

administration of justice

Number 2000/03 October 2000

Robert L. Farb, Editor

2000 LEGISLATION AFFECTING CRIMINAL LAW AND PROCEDURE

■ John Rubin

Indigent Defense 2
Criminal Procedure 4
Criminal Offenses 7
Motor Vehicles 12
Sentencing 14
Juveniles 15
Court Administration 15

The 2000 General Assembly made few substantive changes in the state's criminal law and procedure. Of the criminal legislation enacted, the most significant involved the legality of video poker machines and the procedure for forfeiture of bail bonds. The General Assembly did, however, reorganize a crucial part of the administration of the criminal justice system—indigent defense.

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.

Anyone may obtain a free copy of any bill by writing the Printed Bills Office, State Legislative Building, 16 West Jones Street, Raleigh, NC 27603, or by calling that office at (919) 733-5648. Copies of bills also may be obtained from the General Assembly's website, <http://www.ncga.state.nc.us/>.

Some of the material in this bulletin was drawn from the forthcoming Institute of Government publication NORTH CAROLINA LEGISLATION 2000, which may be viewed on the Institute's website at <http://ncinfo.iog.unc.edu/pubs/nclegis/nclegis2000/index.html>. That publication, as well as other bulletins on recent legislation, may be ordered from the Institute's publications office at (919) 966-4119.

John Rubin is an Institute of Government faculty member who specializes in criminal law and procedure.

Indigent Defense

S.L. 2000-144 (S 1323), the Indigent Defense Services Act of 2000, deals with the provision of legal services to indigent persons who are charged with crimes or who are otherwise entitled to legal assistance at state expense. It places the responsibility for managing indigent defense under a new statewide Office of Indigent Defense Services (Office). Most of the provisions governing the powers and duties of the Office appear in new Article 39B of Chapter 7A (G.S. 7A-498 through 7A-498.8). The act also makes numerous conforming changes to Chapters 7A and 15A as well as to other statutes on indigent representation.

The portions of the act establishing the Office became effective August 2, 2000, but the Office does not assume responsibility for providing indigent defense services until July 1, 2001. No rules, standards, or other regulations adopted by the Office concerning the delivery of such services take effect until the latter date. In the interim, the Office must develop procedures for the orderly transfer of authority over the program to the Office.

Background. With some modifications, the act adopts the recommendations of the Indigent Defense Study Commission (Study Commission), created in 1998 to consider ways to improve the management of funds being expended for representation of indigent defendants without compromising the quality of representation. The enabling legislation directed the Study Commission to consider a host of issues, including the procedures for determining indigency, the effectiveness and quality of different methods of providing legal representation (public defenders, appointed counsel, contract attorneys), the procedures for evaluating compensation requests by private counsel and expert witnesses, and the appropriateness of modifying the current management structure. *See* section 16.5, S.L. 1998-212 (S 1366), as amended by section 17.11, S.L. 1999-237 (H 168).

The Study Commission met several times during 1999 and 2000 and received information about the status of indigent defense programs, in North Carolina and nationally, from the Administrative Office of the Courts (AOC), the Legislative Fiscal Research Division, the Institute of Government, the directors of indigent defense programs in Minnesota and Kentucky, and an outside consultant funded through a grant to the American Bar Association from the U.S. Bureau of Justice Assistance.

The Study Commission concluded that the indigent defense program in North Carolina suffers from a lack of centralized planning, oversight, and

management. The Study Commission found that authority over the program is scattered among the AOC, the North Carolina State Bar, thirty-six local bar committees (coinciding with the thirty-six judicial districts), more than 300 judges acting in thousands of separate cases, and eleven independent public defenders. The Study Commission found that the program, which costs the state more than \$60 million per year, needed more management and recommended that the General Assembly establish the new statewide Office of Indigent Defense Services. The Study Commission did not make individual recommendations on the various issues identified by the General Assembly, concluding that the Office, assisted by professional staff, would be in the best position to address those issues. *See* Report and Recommendations of the Indigent Defense Study Commission, submitted to the North Carolina General Assembly May 1, 2000.

Purpose of legislation. New G.S. 7A-498.1 sets forth several goals for the Office. It states that the legislation's purpose is to:

- enhance the oversight of legal services provided at state expense;
- improve the quality of representation and ensure the independence of counsel;
- establish uniform policies and procedures for the delivery of services;
- generate reliable statistical information; and
- deliver services in an efficient, cost-effective manner without sacrificing the quality of representation.

Structure and authority of Office. G.S. 7A-498.2 describes the structure of the Office and its relationship to the AOC. The Office is administered by the Director of Indigent Defense Services (Director) and is governed by the Commission on Indigent Defense Services (Commission). The Office is established within the Judicial Department, and its budget is part of the Judicial Department's budget. The AOC provides administrative support to the Office, but the Office exercises its powers independently of the AOC and has final authority over budget and policy decisions.

The Office is responsible for providing legal representation in virtually all cases in which an indigent person is entitled to representation at state expense. The Office's jurisdiction, specified in new G.S. 7A-498.3, covers:

- cases in which an indigent person has a constitutional right to counsel;

- cases in which an indigent person is statutorily entitled to legal representation under G.S. 7A-451 and -451.1, the main statutes describing the right to counsel; and
- any other cases in which the Office is designated by statute as responsible for providing legal representation.

In all of these cases, the Office is responsible for overseeing the delivery of legal services and allocating and dispersing funds appropriated by the General Assembly for such services.

Membership of Commission. The Commission on Indigent Defense Services, the governing body of the Office, consists of thirteen members appointed for staggered terms of four years by the Chief Justice, Governor, Speaker of the House, President Pro Tempore of the Senate, Public Defenders Association, and various bar groups (G.S. 7A-498.4). The Commission also has the responsibility of appointing three of its members.

Individuals appointed to the Commission must have significant experience in the defense of criminal or other cases under the Office's jurisdiction or must have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors, law enforcement officials, or judicial officials may serve on the Commission, except that the Chief Justice's appointee must be an active or former member of the judiciary and one of the Commission's appointees may be an active member of the judiciary. Active employees of the Office, including active public defenders, may not serve on the Commission; however, private attorneys who do appointed or contract work for the Office may be on the Commission. All members of the Commission may vote on matters coming before it, but the Commission must adopt rules with respect to voting on matters in which a member has or appears to have a financial or other personal interest.

Director and professional staff. The Director of Indigent Defense Services is appointed by the Commission for a term of four years and must be an attorney. The Director may be removed before the end of his or her term by a two-thirds vote of all Commission members (G.S. 7A-498.6). The 2000 Appropriations Act [S.L. 2000-67 (H 1840)] gives the Director an initial staff of four—a chief financial officer, information systems manager, research analyst, and administrative assistant. Funding for the Director and the administrative assistant positions begins November 1, 2000; funding for the other positions begins January 1, 2001.

Development of standards. One of the principal functions of the Office, acting through the Commission and Director, is to develop standards to ensure the quality of representation provided to indigent defendants. G.S. 7A-498.5(c) requires the Office to develop standards on, among other things:

- minimum qualifications for appointed counsel;
- caseloads for public defenders and appointed counsel;
- performance of public defenders and appointed counsel; and
- qualifications and performance of counsel in capital cases.

Methods of delivering services. Another key function of the Office is to determine the methods for providing legal representation in each district. The Office may choose to rely on appointed counsel on a case-by-case basis; enter into contracts with attorneys to handle a number of cases over a specified period of time; employ full-time or part-time public defenders to represent indigent defendants in a particular district or region; or use any combination of methods [G.S. 7A-498.5(d)].

In determining the method for delivering services, the Office is required to consult with the district bar and the judges of the district or districts under consideration and ensure that they have the opportunity to be significantly involved in the process. The Office also must solicit written comments and forward them to the members of the General Assembly who represent the affected districts and to other interested parties [G.S. 7A-498.5(e)]. Before the Office may establish or abolish a public defender office, a legislative act is required [G.S. 7A-498.7(a)].

Appointment and compensation of counsel. Under revised G.S. 7A-452, which governs the assignment of counsel in individual cases, the courts and the Office each have responsibilities. The court makes the initial determination of whether a person is indigent and is entitled to counsel at state expense. The Office is required to develop standards for determining indigency [G.S. 7A-498.5(c)(8)].

If the court finds in a non-capital case that a person is entitled to counsel, the court assigns counsel pursuant to rules adopted by the Office. If the court finds that a person is entitled to counsel in a capital case, the Office makes the assignment. When practicable, at least one member of each capital defense team must be a member of the bar in that division (G.S. 7A-452).

The Office is responsible for developing procedures for compensating appointed counsel, including rates of compensation, schedules of allowable expenses, and procedures for applying for and receiving compensation [G.S. 7A-498.5(f), 7A-458]. The Office is also responsible for developing procedures for compensating experts [G.S. 7A-458.5(f), 7A-454].

Public defender offices. The act repeals the provisions on public defenders in G.S. 7A-465 through 7A-471 but repeats many of those provisions in new G.S. 7A-498.7. For example, public defenders continue to be appointed by the senior resident superior court judge from a list of two to three attorneys nominated by the local bar. Public defender offices are subject to standards adopted by the Office, although day-to-day operation and administration is the responsibility of the public defender in charge of the office.

New G.S. 7A-498.8 deals with the office of appellate defender, which likewise is subject to the Office's oversight. That section repeats a number of provisions from the statutes governing the appellate defender's office (G.S. 7A-486 through 7A-486.7), which are repealed. A principal difference is that the head of the appellate defender's office is appointed by the Commission rather than by the Chief Justice.

Recoupment of counsel fees. Revised G.S. 7A-455 continues to require the court to enter judgment for the value of legal services rendered to an indigent person, whether by private counsel or public defender, if the indigent person is convicted. The Office is required to develop procedures for determining the value of services and entering judgment.

Counsel in noncriminal cases. The act amends numerous statutes dealing with the right to counsel in noncriminal cases, such as juvenile delinquency cases, parental termination hearings, and involuntary commitment proceedings. The changes make the delivery of services in these cases subject to the Office's oversight; they do not alter the extent of a person's right to counsel.

Criminal Procedure

Bail Bonds

Two chapters of the General Statutes deal with bail bonds—Chapter 15A on criminal procedure and Chapter 58 on insurance. S.L. 2000-133 (H 1607) rewrites statutes in both chapters to modify the procedures for forfeiture of bail bonds and certain other procedures. The act applies to bonds executed

and forfeiture proceedings initiated on or after January 1, 2001.

Definitions. The act begins with a rewrite of G.S. 15A-531, the definitions section of the bail article in Chapter 15A. A defendant who is obligated to appear in court on penalty of forfeiting bail is referred to as the "defendant" rather than the "principal." A person who writes bonds on behalf of an insurance company is referred to as a "bail agent" instead of a "surety bondsman." The definitions of "accommodation bondsman," "insurance company," "professional bondsman," and "surety bondsman," set forth in G.S. 58-71-1, are restated in G.S. 15A-531. An accommodation bondsman is a person who, for no consideration, acts as a surety for a defendant by promising to pay the amount of the bond in the event that the defendant fails to appear in court. An insurance company and a professional bondsman are two different types of commercial sureties—the first pledges the assets of the insurance company as security, the second pledges his or her own assets. A surety bondsman is any one of these three types of sureties.

The current provisions on cash bonds are carried over to new G.S. 15A-531(1c), which defines "bail bond" as an unsecured appearance bond, an appearance bond secured by a cash deposit in the full amount of the bond, an appearance bond secured by a mortgage, or an appearance bond secured by a surety. As under current law, a bond secured by a bail agent on behalf of an insurance company is considered the same as cash, while a bond secured by a professional bondsman is not. Cash bonds set in child support contempt proceedings may not be satisfied in any manner other than by the deposit of cash.

Identifying information on bond. New G.S. 15A-544.2 requires that the following information be entered on each bail bond: the name and mailing address of the defendant; name and address of any accommodation bondsman; name and license number of any professional bondsman and any runner executing a bond on a professional bondsman's behalf; and name of any insurance company and name, license number, and power of appointment number of any bail agent executing a bond on an insurance company's behalf. If a bail bond does not contain the required information, a defendant's release may be revoked.

Surrender of defendant by surety. The act rewrites the procedures in G.S. 15A-540 for the surrender of a defendant by a surety. It also rewrites G.S. 58-71-25, which contained somewhat different surrender procedures, to require that any surrender be in accordance with G.S. 15A-540.

Revised G.S. 15A-540(a) provides that if a defendant has not yet breached the conditions of a bail bond—that is, if he or she has not failed to appear in court as scheduled—a surety may surrender the defendant as provided in G.S. 58-71-20. That section specifies the locations where a surety may surrender the defendant and requires that the surety return the premium paid by the defendant except in certain circumstances. Upon application by the surety after surrender, the clerk must exonerate the surety from the bond—that is, relieve the surety of liability for any later failure to appear by the defendant.

Revised G.S. 15A-540(b) provides that after the defendant has breached the bond, a surety may arrest the defendant and surrender him or her to the sheriff of the county in which the defendant is bonded to appear or to the sheriff where the defendant was bonded. A surety also may surrender a defendant who is already in the sheriff's custody by appearing in person and informing the sheriff that the surety wishes to surrender the defendant.

Revised G.S. 15A-540(c) provides that when a defendant is surrendered by a surety after breach, the sheriff without unnecessary delay must take the defendant before a judicial official for the setting of new pretrial release conditions. The subsection also seeks to limit the discretion of judicial officials who initially re-set bonds when a surety surrenders the defendant after a failure to appear. It requires the judicial official (usually a magistrate) to impose any conditions set by the court in its order for arrest and further states that, if the issuing court has not set conditions, the magistrate must double the amount of the previous bond and require that it be secured. The magistrate also must indicate on the release order that the defendant was surrendered for failing to appear.

Entry and notice of forfeiture. Part 2 of Article 26 of Chapter 15A (15A-544.1 through 15A-544.8) sets forth the new procedures for forfeiture of bail bonds. G.S. 15A-544.3 authorizes the court, upon the defendant's failure to appear, to enter a forfeiture for the full amount of the bond. G.S. 15A-544.4 requires the court to notify the defendant and each surety of entry of forfeiture by first-class mail; the court also must mail a copy to any bail agent who executed the bond on behalf of an insurance company, though failure to do so does not affect the validity of notice given to the insurance company. Notice is effective when mailed, but if notice is not mailed within thirty days of entry of forfeiture, the forfeiture may not be converted to a final judgment and may not be enforced or reported to the Insurance Commissioner.

Grounds for setting aside forfeiture. Subject to certain time limits, described below, a forfeiture must

be set aside for any of the following reasons, which are set forth in G.S. 15A-544.5:

- the defendant's failure to appear has been set aside by the court and the order for arrest has been recalled;
- all charges for which the defendant was bonded to appear have been finally resolved other than by the state's taking of a voluntary dismissal with leave;
- the defendant has been surrendered by a surety as provided in G.S. 15A-540 (discussed above);
- the defendant has been served with the order for arrest for failing to appear;
- the defendant died before final judgment on the forfeiture; and
- the defendant was incarcerated in the Department of Correction or was in a unit of the Federal Bureau of Prisons within North Carolina at the time of the failure to appear.

Methods of setting aside forfeiture. The act provides for two methods of setting aside a forfeiture. First, G.S. 15A-544.5(c) provides that if the court enters an order striking a defendant's failure to appear and recalling an order for arrest, it may simultaneously enter an order setting aside any bond forfeiture. Unless the court orders otherwise, further appearances by the defendant continue to be secured by the same bail bond.

Second, G.S. 15A-544.5(d) establishes a motion procedure for setting aside a forfeiture if it has not been set aside under subsection (c), above. The defendant or surety has 150 days from the date on which notice of forfeiture was given to make a written motion to set aside the forfeiture. The motion must be filed with the superior court clerk of the county in which the forfeiture was entered and must be served on the district attorney for that county and the county board of education. If the district attorney or county board of education do not file written objections within ten days of service of the motion, the clerk must set aside the forfeiture. If written objections are filed, a hearing on the motion must be held in the trial division in which the defendant was bonded to appear. If the court allows the motion, the forfeiture is set aside. If the court does not set aside the forfeiture, it becomes a final judgment on the later of the date of the hearing or the date a forfeiture becomes final under G.S. 15A-544.6 (essentially, 150 days after notice of forfeiture was given). Thus if the court denies the motion on day 120, the forfeiture becomes final and subject to execution on day 150. If the motion is still pending on

day 150, the judgment does not become final until the court rules on the motion. Only one motion to set aside a particular forfeiture may be considered by the court [G.S. 15A-544.5(e)].

No more than two forfeitures may be set aside in any case if the surety or bail agent knew before executing the bond that the defendant had previously failed to appear two or more times [G.S. 15A-544(f)]. An order on a motion to set aside a forfeiture is a final judgment for purposes of appeal. Appeal is as in civil actions and, if properly filed, the court may stay the effectiveness of the forfeiture on conditions the court finds appropriate [G.S. 15A-544.5(h)].

Entry and execution of forfeiture judgment. On the 150th day following notice of forfeiture, a forfeiture automatically becomes a final judgment without further action of the court unless the court has set aside the forfeiture or a motion to set aside is still pending (G.S. 15A-544.6). Once a forfeiture becomes final, the superior court clerk must docket it as a civil judgment against the defendant and each surety and, like any civil judgment, it constitutes a lien against the real property of the defendant and surety. Under revised G.S. 24-5(a1), the judgment begins bearing interest on the date of docketing rather than on the date of entry. After docketing, the clerk must issue an execution on the judgment against the defendant and each accommodation and professional bondsman. If an insurance company or professional bondsman is named in the judgment, the clerk also must send a copy of the judgment to the Insurance Commissioner. Once a final judgment is docketed, a surety may not act as a surety on any other bail bond in that county until the judgment is satisfied in full.

Extraordinary relief. Under G.S. 15A-544.8, the court may grant a defendant or surety relief from a final judgment of forfeiture for one of the following two reasons:

- the person seeking relief was not given notice as required by G.S. 15A-544.4, discussed above; or
- other extraordinary circumstances exist that the court finds, in its discretion, warrant relief.

This section includes the procedure for motions for extraordinary relief, which must be filed within three years of the date the forfeiture judgment becomes final.

Other bail bond changes. A second act, S.L. 2000-180 (H 1608), makes various changes to the bail bond laws. The principal changes, which became effective on October 1, 2000, are as follows.

The act amends various sections of G.S. Chapter 58 to require persons licensed as bail bondsmen or runners to work under the supervision of an experienced bondsman for their first year. The act includes some exceptions to this requirement.

Amended G.S. 58-71-95(5) provides that a bail bondsman who, after final termination of liability on a bond, knowingly fails to return any collateral security that exceeds \$1,500 in value is guilty of a Class I felony (rather than a Class 1 misdemeanor under G.S. 58-71-185, which governs other violations of the bail bond article in Chapter 58).

Amended G.S. 58-71-100 provides that collateral security must be held in trust and that trust funds may not be commingled with other funds. If the collateral security is in the form of cash or a check, the bail bondsman must deposit it within two banking days in a separate, non-interest bearing trust account in a bank in North Carolina.

Other Procedural Changes

Traffic law enforcement statistics. Apparently concerned about possible racial profiling in the stopping of vehicles—that is, the stopping of vehicles based on the race or ethnicity of the drivers or passengers—the 1999 General Assembly amended G.S. 14-110 to require the Division of Criminal Statistics (Division) to collect information on traffic stops made by state law enforcement officers, such as the North Carolina State Highway Patrol [S.L. 1999-26 (S 76)]. Section 17.2 of S.L. 2000-67 (H 1840) further amends G.S. 14-110 to require the division, effective August 1, 2000, to keep the following additional information: the identity of the officer making the stop, the date the stop was made, the location of the stop, and the agency making the stop. The amended statute also provides that officers may be assigned anonymous identification numbers for record-keeping purposes and that their identity is not a public record and may not be disclosed unless a court finds that disclosure is necessary to resolve a claim or defense.

Concealed handgun permits. S.L. 2000-191 (H 1508) makes several minor changes to the statutes governing concealed handgun permits (G.S. 14-415.10 through 14-415.23). The act eliminates the fingerprinting requirement for renewal permits if the applicant's fingerprints are submitted to the State Bureau of Investigation (SBI) on the Automated Fingerprint Information System (AFIS) after June 30, 2001 (G.S. 14-415.16); it reduces the renewal fee from \$80 to \$75 [G.S. 14-415.19(a)]; it requires entities

presented with an original *or* photocopied release for records concerning an applicant's mental health or capacity to disclose such records to the sheriff [G.S. 14-415.14(c)]; and it provides that a concealed handgun permit is valid for five instead of four years [G.S. 14-415.11(b)]. All changes became effective July 1, 2000, except that the longer permit period applies only to permits issued or renewed on or after that date.

Reporting procedure for controlled substance taxes. Effective for arrests and seizures occurring on or after December 1, 2000, S.L. 2000-119 (H 1551) revises the reporting procedures to be followed by local and state law enforcement agencies in cases involving unauthorized substances. The act repeals G.S. 114-18.1, which required law enforcement agencies to submit unauthorized-substance reports to the SBI, and G.S. 114-19(b), which required the SBI to notify the Department of Revenue of the reports it received. The act replaces those provisions with G.S. 105-113.108(b), which requires local and state law enforcement agencies to report directly to the Department of Revenue.

The act also revises the circumstances under which law enforcement agencies must submit a report. G.S. 105-113.108(b) continues to require law enforcement agencies to submit a report within forty-eight hours of seizing certain unauthorized substances, or arresting an individual in possession of certain unauthorized substances, if a revenue stamp is not affixed to the substances. Removed from the list of substances for which a report is required are counterfeit controlled substances; this change conforms to a 1995 change repealing the tax on counterfeit controlled substances [S.L. 1995-340 (H 123)]. Added to the list of substances for which a report is required are any quantities of illicit mixed beverages, illicit spirituous liquor, and mash; this change conforms to a 1997 change imposing a tax on these substances [S.L. 1997-292 (H 754)].

Enforcement of other tax laws. G.S. 105-236.1 has allowed the Secretary of the Department of Revenue to appoint employees of the Unauthorized Substances Tax Division as revenue law enforcement officers and to authorize them to enforce the tax on controlled substances (discussed above). The statute also has allowed the Secretary to appoint employees of the Criminal Investigations Division (CID) as revenue law enforcement officers and to grant them the authority to enforce certain felony tax violations. For employees of either division to act in a law enforcement capacity, they must be certified as criminal justice officers under G.S. Chapter 17C.

Effective July 14, 2000, S.L. 2000-119 (H 1551) makes two changes to G.S. 105-236.1. First, it

authorizes CID employees appointed by the Secretary to enforce certain misdemeanor tax violations. Second, it authorizes the Secretary to administer the oath of office to revenue law enforcement officers.

Criminal Offenses

Video Poker

S.L. 2000-151 (S 1542) seeks to regulate the use of video poker and similar video gaming machines. The law forbids the operation of certain machines, limits the number of machines that may be used at any one location, prohibits their use by individuals under age eighteen, and imposes other restrictions. The law states that it does not preempt more restrictive local ordinances on video gaming machines [G.S. 14-306.1(j)].

Definition of video gaming machine. The definition of "video gaming machine" is critical to applying the new restrictions. The apparent intent of the act is to regulate certain types of video gaming machines—video poker, video bingo, and other video games that involve the random matching of symbols.

Two sections must be examined—G.S. 14-306, which defines "slot machine," and new G.S. 14-306.1(c), which defines "video gaming machine." Slot machines have been and continue to be unlawful unless they fall within an exception, while video gaming machines are subject to the new video gaming restrictions if not banned altogether as slot machines. Together these sections create three categories of machines—those that are always lawful, those that are always unlawful, and those that may or may not be lawful depending on the application of the new video gaming restrictions.

Lawful machines. In the "always lawful" category are those machines defined in G.S. 14-306(b)(1): coin-operated machines, video games, pinball machines, and other computer, electronic, or mechanical devices that (a) are played for amusement, (b) involve the use of skill or dexterity to solve problems or make varying scores, *and* (c) do not award free replays or coupons that may be redeemed for prizes or cash. These machines are (and in the past have been) excepted from the definition of slot machine in G.S. 14-306 and thus from the slot machine ban. They also are excepted from the definition of video gaming machine in new G.S. 14-306.1(c) and thus from the new video gaming restrictions. An example of such a game might be an air hockey game at a video arcade, which awards no replays and no coupons redeemable for prizes.

At least some of the machines defined in G.S. 14-306(b)(2) also may be placed in the “always lawful” category, but the statutes are not entirely clear on this point. G.S. 14-306(b)(2) covers the same machines as those covered by subsection (b)(1)—namely, ones that are played for amusement and that involve the use of skill or dexterity—except that under (b)(2) the machines may award free replays or coupons exchangeable for prizes and merchandise (but not cash) worth up to \$10. (The machines also must limit to eight the number of accumulated credits or replays that may be played at one time.) An example of such a machine might be a miniature basketball game that awards tickets, redeemable for small prizes, based on the number of shots made. These machines have been excepted from the definition of slot machine in G.S. 14-306 and so have been lawful in the past. Strictly read, however, the new definition of video gaming machine (discussed below) could be interpreted as making any machines covered by G.S. 14-306(b)(2) subject to the new video gaming restrictions, a result the General Assembly almost certainly did not intend.

Unlawful machines. In the “always unlawful” category are slot machines that do not come within either of the exceptions in G.S. 14-306(b)(1) and (2). According to previously issued opinions by the Attorney General’s office, video poker and similar games that do not exceed the replay and award restrictions are within the exception in G.S. 14-306(b)(2), and therefore are not illegal slot machines, because they involve the use of some skill and dexterity.

Two new subsections in G.S. 14-306 reinforce the prohibition on devices that exceed the replay or award restrictions. New subsection (c) provides that video machines within the exception in subsection (b)(2) must display the message that it is a criminal offense to pay more than that allowed by law. New subsection (d) states that the exception in subsection (b)(2) does not apply to machines that pay off in cash or that issue coupons exchangeable for cash or for merchandise worth more than \$10.

Operation of a prohibited slot machine, or possession of such a machine for the purpose of operation, remains a violation of G.S. 14-301, a Class 2 misdemeanor under G.S. 14-303. In contrast, violation of the new restrictions on operating video gaming machines, including those restrictions that regulate but do not ban operation of the machines, is at least a Class 1 misdemeanor and may be as high as a Class G felony under revised G.S. 14-309, discussed further below. G.S. 14-309 also governs the punishment for slot machine violations under G.S. 14-

304 and 14-305, which were Class 2 misdemeanors but now are subject to the higher punishments.

New G.S. 14-306(d) appears to increase the penalty for one other slot machine violation. Effective for offenses committed on or after October 1, 2000, that subsection makes it “a criminal offense, punishable under G.S. 14-309, for the person making the unlawful payout [of cash or merchandise worth over \$10] *to violate this section*” (emphasis added). The violation to which G.S. 14-306(d) refers is apparently the act of making an unlawful payout; G.S. 14-306, which is primarily a definitions section, does not prohibit any other activity.

Regulated machines. G.S. 14-306.1(c) contains four definitions of video gaming machine. It begins with the statement that a video gaming machine is a “slot machine” as defined in G.S. 14-306(a). This definition (definition number one) does not really aid in understanding what machines are subject to the new video gaming restrictions. New G.S. 14-306.1(c) states that the listing of games in that subsection does not make operation of those games lawful if they are otherwise prohibited by law [G.S. 14-306.1(l) states a similar rule]. Slot machines are prohibited altogether unless they fall within one of the two exceptions in G.S. 14-306(b).

G.S. 14-306.1(c) contains three additional definitions of video gaming machine, which apparently must be read together; otherwise, the new restrictions would appear to sweep too broadly. The subsection states that video gaming machines include any electrical, mechanical, or computer games, such as video poker, video bingo, video craps, and other video games that are based on the random matching of different symbols and that do not depend on the skill or dexterity of the player (definition number two). The subsection next states that a video gaming machine is a video machine that requires the deposit of any coin or token or the use of any credit card or other method that requires payment to activate play of the games listed in the subsection (definition number three). By its own terms, this definition modifies definition number two.

Last, the subsection states that video gaming machines include those within the exclusion in G.S. 14-306(b)(2) but not those within the exclusion in G.S. 14-306(b)(1) (machines that do not award replays or redeemable coupons). If read alone, this definition (definition number four) covers all of the video games in G.S. 14-306(b)(2), including previously lawful arcade games such as miniature basketball, and makes those games subject to the new video gaming restrictions, such as the prohibition on use of such games by any person under age 18. It seems highly

unlikely that the General Assembly intended this result. A more logical approach might be to read definition number four in conjunction with definitions two and three. One could then conclude that only those kinds of games listed in G.S. 14-306.1(c) that also fall within the exception in G.S. 14-306(b)(2) are subject to the video gaming restrictions. In other words, video poker and similar games would be subject to the video gaming restrictions, but other types of video arcade games would not.

Restrictions on video gaming machines. Except for two categories of offenses, the new regulations on video gaming machines apply to offenses committed on or after October 1, 2000.

G.S. 14-306.1(a), which bans “new” video gaming machines, is one of the provisions with an early effective date. It states that it is unlawful to operate, allow to be operated, place into operation, or possess for the purpose of operation any video gaming machine unless it was

- lawfully in operation and available for play in North Carolina on or before June 30, 2000, and
- listed in North Carolina by January 31, 2000, for ad valorem taxation for the 2000–01 tax year.

This provision is effective August 2, 2000. Thus, on or after that date, it is unlawful to operate any video gaming machines that do not meet the above criteria.

G.S. 14-306.1(h), which bans the warehousing of video gaming machines, is the other offense with an early effective date. It applies to offenses committed on or after September 1, 2000. The provision applies to the warehousing of all video gaming machines, newly or already in the state, except when the warehousing is in conjunction with the assembly, manufacture, and transportation of those machines as defined in subsection (g) of G.S. 14-306.1. That subsection provides that the various restrictions on video gaming machines do not apply to assemblers, manufacturers, and transporters of video gaming machines who assemble, manufacture, and transport them for sale in another state as long as the machines cannot be used to play the prohibited games while in North Carolina. Subsection (g) also exempts those who assemble, manufacture, and sell such machines for use by a federally recognized Indian tribe if such machines may be lawfully used under the Indian Gaming Regulatory Act.

The remaining prohibitions and restrictions apply to offenses committed on or after October 1, 2000. Subsection (b) of G.S. 14-306.1 provides that of those

video gaming machines that are lawful, it is unlawful to operate, allow to be operated, place into operation, or possess for the purpose of operation more than three machines at one location. Subsection (d) specifies the minimum distance between locations and requires that the machines be inside a permanent building.

Subsection (c1) prohibits any person under age eighteen from playing a video gaming machine. In contrast to the punishment for other violations, discussed below, this violation is an infraction, a non-criminal violation of law punishable under G.S. 14-3.1 by a maximum penalty of \$100. It is also unlawful for the operator of a video gaming machine to knowingly allow a person under age eighteen to play a video gaming machine. This violation is subject to greater punishments, described below.

Subsection (c2) makes it unlawful to operate or allow the operation of any video gaming machine from 2:00 A.M. Sunday to 7:00 A.M. Monday; subsection (c3) requires that the machines be in plain view; and subsection (c4) prohibits advertising of video gaming machines by on- or off-premises signs.

Registration and reporting requirements.

Subsection (e) of G.S. 14-306.1 provides that no later than October 1, 2000, the owner of any video gaming machine must register the machine with the sheriff of the county in which the machine is located (on a form provided by the sheriff). If the machine is moved to a different location, the owner must reregister the machine before it is placed in operation. The subsection also provides that a material false statement in the registration form subjects the machine to seizure under G.S. 14-298, discussed below.

Beginning with the first quarter of 2001, subsection (e1) requires the owner of a video gaming machine to file a quarterly report with the Department of Revenue disclosing the gross receipts per machine, number of machines per location, and total value of prizes awarded per machine. The first report is due April 15, 2001, and thereafter by the fifteenth day of the month after the quarter ends. A failure to report or the filing of a materially false report subjects the machine to seizure under G.S. 14-298. Upon request, the sheriff of the county where the machines are located may obtain a copy of the report from the Department of Revenue.

Punishments. G.S. 14-309 has made it a Class 2 misdemeanor to violate G.S. 14-304 through 14-309, which cover certain slot machine violations. The statute is revised to increase the punishment for violations of those statutes and to set the punishment for violations of the new video gaming restrictions in G.S. 14-306.1. Revised G.S. 14-309 makes a first offense a Class 1 misdemeanor, a second offense a

Class I felony, and a third or subsequent offense a Class H felony. If a violation of G.S. 14-306.1 involves the operation of five or more video gaming machines, the person is guilty of a Class G felony. These punishments apply to offenses committed on or after October 1, 2000, except for violations of G.S. 14-306.1(a), which bans operation of new video gaming machines. The increased punishments apply to violations of that subsection committed on or after August 2, 2000. G.S. 14-306.1(h), the ban on the warehousing of video gaming machines, is effective September 1, 2000, but the enhanced punishments apply only to violations of that section committed on or after October 1, 2000; for offenses committed on or after September 1 and before October 1, the punishment remains a Class 2 misdemeanor under the previous version of G.S. 14-309.

The revised statutes also impose other sanctions. G.S. 14-306.1(k) disqualifies a person from possessing a video gaming machine for varying lengths of time if convicted under G.S. 14-309. A person may not possess a video gaming machine for one year if he or she has been convicted once under G.S. 14-309, for two years if convicted twice, and indefinitely if convicted three or more times. The effective date of this provision is stated as October 1, 2000; presumably the penalties apply only to offenses committed on or after that date.

Also effective for offenses committed on or after October 1, 2000, new G.S. 14-306.2 provides that a violation of the video gaming restrictions by a person with an alcoholic beverage control (ABC) permit is a violation of the ABC laws. Such a violation may subject a permittee to administrative penalties, including suspension or revocation of an ABC permit.

Last, G.S. 14-298 is revised to authorize law enforcement officers to seize and destroy any video gaming machine whose use is prohibited by G.S. 14-306.1. Previously, the seizure provisions applied only to illegal slot machines and other illegal gambling devices.¹ The statute does not specify the procedure that law enforcement officers should follow before seizing and destroying a machine. Presumably officers should obtain a search warrant or other court order authorizing the action (G.S. 15-11.1 prescribes the procedure for seizure of evidence in criminal cases

1. Another section, G.S. 14-299, authorizes the seizure and forfeiture of money and other things of value exhibited for the purpose of allowing persons to bet on any game or used in the conduct of any such game. That section was not revised and, unlike G.S. 14-298, does not specifically refer to video gaming machines.

generally). Although the revisions were made effective August 2, 2000, law enforcement officers may not exercise the revised seizure authority until the new prohibitions become effective—August 2, 2000, for the ban on new machines; September 1, 2000, for the ban on warehousing; and October 1, 2000, for most other violations.

Other provisions. The North Carolina Sheriffs' Association, in consultation with the Division of Alcohol Law Enforcement and the Conference of District Attorneys, must report on enforcement of the new law no later than January 1, 2001, to the Joint Legislative Commission on Governmental Operations.

Other Criminal Offenses

Cyberstalking. In 1999 the General Assembly amended G.S. 14-196(a)(2), which had prohibited threatening telephonic communications, by specifically prohibiting telephonic or e-mail threats. The statute also was revised to prohibit threats to inflict bodily harm on a person's child, sibling, spouse, or dependent [S.L. 1999-262 (S 956)]. This session, in S.L. 2000-125 (H 813), the General Assembly deleted the reference to e-mail in G.S. 14-196(a)(2) and enacted a new statute, G.S. 14-196.3, prohibiting a wider range of electronic mail and electronic communications, referred to in the statute's title as "cyberstalking."

Effective for offenses committed on or after December 1, 2000, G.S. 14-196.3 makes it a Class 2 misdemeanor to do any of the following:

- Use electronic mail or other electronic communications to (a) threaten to inflict bodily harm to a person or that person's child, sibling, spouse, or dependent, (b) threaten injury to a person's property, or (c) extort money or other things of value.
- Repeatedly transmit electronic mail or other electronic communications to another person for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing.
- Knowingly make in electronic mail or other electronic communications to another person any false statement concerning death, injury, illness, disfigurement, indecent conduct, or criminal conduct of that person or any member of that person's family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass.
- Knowingly permit an electronic communication device under the person's

control to be used for any of the above purposes.

In addition to listing the prohibited acts, the new statute includes a definition of electronic mail and electronic communication; provides that an offense may be deemed to have been committed where the electronic mail or electronic communication was originally sent, originally received in this state, or first viewed in this state; and excludes any peaceful, nonviolent, or non-threatening activity intended to express political views, provide lawful information, or otherwise involve constitutionally protected speech.

Other computer crimes. Article 60 of Chapter 14 (G.S. 14-453 through 14-458) prohibits a variety of acts involving damage to or unauthorized accessing of computers. Effective for offenses committed on or after December 1, 2000, S.L. 2000-125 (H 813) revises these statutes to clarify that they apply to computer programs as well as to computers, computer systems, and computer networks. The act also incorporates in G.S. 14-453 (the definition section for Article 60) the definition of electronic mail from new G.S. 14-196.3, discussed above.

Trespassing on railroad. Effective for offenses committed on or after December 1, 2000, S.L. 2000-146 (S 1183) adds a new statute, G.S. 14-280.1, making it a Class 3 misdemeanor to trespass on a railroad right-of-way. A person is guilty of this offense if he or she

- enters and remains
- on a railroad right-of-way
- without the consent of the railroad company or person operating the railroad or without authority under state or federal law.

The statute does not apply to persons crossing a railroad right-of-way at a public or private crossing or at an abandoned railroad right-of-way.

Personal watercraft. G.S. 75A-13.3(e) has provided that certain maneuvers by a person operating a personal watercraft (a jet ski) constitute reckless operation of a vessel in violation of G.S. 75A-10(a), a Class 2 misdemeanor under G.S. 75A-18(b), which sets forth the punishment for violations of certain subsections of G.S. 75A-10. One such maneuver specified in G.S. 75A-13.3(e) has been operating a personal watercraft at greater than a no-wake speed within 100 feet of an anchored vessel, dock, marked swimming area, or other specified areas.

Effective for offenses committed on or after June 30, 2000, S.L. 2000-52 (H 541) deletes this prohibition from G.S. 75A-13.3(e) and restates it with some

modification in new subsection (a1) of G.S. 75A-13.3. This revision has two effects. First, although the new subsection continues the general prohibition on operating a personal watercraft at greater than a no-wake speed within 100 feet of the specified areas, it allows a personal watercraft to be operated at a greater speed at a distance as close as 50 feet of those areas while in a narrow channel (defined in new subsection (f1) as 300 feet or less in width). Second, the penalty for violating the speed and distance restrictions is apparently reduced to a Class 3 misdemeanor, punishable by a fine of up to \$250 only, because G.S. 75A-18(a) establishes this lower punishment for violations of G.S. Chapter 75A for which no punishment is otherwise specified.²

Controlled substance schedules. Effective for offenses committed on or after December 1, 2000, sections 92.2(a) through 92.2(c) of S.L. 2000-140 (S 1335) amend the controlled substance schedules by dropping gamma hydroxybutyric acid from the list of Schedule IV controlled substances in G.S. 90-92(a)(1) and adding that substance to the list of Schedule I controlled substances in G.S. 90-89(4). Offenses involving Schedule I controlled substances generally carry a greater punishment than offenses involving other controlled substances. The act designates the above substance as a Schedule III controlled substance if it is contained in a drug product that has been approved under the federal Food, Drug, and Cosmetic Act. The act also amends G.S. 90-95(d2) to add gamma -butyrolactone to the list of regulated precursor chemicals.

Violent habitual felons. Under G.S. 14-7.7 through 14-7.12, a person convicted for the third time of a violent felony must be sentenced to life without parole. "Violent felony" is defined in G.S. 14-7.7(b) as

- (1) any Class A through E felony;
- (2) any repealed or superseded offense substantially equivalent to the offenses in (1); or
- (3) any offense committed in another jurisdiction that is substantially equivalent to the offenses in (1).

2. Two local acts also affect personal watercraft and other vessels. Effective June 19, 2000, S.L. 2000-14 (H 1688) allows Currituck County to adopt ordinances regulating the operation of personal watercraft in the Atlantic Ocean and other waterways in and adjacent to the county; effective June 30, 2000, S.L. 2000-41 (H 1659) makes it a Class 3 misdemeanor to operate a vessel at greater than no-wake speed in certain waterways in Carteret County.

Effective for offenses committed on or after September 1, 2000, section 13 of S.L. 2000-155 (H 1499) revises subsection (3) to provide that out-of-state convictions must be substantially "similar," rather than substantially "equivalent," to the offenses in subsection (1). The wording of subsection (2) is unchanged.

Criminal record checks. S.L. 2000-154 (S 1192) creates three new Class A1 misdemeanors, the most serious class of misdemeanor. Effective for offenses committed on or after January 1, 2001, it is a Class A1 misdemeanor for applicants for certain jobs to willfully provide false information that is the basis of a criminal history record check. The act applies to applicants for certain jobs at: adult care homes [G.S. 131D-40(e)]; nursing homes or home care agencies [G.S. 131E-265(e)]; and mental health, developmental disabilities, and substance abuse services area authorities [G.S. 122C-80(f)]. The act also modifies the procedures for conducting such criminal history checks. A second act, S.L. 2000-138, sec. 6.4 (S 787), authorizes the Joint Legislative Health Care Oversight Committee to study the criminal background checks required for the adult care industry and the issue of establishing a list of mandatory disqualifying convictions. For a discussion of other mental health legislation, *see* Mark Ford Botts, *Mental Health and Related Laws, in* NORTH CAROLINA LEGISLATION 2000 (Institute of Government 2000) (available at <http://ncinfo.iog.unc.edu/pubs/nclegis/nclegis2000/index.html>).

Telephone solicitations. S.L. 2000-161 (H 1493) regulates telephone solicitations to residential telephone subscribers. Violations of the new restrictions, set forth in new G.S. 75-30.1, are not made criminal offenses; rather, the Attorney General may enforce the statute by seeking civil monetary penalties and injunctive relief.

Processing fee for worthless checks. G.S. 25-3-506 has allowed a person who receives a worthless check for goods or services to charge a processing fee of up to \$25 if the person has given the check writer notice of the potential fee by posting a sign or giving written notice in accordance with the requirements of that statute. The court may then impose this fee as part of the restitution required of a defendant convicted of writing a worthless check under G.S. 14-107. Effective for checks presented on or after October 1, 2000, S.L. 2000-118 (H 1021) eliminates the notice requirement as a precondition to imposition of the processing fee.

Collection of worthless checks without prosecution. In 1997 the General Assembly authorized pilot programs in selected counties for collecting worthless checks without criminal prosecution. Each year since 1997 the General Assembly has extended the program to additional counties. S.L. 2000-67, sec.

15.3A (H 1840) authorizes such programs in Cumberland, Edgecombe, Nash, Onslow, and Wilson counties (in addition to Brunswick, Bladen, Columbus, Durham, New Hanover, Pender, Rockingham, and Wake counties).

To participate in the program, the "check passer" must meet the criteria established by the local district attorney and must pay a fee of \$50. A participating check passer may not be prosecuted if he or she makes restitution to the "check taker" for the amount of the check, any service charges imposed by a bank on the check taker for processing of the check, and any processing fees imposed by the check taker under G.S. 25-3-506.

Motor Vehicles

Alcohol-Related Violations

The Governor's DWI Task Force again proposed legislation to modify the laws on impaired driving and other alcohol-related violations involving motor vehicles. The changes all appear in S.L. 2000-155 (H 1499) and, except as noted, apply to offenses committed on or after September 1, 2000.

Open containers. North Carolina has several laws dealing with open containers of alcohol in motor vehicles. Under G.S. 18B-401, it is unlawful for a person to transport an open container of fortified wine or spirituous liquor (distilled spirits such as whiskey or gin) in the passenger area of a motor vehicle. It is also unlawful under that section for a person to drive a motor vehicle while consuming any malt beverage (beer) or unfortified wine. G.S. 20-138.7, enacted in 1995, makes it unlawful for a person who has any alcohol in his or her system to drive a vehicle if there is an open container of alcohol (beer, wine, or spirituous liquor) in the passenger area. It has been permissible, however, to have open containers of beer or unfortified wine in the passenger area and for passengers to consume those beverages as long as the driver has no alcohol in his or her system.

S.L. 2000-155 narrows that exception further but does not completely eliminate it. The change was sparked in part by federal law (23 U.S.C. § 154), which requires as a condition of receipt of some federal highway construction funds that states prohibit the possession of open containers of alcohol and the consumption of alcohol in motor vehicles on highways.

Under new G.S. 20-138.7(a1), no person may possess an open container of alcohol (beer, wine, or spirituous liquor) or consume alcohol in the passenger

area of a motor vehicle while the vehicle is on a highway or highway right-of-way. Revised G.S. 20-138.7(e) makes the violation an infraction and also states that the violation is not a moving violation for the purpose of assessing driver's license points.

Several qualifications either are explicitly stated or are implicit in the new law. First, it only applies to vehicles on highways, not to vehicles in public vehicular areas such as parking lots [G.S. 20-138.7(a1)]. Second, only the person who possesses or consumes an alcoholic beverage may be charged with a violation of the new law; the driver is not automatically responsible for the violation [G.S. 20-138.7(a1)]. Third, only motor vehicles required to be registered with the Division of Motor Vehicles (DMV) are subject to the law; other types of vehicles (such as some farm vehicles or golf carts that use a highway only to cross it to reach another part of a golf course) are not covered [G.S. 20-138.7(a3)]. Fourth, the new law does not apply to motor vehicles used primarily for transportation for compensation, the living quarters of motor homes, or house trailers [G.S. 20-138.7(a2)].

The act also qualifies the current prohibition in G.S. 20-138.7(a) on driving with any alcohol in one's system while there is an open container in the vehicle. That prohibition as revised applies only if the motor vehicle must be registered with DMV and the vehicle is being driven on a highway or highway right-of-way.

The act applies to offenses committed on or after September 1, 2000, and it expires September 30, 2002. The act requests that the Attorney General initiate litigation in the meantime to challenge the federal government's authority to condition highway funds on the enactment of this law.

Ignition interlock devices. In 1999, the General Assembly enacted legislation providing that certain individuals may operate a motor vehicle only if it is equipped with an ignition interlock device. The requirement, which became effective July 1, 2000, applies to individuals who are convicted of impaired driving under G.S. 20-138.1 and who either have an alcohol concentration of 0.16 or more or have a conviction of another impaired driving offense within the past seven years. Such individuals, while driving with a limited driving privilege or during a specified length of time after their license has been restored, may not operate a vehicle that does not have an ignition interlock device. A violation of the restriction constitutes the offense of driving while license revoked.

Under amended G.S. 20-17.8, holders of a limited privilege or a restored license who meet the above criteria still may not drive a vehicle without an ignition interlock device. The amended section further provides

that a person with a restored license must have the device installed on *all* registered vehicles that the person owns. The requirement does not apply to a person who is driving with a limited driving privilege.

If a person holding a restored license demonstrates that a vehicle owned by the person is not in his or her possession and is used by another family member, DMV may excuse the person from installing the device on that vehicle. The amended section provides further that the court must acquit a person who is charged with driving while license revoked for failing to have an ignition interlock device installed on a vehicle if the court finds that the vehicle was not required to be equipped with the device and that the person committed no other violation.

The act also amends the alcohol concentration limits for individuals who are subject to the ignition interlock requirement and who are driving with a restored license. As under the previous version of G.S. 20-17.8(b), the holder of a restored license may not drive with an alcohol concentration of 0.04 or more for a specified period of time if the ignition interlock requirement was imposed as a result of a conviction of driving with an alcohol concentration of 0.16 or more. Under the amended subsection, the person may not drive with an alcohol concentration of more than 0.00 if the ignition interlock requirement was imposed either because: (a) the person was convicted of driving with an alcohol concentration of 0.16 or more and based on the same set of circumstances was also convicted of one of a number of other offenses (for example, felony death by vehicle); or (b) the person has a conviction of another impaired driving offense within seven years of the offense that resulted in revocation of the person's license.

The act also establishes a zero tolerance level for individuals who are subject to the ignition interlock requirement and who are driving with a limited privilege. This amendment does not change current law because the statute authorizing limited driving privileges, G.S. 20-179.3, already prohibits the holder from driving with any alcohol in his or her system.

The last ignition interlock change seeks to clarify the admissibility of an alcohol concentration report from an ignition interlock system. Amended G.S. 20-17.8(f) provides that such a report is not admissible as evidence of driving while license revoked or in an administrative revocation proceeding unless the person was operating the vehicle while the device indicated an alcohol concentration in violation of the applicable concentration limit.

Officer's affidavit. G.S. 20-19 was amended in 1999 to establish lower alcohol concentration restrictions for drivers whose licenses have been

restored after an impaired driving conviction. (These requirements, which apply to license restorations following offenses committed on or after July 1, 2000, are distinct from the ignition interlock requirement discussed above.) As part of the 1999 amendments, the General Assembly required officers to submit an affidavit to DMV if a person subject to the restrictions drove with an alcohol concentration above the specified limit. S.L. 2000-155 amends G.S. 20-16.2 to require officers to submit an affidavit if a person who is subject to the alcohol concentration restriction violates a provision of the restriction other than the alcohol concentration level. Although not specified in the act, an example of a provision other than the alcohol concentration level might be the requirement in G.S. 20-19(c3) that a restored license holder must agree to go to a place where a chemical analysis can be performed if an officer has reasonable grounds to believe the person was driving in violation of the alcohol concentration level.

Out-of-state convictions. In several parts of the impaired driving laws, out-of-state convictions are treated as prior convictions if they are substantially “equivalent” to a North Carolina offense. S.L. 2000-155 amends those statutes to provide that the convictions must be substantially “similar.”

Sequential breath tests. Under current law, two breath samples within 0.02 of each other must be taken for a breath test to be considered valid; however, if a person refuses to give a second or subsequent sample, the readings before the refusal may be used to establish the person’s alcohol concentration. G.S. 20-139.1(b3) has required that the refusal to give a second sample be willful. S.L. 2000-155 deletes the term “willful” from that subsection. (The act does not revise G.S. 20-16.2(c), which still requires a willful refusal for a person’s driver’s license to be revoked.) The practical impact of this change is unclear. For a first sample to be admissible, a person still must “refuse” to give a subsequent sample, an act that inherently involves some exercise of will and not a mere failure. *See Joyner v. Garrett*, 279 N.C. 226, 233 (1971) (refusal involves “positive intention to disobey”); *see also State v. Summers*, 132 N.C. App. 636, 643–45 (1999) (decision in license revocation proceeding that person had not refused breath test estopped state in impaired driving prosecution from offering evidence of refusal under G.S. 20-139.1(f)), *aff’d*, 351 N.C. 620 (2000).

Other Motor Vehicle Changes

Oversize load permits and penalties. G.S. 20-119 authorizes the state Department of Transportation

(DOT) to issue a special permit for oversize and overweight vehicles. A violation of the permit’s terms has been a Class 3 misdemeanor. Effective for violations occurring on or after July 13, 2000, S.L. 2000-109, part VII (H 1854) makes such violations punishable by a civil penalty, to be assessed by DOT against the registered owner of the vehicle. The act creates two new criminal offenses involving oversize vehicles, however. It is a Class 2 misdemeanor under new G.S. 20-140(f) to drive recklessly in a commercial motor vehicle while carrying a load subject to permit requirements and a Class 2 misdemeanor under new G.S. 20-141(j3) to drive a commercial vehicle in excess of fifteen miles per hour above the posted speed or over the speed set by the permit while carrying a load subject to permit requirements. The act also amends G.S. 20-16(c) to impose six driver’s license points for these new offenses and G.S. 20-17.4(d) to include these offenses in the definition of “serious violations” for purposes of disqualifying a person from driving a commercial vehicle.

Child restraint systems. G.S. 20-137.1 requires any driver transporting a passenger less than sixteen years of age to have the passenger secured in a child passenger restraint system or seatbelt. A child less than five years of age and less than forty pounds in weight must be secured in a child safety seat. A violation of these requirements has been an infraction, resulting in a penalty up to \$25 but no driver’s license or insurance points. Effective for violations committed on or after December 1, 2000, S.L. 2000-117 (S 1347) amends G.S. 20-137.1(d) to impose two driver’s license points for a violation. The amended section continues to prohibit the assessment of insurance points.

Window tinting. Under G.S. 20-127, tinting can be used on side and rear windows as long as the total light transmission is at least 35 percent. Several types of vehicles have been excluded from this requirement, and S.L. 2000-75 (H 723) creates an additional exception, effective July 1, 2001, for individuals who suffer from a medical condition that makes them photosensitive to visible light. The amended statute allows the person to apply for a medical exception permit, which must be displaced on the rear window of the vehicle to which it applies.

Sentencing

Confidentiality of sentencing services information. Sentencing services programs (formerly called community penalties programs) make sentencing recommendations in cases in which the judge may, but is not required to, sentence the defendant to an active

term of imprisonment. Effective July 1, 2000, S.L. 2000-67, sec. 15.9 (H 1840) amends G.S. 7A-773.1(d) to emphasize that information obtained by a sentencing services program in preparing a sentencing plan may not be used by the prosecution at trial for any purpose. The measure also revises G.S. 15A-1333 to make clear that information obtained in the preparation of a sentencing plan is not a public record. (Access to a sentencing plan is permitted in accordance with the comprehensive sentencing program plan prepared by the program under G.S. 7A-774.) Revised G.S. 15A-1333 also provides that once submitted to the court, a sentencing plan still may be expunged from the court record to protect the confidentiality of the information contained in the plan.

Abuser treatment program. Effective for offenses committed on or after December 1, 2000, S.L. 2000-125 (H 813) amends G.S. 15A-1343(b1) to allow a judge to impose as a special condition of probation that the defendant attend and complete an abuser treatment program if the judge finds that the defendant is responsible for acts of domestic violence. The act also amends G.S. 50B-3(a), which has allowed a court to include in a civil domestic violence protective order (DVPO) a requirement that a party responsible for acts of domestic violence attend and complete an abuser treatment program. The act deletes from that subsection the requirement that the program be within a reasonable distance of the party's residence. Whether attendance is required as a special condition of probation or as part of a DVPO, the program must be one approved by the Department of Administration.

Jail fees. Effective for sentences being served on or after July 1, 2000, S.L. 2000-109, part V (H 1854) modifies the provisions on jail fees for probationers. Amended G.S. 7A-313 continues to provide that individuals who are convicted of a crime are liable to the county or municipality maintaining the jail in the amount of \$5 for each day of pretrial confinement. The act amends the statute to provide that individuals who are sentenced to jail as a condition of probation and who are ordered to pay jail fees are liable to the county or municipality at the same per diem rate paid by the Department of Correction for jail space—currently, \$18 per day (pursuant to S.L. 1997-443, sec. 19.21(a) (S 352)). This higher fee apparently applies to post-conviction confinement only, since the statute continues to impose a per diem fee of \$5 for pretrial confinement. Thus, the higher fee would apply if a person is convicted and placed on special probation, a form of probation in which a person is confined in jail for a short period of time as a condition of suspension of a longer term of imprisonment.

Juveniles

Department of Juvenile Justice and Delinquency Prevention. The General Assembly made few changes to the laws concerning delinquent and undisciplined juveniles, but it did address a number of organizational matters, including the status of the Office of Juvenile Justice.

When the General Assembly enacted the Juvenile Justice Reform Act in 1998, it combined state-level functions that previously had been carried out by the Juvenile Services Division in the Administrative Office of the Courts and by the Division of Youth Services in the Department of Health and Human Services. Because of disagreement of where to house these combined functions, the General Assembly placed them temporarily in a new Office of Juvenile Justice in the Governor's Office. This session the General Assembly returned to the issue and, in S.L. 2000-137 (H 1804), created a new cabinet-level Department of Juvenile Justice and Delinquency Prevention. The duties of the department are described in new Article 12 of G.S. Chapter 143B (G.S. 143B-511 through 143B-537). The article largely mirrors the provisions in Article 3C of G.S. Chapter 147, which created the Office of Juvenile Justice and which the act repeals. The act became effective July 20, 2000.

For a discussion of other organizational changes in the area of juvenile justice, as well as changes affecting abuse, neglect, and dependency proceedings, see Janet Mason, *Juvenile Law*, in NORTH CAROLINA LEGISLATION 2000 (Institute of Government 2000) (available at <http://iog.unc.edu/pubs/nclegis/nclegis2000/index.html>).

Court Administration

Court personnel. The 2000 Appropriations Act, S.L. 2000-67 (H 1840) adds the following court personnel, effective July 1, 2000, unless otherwise noted:

- 13 magistrate positions (full-time in Alamance, Alexander, Anson, Brunswick, Chatham, Guilford, Hertford, Jackson, and Perquimans, and half-time in McDowell, Mecklenburg, Wake, and Warren counties);
- nine district court judges, one each in districts 1, 4, 9B, 10, 11, 17A, 22, 26, and 28 (effective December 15, 2000, subject to Voting Rights Act requirements);
- two superior court judges, one each in superior court districts 4B and 26B (effective

December 15, 2000, subject to Voting Rights Act requirements), and one judicial assistant in superior court district 11B;

- three court of appeals judges, with support staff (effective December 15, 2000);
- two court reporters (effective October 1, 2000);
- four positions (three attorneys) in the Office of Special Counsel, which represents patients at the state's mental institutions;
- six positions in the Guardian Ad Litem program; and
- thirty-five positions in the Administrative Office of the Courts, with most in that office's court technology program.

Two special superior court judgeships were eliminated (as of October 1, 2000, and December 31, 2000). No new positions were created in prosecutors' offices, although approximately \$50,000 was appropriated to allow the thirty-nine elected District Attorneys to join the National District Attorneys' Association and to allow some to attend that organization's national conference.

Court programs. The General Assembly expanded funding for the following court-related programs in the indicated amounts: technology improvements (approximately \$7.5 million); replacement of non-technology equipment, such as copiers and mailing machines (\$1 million); community mediation/dispute settlement centers (approximately \$300,000); drug treatment courts (\$100,000); worthless check programs (approximately \$400,000); family court in two additional districts (approximately \$600,000); interpreter services for people who do not speak English (an increase of approximately \$250,000

for interpreters generally and approximately \$75,000 for interpreters in domestic violence cases in district court); and installation of seventy-five courtroom recording systems for district court and non-jury superior court proceedings (approximately \$200,000).

Court studies. S.L. 2000-138, sec. 2.1 (S 787) authorizes the Legislative Research Commission to study the following issues related to the courts and criminal justice system (the number of the bill raising the issue during the 1999-2000 legislative session and the first-named sponsor are noted):

- termination of parental rights of individuals convicted of rape (H 1678, Ellis); and
- authority of magistrates and clerks of courts (H 1224, Baddour; S 1023, Clodfelter).

Local funding of court functions. In 1999, the General Assembly authorized cities and counties to provide supplemental funding for temporary support positions in their local prosecutors' offices upon approval of the Administrative Office of the Courts. Effective July 1, 2000, S.L. 2000-67, sec. 15.4 (H 1840) amends G.S. 7A-44.1 and 7A-102 to authorize similar funding arrangements to supplement support staff for superior court judges and clerks of court. The act also amended G.S. 7A-467 to authorize such an arrangement with public defender offices but, with the creation of the Indigent Defense Commission, discussed above, G.S. 7A-467 was repealed.

Increase in court costs. S.L. 2000-109, part IV (H 1854) increases court costs in the typical criminal case to \$90 in district court and \$115 in superior court. The increase applies to costs assessed or collected on or after July 15, 2000.

This Bulletin is published by the Institute of Government to address issues of interest to local and state government employees and officials. Public officials may photocopy the Bulletin under the following conditions: (1) it is copied in its entirety; (2) it is copied solely for distribution to other public officials, employees, or staff members; and (3) copies are not sold or used for commercial purposes.

Additional copies of this Bulletin may be purchased from the Institute of Government. To place an order or to request a catalog of Institute of Government publications, please contact the Publications Sales Office, Institute of Government, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330; telephone (919) 966-4119; fax (919) 962-2707; e-mail khunt@iogmail.iog.unc.edu; or visit the Institute's web site at <http://ncinfo.iog.unc.edu>.

The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 3001 copies of this public document at a cost of \$2233.34 or \$0.74 each. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.

©2000

Institute of Government. The University of North Carolina at Chapel Hill
Printed in the United States of America

This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes