the governmental entity). The statute does not specify, but presumably the petition is heard in the court of conviction, which will usually be the superior court because the DNA provisions apply to felonies only. The revised statute does not specify whether the defendant has a right to have counsel appointed for the hearing. [The notice provisions in G.S. 15A-268(b) state that notice of the petition must be given to the defendant’s current counsel of record, but the defendant may not have counsel if proceedings are no longer pending. The notice provisions also state that the Office of Indigent Defense Services must be given notice but do not specifically authorize appointment of counsel. *See* G.S. 7A-498.3 (Office of Indigent Defense Services is responsible for providing legal services in cases in which appointment of counsel is constitutionally or statutorily required).] New G.S. 15A-268(f) provides that the court’s order regarding disposition of evidence is appealable, and the government entity may not dispose of the evidence while an appeal is pending.

G.S. 15A-269 allows the defendant to make a postconviction motion for DNA testing and requires the court to grant the motion if certain conditions are met, including that there is a reasonable

probability that the verdict would have been more favorable to the defendant if the requested DNA testing had been conducted on the evidence. S.L. 2007-539 adds an additional requirement for relief under this section—namely, the defendant must sign a sworn “affidavit of innocence.” The DNA provisions do not contain a definition of “innocence,” and it is not clear whether the defendant must swear to complete innocence or may swear to partial innocence—for example, that the defendant was an accomplice and not the perpetrator of the crime, which could be relevant in a capital case in which a defendant was sentenced to death, or that the defendant participated in one offense (burglary) but not another (sexual assault of the victim). If the condition is interpreted as requiring the defendant to assert complete innocence, the condition would seem inconsistent with the existing requirement that the defendant show only that the verdict would have been more favorable had DNA testing been conducted. That requirement suggests that the defendant may obtain DNA testing to show reduced culpability.⁶ A claim of complete innocence is explicitly required under the statutes governing the Innocence Inquiry Commission, established in 2006 by the General Assembly to review claims of factual innocence outside traditional court channels. Those statutes, in contrast with this new legislation, state that a person seeking relief must assert “complete innocence” for the crime for which he or she was convicted, including any reduced level of criminal responsibility relating to the crime. *See* G.S. 15A-1460(1).

Last, new G.S. 15A-270.1 gives the defendant the right to appeal an order denying a motion for DNA testing, including by interlocutory appeal. Thus if the court denies a motion for DNA testing before trial, the defendant has the right to appeal the court’s interlocutory order.

Sex Offender Registration and Satellite Monitoring

Satellite Monitoring

Background. The sex offender registration program in North Carolina has undergone several changes since its introduction in 1996. The General Assembly significantly expanded the program in 2006, requiring satellite-based monitoring via a global positioning system (GPS) for two basic types of offenders. First, a person who commits an “aggravated offense,” is a “recidivist,” or is classified as a “sexually violent predator” as defined in North Carolina’s sex offender registration statutes—that is, a person who is required to register for life—is required to submit to lifetime satellite monitoring. Second, a person who commits an offense involving “physical, mental, or sexual abuse” of a minor may be required to submit to satellite monitoring for up to the period of registration, although when this requirement has been imposed, the monitoring usually has been for the period of supervised probation. The legislation requiring satellite monitoring appeared to make the court responsible for determining whether a person should be subject to either period of satellite monitoring. *See* Section 15 of S.L. 2006-247 [providing in G.S. 14-208.33(a), renumbered by codifier of statutes as G.S. 14-208.40(a), that court orders satellite monitoring]. Several questions arose, however, about the procedures to follow. For example, some offenders already had been sentenced by the court before enactment of the satellite monitoring requirement, but under the effective-date language of the act,

6. *Cf.* Model Legislation, 2007 State Legislative Sessions: An Act Concerning Access to Post-Conviction DNA Testing (Innocence Project, Benjamin N. Cardozo School of Law) (recommending the following as one of conditions for motion for postconviction DNA testing: “A reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution.”), posted at www.innocenceproject.org/docs/Model_Statute_Postconviction_DNA.pdf.

they still were potentially subject to satellite monitoring. Was the court responsible for determining whether those individuals had to submit to satellite monitoring? If not, who would make that determination and under what evidence standards?

The 2007 revisions to the satellite monitoring program, in S.L. 2007-213 (H 29) (hereinafter “2007 Sex Offender Act”), seek to respond to these issues. Most importantly, new G.S. 14-208.40A explicitly directs the court at sentencing to determine whether the defendant is subject to satellite monitoring. That provision applies to sentences entered on or after December 1, 2007. New G.S. 14-208.40B provides that if a court has not determined whether an offender should be required to submit to satellite monitoring, the case must be returned to the court for a determination. That provision is effective December 1, 2007, and is referred to below as the “bring-back” procedure. The details of these two new procedures, as well as other aspects of the 2007 Sex Offender Act, are discussed below. To provide context for the changes made in the latest legislation, the discussion also describes significant features of the sex offender registration program. The discussion does not attempt to cover legal issues that may be raised about satellite monitoring and other incidents of North Carolina’s sex offender registration program. *See, e.g., Usategui v. Easley* (E.D.N.C., filed Nov. 2, 2007) (pending lawsuit challenges various incidents of North Carolina’s satellite monitoring program). Nor does it cover the federal Adam Walsh Act, which requires states to implement additional registration requirements by July 27, 2009, or potentially forfeit 10 percent of the federal funds they otherwise would receive through the Edward Byrne Memorial Justice Assistance Grant Program.⁷

Determining the offender’s status. To determine whether an offender is subject to satellite monitoring, either at initial sentencing or under the bring-back procedure, the court essentially must take three steps. First, the court must determine whether a person has a “reportable conviction” as defined by G.S. 14-208.6(4). Second, the court must determine whether the person is within one of the four aggravated categories triggering satellite monitoring—aggravated offense, recidivist, sexually violent predator, or offense involving physical, mental, or sexual, abuse of a minor. Third, the court must determine whether the person is subject to satellite monitoring. Each of these steps is briefly reviewed below. For additional information about these steps, *see* John Rubin, *Determining the Defendant’s Registration Obligations under the Revised Sex Offender Laws* (Jan. 2008) (hereinafter *Determining the Defendant’s Registration Obligations*), posted at www.sog.unc.edu/programs/crimlaw/200710Sex%20offender.pdf.

Determining whether a person has a reportable conviction. To determine whether a person must submit to satellite monitoring, the court first must ascertain that the offense is a “reportable conviction.” Only a person with a reportable conviction is subject to sex offender registration requirements, and only a person subject to sex offender registration requirements is potentially subject to satellite monitoring. An offense is a “reportable conviction” if it is a “sexually violent offense,” an “offense against a minor,” or one of certain “peeping offenses,” as defined in G.S. 14-208.6. That statute lists the offenses that are within those categories, and the court has little discretion in making this initial determination. If an offense is on the statutory list of offenses, the person must register as a sex offender. If the offense is not

7. States must implement the additional requirements by the later of three years after July 27, 2006, the date the Adam Walsh Act was enacted, or one year after the U.S. Attorney General creates software for states to use in operating uniform sex offender registries and Internet websites. *See* Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-248, codified at 42 U.S.C. 16901 *et seq.*; *see also* Proposed National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. No. 103 (May 30, 2007) (proposed guidelines interpreting requirements of Adam Walsh Act), posted on website of Sex Offender, Sentencing, Monitoring, Apprehending, Registering & Tracking (SMART) Office, Office of Justice Programs, U.S. Department of Justice at www.ojp.usdoj.gov/smart/proposed.htm.

on the list, the person is not subject to sex offender registration requirements. For a list of the offenses that constitute reportable convictions, and the dates that those offenses became subject to registration requirements, see *Determining the Defendant's Registration Obligations, supra*, at pp. 5–10. For a few of the listed offenses (aiding or abetting a sexually violent offense or offense against a minor, and peeping), the court must make the additional determination that registration is necessary before the offense constitutes a “reportable conviction.” See G.S. 14-208.6(4)a, d.

Determining whether a person is in one of the four aggravated categories. Once the court determines that a person has a reportable conviction, it next must determine whether the person is within one of the four aggravated categories. Only a person within one of those categories may be ordered to submit to satellite monitoring. If the offense is a reportable conviction, the 2007 Sex Offender Act requires the prosecutor to present to the court any evidence that the defendant is within one of those categories; the prosecutor “has no discretion” to withhold any such evidence. See G.S. 14-208.40A. The defendant has the right to present any contrary evidence. The court, not the jury, makes the findings at sentencing. New G.S. 14-208.40A does not specify the burden of proof, but presumably the state has the burden by at least a preponderance of the evidence. The new statute does not require that the state allege in an indictment or other notice that the defendant is within one of the four aggravated categories (except for sexually violent predator, discussed below).

The term “aggravated offense,” one of the four aggravated categories, is defined in G.S. 14-208.6(1a). It means a criminal offense involving (1) vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious force or (2) vaginal, anal, or oral penetration with a victim who is less than twelve years old. One question is whether for an offense to be an aggravated offense, the definition of that offense must include the elements of the above definition. In other words, is the court supposed to look at the elements of the offense for which the defendant was convicted or the specific facts of the offense committed by the defendant?

If an elements approach is used, only certain offenses in North Carolina would constitute aggravated offenses—those that involve a sexual act involving penetration and either the use of force or threat of serious force or a victim under the age of twelve. The difficulty is that the aggravated offense definition, which derives from federal law, does not track North Carolina’s offense definitions. The North Carolina offenses that most closely resemble the federal definition are rape and sexual offense, but the match is not exact. For example, penetration is a requirement for both subcategories of aggravated offense. Under North Carolina law, penetration is an element of rape, which involves vaginal intercourse, and sexual offense based on anal intercourse or the insertion of an object into another’s genital or anal opening, but penetration is not an element of sexual offense based on the oral sex acts of fellatio, cunnilingus, or anilingus. See JESSICA SMITH, *NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME* 168 (6th ed. 2007). Other North Carolina offenses that are reportable convictions, such as indecent liberties and sexual battery, do not specify vaginal, anal, or oral sex acts (with or without penetration) as elements.

If instead a factual approach is used, a court may look at the facts of the offense committed by the defendant to determine whether they meet the definition of aggravated offense. Thus a conviction of indecent liberties with a child might constitute an aggravated offense if the offense involved a sexual act of penetration by force or against a child under the age of twelve. The offense resulting in a conviction would still have to be a reportable conviction under this approach—if the defendant is convicted of a non-reportable offense, such as crime against nature, the underlying acts could never elevate the offense to an “aggravated offense.”

The question of whether to use an elements or factual approach is initially one of legislative intent. The “aggravated offense” category was adopted in 2001 in North Carolina to require those persons within that category to register as a sex offender for life. The definition of the category was not changed with the adoption of satellite monitoring in 2006. There appear to be no North Carolina appellate opinions that have considered how to apply the term, however. In practice, trial courts had generally not been determining whether an offense constitutes an aggravated offense, and it does not appear that any case has reached the appellate courts.⁸ In support of the argument that courts must look at the facts of the offense is the requirement in new G.S. 14-208.40A(a) that the “district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.” The statute also provides that the defendant may present contrary “evidence.” This language suggests that the General Assembly intended for the court to make a factual determination based on the evidence presented. On the other hand, the new section states that the court must determine whether “the *conviction offense* was an aggravated offense,” which may suggest that the controlling question is whether the offense for which the defendant was convicted is an aggravated offense. *See State v. Mastne*, 725 N.W.2d 862 (Neb. Ct. App. 2006) (holding that court should look at definition of offense, not specific facts, to determine whether defendant has been convicted of “aggravated offense”; definition of aggravated offense in that jurisdiction is similar to definition adopted by North Carolina); *see also generally Taylor v. United States*, 495 U.S. 575, 599–602 (1990) (in determining whether to impose sentence enhancement for federal offense based on prior state conviction, trial court must use categorical approach—that is, trial court generally may look only at fact of conviction and statutory definition of prior offense and not facts underlying prior conviction; court bases holding on Congress’s intent but also discusses some of practical difficulties of factual approach); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (in determining whether state conviction constituted deportable offense under immigration law, court holds that language of federal statute “requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime”).

The second aggravated category, “recidivist,” is more straightforward. *Recidivist* is defined as a person who has “a prior conviction for an offense that is described in G.S. 14-208.6(4),” the provision defining *reportable conviction*. Thus a person with a prior conviction for indecent liberties may be considered a “recidivist” if convicted a second time of indecent liberties or another offense subject to registration requirements. A lingering question is whether a person could be considered a “recidivist” if the prior conviction was not subject to registration requirements at the time. For example, if a person was convicted of indecent liberties and completed his or her sentence before 1996 when the registration requirements first took effect, would the person be considered a recidivist if convicted of indecent liberties again? The statutes do not provide a clear answer.

The third aggravated category is “sexually violent predator.” New G.S. 14-208.40A states that at sentencing for a reportable conviction the district attorney must present evidence of, and the court must determine, whether the offender is classified as a sexually violent predator pursuant to G.S. 14-208.20. The latter statute requires the district attorney and the court to follow certain procedures in classifying a person as a sexual violent predator; among other things, the district attorney must have given notice to the defendant before trial of the intent to have the defendant classified as a sexually violent predator

8. In many cases, the practice up to now has been that the sheriff of the county where the defendant must register has determined whether a conviction met the definition of aggravated offense. It appears that sheriffs have been considering the facts of the particular offense, as evidenced by the court record and other information, and not the elements alone. Any legal issues involved in such post-sentence determinations are beyond the scope of this discussion.

and the court must have sent the defendant for an evaluation by a board of experts following trial. Unless these procedural requirements are followed, it would appear that the court could not consider whether the defendant is a sexually violent predator and subject to satellite monitoring on that ground.

The fourth aggravated category is an offense that involved “physical, mental, or sexual abuse of a minor.” There is no statutory definition of the term. This language also has provided the basis for certain mandatory conditions of probation and post-release supervision, such as restrictions on living with a minor during the period of supervision [*see* G.S. 15A-1343(b2) and 15A-1368.4(b1), enacted in 1996 in S.L. 1996-18, Sec. 20.14(b), (c) (2d extra session, H 53)] and the new provisions on warrantless searches, discussed below. No statutory definition is provided in that context either.

Monitoring consequences. If a person has a reportable conviction and is within any of the first three aggravated categories—aggravated offense, recidivist, or sexually violent predator—the court must order the offender to submit to satellite monitoring for life. *See* G.S. 14-208.40A(c). The court does not make any additional findings. (The offender also must register as a sex offender for life by virtue of being in one of those categories and must re-verify his or her registration information with the sheriff every ninety days, rather than every six months as with offenders subject to the regular sex offender registration program.) Lifetime satellite monitoring may be terminated by the Post-Release Supervision and Parole Commission under G.S. 14-208.43. There is no provision for termination of the lifetime registration requirement.

If the person is not within one of those categories but the offense involved physical, mental, or sexual abuse of a minor, the court must order the Department of Correction (DOC) to do a risk assessment and report the results to the court within thirty to sixty days of the court’s order. The statute does not specify whether the court should continue the sentencing of the defendant while awaiting the DOC’s report. *Compare* G.S. 14-208.20(b) (providing that if prosecutor has sought classification of defendant as sexually violent predator pursuant to statutory procedures, court orders evaluation of defendant prior to sentencing). If the court finds based on the DOC risk assessment that the offender requires the highest possible level of supervision and monitoring, the court must order the offender to submit to satellite monitoring for the period of time specified by the court. The statutes do not explicitly set an outside limit on monitoring; however, the period of monitoring could be for no longer than the period during which the person is “required to register,” a precondition for satellite monitoring. *See* G.S. 14-208.40(a). In practice, courts have tended to impose satellite monitoring in these cases for the term of supervised probation. The new statute does not specify the procedure for the court to follow after it receives the DOC risk assessment. Presumably, the court must hold an additional hearing, at which the state and defendant may be heard as to the report’s findings and the appropriateness of satellite monitoring.

Bring-back procedure. New G.S. 14-208.40B provides a procedure for returning to court an offender who has been convicted of a reportable offense if a court has not determined whether the offender must submit to satellite monitoring. In those instances, DOC must initially determine whether the offender falls into one of the four aggravated categories described above. If DOC determines that the offender falls into one of those categories, it must schedule a hearing in the court of the county where the offender resides. DOC must notify the offender of its preliminary determination and the date of the scheduled hearing by certified mail. The hearing may be no sooner than fifteen days from the date notice was mailed.

The hearing procedure is the same as under new G.S. 14-208.40A. Thus the district attorney presents evidence of the appropriate designation, the defendant presents contrary evidence, and

the court determines whether the offender falls into one of the aggravated categories. The court must obtain a DOC risk assessment for cases involving “physical, mental, or sexual abuse” of a minor.

The new statute does not specifically address whether the defendant has the right to have counsel appointed at these “bring-back” hearings. If the court makes the satellite monitoring determination at the sentencing hearing in the case, the defendant will be represented by any counsel that he or she had for the trial of the case. The defendant may have the same right to counsel if a satellite monitoring determination was not made at the initial sentencing hearing and a further hearing has to be scheduled under new G.S. 14-208.40B.

The bring-back procedures are effective December 1, 2007 [pursuant to S.L. 2007-484, Sec. 42 (S 613)]. Thus, beginning December 1, 2007, DOC must schedule hearings in all cases in which it determines that satellite monitoring is appropriate and in which there has been no court determination. This hearing requirement appears to encompass cases in which DOC previously placed a person on satellite monitoring without a court determination. The satellite monitoring provisions took effect August 16, 2006, and pursuant to those provisions, DOC began placing offenders on satellite monitoring January 1, 2007.

Enforcement of monitoring requirements. The 2007 Sex Offender Act makes several changes to assist DOC, which is principally responsible for administering the satellite monitoring program, in enforcing the monitoring requirements. Unless otherwise indicated, these provisions are effective December 1, 2007.

New G.S. 14-208.40C requires offenders who receive an active sentence and who are required to enroll in the program to report to the Division of Community Corrections to receive the appropriate equipment immediately upon release from the Division of Prisons. Offenders subject to the program who receive a probationary sentence must report immediately upon sentencing and, if necessary, must return at a time designated by the Division of Community Corrections to receive the appropriate equipment.

The act deletes from G.S. 14-208.42 the provision placing an offender on unsupervised probation for life when placed on lifetime satellite monitoring. Instead, the revised statute provides that DOC has the authority to contact the offender at the offender’s residence or to require the offender to appear at a specific location as needed for purposes of enrollment in the satellite monitoring program, receipt and maintenance of equipment, and other steps necessary to complete the requirements for satellite monitoring.

Effective for offenses committed on or after December 1, 2007, the act revises G.S. 14-208.44(b) to make it a Class E felony to intentionally interfere with the proper functioning of a device (as well as to intentionally tamper with, remove, or vandalize a device, which has been prohibited by that statute). New G.S. 14-208.44(c) makes it a Class 1 misdemeanor if a person required to enroll in a satellite-monitoring program fails to provide necessary information to DOC or to fail to cooperate with DOC guidelines and regulations for the program.

Reports. Section 17.14 of the 2007 appropriations act, S.L. 2007-323 (H 1473), requires DOC to report by March 1 of each year to various legislative committees on the number of sex offenders subject to satellite monitoring, the caseloads of probation officers assigned to offenders subject to satellite monitoring, the number of violations, the number of absconders, the projected number of offenders to be enrolled by the end of that year, and the total cost of the program, including a per-offender cost. (G.S. 14-208.45 provides that a person required to submit to satellite monitoring must pay a one-time fee of \$90, unless the court waives the fee for good cause. This provision indicates that the person may not be required to bear other costs associated with satellite monitoring.)

Other Sex Offender Changes

Warrantless searches and other conditions. Effective for persons placed on probation on or after December 1, 2007, the 2007 Sex Offender Act (S.L. 2007-213) revises G.S. 15A-1343(b2) to provide that a person convicted of a reportable offense or of an offense involving physical, mental, or sexual abuse of a minor must submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present. The searches must be for purposes specified by the court and reasonably related to the probation supervision, and the probationer may not be required to submit to a search that is otherwise unlawful. The revised provision also states that warrantless searches of the probationer's computer or other electronic mechanisms that may contain electronic data are considered reasonably related to the probation supervision. Amendments to G.S. 15A-1374(b)(11) and 15A-1368.4(b1) make similar changes for parolees and people on post-release supervision.

Other consequences. The 2007 Sex Offender Act revises G.S. 14-208.9(a) to require offenders who are required to register and who move from one county to another to report in person to the sheriff of the new county (as well as to the sheriff of the previous county) and to provide written notice to each sheriff of the new address within ten days of the change of address. This provision was initially set to take effect on December 1, 2007 (*see* Section 15 of S.L. 2007-213), but a technical corrections bill changed the effective date to July 11, 2007. *See* Section 42(b) of S.L. 2007-484 (S 613). Since the technical corrections bill did not take effect until August 30, 2007, the above requirement likely applies beginning on that date.

G.S. 14-208.16 prohibits a person who is required to register from residing within 1,000 feet of a school as defined in that section. Subsection (d) provides that the restriction does not apply if the residence was established before the nearby property was turned into a school. This exception includes situations in which the offender resides with an immediate family member who established residence before a change in the ownership or use of the nearby property. Effective July 11, 2007, the act revises the exception to define *immediate family member* as a child or sibling who is eighteen years of age or older, or a parent, grandparent, legal guardian, or spouse of the offender.

Disclosure of certain reportable convictions in child custody proceedings. Effective for actions or proceedings filed on or after October 1, 2007, S.L. 2007-462 (H 1328) adds G.S. 50-13.1(a1) to require any person instituting an action or proceeding for custody *ex parte* who has been convicted of a sexually violent offense, as defined in G.S. 14-208.6(5), to disclose the conviction in the pleadings. A *sexually violent offense* is the principal type of conviction that requires a person to register as a sex offender under North Carolina's sex offender registration law.

Funds. The 2007 appropriations act appropriates approximately \$210,000 in recurring funds for each year of the 2007-09 fiscal biennium for a staff position and operating funds for the sex offender registry. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Section I, Justice.

Criminal Discovery and Related Procedures

In 2004, the General Assembly rewrote the criminal discovery provisions and significantly expanded the statutory rights of criminal defendants to obtain information from the state about the prosecution against them. The collection of revised statutes is commonly known as the "open-file discovery" law. *See* S.L. 2004-154 (S 52); John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*,

ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06 (Oct. 2004), at www.sog.unc.edu/programs/crimlaw/aoj200406.pdf. In the 2007 session, the General Assembly passed three acts making minor modifications to those provisions as well as other acts giving the parties in criminal cases access to information.

Open-File Discovery Changes

Law enforcement's obligation to provide evidence to prosecuting attorney. As part of the 2004 revisions to the criminal discovery laws, the General Assembly required law enforcement officers to make available to the state (that is, the prosecutor) on a timely and continuing basis all materials and information acquired in the course of the investigation of a felony. This provision was added to enable the state to comply with its obligation under revised G.S. 15A-903(a) to make available to the defendant the complete files of all law enforcement agencies involved in the investigation. The problem with the provision was that it was added to a statute that was easily overlooked—G.S. 15A-501(6), in Article 23 of G.S. Chapter 15A, Police Processing and Duties Upon Arrest. S.L. 2007-183 (H 786) reinforces law enforcement agencies' obligations by placing a similar provision in new G.S. 15A-903(c), a part of the criminal discovery statutes. The new subsection provides that on the state's request, law enforcement agencies (and prosecutorial agencies) must make available to the state a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant. The act applies to cases where the trial date set pursuant to G.S. 7A-49.4 is on or after December 1, 2007. For cases before that date, law enforcement still has an obligation to provide its investigative files to the state under G.S. 15A-501(6).

Oral statements by witnesses. In 2004, the General Assembly significantly expanded the state's obligation to provide statements of witnesses to the defendant. Before that change, the state was required to provide witness statements to the defendant only if the statements met certain criteria (for example, they were signed or otherwise formally adopted by the witness) and only after the witness had testified. The state also was required to reduce to written or recorded form oral statements by the defendant and any co-defendant being tried jointly with the defendant. The General Assembly deleted those provisions in 2004 and required in revised G.S. 15A-903(a)(1) that the state provide to the defendant all witness statements and reduce to written or recorded form and provide to the defendant all oral statements. In *State v. Shannon*, the Court of Appeals recognized that these provisions require prosecuting attorneys and their legal staff, as well as law enforcement officers, to memorialize oral statements made to them by witnesses and provide them to the defendant in discovery. The court rejected the state's argument that prosecuting attorneys are exempt from the requirement of memorializing oral statements by witnesses. See *State v. Shannon*, ___ N.C. App. ___, 642 S.E.2d 516 (2007) (state petitioned North Carolina Supreme Court to review Court of Appeals' decision but, in light of legislation below, state withdrew its petition).

In S.L. 2007-377 (S 1009), the General Assembly reaffirmed its approach to oral witness statements, with minor modifications, effective for cases pending on or after August 19, 2007. Revised G.S. 15A-903(a)(1) continues to require the state to reduce all oral statements to written or recorded form and provide them to the defendant except in the following circumstances: (1) the oral statement was made to a prosecuting attorney outside the presence of a law enforcement officer or investigational assistant and (2) the oral statement does not contain significantly new or different information from a prior statement made by the witness. (The classification of investigational assistant is described in G.S. 7A-69.) Thus if the specified personnel are present when a witness speaks to a prosecutor, any

statements by the witness must be reduced to writing; if the prosecutor is alone or with someone other than the specified personnel, any statements also must be reduced to writing unless the statements contain no significantly new or different information.

Certain information not subject to disclosure. Before the 2004 revisions to the discovery law, the state had the right to withhold a broad range of information from discovery. The then-existing “work product” provision, in G.S. 15A-904(a), provided that unless disclosure was otherwise required by the discovery statute or constitutional principles, the state could withhold reports, memoranda, and other documents made by the state in the investigation and prosecution of the case as well as statements made by witnesses and prospective witnesses. The 2004 open-file discovery legislation rewrote the work product provision in G.S. 15A-904(a) to focus on protecting prosecuting attorneys’ mental impressions and conclusions about the case while ensuring that the defendant had access to factual information, whether obtained by a prosecuting attorney or law enforcement officer. Thus revised G.S. 15A-904(a) allowed the state to withhold written materials drafted by the prosecuting attorney or the prosecuting attorney’s legal staff for their own use at trial (such as voir dire questions or closing arguments) and other materials that they drafted to the extent the materials contained their opinions, theories, strategies, or conclusions. Under G.S. 15A-908, prosecutors (as well as defendants) could apply to the court for a protective order if they wanted to withhold information that otherwise would have to be disclosed.

S.L. 2007-377 leaves these provisions in place but revises G.S. 15A-904, effective for cases pending on or after August 19, 2007, to allow the state to withhold two additional types of information without seeking a protective order. First, under new G.S. 15A-904(a1), the state is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law. Thus to obtain the identity of a confidential informant, a defendant would have to make a motion to the court for disclosure based on constitutional or statutory grounds. *See, e.g., Roviario v. United States*, 353 U.S. 53 (1957); G.S. 15A-978. Second, under new G.S. 15A-904(a2), the state is not required to provide any personal identifying information of a witness (such as a social security number) beyond the witness’s name, address, date of birth, and published phone number unless on the defendant’s motion the court determines that the defendant needs additional information to accurately identify and locate the witness.

Meaning of “prosecutorial agency.” As revised in 2004, G.S. 15A-903(a)(1) requires the state to make available to the defendant the files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. In effect, this provision requires the prosecuting attorney to obtain the files of these agencies and provide them to the defendant. A lingering question has concerned which agencies’ files the prosecuting attorney must obtain and provide to the defendant. Certainly, the district attorney’s office that is prosecuting the case would be a covered agency, and the prosecuting attorney would have to disclose information in that office’s possession. Likewise, the files of investigating law enforcement agencies must be disclosed. (To assist prosecutors in complying with that obligation, another act from the 2007 legislative session requires law enforcement agencies to provide their files to the prosecuting attorney on request. *See* S.L. 2007-183, discussed above.)

What if an entity is not a law enforcement or prosecutorial agency itself but obtains information on behalf of a law enforcement or prosecutorial agency? For example, suppose the prosecuting attorney uses a private lab for DNA testing in a criminal case. Few would dispute that the prosecuting attorney would have to disclose that information. If the prosecuting attorney obtained the lab report, it would be considered part of the prosecutor’s file and therefore would be subject to statutory

discovery requirements. Even if the prosecutor did not actually take possession of the report, he or she would have the right to obtain it and would be obligated to disclose it to the defendant. *See State v. Pigott*, 320 N.C. 96, 102 (1987) (court holds under prior discovery statute that a prosecutor is obligated to turn over discoverable information in possession of “those working in conjunction with him and his office”); *see also Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) (in case applying *Brady v. Maryland*, which deals with prosecutors’ constitutional obligation to disclose evidence, court held that a prosecutor could not avoid disclosing evidence “by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial”).

S.L. 2007-393 (S 1130) makes the prosecutor’s obligations explicit with respect to outside agencies. Effective October 1, 2007, G.S. 15A-903(a)(1) provides that “the term ‘prosecutorial agency’ includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant.” This language clearly would cover information developed by the private lab in the above example. There still may be some gray areas, however. For example, in connection with allegations of abuse and neglect, a county Department of Social Services (DSS) may investigate the same conduct as charged in a criminal case. Under the new language in G.S. 15A-903(a)(1), it seems unlikely that DSS would be considered a “prosecutorial agency” just because it had investigated the same conduct and, therefore, unlikely that its files would automatically be subject to the statutory discovery provisions. *See State v. Pendleton*, 175 N.C. App. 230 (2005) (interpreting 2004 version of G.S. 15A-903(a)(1), court finds that DSS did not act in the capacity of a prosecutorial agency where DSS referred matter to police for investigation, the police gathered their own evidence, and a DSS employee sat in on an interview by police of a child victim). In some instances, however, DSS or other outside agencies could become so involved in a criminal investigation that they could be considered to be acting in a law enforcement or prosecutorial capacity, and the portion of their files pertaining to the case could be subject to the statutory disclosure requirements. *See generally State v. Morrell*, 108 N.C. App. 465 (1993) (social worker assigned to case of allegedly abused child acted as a law enforcement agent in interviewing the defendant, rendering inadmissible custodial statements made to social worker without *Miranda* warnings). Regardless of whether an outside agency would be considered a “prosecutorial agency” under the new language, the state would still have to disclose information it obtains from an outside agency, just as it would have to turn over information obtained from any other source. The defendant also would have the right in some circumstances to obtain the information directly from the outside agency by motion to the court or subpoena. *See generally Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (describing defendant’s right to obtain records in possession of third parties).

Other Discovery Mechanisms

Subpoenas for documents. Rule 45 of the North Carolina Rules of Civil Procedure governs the use of subpoenas in civil cases and, for the most part, in criminal cases as well. G.S. 15A-801 and 15A-802 state that Rule 45 applies to criminal cases except for one subsection of the rule—the provision that requires the subpoenaing party to serve a copy of the subpoena on the other parties to the case and not just on the person or entity being subpoenaed. In 2003 the General Assembly made numerous revisions to Rule 45, prompted primarily by concerns from civil practitioners. Because of the language of G.S. 15A-801 and 15A-802, those changes appeared to apply to criminal cases as well.⁹

9. For a discussion of the changes to Rule 45 and subpoena practice in general, *see* John Rubin and Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (Sept. 2005), posted at

In the 2007 legislative session, Rule 45 was revised in a more limited fashion but again apparently in response to concerns in civil cases. Effective for actions filed on or after October 1, 2007, S.L. 2007-514 (H 316) adds new subsection (d1) to Rule 45 to require a party who has obtained material in response to a subpoena to serve on all other parties a notice of receipt of the material. The party must serve the notice of receipt within five business days after receipt and if requested must provide other parties an opportunity to inspect and copy the materials at the inspecting party's expense.

The act does not specifically exempt criminal cases from this requirement, although somewhat paradoxically the subpoenaing party in a criminal case need not give notice of the service of a subpoena in light of the above provisions of G.S. Chapter 15A. The new subpoena provisions are also in tension with G.S. 15A-905 and 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the state evidence that he or she intends to use at trial. If the new notice and inspection requirements do apply to criminal cases, a party may have grounds to seek a protective order under G.S. 15A-908 to withhold the records from disclosure. Alternatively, instead of using a subpoena, a party may move for a court order for production of records, which is not governed by Rule 45.¹⁰

Access to confidential school personnel files by state. Effective July 8, 2007, S.L. 2007-192 (H 550) revises G.S. 115C-321 to create an exception to school employees' right to confidentiality in their personnel files. New G.S. 115C-321(a1) provides that information in an employee's personnel file that is relevant to certain crimes may be made available to law enforcement and the district attorney. New G.S. 115C-321(a2) provides that the employee must be given five working days' written notice of any disclosure so that the employee may apply to the district court to determine whether the information is relevant to any criminal misconduct. Failure of the employee to apply for review waives any right to relief. The statute does not specify who must give the employee notice. New G.S. 115C-321(a3) provides that statements or admissions made by the employee and produced under subsection (a1) are not admissible in any subsequent criminal proceeding against the employee.

Disclosures of health information to law enforcement. Effective June 27, 2007, S.L. 2007-115 (H 353) amends G.S. 90-21.20B in an attempt to harmonize state and federal confidentiality law by allowing health care providers to disclose health information in certain situations permitted under federal law. Under the federal privacy regulation promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164), regulated health care providers are allowed to disclose protected health information without patient permission in a variety of circumstances. States are allowed, however, to have more protective state laws in place. Interpretation and implementation of North Carolina's confidentiality laws has been uneven and somewhat confusing over the years, primarily because it has not been clear whether the state's physician-patient privilege (G.S. 8-53) was more protective of privacy than the HIPAA Privacy Rule. Many health care providers erred on the side of caution by concluding that the privilege was more protective. Therefore, many providers refused to disclose protected health information without patient permission or a court order in circumstances in which the HIPAA Privacy Rule would have allowed disclosure.

www.sog.unc.edu/pubs/electronicversions/pdfs/hlb82.pdf. Although this bulletin was written to assist health departments in responding to subpoenas, the information about subpoena requirements is generally applicable to all proceedings.

10. See 1 NORTH CAROLINA DEFENDER MANUAL § 4.7A, at 35-38 (May 1998) (discussing grounds and procedures for obtaining records in possession of third parties), posted at www.ncids.org.

S.L. 2007-115 addresses this ambiguity in part by adding new language to G.S. 90-21.20B authorizing health care providers to ignore the privileges and disclose information for (1) law enforcement purposes as permitted by a specific section of the HIPAA Privacy Rule, 45 C.F.R. 164.512(f) and (2) treatment, payment, and health care operations purposes as permitted by another section of the federal rule, 45 C.F.R. 164.506. Health care providers must still comply with any state law that “specifically” prohibits disclosure of particular information, such as information identifying a person who has or may have a reportable communicable disease, which is protected under G.S. 130A-143. Overall, this change in the law is rather significant in that it opens the door for health care providers to share information with each other and with law enforcement officials to the extent permitted by the HIPAA Privacy Rule without concern for potential violations of the privileges recognized in state law.¹¹

Criminal Offenses and Related Matters

Domestic Violence

Felony violation of domestic violence protective order. Ordinarily, a violation of a domestic violence protective order (DVPO) is a Class A1 misdemeanor under G.S. 50B-4.1(a). The 2001 General Assembly revised G.S. 50B-4.1 to add two felony offenses—committing a felony knowing that a DVPO prohibits that conduct, punishable as a felony one class higher than the felony committed, and violating a DVPO after three convictions under G.S. Chapter 50B, a Class H felony. Effective for offenses committed on or after December 1, 2007, S.L. 2007-190 (H 47) creates a new felony offense. Under new G.S. 50B-4.1(g), a person is guilty of a Class H felony if he or she

- while in possession of a deadly weapon on or about or within close proximity of his or her person
- knowingly
- violates a valid DVPO
- by failing to stay away from a place or person as directed by the DVPO.

Pretrial release for domestic violence offenses. G.S. 15A-534.1 contains a special procedure, known as the “48-hour law,” for determining pretrial release conditions for defendants charged with certain domestic violence offenses. Under that statute, only a judge may determine pretrial release conditions during the first 48 hours after arrest. Effective for offenses committed on or after December 1, 2007, S.L. 2007-14 (H 42) revises that statute to make the offense of stalking subject to the 48-hour law if the offense is against a spouse or former spouse of the defendant or against a person with whom the defendant lives or has lived as if married.

Separate waiting area for domestic violence victims. Effective April 12, 2007, S.L. 2007-15 (H 46) provides that where practical, the clerk of superior court in each county must work with the county sheriff to make available to domestic violence victims a secure area, segregated from the general population of the courtroom and available on the victim’s request, where they may await hearing of their court case. The Administrative Office of the Courts must report to the Joint Legislative Committee on Domestic Violence by May 1, 2008, on the progress of providing space in each courthouse.

11. The summary of this bill is drawn from Aimee N. Wall, *Health, in NORTH CAROLINA LEGISLATION 2007* (forthcoming), available online at www.sog.unc.edu/pubs/nclegis/nclegis2007/14%20Health.pdf.

Victims' rights for protective order violations. The Crime Victims' Rights Act (Article 46 of G.S. Chapter 15A) provides specific protections to victims of certain crimes, such as notice of court proceedings from the district attorney's office if requested by the victim. Included in the definition of *victim* in G.S. 15A-830(a)(7) are victims of certain misdemeanors when the defendant has a personal relationship with the victim as defined in G.S. 50B-1(b). Effective October 1, 2007, S.L. 2007-116 (S 30) revises G.S. 15A-830(a)(7) to add as a covered victim a victim of a violation of a valid domestic violence protective order under G.S. 50B-4.1.

The act also revises G.S. 50B-3(c1) to provide that when a protective order is filed with the Clerk of Superior Court, the clerk must provide to the applicant an informational sheet developed by the Administrative Office of the Courts containing a list of various agencies and services available to the applicant.

Firearm notification requirements. S.L. 2007-294 (H 1810) requires the Administrative Office of the Courts, in cooperation with the North Carolina Coalition against Domestic Violence and the North Carolina Governor's Crime Commission, to develop a form to comply with the criminal case firearm notification requirements of the federal Violence Against Women Act of 2005. Effective January 1, 2008, the court must provide a copy of the form to all defendants convicted of crimes subject to the firearm notification requirements.

Domestic violence homicide reporting. Beginning July 1, 2007, S.L. 2007-14 (H 42) requires the North Carolina Attorney General's office to develop a reporting system and database reflecting the number of homicides in North Carolina involving an offender and victim who had a personal relationship as defined by G.S. 50B-1(b). The database must include the type of personal relationship between the offender and victim, whether the victim had obtained a protective order pursuant to G.S. 50B-3, and whether the offender was on pretrial release pursuant to G.S. 15A-534.1 (the "48-hour law"). All state and local law enforcement agencies must report all cases to the Attorney General's office that meet the criteria for the new reporting system.

Weapons

Possession of weapons in courthouse by judges and detention officers. G.S. 14-269.4 forbids the possession of a deadly weapon, whether openly or concealed, on state property and in courthouses except by certain personnel, such as law enforcement officers. Effective August 21, 2007, S.L. 2007-412 (H 573) amends that section to permit district and superior court judges to possess a handgun in courthouses if they are in the building to discharge their official duties and they have a concealed handgun permit; and effective August 29, 2007, S.L. 2007-474 (H 1707) amends that section to allow detention officers employed by the sheriff to carry firearms in a courthouse if authorized by the sheriff.

Concealed handgun permits for retired law enforcement officers. Effective for offenses committed on or after December 1, 2007, S.L. 2007-427 (H 1231) amends several provisions in G.S. Chapter 14, Article 54B, to allow qualified retired law enforcement officers [as defined in new G.S. 14-415.10(4a)] to carry a concealed handgun without obtaining a concealed handgun permit if they obtain certification (as provided in new G.S. 14-415.26) from the North Carolina Criminal Justice Education and Training Standards Commission. A willful and intentional misrepresentation on an application for certification is a Class 2 misdemeanor, results in immediate revocation of any certification, and renders the person ineligible to obtain a certification or concealed carry permit. The

act also exempts from obtaining a permit certain law enforcement and retired law enforcement officers authorized to carry a concealed handgun under federal law (as described in new G.S. 14-415.25).

Carrying of weapon by certain armed security guards on school property. Effective August 30, 2007, S.L. 2007-511 (S 854) amends G.S. 14-269.2, the statute prohibiting carrying a weapon on educational property, to allow armored car service and armed courier service guards to carry weapons with the permission of the college or university, and armed security guards to carry weapons at hospitals or health care facilities on educational property with the permission of the college or university. The guards must be registered under G.S. Chapter 74C, which regulates private protective services. (This change was also made in S.L. 2007-427, effective August 23, 2007.)

Drug and Alcohol Offenses

“Safe zones” near child care centers, schools, and parks. Under G.S. 90-95(e)(8) and 90-95(e)(10), it has been a Class E felony for a person twenty-one years of age or older to manufacture, sell, deliver, or possess with intent to sell or deliver a controlled substance in violation of G.S. 90-95(a)(1) within 300 feet of a child care center, elementary or secondary school, or public park. Effective for offenses committed on or after December 1, 2007, S.L. 2007-375 (S 8) amends G.S. 90-95(e)(8) and (10) to increase the distance to 1,000 feet. It also amends G.S. 90-95(e)(10) to delete the requirement that the public park contain a playground. The two subdivisions continue to provide that the transfer of less than five grams of marijuana for no remuneration does not constitute a delivery in violation of G.S. 90-95(a)(1).

Ethyl alcohol. G.S. 90-113.10 through 90-113.12 prohibit inhaling certain substances for the purpose of inducing intoxication; possessing these substances for the purpose of inhaling; and selling, delivering, or possessing with the intent to sell or deliver these substances. Effective for offenses committed on or after December 1, 2007, S.L. 2007-134 (S 125) revises those statutes to add ethyl alcohol to the list of covered substances. The act also adds G.S. 90-113.10A, effective the same date, to prohibit knowingly manufacturing, selling, delivering, or possessing an “alcohol vaporizing device” as defined in the new statute. A violation of any of these statutes is a Class 1 misdemeanor.

Pretrial release restrictions involving methamphetamine offenses. Effective August 30, 2007, Section 4 of S.L. 2007-484 (S 613) recodifies G.S. 15A-736.1 as G.S. 15A-534.6. Because the original statute was located within the extradition statutes, it could have been construed as applying to offenders in extradition cases only—that is, offenders arrested in North Carolina for offenses committed outside North Carolina. The recodification places the statute among the pretrial release statutes and makes it clear that it applies to any offender arrested in North Carolina.

G.S. 15A-534.6 authorizes judicial officials to deny pretrial release for certain methamphetamine offenses under certain conditions. The section provides that a rebuttable presumption arises that no conditions of release would assure the safety of the community if the state shows by clear and convincing evidence that

- the defendant is charged with a violation of G.S. 90-95(b)(1a) (manufacture of methamphetamine) or 90-95(d1)(2)b. (possession of precursor chemical knowing that it will be used to manufacture methamphetamine), and
- the defendant is dependent on or regularly uses methamphetamine and the violation was committed or attempted to maintain or facilitate the defendant’s dependence or use.

Pharmacy records. G.S. 90-85.26 requires pharmacies to maintain a record of prescription orders and refills that they compound or dispense. Effective July 20, 2007, S.L. 2007-248 (H 1369) amends G.S. 90-85.26 to allow pharmacies to maintain an electronic image in lieu of hard copies of prescription orders and refills. Such electronic images are considered originals under the amended statute. This change may be relevant to cases in which a prescription order is needed as evidence.

Underage drinking. G.S. 18B-302 addresses alcohol offenses involving underage persons. It prohibits, among other things, selling or giving alcohol to a person under twenty-one years old and makes this offense a Class 1 misdemeanor under the punishment provisions in G.S. 18B-302.1. Effective for offenses committed on or after December 1, 2007, S.L. 2007-537 (H 1277) amends G.S. 18B-302 to separate the offense of giving alcohol to a person under twenty-one [recodified in new G.S. 18B-302(a1)] from the offense of selling alcohol [in current G.S. 18B-302(a)]. The criminal punishment for these offenses remains the same, but a person convicted of the giving offense will have his or her driver's license revoked for one year under revised G.S. 18B-302(g) and revised G.S. 20-17.3. A selling offense does not result in a driver's license revocation under these provisions. The act also amends these statutes to require a one-year driver's license revocation for any person convicted of aiding and abetting a violation of G.S. 18B-302(a) (selling to underage person), (a1) (giving to underage person), or (b) (purchasing, possessing, or consuming by underage person). Previously, the revocation applied only to an underage person convicted of aiding and abetting those offenses. Revised G.S. 20-17.3 provides that a person whose driver's license is revoked for a giving offense or an aiding and abetting offense is eligible for a limited privilege under G.S. 20-179.3.

Offenses of a Sexual Nature

Testing of person charged with sex offense for sexually transmitted infection. G.S. 15A-615 requires that a person charged with certain sex offenses must be tested for sexually transmitted infections following a finding of probable cause by a judge or issuance of an indictment by a grand jury. Effective for offenses committed on or after December 1, 2007, S.L. 2007-403 (H 118) amends that statute to specify that a defendant ordered to be tested must be tested within forty-eight hours after the date of the court order. The revised statute states that a HIV test must use the HIV-RNA Detection Test.

Reporting of film or photograph containing image of minor engaged in sexual activity. Effective September 1, 2007, S.L. 2007-263 (H 27) adds G.S. 66-67.4 to place reporting obligations on processors of photographic images and on computer technicians (as defined in the new section) if in the course of their employment they observe an image of a minor or person who reasonably appears to be a minor engaged in sexual activity. In that instance, the processor or technician must report the name and address of the person requesting the processing of the film or the owner or person in possession of the computer to the Cyber Tip Line at the National Center for Missing and Exploited Children or to the appropriate law enforcement official in the county or municipality. Employees of a processor or technician also may report the information to a person designated by the employer, who then must report the information as provided above. The new section grants immunity from civil or criminal liability to a person who makes such a report in good faith.

Polygraph examinations of victims of sexual assault. Effective for offenses committed on or after December 1, 2007, S.L. 2007-294 adds G.S. 15A-831.1 to provide that a criminal or juvenile justice agency may not require a person claiming to be a victim of a sexual assault or a witness to a sexual assault, to submit to a polygraph or similar examination as a precondition of the agency

investigating the matter. If an agency wishes to perform a polygraph examination, the agency must inform the person that the examination is voluntary, that the results are not admissible in court, and that a refusal to take the examination will not be the sole basis for a decision by the agency not to investigate the matter.

Pretrial release restrictions involving sex offenses and crimes against children. G.S. 15A-534.4 has authorized judicial officials to impose certain pretrial release conditions (stay away from home, school, or place of employment of the alleged victim; not communicate or attempt to communicate with the victim; and not assault or harm the victim) when the defendant is charged with any of the sex offenses or crimes against children specified in that section. Effective for offenses committed on or after December 1, 2007, S.L. 2007-172 (S 17) revises that section to *require* the judicial official to impose the indicated conditions; however, the judicial official may waive the “stay away” and “no communication” conditions if the judicial official makes written findings of fact that it is not in the best interest of the alleged victim that the condition be imposed.

Theft Offenses

Larceny changes. Effective for offenses committed on or after December 1, 2007, S.L. 2007-373 (S 1270) revises the offenses of receiving or possessing stolen goods in G.S. 14-71, creates a new felony offense of larceny from a merchant in G.S. 14-72.11, and creates new felony offenses involving “organized retail theft” in new Article 16A of G.S. Chapter 14 (G.S. 14-86.5 and 14-86.6).

Revised G.S. 14-71 provides that if a person knowingly receives or possesses property that was in the custody of a law enforcement agency and that was explicitly represented as stolen to the person by an agent of the law enforcement agency, the person is guilty of a Class H felony. Before this change, a person could not be convicted of receiving or possessing stolen goods because stolen goods that have been recovered by law enforcement (or that were never stolen in the first place) lose their status as “stolen” property and therefore did not satisfy the element of the offense requiring that the goods be stolen. A person could still have been convicted before this change of an attempt to receive or possess stolen goods, punishable under structured sentencing as a Class I felony (one class lower than the completed offense). *See State v. Hageman*, 307 N.C. 1 (1982) (finding that a defendant could be convicted of attempt to receive stolen property that had lost its status as stolen even though it was impossible for the defendant to have committed the completed crime of receiving stolen property).

New G.S. 14-72.11 makes it a Class H felony for a person to commit larceny against a merchant in any of the following four circumstances:

1. When the property has a value of more than \$200, by using an exit door meeting the criteria in the new section
2. By removing, destroying, or deactivating a component of an antishoplifting or inventory control device
3. By affixing a product code for the purpose of fraudulently obtaining goods or merchandise at less than the actual price
4. When the property is infant formula as defined in 21 U.S.C. 321(z) and has a value of more than \$100.

New G.S. 14-86.6 creates two new felony offenses under the general rubric of “organized retail theft.” G.S. 14-86.6(a)(1) makes it a Class H felony for a person to

- conspire with another person
- to commit theft of retail property from a retail establishment
- with a value of more than \$1,500 aggregated over a ninety-day period
- with the intent to sell that retail property for monetary or other gain and
- take or cause that retail property to be placed in the control of a retail property fence or other person in exchange for consideration.

G.S. 14-86.6(a)(2) makes it a Class H felony for a person to

- receive or possess retail property
- that has been taken or stolen in violation of G.S. 14-86.6(a)(1)
- knowing or having reasonable grounds to believe the property is stolen.

G.S. 14-86.6(b) provides that an interest acquired or maintained in violation of the new statute is subject to forfeiture as provided in G.S. 18B-504.

Chop shops. Effective for offenses committed on or after December 1, 2007, S.L. 2007-178 (H 1354) creates four new offenses involving “chop shop” activities. Under new G.S. 14-72.7, a person is guilty of a Class H felony if he or she knowingly does any of the following:

1. Alters, destroys, dismantles, or stores a motor vehicle or motor vehicle part that the person knows to be illegally obtained.
2. Permits a place to be used for activity prohibited by G.S. 14-72.7 if the person owns or has legal possession of the place and knows the place is being used for a prohibited activity.
3. Purchases, disposes of, sells, receives, or possesses a motor vehicle or part knowing that the vehicle identification number has been altered, counterfeited, destroyed, or removed.
4. Purchases, disposes of, sells, receives, or possesses a motor vehicle or part to or from a person engaging in an activity prohibited by G.S. 14-72.7 knowing that the person is engaging in that activity.

The statute identifies certain activities as “innocent” and exempt from the statute, such as purchasing a vehicle in good faith and without knowledge of previous illegal activity.

G.S. 14-72.7 provides the following additional remedies for violations. First, it authorizes the criminal court to assess a civil penalty, in addition to or in lieu of a fine, of up to three times the assets obtained by the defendant as a result of the violation, to be remitted to the Civil Penalty and Forfeiture Fund in Article 31A of G.S. Chapter 115C. [Penalties remitted to that fund are distributed on a pro rata basis to public schools throughout North Carolina, while criminal fines go to the public schools in the county in which the violation occurred. *See generally North Carolina School Boards Ass’n v. Moore*, 359 N.C. 474 (2005).] Second, a person aggrieved by a violation may file a civil action for damages. Third, any instrumentality used in a prohibited activity is subject to seizure and forfeiture under G.S. 14-86.1 (seizure and forfeiture cases involving larceny and similar crimes), and the real property used for a prohibited activity is subject to the abatement and forfeiture provisions in G.S. Chapter 19 (abatement of nuisances).

Food stamp fraud. Effective June 20, 2007, S.L. 2007-97 (S 836) renames the food stamp program to reflect the use of electronic benefit transfer cards. In several statutes, including the

statutes dealing with food stamp fraud (G.S. 108A-53 and 108A-53.1), the act replaces the term “food stamps” with “electronic food and nutrition benefits.” The act makes no substantive changes.

Offenses Related to Animals

Exceptions to prohibition on dog fighting and baiting. G.S. 14-362.2 prohibits dog fighting and baiting. Effective for offenses committed on or after December 1, 2007, S.L. 2007-180 (S 1424) provides that G.S. 14-362.2 does not prohibit the use of dogs in earthdog trials sponsored by entities that are approved by the Commissioner of Agriculture and meet standards that protect the health and safety of the dogs. (Earthdogs are terriers, dachshunds, and miniature schnauzers trained to hunt underground quarry, such as raccoons.) Effective July 5, 2007, S.L. 2007-181 (S 21) provides that G.S. 14-362.2 does not apply to the use of herding dogs engaged in the working of domesticated livestock for agricultural, entertainment, or sporting purposes.

Law enforcement agency animals and assistance animals. G.S. 14-163.1 has made it a crime to assault a law enforcement agency animal or assistance animal as defined in that section. The punishment depends on the seriousness of the assault. Effective for offenses committed on or after December 1, 2007, S.L. 2007-80 (S 34) adds a new subsection (a1) to that statute, making it a Class H felony for a person who knows or has reason to know that an animal is a law enforcement agency animal or assistance animal to willfully kill the animal. The act also adds G.S. 15A-1340.16(d) making it an aggravating factor at sentencing for a felony if the offense was committed against or proximately caused serious harm (as defined in G.S. 14-163.1) or death to a law enforcement agency animal or assistance animal (also defined in G.S. 14-163.1) while the animal was engaged in the performance of its duties.

Starvation and other animal cruelty changes. Effective for offenses committed on or after December 1, 2007, S.L. 2007-211 (H 995) adds G.S. 14-360(a1) to make it a Class A1 misdemeanor if a person

- maliciously
- kills or causes or procures to be killed
- any animal
- by intentional deprivation of necessary sustenance.

Effective July 11, 2007, the act also revises G.S. 14-360(c) to exempt from the animal cruelty statute the physical alteration of livestock or poultry for the purpose of conforming with breed or show standards.

Immunity for veterinarians who report animal cruelty. Effective October 1, 2007, S.L. 2007-232 (H 1359) adds G.S. 14-360.1 to give veterinarians immunity from civil liability, criminal liability, and professional disciplinary action for reporting animal cruelty, or for participating in an investigation or testifying in a judicial proceeding arising from a report of animal cruelty. The statute also provides that these actions are not in breach of any veterinarian-patient confidentiality. The statute’s protections do not apply if the veterinarian acted in bad faith or with a malicious purpose. The statute also provides that a failure to report animal cruelty is not grounds for disciplinary action.

Hunting offenses. Effective for offenses committed on or after October 1, 2007, S.L. 2007-96 (S 1246) adds G.S. 113-294(r) making it a Class 2 misdemeanor to place processed food products, as defined by that subsection, as bait in any area of the state where the Wildlife Resources Commission has established an open season for taking black bears. Effective for acts committed on or after October 1, 2007, S.L. 2007-401 (S 1464) amends G.S. 113-291.8(a) to require any person hunting deer during a deer firearms season to wear hunter orange, and amends G.S. 113-291.11 to prohibit intentionally feeding alligators outside of captivity.

Regulatory Offenses

Telephone Records Privacy Protection Act. Effective for offenses committed on or after December 1, 2007, S.L. 2007-374 (S 1058) enacts the Telephone Records Privacy Protection Act as new Article 19D of G.S. Chapter 14 (G.S. 14-113.30 through 14-113.33). G.S. 14-113.31 creates three different sets of violations:

1. Obtaining or attempting to obtain by any means a telephone record that pertains to a telephone service customer who is a resident of North Carolina without the customer's consent by doing certain acts, such as making a false statement to a representative of a telephone service provider or to a telephone service customer.
2. Knowingly purchasing, receiving, or soliciting another to purchase or receive a telephone record pertaining to a customer without prior authorization of the customer or if the purchaser knows or has reason to know that the record was obtained fraudulently.
3. Selling or offering to sell a telephone record that was obtained without the customer's prior consent or if the person knows or has reason to know that the telephone record was obtained fraudulently.

G.S. 14-113.33 makes all of the above violations Class H felonies. It allows a criminal proceeding to be brought in the county where the customer resides, where the defendant resides, or where any part of the offense took place, or in any other county instrumental to the completion of the offense, regardless of whether the defendant was ever present in that county. It also provides that a violation is a violation of G.S. 75-1.1 (unfair or deceptive acts or practices affecting commerce) and allows a customer to obtain damages in a civil suit in the circumstances specified.

Mortgage fraud. Effective for offenses committed on or after December 1, 2007, S.L. 2007-163 (H 817) enacts the Residential Mortgage Fraud Act as new Article 20A of G.S. Chapter 14. The act creates four separate offenses in G.S. 14-118.12. A person is guilty of residential mortgage fraud when, for financial gain and with the intent to defraud, he or she does any of the following:

1. Knowingly makes or attempts to make a material misstatement in the mortgage lending process with the intent that others involved in the process (such as a lender or borrower) rely on it.
2. Knowingly uses or attempts to use any misstatement in the mortgage lending process with the intent that others involved in the process rely on it.
3. Receives or attempts to receive any funds in connection with a residential mortgage closing that the person knew or should have known resulted from a violation in 1. or 2., above.
4. Conspires with or solicits another to violate 1., 2., or 3., above.

Under new G.S. 14-118.15, a violation involving a single mortgage loan is a Class H felony, and a violation involving a pattern of residential mortgage fraud (as defined in G.S. 14-118.11) is a Class E felony. Under G.S. 14-118.6, all real and personal property used or derived from a violation is subject to forfeiture as provided in G.S. 14-2.3 (forfeiture of gain acquired through felony) and G.S. 14-7.20 (forfeiture involving continuing criminal enterprise). The forfeiture provision provides exceptions for a lender who has obtained a security interest in the property in good faith or an owner who has made a bona fide purchase of the property. G.S. 14-118.16 also provides that the court may order restitution to any person who suffered a financial loss as a result of a violation. Venue for prosecution of a violation is as provided in new G.S. 14-118.13.

Rate evasion fraud. Effective for applications for motor vehicle insurance made on or after January 1, 2008, S.L. 2007-443 (H 729) creates the offense of rate evasion fraud. Under new G.S. 58-2-164, it is a Class 3 misdemeanor for any person, with intent to deceive an insurer, to present or cause to be presented a written or oral statement in support of an application for auto insurance or vehicle registration knowing that the application contains false or misleading information that states the applicant is an eligible risk when the applicant is not. Assisting, abetting, soliciting, or conspiring with a person to prepare or make such a statement is also a Class 3 misdemeanor. A violation is punishable by a fine of up to \$1,000. New G.S. 58-2-164(h) provides further that in a civil suit based on a claim for which a person has been convicted of the new offense, the conviction may be entered into evidence against the defendant and establishes the defendant's liability as a matter of law for any damages, fees, or costs that may be proved and allowed.

Pawnbrokers. G.S. Chapter 91A regulates pawnbrokers. Effective for goods pawned on or after October 1, 2007, S.L. 2007-415 (S 806) amends G.S. 91A-10 to prohibit a pawnbroker from selling, exchanging, bartering, or removing pawned goods before the earlier of seven days after the date the transaction is electronically reported to the sheriff of the county or chief of police of the municipality or thirty days after the transaction, except in certain circumstances. Previously, the pawnbroker had to hold the goods for forty-eight hours.

Offenses by accountants. Effective for offenses committed on or after December 1, 2007, S.L. 2007-83 (S 777) revises G.S. 93-13 to increase the punishment for violations of certain accounting laws (G.S. 93-3, 93-4, 93-5, 93-6, and 93-8) from a Class 3 misdemeanor, punishable by a fine only from \$100 to \$1000, to a Class 1 misdemeanor.

Dealing in regulated metals. Effective for offenses committed on or after December 1, 2007, S.L. 2007-301 (H 367) revises the obligations of secondary metals recyclers in dealing with regulated metals. Revised G.S. 66-11 imposes additional record-keeping requirements, limitations on purchases or receipt of regulated metals, and retention periods before sale or alteration of regulated metals by a person who has previously been convicted of certain violations. A first violation of G.S. 66-11 remains a Class 1 misdemeanor. A subsequent violation is a Class I felony. The act also adds G.S. 66-11.2 providing for the forfeiture of vehicles used or intended for use in conveying, transporting, or facilitating the conveyance or transportation of unlawfully obtained regulated metals.

Law practice. G.S. 84-2 has prohibited various court personnel, such as judges, full-time district attorneys, public defenders, and clerks, from engaging in the private practice of law. A violation is a Class 3 misdemeanor, punishable by a fine only of \$200. Effective for offenses committed on or after December 1, 2007, Section 28(a) of S.L. 2007-484 (S 613) revises that statute to prohibit magistrates, whether full-time or part-time, from engaging in the private practice of law.

Motor Vehicles

The General Assembly passed numerous bills during the 2007 legislative session dealing with motor vehicles. Those bills are analyzed in Shea Riggsbee Denning, *Motor Vehicles*, in the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2007, which may be viewed online at www.sog.unc.edu/pubs/nclegis/nclegis2007/21%20Motor%20Vehicles.pdf. The principal motor vehicle bills that may be of interest to those who work in the criminal justice system are:

- S.L. 2007-165 (S 1290), which addresses the use of equipment designed to monitor a defendant's sweat for the presence of alcohol (continuous alcohol monitoring devices).

- S.L. 2007-260 (S 1359), which gives a motorcyclist a defense to running a red light in specified circumstances.
- S.L. 2007-261 (H 183), which prohibits a person from using a cell phone while operating a school bus.
- S.L. 2007-380 (S 925), which deals with speeding offenses, including the circumstances in which a person may receive a prayer for judgment continued or lesser offense of improper equipment when charged with speeding in excess of 25 miles per hour or more over the posted speed limit.
- S.L. 2007-293 (S 758), which authorizes a limited driving privilege for individuals convicted of certain driving while license revoked offenses.
- S.L. 2007-382 (S 924), which revises the elements of the offense of passing a stopped school bus by, among other things, eliminating the requirement for the felony offense of passing a stopped school bus and striking a person that the driver cause serious bodily injury to the person struck.
- S.L. 2007-455 (H 976), which revises the definition of a public vehicular area within or leading to a gated community.
- S.L. 2007 493 (S 999), which makes a number of changes to the Motor Vehicle Driver Protection Act of 2006, which was a comprehensive re-write of North Carolina's impaired driving laws.

Other Criminal Offenses

Audiovisual recordings of motion pictures. Effective for offenses committed on or after December 1, 2007, S.L. 2007-463 (H 1094) modifies the punishments for the unauthorized copying of motion pictures. G.S. 14-440.1(b) has prohibited the use of an audiovisual recording device to transmit, record, or copy a motion picture without the theater owner's consent. Revised G.S. 14-440.1(c) will make such a violation a Class I felony, with a minimum fine of \$2,500 for a first offense and a minimum fine of \$5,000 for a second or subsequent offense. Under new G.S. 14-440.1(a1), it will be a Class 1 misdemeanor to use a photographic camera to record, copy, or transmit a part of a motion picture not greater than one image without the written consent of the motion picture theater owner. The forfeiture provisions in G.S. 14-440.1(c) apply to both felony and misdemeanor offenses under G.S. 14-440.1.

Pyrotechnics. G.S. 14-410(a) has allowed boards of county commissioners to issue permits for the use of pyrotechnics, which otherwise would be prohibited, at public exhibitions. Effective May 11, 2007, S.L. 2007-38 (H 189) modifies G.S. 14-410(a) and 14-413 to allow a board of county commissioners to authorize the governing body of any city in the county to issue permits for the use of pyrotechnics at public exhibitions. All local acts granting such authority to a city expire one year after the effective date of S.L. 2007-38.

Desecration of graves. G.S. 14-148 and 14-149 address offenses involving damage to graves. Effective for offenses committed on or after December 1, 2007, S.L. 2007-122 (H 105) reorganizes those two sections, clarifies the offenses that they cover, and modifies the punishment for some of the offenses. The distinguishing element of each offense is italicized below.

Under revised G.S. 14-148, it is a Class 1 misdemeanor to willfully do any of the following if the damage is less than \$1,000, and a Class I felony if the damage is more than \$1,000:

1. Throw, place, or put *refuse, garbage, or trash* in or on a cemetery.

2. Take away, disturb, vandalize, destroy, or change the location of any *stone, brick, iron, or other material or fence enclosing a cemetery* without authorization of law or consent of the surviving spouse or next of kin.
3. Take away, disturb, vandalize, destroy, or tamper with *shrubbery, flowers, plants, or other articles* planted or placed within a cemetery without authorization of law or consent of the surviving spouse or next of kin.

Under G.S. 14-149(a), it is a Class I felony, regardless of the monetary value of any damage, to knowingly and willfully do any of the following without authorization of law or consent of the surviving spouse or next of kin:

1. Open, disturb, destroy, remove, vandalize, or desecrate a *casket or other repository of human remains*.
2. Take away, disturb, vandalize, destroy, tamper with, or deface a *tombstone, headstone, monument, grave marker, grave ornamentation, or grave artifact* erected or placed within a cemetery.

Last, under G.S. 14-149(a1), it is a Class H felony to knowingly and willfully disturb, destroy, remove, vandalize, or desecrate any **human remains interred in a cemetery** without authorization of law or the consent of the surviving spouse or next of kin.

Assault on patient. Effective for offenses committed on or after December 1, 2007, S.L. 2007-188 (H 554) revises G.S. 14-32.2(b)(4) to increase from a Class A1 misdemeanor to a Class H felony the offense of patient abuse in violation of G.S. 14-32.2(a) if the conduct causes bodily injury or death. All violations of G.S. 14-32.2 are now felonies.

False report of mass violence at school. Effective for offenses committed on or after December 1, 2007, S.L. 2007-196 (H 1347) adds new G.S. 14-277.5 making it a Class H felony for a person to:

- By any means of communication
- To any person or groups of persons
- Make a report
- That an act of mass violence (as defined in the new statute) is going to occur either
 - On educational property (as defined in G.S. 14-269.2) or
 - At a curricular or extracurricular activity sponsored by a school (also defined in G.S. 14-269.2)
- Knowing or having reason to know the report is false.

G.S. 14-277.5(c) authorizes the court to order a person convicted under the statute to pay restitution, including costs and consequential damages resulting from the disruption of normal activity on the premises.

Damage to wireless, cable telecommunications, telephone, and electric-power equipment. G.S. 14-154 has prohibited a person from damaging any telegraph, telephone, or electric-power-transmission pole, wire, insulator, or other fixture or apparatus attached to a telegraph, telephone, or electric-power-transmission line. Effective for offenses committed on or after December 1, 2007, S.L. 2007-301 revises that section to expand its coverage to cable telecommunications and wireless communications equipment. The revised section also specifies in more detail the types of equipment covered, such as insulators, transformers, and transmission equipment. A violation related to any covered device is raised from a Class 1 misdemeanor to a Class I felony.

Demonstrations on roads or highways. Effective for offenses committed on or after August 17, 2007, S.L. 2007-360 (H 563) adds G.S. 20-174.2 authorizing municipalities and counties to adopt

ordinances regulating the time, place, and manner of gatherings, picket lines, or protests by pedestrians on state roadways and highways.

Misuse of 911 system. Effective for offenses committed on or after January 1, 2008, Section 1(b) of S.L. 2007-383 (H 1755) adds new G.S. 14-111.4 creating two offenses involving misuse of the 911 system. A person is guilty of a Class 3 misdemeanor if he or she

- is not seeking public safety assistance, providing 911 service, or responding to a 911 call and
- knowingly accesses or attempts to access the 911 system
- For a purpose other than an emergency communication.

A person is guilty of a Class 1 misdemeanor if he or she

- knowingly accesses or attempts to access the 911 system
- for the purpose of avoiding a charge for voice communications service (as defined in new G.S. 62A-40) and
- the value of the charge exceeds \$100.

The new offenses are part of a much larger act reorganizing the administration of the state's 911 system.

Law Enforcement

Jurisdiction of law enforcement officers. G.S. 15A-402(e) provides that county law enforcement officers may arrest a person anywhere in North Carolina when the arrest is for a felony committed within the officer's territorial jurisdiction (that is, the officer's county or property owned by the county). Effective May 16, 2007, S.L. 2007-45 (H 343) revises G.S. 15A-402(e) to provide that county law enforcement officers include officers of consolidated county-city law enforcement agencies—for example, officers of the Charlotte-Mecklenburg Police Department.

Investigations of use of deadly force by law enforcement officers. Effective for acts occurring on or after October 1, 2007, S.L. 2007-129 (H 1617) adds G.S. 147-90 to provide that when a law enforcement officer kills a private citizen with a firearm in the line of duty, the district attorney in the prosecutorial district in which the death occurred must request the SBI to investigate the incident if the surviving spouse or next of kin so requests within 180 days after the death. New G.S. 147-90 provides that statements prepared by or on behalf of a district attorney are not public records under G.S. 132-1 and may be released by the district attorney only "as provided by G.S. 132-1.4 or other applicable law." [G.S. 132-1.4(g) and (h) indicate that records that are not public records are subject to disclosure under G.S. Chapter 15A, which includes the criminal discovery statutes.]

Fingerprinting and photographing for offenses involving impaired driving, driving while license revoked for impaired driving, and other Chapter 20 violations. G.S. 15A-502 identifies the circumstances in which a law enforcement agency may and must fingerprint and photograph a person upon arrest. Effective for offenses committed on or after October 1, 2007, S.L. 2007-370 (S 1211) revises G.S. 15A-502 to require the arresting law enforcement agency to fingerprint and photograph a person charged with an offense involving impaired driving [as defined in G.S. 20-4.01(24a)] or driving while license revoked for an impaired driving revocation (as defined in G.S. 20-28.2) if the person arrested cannot be identified by a valid form of identification.

G.S. 15A-502(b) forbids the taking of photographs or fingerprints when the charged offense is a Class 2 or 3 misdemeanor under G.S. Chapter 20. Effective for offenses and violations committed

on or after December 1, 2007, S.L. 2007-534 (H 454) revises that subsection to allow law enforcement to take a photograph of a person who operates a motor vehicle on a street or highway if the person is cited by a law enforcement officer for a motor vehicle moving violation, the person does not produce a valid driver's license, and the officer has a reasonable suspicion concerning the true identity of the person. The revised subsection states that it does not authorize a photograph for offenses listed in the third paragraph of G.S. 20-16(c) for which no points are assessed or for equipment violations specified in G.S. Chapter 20, Article 3, Part 9. New G.S. 15A-502(b1) details how photographs are to be taken and retained—for example, the photograph may be taken of the driver only and must be destroyed after disposition of the charge.

Bail Bonds

The General Assembly made a number of changes in pretrial release conditions for specific offenses—domestic violence, methamphetamine offenses, and offenses of a sexual nature and against children. Those changes are discussed in the pertinent parts of this bulletin discussing those offenses. The provisions below apply to bail bonds and bail bondsmen.

Bond forfeitures. When a defendant fails to appear for trial and the court enters an order forfeiting the security posted to assure the defendant's appearance, the surety (bail bondsman) or defendant may move to set aside the forfeiture for the reasons described in G.S. 15A-544.5(b). Subdivision (b)(6) of that statute has required that a forfeiture be set aside if the defendant was incarcerated in a state or federal prison in North Carolina at the time of the failure to appear. Effective for forfeitures entered on or after October 1, 2007, S.L. 2007-105 (S 880) revises that provision to allow proof by electronic records of the defendant's incarceration. It also expands the grounds for setting aside a forfeiture by adding new G.S. 15A-544.5(b)(7), which requires that a forfeiture be set aside if the defendant was incarcerated in a local, state, or federal jail, prison, or detention center anywhere within the United States at the time of the failure to appear—that is, when the defendant is incarcerated in places other than a state or federal prison in North Carolina. The district attorney for the county in which the charges are pending must be given notice as provided in new subdivision (b)(7). The act also adds G.S. 15A-544.5(d)(8) to authorize the court to impose monetary sanctions against a surety for submitting fraudulent documentation in support of a motion to set aside a forfeiture or for intentionally failing to attach the required documentation.

Circumstances under which surety is not required to return bail bond premium. G.S. 58-71-20 requires the surety on a bail bond to return the full premium on the bond when the surety surrenders the defendant before there has been a breach of the bond (a failure to appear by the defendant). The statute allows the defendant to be surrendered without returning the premium in certain circumstances. Effective August 21, 2007, S.L. 2007-399 (S 1327) amends G.S. 58-71-20 to add two more exceptions to the requirement that the premium be returned—(1) when the defendant fails to disclose information or provides false information regarding any previous failure to appear, any felony conviction within the past ten years, or any pending criminal charges; or (2) when the defendant knowingly provides the surety with incorrect personal identification or uses a false name or alias.

Requirements for licensure as bail bondsmen and runners. Effective for applications for licensure on or after October 1, 2007, S.L. 2007-228 (S 881) revises G.S. 58-71-50(b) to require applicants for a license as a bail bondsman or runner to hold a valid North Carolina drivers license or identification card issued by the Division of Motor Vehicles. The act also requires that the applicant be a “resident” of North Carolina, defined in new G.S. 58-71-1(8a) as a person who has lived in North Carolina for

at least six consecutive months before applying for licensure. In applying for licensure, the applicant must present at least two of the types of documentation of residency specified in G.S. 58-71-50(c)—for example, a utility bill showing the applicant’s residential address or a written lease agreement for a residence in North Carolina.

Sentencing and Other Consequences

No death penalty for person under 18. In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court held that it was unconstitutional to put a person to death for a crime committed when the person was under the age of eighteen. North Carolina law has barred the execution of a person under the age of seventeen at the time of the crime except in specified circumstances. Effective June 14, 2007, S.L. 2007-81 (H 784) revises the applicable statute, G.S. 14-17, to conform with *Roper* and bar execution of a person under the age of eighteen in all circumstances.

New aggravating factor in felony sentencing. See Offenses Related to Animals (law enforcement agency animals and assistance animals), above.

Parole review of inmates sentenced before structured sentencing. Consistent with provisions enacted during the 2005 and 2006 legislative sessions, the General Assembly during the 2007 session directed the Post-Release Supervision and Parole Commission to analyze the amount of time served by each inmate eligible for parole on or before July 1, 2008, compared to the time served by offenders for comparable offenses governed by structured sentencing. The Commission must report the results of its review by April 1, 2008, to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and to the Chairs of the Senate and House Appropriations Committees and Appropriations Subcommittees on Justice and Public Safety. See Section 17.11 of S.L. 2007-323 (H 1473).

Expunction of civil revocation of drivers license. G.S. 15A-145 and 15A-146 have allowed a person to obtain an expunction of a conviction or a dismissal of criminal charges in certain circumstances. Effective October 1, 2007, S.L. 2007-509 (S 301) amends those statutes to provide that if the court orders an expunction of a conviction or dismissal, it also must order expunction of any civil revocation of a driver’s license as the result of the criminal charge. The revised statutes provide that these new expunction provisions do not apply to civil or criminal charges based on the civil revocation or to civil revocations under G.S. 20-16.2, which deals with revocations of a driver’s license for impaired driving and certain other alcohol-related offenses. The act also directs the Administrative Office of the Courts (AOC), in consultation with the Division of Motor Vehicles (DMV), to review any offenses expunged pursuant to G.S. 15A-145 and 15A-146 before October 1, 2007. If the expunged offense resulted in a civil driver’s license revocation and that revocation would be subject to expunction under revised G.S. 15-145 or 15A-146, the AOC must expunge the revocation from the court records and notify DMV to expunge the revocation from its records.

Costs and fines. Section 30.8 of S.L. 2007-323 (H 1473) revised G.S. 7A-304(a) to increase costs in criminal cases by \$10. The revised section also imposes a \$100 charge if a defendant fails to appear to answer the charges against him or her, subject to the exceptions indicated; previously, the charge was \$50 and only for failures to appear on motor vehicle offenses. The increases are effective August 1, 2007, as provided in Section 30.8(l) of that act.

Effective for cases adjudicated on or after August 1, 2007, Section 30.9 of the above act revised G.S. 7A-321 to authorize the Administrative Office of the Courts (AOC) to assess a collection assistance fee on amounts remaining unpaid by persons not sentenced to supervised probation if the

amount due remains unpaid for 30 days after the time allotted by the court. The fee may not exceed the average cost of collecting the debt or 20% of the amount past due, whichever is less. The AOC may enter contracts with collection agencies to collect the past due amounts. If the AOC assesses such a fee or uses a collection agency, it may not also impose a collection fee under G.S. 115C-437 (which allows the costs of collection to be deducted from fines, penalties, and forfeitures remitted to school boards).

Access to social security number for recoupment of attorneys fees. G.S. 20-7(b2) provides that the social security number of an applicant for a driver's license is not a public record and may not be disclosed by DMV unless otherwise authorized. Effective July 20, 2007, S.L. 2007-249 (S 1287) revises that section to permit DMV to disclose to the Office of Indigent Defense Services (IDS) the social security number of a license applicant to verify the identity of a client who has received legal services at state expense and to enforce a court order to reimburse the state for those services. The form order for requiring repayment of attorneys fees requests the social security number of the client, but the number is sometimes omitted or is inaccurate, impeding the ability of IDS to recover attorneys fees.

Corrections. Legislation related to prisons and jails is discussed in James Markham, *Sentencing, Corrections, Prisons, and Jails*, in the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2007, which may be viewed online at www.sog.unc.edu/pubs/nclegis/nclegis2007/26%20Sentencing%20Corrections%20Prisons%20and%20Jails.pdf.

Forfeiture of pension benefits. Effective for offenses committed on or after July 1, 2007, S.L. 2007-179 (S 659) adds G.S. 135-75.1 providing for the forfeiture of retirement benefits by a justice, judge, district attorney, and superior court clerk upon conviction of certain felonies. For a discussion of this legislation, see James C. Drennan and Dona Lewandowski, *Courts and Civil Procedure*, in NORTH CAROLINA LEGISLATION 2007 (forthcoming), posted at www.sog.unc.edu/pubs/nclegis/nclegis2007/06%20Courts%20and%20Civil%20Procedure.pdf.

Criminal record checks. Effective July 8, 2007, S.L. 2007-189 (H 584) authorizes the Department of Justice to provide criminal history checks to the Office of Information Technology Services for employees and prospective employees; and effective October 1, 2007, S.L. 2007-516 (H 1659) authorizes the Department of Justice to provide criminal history checks to the Department of Public Instruction for employees, prospective employees, and independent contractors and their employees.

Immigration and Related Issues

Determination of immigration status of person jailed on felony or impaired driving charge.

Effective January 1, 2008, S.L. 2007-494 (S 229) adds new G.S. 162-62 to require the administrator of a jail or other detention facility to seek to determine whether a person who is in custody awaiting trial on a felony or impaired driving offense is a legal resident of the United States. Being charged with a criminal offense is generally not grounds for removal (deportation) of a person who is not a legal resident of the United States, but being present in the United States without proper authorization would be grounds for removal. The new statute directs the administrator or other person in charge of the facility to make this determination by inquiring of the prisoner, examining any relevant documents, or doing both. If the administrator cannot determine whether the prisoner is a legal resident of the United States, he or she must make a query through the Division of Criminal Information system to the Law Enforcement Support Center of Immigration and Customs Enforcement of the United States Department of Homeland Security.

The new statute does not describe the process for an administrator's questioning of prisoners about their immigration status. A person has a Fifth Amendment right not to answer questions that

may incriminate him or her and could lead to criminal prosecution. Because criminal penalties may be imposed for some immigration violations, including entering the U.S. without inspection (that is, entering the country illegally in violation of 8 U.S.C. § 1325), a prisoner would have the right to refuse to answer such questions. Because a prisoner is necessarily in custody, any information a prisoner provides in response to an administrator's inquiry may be inadmissible in any criminal proceeding unless the prisoner received *Miranda* warnings. A prisoner's response may be used in immigration proceedings, however, including proceedings to deport the person, because the courts have held that these proceedings are civil and a violation of *Miranda* does not require exclusion of the response in those proceedings. *See Busto-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990) (*Miranda* warnings are not required prior to questioning of person about information used to deport him or her because deportation proceedings are civil, not criminal, in nature; deportation proceedings still must conform to Due Process standards, and involuntary statements are inadmissible).

The new statute also states that it should not be construed as denying bond to a prisoner or to prevent a prisoner from being released from confinement when that prisoner is otherwise eligible for release. This provision affirms existing North Carolina and federal law. Under North Carolina law, a person arrested on criminal charges has the right to have pretrial release conditions set except in limited circumstances (for example, the person is charged with capital murder). Under federal law, Immigration and Customs Enforcement (ICE) may issue a detainer for a person held in a state detention facility awaiting trial, directing the facility to hold the person for up to forty-eight hours (excluding Saturdays, Sundays, and holidays) after the person meets the pretrial release conditions imposed by state authorities. *See* 8 C.F.R. 287.7. After forty-eight hours, the person must be released if he or she has met the pretrial release conditions and has not been picked up by ICE.

Protections for victims of human trafficking. Effective for offenses committed on or after December 1, 2007, S.L. 2007-547 (S 1079) amends G.S. 14-43.11 to provide that a victim of human trafficking who is not a legal resident of North Carolina is eligible for public benefits and services of any state agency if the victim otherwise qualifies for them. The act also adds G.S. 15A-832(h) to the Crime Victims' Rights Act to require the district attorney's office to notify the Office of Attorney General and Legal Aid of North Carolina when a person is a victim of human trafficking and is entitled to services under revised G.S. 14-43.11. (Revised G.S. 7A-474.2(1) and 7A-474.3 authorize Legal Aid to assist human trafficking victims in obtaining these services, and the 2007 appropriations act provides \$50,000 in nonrecurring funds for fiscal year 2007-08 for legal assistance for human trafficking victims. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Section I, Justice.) S.L. 2007-547 also amends G.S. 15A-830(7) to clarify that a victim of human trafficking is a "victim" within the meaning of the Crime Victims' Rights Act. Last, the act amends various provisions in G.S. Chapter 15C, the address confidentiality program, to cover victims of human trafficking.

Interpreters. Section 14.23 of S.L. 2007-323 amends G.S. 7A-314(f) to explicitly authorize courts to use foreign language interpreters, payable from funds appropriated to the Administrative Office of the Courts, when necessary in criminal or G.S. Chapter 50B cases to assist the court in the efficient transaction of business.

Duration of driver's license. Effective for driver's licenses issued or renewed on or after May 23, 2007, S.L. 2007-56 (S 1026) amends G.S. 20-7 to provide that the Division of Motor Vehicles (DMV) may issue a driver's license of shorter duration to applicants whose legal presence in the United States is of limited duration as demonstrated by valid documentation issued under the authority of the federal government. Licenses of limited duration must expire no later than the

authorization for the applicant's presence in the United States. Under amended G.S. 20-15, DMV has the authority to cancel a license if the licensee is no longer authorized under federal law to be present in the United States.

Funding for technical assistance and training. The 2007 appropriations act appropriates \$750,000 for fiscal year 2007–08 for a Governor's Crime Commission grant to the North Carolina Sheriff's Association for technical assistance and training associated with immigration enforcement. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Section I, Crime Control and Public Safety.

Juvenile Delinquency Proceedings

Legislation enacted by the General Assembly relating to juvenile delinquency proceedings is discussed in Janet Mason, *Children and Juvenile Law*, in the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2007, which may be viewed online at www.sog.unc.edu/pubs/nclegis/nclegis2007/04%20Children%20and%20Juvenile%20Law.pdf. The principal bills that may be of interest to those who work in the juvenile justice system are:

- S.L. 2007-100 (H 1243), which allows a juvenile to be physically restrained at a court hearing only if the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom.
- S.L. 2007-168 (H 1479), which establishes procedures to address contempt by juveniles.
- S.L. 2007-458 (H 1148), which addresses the disclosure of identifying information of juveniles who escape from custody.
- S.L. 2007-493 (S 999), which allows the court to order that a juvenile be placed in secure custody for a violation of G.S. 20-138.1 (impaired driving) or G.S. 20-138.3 (driving by person less than twenty-one years old after consuming alcohol or drugs) if the court finds a reasonable factual basis to believe the juvenile committed the alleged offense and the juvenile has demonstrated that he or she is a danger to persons.

Court Administration

Mediation in district criminal court cases. G.S. 7A-38.5 has directed chief district court judges and district attorneys to encourage mediation in district court criminal cases. Under that statute, community mediation centers (also known as dispute settlement centers or dispute resolution centers) have been authorized to receive referrals to mediate such cases. S.L. 2007-387 (S 728) continues to encourage, in new G.S. 7A-38.3D, the use of mediation in district court criminal cases. It provides, among other things, that prosecutors may delay prosecutions so that mediation may take place. It also directs community mediation centers to assist courts in administering mediation programs for district criminal court, to assist in screening and scheduling cases for mediation, and to provide certified mediators to conduct district court criminal mediations.

G.S. 7A-38.3D also seeks to standardize mediation practices. It directs the North Carolina Supreme Court to adopt rules for mediations in district court criminal cases, certification requirements for district court criminal mediators, requirements for training programs for mediators, and rules regulating the conduct of mediators and trainers of mediators. The act directs the Supreme Court to adopt rules for the certification of mediators by January 1, 2008, and provides that the act is effective

on or after the date the Supreme Court adopts such rules. In addition to the rules to be adopted by the Supreme Court, the new statute establishes some basic requirements for district court criminal mediations. Among other things, G.S. 7A-38.3D gives mediators the authority to permit or exclude any person from attending and participating in a mediation and allows lawyers for the participants to attend and participate; gives mediators judicial immunity; makes certain materials maintained by mediators and community mediation centers confidential, such as memoranda, work notes, and products of a mediator; provides that evidence of statements or conduct during a mediation are not subject to discovery and are not admissible in any proceeding in which the mediation arose, subject to certain exceptions; and precludes a mediator from being compelled to testify or produce evidence about the mediation, subject to certain exceptions (most significantly, in trials of a felony, the presiding judge may compel the disclosure of any evidence arising out of a mediation, other than a statement by the defendant, if the evidence is to be introduced at trial, the judge determines that introduction of the evidence is necessary to the proper administration of justice, and the evidence cannot be obtained from any other source).

Any agreement reached in a mediation must be reduced to writing under the new statute. When the agreement provides for dismissal of the case, the defendant must pay to the clerk the \$60 dismissal fee specified in G.S. 7A-38.7, unless the agreement provides for payment of the fee by another person or the judge waives the fee for good cause.

Other legislation relating to court administration. Other legislation relating to court administration is discussed in James C. Drennan and Dona Lewandowski, *Courts and Civil Procedure*, in the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2007, which may be viewed online at www.sog.unc.edu/pubs/nclegis/nclegis2007/06%20Courts%20and%20Civil%20Procedure.pdf.

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