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2008 Legislation Affecting Criminal Law and Procedure

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As in past sessions, the 2008 General Assembly devoted considerable attention to sex offenders, creating, expanding, and tightening restrictions on their conduct and whereabouts. The General Assembly also enacted several offenses involving gang activity and made smaller changes on a range of issues involving criminal law and procedure. These 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 book North Carolina Legislation 2008, which may be viewed online at www.sog.unc.edu/pubs/nclegis/nclegis2008/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/.

Sex Offenders

The General Assembly passed three major acts in 2008 related to sex offenders, creating new sex offenses, increasing the punishment for existing offenses, and tightening restrictions on convicted offenders. These changes follow major changes enacted in 2006 and 2007 involving sex offenders and may be a prelude to an additional set of changes in 2009, when the General Assembly will consider whether to adopt new federal standards on sex offenders. The discussion below begins with a description of the Jessica Lunsford Act for North Carolina, S.L. 2008-117 (H 933), named after a young girl in Florida who was raped and killed in 2005. Various laws, commonly known as Jessica's Laws, have been introduced around the country to increase the punishment for and restrictions on sex offenders. North Carolina's version likewise takes a tough stance on sex offenders. The discussion then describes the impact of the other two sex offender laws enacted by the 2008 North Carolina General Assembly. It closes by summarizing the key provisions of the federal standards under consideration in North Carolina and other states.[1]

Jessica's Law

Rape and sex offense against a child under age 13. Under G.S. 14-27.2, first-degree statutory rape is defined as vaginal intercourse with a victim under the age of 13 when the perpetrator is at least 12 years old and at least four years older than the victim. Under G.S. 14-27.4, other serious sex acts (such as oral sex acts) constitute first-degree statutory sexual offense if the same age criteria

1. A fourth act, the technical corrections bill, S.L. 2008-187 (S 1632), revises G.S. 14-208.41(b) to clarify that a person must submit to satellite monitoring only if ordered by the court following a hearing under G.S. 14-208.40A or 14-208.40B. Previously, the statute stated that a person had to submit to satellite monitoring if ordered by the court *or* required by the Department of Correction. The deletion of the latter phrase is consistent with statutory changes made in 2007 by the General Assembly, which explicitly placed the responsibility on the court to decide whether a person met the statutory criteria for imposition of satellite monitoring.

A fifth act, the studies bill, S.L. 2008-181 (H 2431), creates the Joint Legislative Study Committee on Civil Commitment of Sexual Predators, consisting of ten members, five appointed by the Speaker of the House and five appointed by the President Pro Tem. of the Senate. This committee is directed to study the state's laws on incapacity to proceed to trial and involuntary commitment, including whether these laws adequately address issues involved when defendants are charged with committing a sex offense against a child, are found incapable of proceeding to trial, and do not meet the criteria for involuntary commitment. The committee must make a final report of its findings and recommendations to the 2009 General Assembly.

are met. Both crimes are Class B1 felonies, the second highest class of felony in North Carolina. Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 (H 933) adds G.S. 14-27.2A and 14-27.4A to create the crimes of rape and sex offense against a child when the child is under the age of 13 and the perpetrator is at least 18 years old. Like first-degree statutory rape and first-degree statutory sex offense, these new offenses are Class B1 felonies. The difference is that the new offenses carry significantly greater penalties. First-degree statutory rape and statutory sex offense are designated as lesser offenses of the new offenses.

The first difference is that a person convicted of one of the new offenses must be sentenced to an active punishment of at least 300 months regardless of regular structured sentencing rules. Ordinarily, a person convicted of a Class B1 felony can receive a low of 144 months active imprisonment to a high of life in prison without parole, depending on the seriousness of the person's prior record level and the presence of aggravating or mitigating factors. The new statutes state that structured sentencing applies to these offenses, subject to the 300-month mandatory minimum (and the life imprisonment provision described below). Thus, a person convicted of one of the new offenses may be sentenced to more than 300 months if the person's prior record level and any aggravating factors warrant a greater sentence under structured sentencing.

Second, the new statutes provide that when the defendant is released from prison, he or she must submit to satellite monitoring for life under the sex offender monitoring statutes. The act makes conforming changes to other statutes to apply the procedures for imposing lifetime satellite monitoring to the new offenses. Thus, revised G.S. 14-208.40A provides that upon conviction, the court at sentencing must determine whether the offense was a violation of the new statutes and, if so, order lifetime satellite monitoring. Under revised G.S. 14-208.43(a), a person ordered to submit to lifetime satellite monitoring based on one of the new offenses may petition the Post-Release Supervision Commission to terminate the requirement. The act also amends G.S. 14-208.6(5) to add the new offenses to the definition of *sexually violent offense,* which triggers registration as a sex offender. As with other offenses requiring registration, the length of registration is for a minimum of ten years unless the offense is an *aggravated offense* (as defined in G.S. 14-208.6(1a)), the person is a *recidivist* (as defined in G.S. 14-208.6(2b)), or the court classifies the person as a *sexually violent predator* (per the procedure in G.S. 14-208.20), in which case registration is for life.

Third, G.S. 14-27.2A(c) and 14-27.4A(c) provide that if the court finds *egregious aggravation,* it may sentence the defendant to up to life in prison without parole, regardless of whether the person could receive such a punishment under regular structured sentencing rules. The statutes place the responsibility of determining *egregious aggravation* on the sentencing judge, but this procedure is likely unconstitutional. In *Blakely v. Washington,* 542 U.S. 296 (2004), the U.S. Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. In light of this constitutional requirement, the jury, not the sentencing judge, would likely have to determine *egregious aggravation*.

This procedural defect may make the *egregious aggravation* provisions difficult to implement without further legislative action. One problem is that the new statutes do not contain a procedure for submitting the question of *egregious aggravation* to the jury, although this problem may be within the trial courts' authority to remedy. North Carolina faced a similar issue when the U.S. Supreme Court decided *Blakely* and effectively invalidated the portion of North Carolina's sentencing statutes directing the sentencing judge to decide aggravating factors. The General Assembly revised the sentencing statutes to address this defect, but for cases not covered by the revised statutes the North Carolina appellate courts held that trial judges could fashion a procedure for submitting aggravating factors to the jury. *See State v. Blackwell,* 361 N.C. 41 (2006). Trial judges may have comparable authority to remedy the constitutional defect in the new rape and sex offense statutes by fashioning a procedure for submitting the issue of *egregious aggravation* to the

jury. A second and perhaps bigger problem, however, lies in the imprecise definitions of *egregious aggravation* in the new statutes, which were designed for application by judges accustomed to exercising discretion, not for juries normally charged with finding concrete facts. The new statutes state that *egregious aggravation* may be found if "the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17 [structured sentencing]." The term also can include "further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover." It also may be considered "based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim." In light of these definitions, it may be difficult without legislative clarification for a jury to follow a judge's instructions and determine whether an offense involves *egregious aggravation.*

Last, a person convicted of rape under new G.S. 14-27.2A "has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape" and has no rights "related to the child under Chapter 48 [adoptions] or Subchapter 1 of Chapter 7B [abuse, neglect and dependency] of the General Statutes." The same disqualifications apply to first- and second-degree rape under G.S. 14-27.2 and 14-27.3.

Thirty-year registration for offenses not subject to lifetime registration. Before 2006, a person subject to registration in North Carolina had to register for ten years unless he or she was subject to lifetime registration. In 2006, the General Assembly amended the ten-year requirement to provide that registration does not terminate automatically after ten years; rather, the person must petition the superior court to terminate the requirement after ten years. Until terminated, the registration period continues indefinitely. S.L. 2008-117 amends G.S. 14-208.6A and 14-208.7 to impose a thirty-year registration requirement. The change appears to impose a maximum period of registration, after which registration automatically terminates.[2] A person still may petition the court to terminate registration after ten years (pursuant to the procedure in G.S. 14-208.12A). The new thirty-year requirement exceeds the federal standards, still to be considered by North Carolina, for two of three categories of sex offenders (discussed below under Federal Guidelines on Sex Offender Registration). The effective-date clause states that the change applies to registrations made on or after December 1, 2008. By using the general term "made", the General Assembly appears to have intended for the change to apply to individuals who begin registration *or* are still required to register on or after December 1, 2008.[3]

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2. The new statutory wording is not entirely clear, but the interpretation in the text has the most statutory support. Revised G.S. 14-208.6A states that the General Assembly's objective is to establish a thirty-year registration requirement, with the right to petition to shorten the registration period after ten years. This language indicates that the thirty-year requirement is intended as a maximum, with the possibility of earlier termination. Revised G.S. 14-208.7 states that a person must maintain registration for at least thirty years unless the person petitions after ten years to terminate registration. The use of the term "at least" suggests that the thirty-year requirement does not terminate automatically; rather, the registrant still must petition to terminate after thirty years. Such an interpretation, however, is difficult to square with the ten-year termination provision. Because the statute already affords a person the right to petition to terminate after ten years, there would seem to be no need for the General Assembly to provide separately that a person may petition to terminate after thirty years. In addition, the registration statutes contain a procedure for petitioning to terminate after ten years, including specific criteria that a registrant must meet. There is no procedure specified for termination after thirty years and no indication that the General Assembly intended to impose the criteria applicable to termination after ten years to termination after thirty years.

3. The effective date clause could be interpreted as applying only to registrations initiated on or after December 1, 2008, because generally speaking a person registers initially and verifies his or her information thereafter. Such an interpretation, however, would create two subcategories of offenders within the category of offenders who may petition to terminate registration after ten years, a curious distinction. Those people who began registering before December 1,

Three-day time limit on changes in status. Several of North Carolina's statutes impose a ten-day time limit for sex offenders to register or give notice of certain changes in their status. G.S. 14-208.7 has required residents who are released from a penal institution, as well as nonresidents who move to North Carolina, to register within ten days of their release or arrival. G.S. 14-208.9 has imposed a ten-day time limit on giving notice of a change of address, intent to move to another state (or to remain in North Carolina after giving notice of an intent to leave), enrollment or termination of enrollment at an institution of higher education, and employment or termination of employment at an institution of higher education. And, G.S. 14-208.9A has required return of a semi-annual verification of address form within ten days. S.L. 2008-117 reduces all of the time limits in these statutes from ten days to three business days. These changes anticipate the federal standards to be considered by the General Assembly in 2009. The act is effective for offenses committed on or after December 1, 2008, which in this context means that a violation of the new time limits on or after that date is punishable as a failure to register under G.S. 14-208.11, a Class F felony.

The act also amends G.S. 14-208.9A(c), which requires a person to appear at the local sheriff's office for the taking of a photograph on the sheriff's request, by changing the time limit from 72 hours to three business days. A violation of this provision remains a Class 1 misdemeanor, punishable under that subsection rather than under G.S. 14-208.11. The General Assembly apparently overlooked G.S. 14-208.8A, which sets a 72-hour time limit on the giving of notice of out-of-county residence for purposes of temporary employment; that provision was not changed. The General Assembly also enacted new provisions, discussed further below, requiring registrants to provide the sheriff's office with online identifiers when they register and re-verify information. If they obtain a new or modified online identifier, they have ten days to notify the sheriff of the change.

Last, the act amends G.S. 14-208.27 and 14-208.28, which have directed the juvenile court counselor responsible for a juvenile who is required to register to advise the sheriff of a change of address of the juvenile and to return the semi-annual verification form to the sheriff. The act reduces the time limit for these actions from ten days to three business days. No penalties are provided for a violation.

Ban on sex offenders in locations used primarily by minors. Over the last several years the General Assembly has made it a crime for those required to register as sex offenders to reside within 1,000 feet of a child care center or elementary or secondary school (*see* G.S. 14-208.16), work at places where a minor is present if their responsibilities would include instruction, supervision, or care of a minor (*see* G.S. 14-208.17(a)), accept minors into their care or custody (*see* G.S. 14-208.17(b)), or provide babysitting services (*see* G.S. 14-321.1). Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 enacts a considerably broader ban on where sex offenders may be present. Under new G.S. 14-208.18, it is a Class H felony for a person

1. who is required to register as a sex offender based on
   a. any offense in G.S. Chapter 14, Article 7A (including any degree of rape or sexual offense and misdemeanor sexual battery), or
   b. any offense where the victim was under the age of 16 (including indecent liberties under G.S. 14-202.1)
2. knowingly
3. to be
   a. on the premises of any place intended primarily for the use, care, or supervision of minors, including schools, child care centers, playgrounds, and children's museums,

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2008, would have to register indefinitely if unable to terminate registration, and those people who began registering on or after December 1, 2008, would have to register for thirty years if unable to terminate registration.

b. within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including malls, shopping centers, or other property open to the general public, or
c. at any place where minors gather for regularly scheduled educational, recreational, or social programs.

The statute contains a technical flaw with respect to the first element of the offense, stating that a person is subject to the ban "if the offense requiring registration is described in subsection (b) of this section." Subsection (c) actually describes the covered offenses. Despite the incorrect reference, the courts may find that the statute adequately identifies the prior offenses covered by the ban. Greater difficulty may lie in consistently applying other elements of the offense. Several of the terms used are general in nature and are not defined in the statute—for example, *schools, child care centers,* and *playgrounds* (in what is designated as element 3a, above), locations *intended primarily for the use, care, or supervision of minors,* which an offender may not *be* within 300 feet of (in element 3b), or *regularly scheduled programs* (in element 3c).

The statute includes a limited number of exceptions. Notwithstanding the ban, a parent or guardian of a minor may take the minor to a location that provides emergency medical care if the minor is in need of such care. A parent or guardian who is otherwise subject to the ban also may be present on school property if he or she (a) has a student enrolled in the school, (b) is there solely to attend a conference to discuss the student or in response to a request by the principal or designee for reasons relating to the welfare or transportation of the student, *and* (c) complies with the notice and supervision requirements in the statute. The statute also exempts voting, attendance at public school if permitted by the local school board pursuant to new G.S. 115C-391(d)(2), discussed next, and receipt of medical treatment or mental health services by a juvenile. The statute contains no other exceptions.

New G.S. 14-208.18 applies to juveniles who have been required to register pursuant to the sex offender registration statutes, banning them from the areas described above unless one of the exceptions applies. Any juvenile required to register is covered by the ban (unless an exception applies) because the only offenses for which a juvenile can be required to register are rape and sex offense, both of which are subject to the new ban. The act also adds new G.S. 115C-391(d)(2) to give local school boards the authority to expel any student who is covered by the ban, including juveniles who have been adjudicated delinquent and have been required to register and juveniles who have been tried and convicted as adults of an offense covered by the ban (listed in G.S. 14-208.18). The new statute states that a local school board's decision to expel a student must be based on "clear and convincing evidence" but does not specify to what the clear and convincing evidence standard should be applied. The new provision does not contain an age minimum, but it could apply to a juvenile 11 years of age or older because, under the sex offender registration statutes, a juvenile may be required to register for an offense committed when he or she was 11 years of age or older. *Compare* G.S. 115C-391(d)(1) (this statute allows a local school board to expel a student 14 years of age or older for certain reasons). Before ordering expulsion, the board must consider whether there is an alternative program that may be offered by the local school unit to provide educational services. If the board decides to provide services to a student on school property, school personnel must supervise the student at all times.

Notice to schools. G.S. 14-208.29 has allowed registration information of juveniles who have been required to register to be released to law enforcement agencies only. Effective December 1, 2008, S.L. 2008-117 revises that statute to require registry information for any juvenile enrolled in a local school to be forwarded to the local school board. The statute does not specify who is

responsible for forwarding this information, but presumably the responsibility falls to the local sheriff's office that maintains the information.

The act also adds G.S. 14-208.25A to require all licensed day care centers and the principals of all elementary, middle, and high schools to register with the North Carolina Sex Offender and Public Protection Registry to receive e-mail notification when a registered sex offender moves within a one-mile radius of the day care center or school.

Restrictions on release for probation violations or violations of post-release supervision. G.S. 15A-1345(b) requires a probationer arrested for a violation of probation conditions to be taken before a judicial official to have conditions of release set pending a probation revocation hearing. If the probationer meets those conditions, he or she is entitled to release pending the revocation hearing. Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 revises G.S. 15A-1345(b) to impose a form of preventive detention on certain probationers. *See generally United States v. Salerno,* 481 U.S. 739 (1987) (discussing constitutional limits on denial of pretrial release to criminal defendants). The revised statute requires the court, prior to allowing release, to find that the probationer is not a danger to the public if he or she "has been convicted of an offense at any time that requires registration under Article 27A of Chapter 14 [the article containing the sex offender registration statutes] or an offense that would have required registration but for the effective date of the law establishing the Sex Offender and Public Protection Registration Program [the title of the article containing the sex offender registration statutes]." This language appears to require that courts deny release to such a probationer, regardless of the offense for which the person is currently on probation and regardless of the date of conviction of the sexually-related offense, unless the court finds that the probationer is not a danger.

The act also modifies G.S. 15A-1368.6(b), which affords a preliminary hearing to a person who is released on post-release supervision and who is arrested for an alleged violation of post-release conditions. The statute provides that if the hearing is not held within seven working days after arrest, the person is entitled to release pending the hearing. The act adds G.S. 15A-1368.6(b1) to prohibit release prior to a preliminary hearing, regardless of when it is held, if the person was released on post-release supervision for an offense subject to registration. Although new 15A-1368.6(b1) appears to do away with the requirement for release of a supervisee if a preliminary hearing is not held within seven days, supervisees are still entitled as a matter of constitutional due process to a preliminary hearing "as promptly as convenient after arrest while information is fresh and sources are available." *See Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

Sex offender registry checks. G.S. 115C-332 requires local school boards to conduct criminal history checks of school personnel and of contractors and their employees who perform duties customarily performed by school personnel. Effective December 1, 2008, S.L. 2008-117 adds G.S. 115C-332.1 to require local boards of education to include the following terms in any contract with *contractual personnel,* defined as individuals whose job involves direct interaction with students and who are not covered by G.S. 115C-332. The contract must require the employer of any *contractual personnel* to conduct an annual check of such personnel on the state and national sex offender registries and must prohibit any contractual personnel who are listed on those registries from having direct interaction with students.

Study of federal guidelines. S.L. 2008-117 directs the North Carolina Attorney General to study the federal sex offender guidelines, finalized in 2008, to the federal Sex Offender Registration and Notification Act (SORNA). The Attorney General must report any recommended actions to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by December 1, 2008. The federal guidelines are discussed below, after the discussion of the other sex offender acts enacted in 2008 by the North Carolina General Assembly.

Other Sex Offender Changes

Changes in definitions for child pornography offenses and increase in punishment. G.S. 14-190.14 through 14-190.19 contain several offenses related to child pornography. Those offenses are keyed to the definitions in G.S. 14-190.13. Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 (S 132) amends G.S. 14-190.13 to expand the definition of *sexual activity,* an element of many of the child pornography offenses, to include the "lascivious exhibition of the genitals or pubic area of any person." *Compare* 18 U.S.C. 2256 (using same terminology as part of definition of federal child pornography offenses).

Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 also increases the punishment for various offenses involving children. Most of the changes are identical to the increases in punishment enacted by S.L. 2008-117 (S 933) (see discussion of Jessica's Law, above), except that S.L. 2008-218 also increases the punishment for a violation of G.S. 14-202.3 (solicitation of a child by computer to commit unlawful sex act) from a Class H to a Class G felony, if either the defendant or the person for whom the defendant was arranging the meeting actually appears at the meeting location. A violation of the statute that does not involve this additional element remains a Class H felony.

Expansion of registration to include felony child abuse involving prostitution and sexual acts. G.S. 14-208.6 lists the offenses that subject a person to sex offender registration requirements and related consequences. The principal category is *sexually violent offense* as defined in G.S. 14-208.6(5). S.L. 2008-220 (S 1736) expands that category by including a violation of G.S. 14-318.4(a1) (committing or permitting act of prostitution on child under age 16 by his or her parent or caretaker) and a violation of G.S. 14-318.4(a2) (committing or allowing sexual act on child under age 16 by his or her parent or legal guardian). The act states that the change applies to persons convicted or released from a penal institution on or after December 1, 2008, not just to offenses committed on or after that date.[4]

The act does not specifically describe the impact of the addition of these offenses, which are both Class E felonies, on post-release supervision (PRS). Under G.S. 15A-1368.2(c), a person convicted of a Class B1 through E felony who is subject to sex offender registration and who is sentenced to active imprisonment must serve five years of PRS after release from prison instead of the usual nine months. By making the above offenses subject to sex offender registration, the General Assembly automatically made the offenses subject to this five-year requirement. The question is whether the General Assembly intended to make the five-year requirement retroactive—that is, whether a person who commits an offense before December 1, 2008, is subject to it. The effective-date clause does not provide a clear answer because the changes made by the act do not specifically address PRS. If courts construe the act as applying retroactively with respect to PRS, the requirement may be subject to constitutional challenge. *See, e.g., Purvis v. Commonwealth,* 14 S.W.3d 21 (Ky. 2000) (post-release supervision is a form a punishment, barring retroactive application).

Inclusion of online identifier in required registration information. The sex offender registration provisions require covered offenders to provide specified information to the local sheriff's office, such as the person's photograph and address. S.L. 2008-220 amends several registration statutes to require that an offender provide to the sheriff any *online identifier* (defined in new G.S. 14-208.6(1n)) that the offender uses or intends to use. The offender must do so when he or she initially registers (*see* G.S. 14-208.7(b)), periodically re-verifies information (*see* G.S. 14-208.9A(a)(3)), and changes an online identifier or obtains a new one (*see* G.S. 14-208.9(e)). All of these provisions require the

4. Also added to the definition of *sexually violent offense,* effective for offenses committed on or after December 1, 2008, are the new offenses of rape and sexual offense against a child under age 13 (see discussion of Jessica's Law, above).

offender to appear before the sheriff in person to provide the information. A failure to inform the sheriff of any new online identifiers or changes to online identifiers within ten days is, like most other failures to comply with registration obligations, a Class F felony under G.S. 14-208.11(a). These changes apply to any person who initially registers or who must maintain registration on or after May 1, 2009. The act also states that a person registered prior to May 1, 2009, is not in violation of the online identifier requirements if he or she provides the information at the first required deadline for the person to verify his or her registry information on or after May 1, 2009.

Also effective May 1, 2009, new G.S. 14-208.14 directs the North Carolina Division of Criminal Statistics to maintain in the central sex offender registry the online identifier information of registrants. New G.S. 14-208.15A authorizes the Division to release online identifiers to entities that provide Internet and other electronic communications services (as defined in new G.S. 14-208.6(1d), (1f), (1g), and (1i)) for the purpose of screening users and comparing the information held by an entity with the information in the central registry. The new statute also provides that when an electronic service entity receives a complaint or report of certain criminal violations, such as soliciting a minor by computer to commit an unlawful sex act, the entity must report the information and the online identifier of the person who allegedly committed the offense to the Cyber Tip Line at the National Center for Missing and Exploited Children.

Online identifier information in the central registry, as well as in the local sheriff's office, is *not* available for public inspection. G.S. 14-208.10 and 14-208.15 identify the information open to the public, and those statutes were not amended to include online identifiers. New G.S. 14-208.15A(d) also directs the Division to adopt rules regarding the release and use of online identifier information, including a requirement that the information not be disclosed for any purpose other than for screening users and comparing information as provided in the new statute.

An entity that complies in good faith with new G.S. 14-208.15A is immune from civil and criminal liability for (a) refusing to provide service to a person on the basis that the entity reasonably believed that the person was subject to sex offender registration requirements, and (b) a person's criminal or tortious acts against a minor with whom the person had communicated on the entity's system. This provision does not require that entities deny all services to a person subject to sex offender requirements. Under new 14-202.5, discussed next, a registered sex offender may not access certain social networking websites but is not barred from using discrete electronic services, such as email or instant messaging services.

Ban on use of certain websites. Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 adds new G.S. 14-202.5 to make it a Class I felony for a person

- who is registered as a sex offender
- to access a *commercial social networking Web site*
- where the person knows that the site permits minor children to become members or to create or maintain personal web pages on the site.

A *commercial social networking Web site* is defined in G.S. 14-202.5(b) as an Internet website that meets the criteria listed in that subsection, including that it allows users to create web pages or personal profiles that contain information such as a nickname of the user, photographs, and links to other personal web pages of friends or associates. The definition excludes an Internet website that provides only one discrete service (photo sharing, e-mail, instant messaging, or chat room or message boards) or has as its primary purpose commercial transactions. G.S. 14-202.5(d) states that North Carolina has jurisdiction if the transmission that constitutes the offense either originates or is received in North Carolina.

The statute does not specifically define what it means for a person *to access* a commercial social networking website, but new G.S. 14-202.5A may provide some guidance. That statute provides

(effective for acts occurring on or after May 1, 2009) that a commercial social networking website may be held civilly liable for damages for failing to make reasonable efforts to prevent a registered sex offender from accessing its website. It states that *access* means allowing the sex offender to utilize the website to do any of the activities described in G.S. 14-202.5(b)(2) through 14-202.5(b)(4)—that is, facilitating social introductions, creating web pages or personal profiles, and providing mechanisms to communicate with other users. Thus, using a commercial social networking website in these respects is prohibited; merely viewing such a website may not be.

Ban on name changes by sex offenders. Effective December 1, 2008, S.L. 2008-218 adds G.S. 14-202.6 and G.S. 101-6(c) to prohibit a registered sex offender from obtaining a name change. Name changes are handled by the clerk of superior court pursuant to the procedures in G.S. Chapter 101. The statutes do not appear to make a violation a crime, as they do not designate a violation as a criminal offense or provide for any criminal penalties.

Reporting of convictions not resulting in active time. S.L. 2008-220 requires the North Carolina Administrative Office of the Courts, in consultation with the North Carolina Department of Justice, Department of Correction, and Sheriffs' Association, to develop by December 1, 2008, a procedure to ensure timely notification to the Division of Criminal Information and to sheriffs of any person who is subject to sex offender registration and does not receive an active term of imprisonment.

Grants to sheriffs' offices. Effective July 1, 2008, S.L. 2008-220 authorizes the Governor's Crime Commission to award grants to sheriffs' offices to assist with enforcement of sex offender laws. Participating sheriffs' offices must provide non-state matching funds equal to 50% of the grant amount, one-half of which may be in the form of in-kind contributions. The act appropriates $250,000 from the General Fund for such grants, up to $25,000 of which may be awarded to each eligible sheriff's office.

Federal Guidelines on Sex Offender Registration

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act. Title I of the Adam Walsh Act is the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), which contains a new set of standards for sex offender registration. The U.S. Department of Justice (US DOJ) has issued guidelines ("Guidelines") interpreting and elaborating on the provisions of SORNA. States must substantially implement the new standards by July 27, 2009, with up to two one-year extensions, or lose 10% of their Byrne Justice Assistance Grant funds. Many of the registration requirements adopted by North Carolina in the past have been in response to this type of federal directive. States may adopt more stringent requirements than required by federal law.

The summary below highlights some of the significant changes required by SORNA and the Guidelines, which may be found on the website of US DOJ's Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) office: www.ojp.usdoj.gov/smart/. It is by no means a comprehensive summary of the numerous requirements in SORNA and the Guidelines. S.L. 2008-117, discussed above, requires the North Carolina Attorney General to review the requirements and report to the General Assembly with recommended actions by December 1, 2008.

Retroactivity. One of the biggest changes required by the Guidelines is that states would have to make their registration requirements retroactive for covered offenses. Thus, subject to narrow exceptions, a person would have to register for those offenses regardless of the date of offense, conviction, or completion of his or her sentence. For example, if a person is convicted of sexual battery for an offense committed before December 1, 2005, the person does not currently have to register under North Carolina law. *See* S.L. 2005-130 (adding sexual battery to the offenses

subject to registration, effective for offenses committed on or after December 1, 2005). Under the Guidelines, however, the person may be subject to registration for that offense. *See* II.C, IX of Guidelines (describing retroactivity requirement); *see also* IV.C of Guidelines (describing offenses subject to registration). Similarly, under the Guidelines, if a person were convicted of indecent liberties in 1980 and completed all of the incidents of his or her sentence by 1985, before any of the sex offender registration requirements took effect, the person still may be subject to registration. (If the person has been in the community longer than the registration period required by SORNA, a state may give the person credit for that time and not require registration.) Under the Guidelines, states need not seek out individuals who are subject to retroactive application of the registration requirements if they are no longer subject to oversight by the criminal justice system; however, if those individuals remain in or reenter the criminal justice system under the conditions described in the Guidelines, states would have to require that they register.

Offenses covered. The Guidelines would likely broaden the offenses that are subject to registration in North Carolina, although it is not yet certain what offenses North Carolina would have to add to the list of registration offenses to comply with the Guidelines. For example, the Guidelines require registration for any sexual offense whose elements involve "(i) any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person's body, either directly or through the clothing." *See* IV.C of Guidelines. This definition would appear to require registration for a violation of G.S. 14-27.7A(b) (statutory rape or sexual offense against a person who is 13, 14, or 15 years old when the defendant is more than four but less than six years older than the person), which is currently not subject to registration under North Carolina law. Under the retroactivity provision discussed above, a person could be required to register for this and other offenses that are currently not subject to registration under any circumstance in North Carolina.

Juvenile registration. North Carolina currently has a limited sex offender registration program for juveniles who commit certain offenses. The information in the registry is not public for juveniles required to register; registration expires when the juvenile turns 18 or juvenile court jurisdiction ends; and the juvenile judge has discretion not to require registration for covered offenses. Under the Guidelines, certain juveniles would be subject to full registration requirements, including the longer registration periods required for adults (discussed below). As with offenses by adults, the new juvenile registration requirements may be retroactive for delinquency adjudications that predate implementation of the SORNA requirements.

The Guidelines (in IV.A) provide that the following convictions and delinquency adjudications of juveniles are subject to registration:

> "Convictions" for SORNA purposes include convictions of juveniles who are prosecuted as adults. It does not include juvenile delinquency adjudications, except under the circumstances specified in SORNA § 111(8). Section 111(8) provides that delinquency adjudications count as convictions "only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such an offense."
>
> Hence, SORNA does not require registration for juveniles adjudicated delinquent for all sex offenses for which an adult sex offender would be required to register, but rather requires registration only for a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes (or attempts or conspiracies to commit such crimes). Considering the relevant aspects of the federal "aggravated sexual abuse" offense referenced in section 111(8), it suffices for substantial implementation if a jurisdiction applies SORNA's requirements to juveniles at least

14 years old at the time of the offense who are adjudicated delinquent for committing (or attempting or conspiring to commit) offenses under laws that cover:

- engaging in a sexual act with another by force or the threat of serious violence; or
- engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim.

"Sexual act" for this purpose should be understood to include any degree of genital or anal penetration, and any oral-genital or oral-anal contact. This follows from the relevant portions of the definition of sexual act in 18 U.S.C. 2246(2), which applies to the 8 U.S.C. 2241 "aggravated sexual abuse" offense.

Length of registration. The federal standards create three tiers of sex offenders, with varying registration periods and obligations. For a tier one offense, the required registration period is 15 years; for a tier 2 offense, the period is 25 years; for a tier 3 offense, the period is life. The tiers determine other registration obligations, such as the frequency with which the person must verify his or her information with the sheriff or other registering entity. *See* V and XII of Guidelines for the offenses in each tier and the duration of registration. The fifteen-year registration requirement for tier 1 offenders can be reduced to ten years if the person meets certain conditions—namely, having a clean record as defined by the Guidelines. Also, a person classified as a tier 3 offender based on a juvenile delinquency adjudication can have the lifetime registration requirement reduced to 25 years in specified circumstances. The other required periods of registration are not subject to reduction.

A state is not required to establish the specific tiers described in the Guidelines as long as the minimum registration period for each category of offenders is satisfied. A state may require longer periods of registration.

Gangs

The 2008 General Assembly passed two acts involving gangs. One, S.L. 2008-214 (H 274), creates several new criminal offenses specific to gangs, requires forfeiture of the proceeds of gang activity, restricts pretrial release, and creates first offender and expunction procedures. The other, S.L. 2008-56 (S 1358), encourages the development of strategies to prevent gangs and address youth involvement with gangs.

New Gang Offenses

Effective for offenses committed on or after December 1, 2008, S.L. 2008-214 creates several new offenses involving gangs, keyed to specific definitions of gangs, gang activity, and other terms. Most of the new offenses are in new Article 13A in G.S. Chapter 14, the North Carolina Street Gang Suppression Act (G.S. 14-50.15 through 14-15.30). G.S. 14-50.21 states that each offense in violation of new G.S. 14-50.16 through 14-50.20 is considered a separate offense. The new offenses are described first, the definitions of the italicized terms thereafter.

Offense of pattern of criminal street gang activity. Under new G.S. 14-50.16(a), a person commits a Class H felony if he or she:

- is employed by or associated with a criminal street gang and either
  - conducts or participates in a *pattern of criminal street gang activity,* or

- acquires or maintains any interest in or control of any real or personal property through a *pattern of criminal street gang activity.*

A person commits a Class F felony rather than a Class H felony if he or she

- is an organizer or supervisor, or acts in any other position of management with regard to a *criminal street gang,* and
- conducts or participates in a *pattern of criminal street gang activity.*

Solicitation of criminal street gang activity by person 16 years of age or older. Under new G.S. 14-50.17, a person commits a Class H felony if he or she

- causes, encourages, solicits, or coerces
- a person 16 years of age or older
- to participate in *criminal street gang activity.*

Solicitation of criminal street gang activity by person under age of 16. Under new G.S. 14-50.18, a person commits a Class F felony if he or she

- causes, encourages, solicits, or coerces
- a person under 16 years of age
- to participate in *criminal street gang activity.*

The statute states that it does not preclude a person who violates the statute from being held criminally culpable under any other provision of law for an offense committed by a minor.

Threat to deter withdrawal from criminal street gang. Under new G.S. 14-50.19, a person commits a Class H felony if he or she

- communicates a threat of injury to a person or to damage the property of another
- with the intent to deter a person from assisting another to withdraw from membership in a *criminal street gang.*

Threat to retaliate for withdrawal from criminal street gang. Under new G.S. 14-50.20, a person commits a Class H felony if he or she

- communicates a threat of injury to a person or to damage the property of another
- as punishment or retaliation against a person for having withdrawn from a *criminal street gang.*

Enhancement of misdemeanor committed for benefit of criminal street gang. Under new G.S. 14-50.22, a person is guilty of an offense that is one class higher than the offense committed if he or she

- is age 15 or older and
- commits a misdemeanor
- for the benefit of, at the direction of, or in association with
- a *criminal street gang.*

If the misdemeanor committed is a Class A1 misdemeanor, it is treated as a Class I felony under this statute.

Discharging firearm from enclosure. Under new G.S. 14-34.9, a person commits a Class E felony if he or she

- willfully or wantonly
- discharges or attempts to discharge

- a firearm
- as part of a pattern of criminal street gang activity
- from within any building, structure, motor vehicle, or other conveyance
- toward a person not within that enclosure.

This statute, which is not part of Article 13A, does not contain any definitions, and it is not clear which, if any, definitions from Article 13A apply (see definition of terms, below). If the term *pattern of criminal street gang activity* is meant to be applied as required in Article 13A, the defendant must have had two prior convictions to be charged with this offense. If the General Assembly intended to apply the definition of *criminal street gang activity* from Article 13A, using the term *pattern* in a colloquial sense only, less stringent requirements would apply.

Offenses involving criminal street gang activity that are not specifically enumerated. New G.S. 50.25 provides that when a defendant is found guilty of a criminal offense other than an offense under G.S. 14-50.16 through 14-50.20, the presiding judge must determine whether the offense involved *criminal street gang activity.* If the judge so finds, the judge must so indicate on the judgment form, and the clerk of court must ensure that the official record of conviction includes a notation of the court's determination. There is no additional punishment prescribed in these circumstances.

Applicability to juveniles. G.S. 14-50.28 states that the new offenses do *not* apply to juveniles under the age of 16 except for a violation of G.S. 14-50.22 (enhancement of misdemeanor committed for benefit of criminal street gang, described above), which specifically applies to violators 15 years of age or older.

Key Definitions

New G.S. 14-50.16 contains several key definitions for the new gang offenses, described above.

A *criminal street gang* or *street gang* means

- an organization, association, or group of three or more people that
  - has as one of its primary activities the commission of one or more felonies or delinquent acts that would be felonies if committed by an adult;
  - has three or more members individually or collectively engaged in, or who have engaged in, *criminal street gang activity*; and
  - may have a common name or identifying sign or symbol.

Criminal street gang activity means to

- commit, or attempt to commit, or solicit, coerce, or intimidate another person to commit an act or acts
- with the specific intent that such act or acts be for the purpose or in furtherance of the person's involvement in a *criminal street gang.*

The definition states that "an act or acts is included if accompanied by the necessary mens rea or criminal intent and would be chargeable by indictment" under Article 5 of G.S. Chapter 90 (the Controlled Substances Act) or as an offense under G.S. Chapter 14 except for certain listed offenses.

A *pattern of criminal street gang activity* means

- engaging in and having a conviction for
- at least two prior incidents of *criminal street gang activity* that

  - have the same or similar purposes, results, accomplices, victims, or methods of commission or are otherwise interrelated by common characteristics, and
  - are not isolated and unrelated
- provided that at least one of these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years of prior *criminal street gang activity*, excluding any period of imprisonment.

This last clause indicates that an offense of criminal street gang activity committed before December 1, 2008, may be a qualifying prior offense; however, this offense did not exist under North Carolina law before passage of the act, which applies only to offenses committed on or after December 1, 2008. Consequently, all qualifying prior offenses may have to be on or after that date.

The definition also states that an offense committed by a defendant prior to indictment for an offense based on a pattern of criminal street gang activity may not be used as the basis for any subsequent indictments for offenses involving a pattern of street gang activity. In other words, a prior offense appears to be extinguished for purposes of charging a pattern of criminal street gang activity once a person is indicted for a pattern of criminal street gang activity, whether or not the prior offense is alleged in the indictment.

Other Penalties and Adverse Consequences

S.L. 2008-214 revises and adds a number of statutes to impose other consequences for gang activities.

Forfeiture. Revised G.S. 14-2.3 and new G.S. 14-50.23 provide for forfeiture of property used in connection with certain gang activities.

The violations covered by the two statutes are not entirely consistent. Revised G.S. 14-2.3, the general provision on forfeiture of the proceeds of crime, states in the case of *any* violation of Article 13A of G.S. Chapter 14, the new article on gangs, any money or other property acquired thereby shall be forfeited to the state. G.S. 14-50.23 states that property used in the course of, derived from, or realized through *criminal street gang activity* or a *pattern of criminal street gang activity* (as defined in Article 13A and described above) is subject to the seizure and forfeiture provisions of G.S. 14-2.3. New G.S. 14-50.23 also includes an exception for "innocent activities" as described in that statute.

Nuisance abatement. New G.S. 14-50.24 provides that any real property that is erected, established, maintained, owned, leased, or used by any *criminal street gang* for the purpose of conducting *criminal street gang activity* (as defined in Article 13A and described above) constitutes a public nuisance and may be abated as provided in G.S. Chapter 19, Article 1 (abatement of nuisances). The new statute includes an exception for "innocent activities."

Use of conviction in civil action. New G.S. 14-50.26 states that a conviction of an *offense defined as criminal gang activity* precludes the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct. This provision reverses the usual rule that convictions (other than guilty pleas or other admissions) are not admissible in later civil proceedings to establish facts determined in the criminal proceeding. It is not entirely clear what is meant by an *offense defined as criminal gang activity.* New Article 13A does not use the term *criminal gang activity,* but new G.S. 14-50.26 may have been intended to apply to *criminal street gang activity.* Also, there is no *offense defined as* criminal gang activity or criminal street gang activity, although there are a number of new gang offenses that include criminal street gang activity as an element.

Local ordinances not preempted. New G.S. 14-50.27 states that new Article 13A does not preclude a local governing body from adopting and enforcing ordinances relating to gangs and gang violence that are consistent with the article and supplement its provisions.

Pretrial Release Restrictions

In most instances, a person charged with a criminal offense has the right to have pretrial release conditions determined. G.S. 15A-533 restricts pretrial release in certain drug trafficking cases by creating a rebuttable presumption that no condition of release will reasonably assure the appearance of the accused or the safety of the community. *See also* G.S. 15A-534.6 (similar presumption in certain methamphetamine cases). S.L. 2008-214 adds G.S. 15A-533(e) to provide that this rebuttable presumption exists if

- there is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with any *criminal street gang*;
- the offense was committed while the person was on pretrial release for another offense; and
- the person has previously been convicted of an offense described in G.S. 14-50.16 through 14-50.20 and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.

A person who meets these criteria may only be released by a district or superior court judge upon a finding that there is a reasonable assurance that the person will appear and that release does not pose an unreasonable risk of harm to the community.

Conditional Discharge and Expunction

S.L. 2008-214 contains two provisions affording first offenders leniency in certain circumstances for violations of new Article 13A.

Conditional discharge and dismissal. G.S. 14-50.29 creates a conditional discharge procedure for first offenders. With the defendant's consent, if the defendant pleads guilty or is found guilty, the court may place him or her on probation, defer further proceedings, and eventually dismiss the case without court adjudication of guilt if

- the defendant has not turned 18 years old,
- the defendant has not been previously convicted of any felony or misdemeanor other than a traffic violation, and
- the current offense is a Class H felony under Article 13A or an enhanced offense under G.S. 14-50.22.

If the court defers proceedings, it must place the defendant on supervised probation for at least one year, in addition to any other conditions. If the defendant fulfills the conditions of probation, the court must discharge the defendant and dismiss the proceedings. A discharge and dismissal is without court adjudication of guilt and does not constitute a criminal conviction. A person may receive one discharge and dismissal under the statute.

The first requirement concerning the defendant's age does not specify the dispositive date, but the answer may lie later in the statute concerning the defendant's eligibility for an expunction. G.S. 14-50.29(d) states that a person who receives a discharge and dismissal may apply for an expunction and that the court must enter an expunction order if the defendant had not turned 18 years old at the time of the offense. In light of this provision, it appears that a person is eligible

for a discharge or dismissal, as well as a later expunction, if the offense occurred before he or she turned 18. G.S. 14-50.30 contains additional requirements for obtaining an expunction following a discharge and dismissal, including various affidavits attesting to the defendant's good character, lack of record, and lack of outstanding restitution orders in the case. The district attorney of the court in which the county was tried is entitled to notice of the proceeding and to respond.

Expunction of conviction. G.S. 14-50.30(a) authorizes an expunction of a criminal conviction, not just an expunction of a discharge and dismissal, but there are two significant differences in the procedures and requirements. First, although the age requirement for expunction of a conviction is identical on its face to the age requirement for expunction of a discharge and dismissal—it states that the defendant must not have turned 18 years of age—the requirement may be stricter. G.S. 14-50.30(b) states that the court must order expunction, assuming all other requirements are met, if the defendant has not turned 18 years of age at the time of conviction. Thus, if the defendant commits the offense before 18 and is convicted thereafter, he or she may not be eligible for an expunction of a conviction. Second, the statute provides that a defendant may not file an application for expunction earlier than (a) two years after the date of conviction or (b) the completion of any probation, whichever is later.

Gang Prevention

S.L. 2008-56 (S 1358), as amended by S.L. 2008-187, Sec. 44.5 (S 1632), directs County Councils, the Department of Public Instruction, the Department of Juvenile Justice and Delinquency Prevention, and the Governor's Crime Commission to study and develop strategies concerning gang activity and youth involvement in gangs.

The Governor's Crime Commission also must develop criteria for eligibility for grants for gang prevention and intervention. Funds are available to public and private entities or agencies for juvenile and adult programs that meet the criteria established by the Governor's Crime Commission. The act does not specify the amount of funds available, but the General Assembly set aside a reserve of $10 million in non-recurring funds for fiscal year 2008–09 for gang prevention. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Sec. L, Reserves/Debt Service/Adjustments.

The act also directs the Department of Crime Control and Public Safety to report to the General Assembly on protocols and procedures used to enter identifying information of juveniles in the GangNet database system. "GangNet is an Internet based law enforcement intelligence sharing database which houses information about known gang members that have been entered by law enforcement agencies. . . ." North Carolina Department of Crime Control and Public Safety, Governor's Crime Commission, *A Comprehensive Assessment of Gangs in North Carolina: A Report to the General Assembly* at viii (Mar. 2008). The General Assembly appropriated $260,000 in nonrecurring funds for fiscal year 2008-09 to Durham County to make enhancements to GangNet. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Sec. I, Correction.

Domestic Violence

New definition of stalking. In 1992, North Carolina first created the offense of stalking in G.S. 14-277.3. Since then, the definition of the offense and its punishment have been revised several times, in 1997, 2001, and 2003. Effective for offenses committed on or after December 1, 2008,

S.L. 2008-167 (H 887) repeals G.S. 14-277.3 and adds new G.S. 14-277.3A, incorporating many of the previous changes and making additional ones. A person is guilty of stalking under the new statute if he or she

- willfully
- without legal purpose
  - harasses another person on more than occasion or
  - engages in a course of conduct directed at another person
- knowing that the harassment or course of conduct would cause
- a reasonable person to
  - fear for the person's safety or the safety of the person's immediate family or close personal associates, or
  - suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

The new statute contains definitions of *harassment, course of conduct, reasonable person,* and *substantial emotional distress.* As under the previous statute, if the prohibited behavior is harassment, it must occur on more than one occasion. If the behavior involves a course of conduct, the new statute does not expressly require that the acts occur on separate occasions, stating only that the defendant have engaged in two or more acts, such as monitoring, observing, following, or threatening another person. However, by using the term "course of conduct," the statute may require that the two acts occur in separate incidents.

The offense classifications for stalking offenses remain the same as under the previous statute. A first offense is a Class A1 misdemeanor, a second offense is a Class F felony, and an offense while a court order is in effect is a Class H felony. As under the previous statute, a person convicted of the misdemeanor offense and sentenced to community punishment must be placed on supervised probation in addition to any other punishment. The new statute modifies slightly the description of the court order required for conviction of a Class H felony. Under the previous statute, the court order had to prohibit similar behavior; under the new statute, the court order must prohibit the conduct described in the new statute.

The new statute also contains a jurisdiction provision, stating that North Carolina may prosecute a defendant for a violation of the statute if any part of the violation occurred in North Carolina, including the effect on the victim.

Several other statutes refer to repealed G.S. 14-277.3—for example, G.S. 15A-266.4 (blood sample for DNA analysis on conviction of certain offenses); G.S. 15A-830 (offenses subject to Crime Victims' Rights Act); and G.S. 50B-1 (definition of domestic violence for purposes of obtaining domestic violence protective order). The act did not change these references to reflect new G.S. 14-277.3A.

Repeat violation of domestic violence protective order. S.L. 2008-93 (H 44) amends G.S. 50B-4.1(f) to provide that a person is guilty of a Class H felony for violating a domestic violence protective order if he or she has previously been convicted of two offenses under G.S. Chapter 50B rather than three offenses. The act states that it is effective for offenses committed on or after December 1, 2008, but that offenses committed before December 1, 2008, may be considered in determining the total number of prior offenses.

Informational sheet for domestic violence victims. G.S. 15A-831(a) describes the duties of the investigating law enforcement agency in cases involving offenses covered by the Crime Victims' Rights Act, including certain offenses in which the accused and the victim have a personal relationship as defined in G.S. 50B-1(b)—that is, domestic violence offenses. Effective July 1, 2008, S.L. 2008-4 (H 2189) amends G.S. 15A-831(a) to require the investigating law enforcement agency

to provide a victim of a domestic violence offense a copy of the informational sheet developed by the Administrative Office of the Courts pursuant to G.S. 50B-3(c1) (AOC-CV-323T, online at www.nccourts.org/Forms/Documents/1074.pdf). This is the same informational sheet that the clerk of court gives to the applicant for a protective order. The act also requires the North Carolina Domestic Violence Commission to study the adoption of a statewide automated notification system for individuals who have received a domestic violence protective order under G.S. Chapter 50B. The Commission must report on the study to the Joint Legislative Commission on Domestic Violence and the General Assembly by January 1, 2009.

Other Criminal Offenses

Generally

Sixty-month sentencing enhancement for use of firearm *or* deadly weapon. G.S. 15A-1340.16A increases a defendant's sentence by sixty months if the defendant commits a Class A through E felony by using, displaying, or threatening the use or display of a firearm while actually possessing the firearm about his or her person. Effective for offenses committed on or after December 1, 2008, S.L. 2008-214 (H 274), the act creating several new gang offenses, significantly broadens this statute by imposing the sixty-month sentence enhancement if the crime involves a firearm *or* a deadly weapon in the above circumstances. The enhancement does not apply—whether the weapon is a firearm or other deadly weapon—if the evidence regarding its use, display, or threatened use or display is needed to prove an element of the felony or if the defendant does not receive a sentence of active imprisonment. G.S. 15A-1340.16A(f); *see also* John Rubin, Ben F. Loeb & James C. Drennan, Punishments for North Carolina Crimes and Motor Vehicle Offenses at 8 (School of Government, 2005) (discussing cases interpreting statute).

Increased punishment for child abuse. North Carolina's statutes have divided physical forms of child abuse into three categories: misdemeanor child abuse inflicting physical injury, felony child abuse inflicting serious physical injury, and felony child abuse inflicting serious bodily injury. Effective for offenses committed on or after December 1, 2008, S.L. 2008-191 (S 1860) revises the child abuse statutes as follows:

- Misdemeanor child abuse inflicting physical injury under G.S. 14-318.2 is increased from a Class 1 to a Class A1 misdemeanor. The elements of the offense remain the same.
- Felony child abuse inflicting serious physical injury is subdivided into two offenses. G.S. 14-318.4(a) continues to provide that a parent or other caretaker is guilty of a Class E felony if he or she intentionally inflicts serious physical injury on a child or intentionally assaults a child and causes serious physical injury. New G.S. 14-318.4(a5) provides that a parent or other caretaker is guilty of a Class H felony if his or her willful act or grossly negligent omission shows a reckless disregard for human life and results in serious physical injury. For purposes of both offenses, new G.S. 14-318.4(d)(2) defines *serious physical injury* as physical injury that causes great pain and suffering *or* serious mental injury. These terms appear to be drawn from case law interpreting the offense of assault inflicting serious injury, in which the courts have construed *serious injury* as including serious mental injury. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime at 86 (6th ed. 2007).
- Felony child abuse inflicting serious bodily injury is also subdivided into two offenses. G.S. 14-318.4(a3) continues to provide that a parent or other caretaker is guilty of a Class C felony if he or she intentionally inflicts serious bodily injury on a child or intentionally

assaults a child and causes serious bodily injury. New G.S. 14-318.4(a4) provides that a parent or other caretaker is guilty of a Class E felony if his or her willful act or grossly negligent omission shows a reckless disregard for human life and results in serious bodily injury. The definition of *serious bodily injury* is recodified in new G.S. 14-318.4(d)(1) but is unchanged.

Server-based electronic game promotions. Article 37 of G.S. Chapter 14 prohibits various gambling devices, including slot machines described in G.S. 14-306 and video gaming machines described in G.S. 14-306.1A. Effective for offenses committed on or after December 1, 2008, S.L. 2008-122 (S 180) enacts G.S. 14-306.3 to make it unlawful to

- promote, operate, or conduct a *server-based electronic game promotion* or
- possess any game terminal with a display that simulates a game ordinarily played on a slot machine or video gaming machine for the purpose of promoting, operating, or conducting a *server-based electronic game promotion*.

G.S. 14-306.3(c) defines a *server-based electronic game promotion* as a system that meets the following criteria: there is a database containing a pool of entries with each entry associated with a prize value; participants purchase or otherwise obtain a prepaid card; with each prepaid card the participant obtains one or more entries; and entries are revealed at a point-of-sale terminal or at a game terminal with a display that simulates a slot machine or video gaming machine. Under G.S. 14-309(a), a person who violates any provision of G.S. 14-304 through 14-309, including new G.S. 14-306.3, is guilty of a Class 1 misdemeanor for a first offense, a Class H felony for a second offense, and a Class G felony for a third or subsequent offense. Under new G.S. 14-309(c), a person who violates G.S. 14-306.3(b) involving the possession of five or more machines prohibited by that subsection is guilty of a Class G felony. Other consequences for a violation of G.S. 14-306.3 include automatic revocation of any alcoholic beverage and control permit under G.S. Chapter 18B and any contract to sell lottery tickets under Article 5 of G.S. Chapter 18C. Revised G.S. 14-298 also authorizes the seizure of any game terminal described in G.S. 14-306.3(b). The prohibitions do not apply to gaming on Indian lands as described in G.S. 14-306.3(e).

Internet sales of tickets above face value. G.S. 14-344 prohibits "ticket scalping," making it a Class 2 misdemeanor to sell or resell tickets for an event for more than their face value, plus tax and a reasonable service fee. The service fee limit is $3 per ticket except that a ticket sales agent may charge a higher service fee if the promoter and agent have so agreed. S.L. 2008-158 (S 1407) adds new G.S. 14-344.1 allowing Internet sales of tickets above face value on the following conditions: (a) the venue where the event will occur has not prohibited resales above face value and (b) the person reselling the ticket provides a ticket guarantee that meets the requirements of the statute. An Internet sale that exceeds the face value of the ticket and does not comply with new G.S. 14-344.1 is punishable as a violation of G.S. 14-344, described above. The new statute states that it does not apply to student tickets issued by institutions of higher education in North Carolina for sporting events, indicating that Internet sales of student tickets above face value will still be treated as ticket scalping. The act is effective August 1, 2008, and expires June 30, 2009.

Effective for the same time period, the act also adds G.S. 14-344.2 making it an unfair trade practice in violation of G.S. 75-1.1 for a person to sell, use, or possess software designed primarily to interfere with the operation of a ticket seller who sells over the Internet. The new statute gives the ticket seller and venue hosting the event standing to bring a private civil action for a violation.

Hate crimes. In 1953, the North Carolina General Assembly enacted Article 4A of G.S. Chapter 14 to prohibit cross burning and other acts of intimidation. Effective for offenses committed on December 1, 2008, S.L. 2008-197 (S 685) amends several of the statutes in that

article as well as G.S. 14-3(c), the general punishment provision for misdemeanors committed out of ethnic animosity. The changes are as follows:

- G.S. 14-12.12(b) has made it a Class I felony to place a burning cross on the property of another or on a public street or highway with the intent to intimidate any person, prevent a person from doing a lawful act, or cause a person to do an unlawful act. The act revises G.S. 14-12.12(b) to include the burning of a cross on any public property with the specified intent and revises G.S. 14-12.15 to increase the punishment for a violation from a Class I to Class H felony.
- G.S. 14-12.13 has made it a Class I felony to place an exhibit of any kind in any location with the intent to intimidate any person, prevent a person from doing a lawful act, or cause a person to do an unlawful act, and G.S. 14-12.14 has made it a Class I felony to commit such an act with the specified intent while the perpetrator is wearing a mask, hood, or other device to disguise his or her identity. The act revises these two statutes to specify that the term *exhibit* includes a noose, and it revises G.S. 14-12.15 to increase the punishment for such a violation from a Class I to Class H felony.
- G.S. 14-3(c) has made it a Class 1 misdemeanor to commit a Class 2 or Class 3 misdemeanor because of the victim's race, color, religion, nationality, or country of origin, and has made it a Class I felony to commit a Class 1 or Class A1 misdemeanor for that reason. The act revises this statute to increase the latter punishment to a Class H felony.

The act directs the Legislative Research Commission to study the impact of recent cross burnings and hanging of nooses within North Carolina to determine whether additional modifications should be made to deter such conduct. The Commission's report is due by the 2009 session of the General Assembly.

Child support orders. Effective October 1, 2008, S.L. 2008-12 (H 724) amends G.S. 50-13.4(g) to eliminate the requirement that the social security numbers of the parties be listed on North Carolina child support orders. G.S. 50-13.4(g) continues to require that the parties provide their social security number to the clerk of court in the county where the action is brought or order is issued, and revised G.S. 5-13.4(h) requires the Administrative Office of the Courts to transmit this information to the Department of Health and Human Services, Child Support Enforcement Program.

Property Offenses

Increased punishment for vandalism. G.S. 14-144 has made it a Class 2 misdemeanor to deface or damage houses, churches, fences, and walls as described in that statute. Effective for offenses committed on or after December 1, 2008, S.L. 2008-15 (H 946) makes a violation a Class I felony if the damage is $5,000 or more.

Theft of fixtures. North Carolina generally follows the common law definition of larceny except as modified by court decision or statute. Traditionally, the offense of larceny has applied to the theft of personal property only—property that is not real property (land) or fixtures (property affixed to real property). New G.S. 14-83A, enacted in S.L. 2008-128 (S 944), abolishes this distinction. Effective for offenses committed on or after December 1, 2008, the new statute provides that the theft of personal property that has become affixed to real property is chargeable as larceny as provided in other statutes.

Changes to larceny offenses. The 2007 General Assembly created and revised three statutes involving larceny offenses. *See* John Rubin, *2007 Legislation Affecting Criminal Law and Procedure,* Administration of Justice Bulletin No. 2008/01 at 23–24 (Jan. 2008), online at

www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0801.pdf. Effective for offenses committed on or after August 7, 2008, S.L. 2008-187, Sec. 34 (S 1632) makes minor changes to all three.

In G.S. 14-71, the 2007 General Assembly revised the elements of the offenses of receiving and possessing stolen goods to include property in the custody of a law enforcement agency that was represented by an agent of the agency to be stolen. The act revises that statute to add representations by "a person authorized to act on behalf of a law enforcement agency."

G.S. 14-72.11 created four different types of larceny from a merchant. For one version, the defendant must use an exit door erected and maintained in accordance with the requirements of certain federal regulations. The act changes the C.F.R. (Code of Federal Regulations) references.

G.S. 14-86.6 made it a Class H felony for a person to conspire to commit theft of retail property from *a retail establishment* with a value exceeding $1,500 over a 90-day period (assuming the other elements of the offense are satisfied). The act modifies the statute to provide that the offense is committed if the person conspires to commit theft of retail property from *retail establishments* (assuming the value, time period, and other elements are met). Thus, a conspiracy meeting the requirements for the offense may be prosecuted if directed at a single retail establishment or multiple establishments.

Motor Vehicle Offenses[5]

Hit and run. S.L. 2008-128 (S 944) amends G.S. 20-166 to replace the terms *accident* and *collision* with the term *crash*. Revised G.S. 20-166 distinguishes leaving the scene of a crash that resulted in serious bodily injury, as that term is defined in G.S. 14-32.4, from leaving the scene of a crash resulting in injury. A person who leaves the scene of a crash resulting in serious bodily injury commits a Class F felony, whereas a person who leaves the scene of a crash resulting in injury commits a Class H felony. The act is effective December 1, 2008, and applies to offense committed on or after that date.

Riding in open bed of vehicle. S.L. 2008-216 (H 2340) amends G.S. 20-135.2B to raise the minimum age from 12 to 16 years old at which children can ride in the open bed or cargo area of a vehicle (such as the back of a pickup truck). The act also removes the exception for vehicles that are operated in a county with no incorporated area with a population exceeding 3,500. In addition, the amended statute provides that the penalty for a violation, which remains an infraction, is no more than $25 even if more than one child under the age of 16 is riding in the open bed or cargo area; and that a violation of the statute does not constitute negligence per se. The amendments apply to offenses committed on or after October 1, 2008.

Regulatory Offenses

Recycling violations by permittees. G.S. 18B-1006.1 requires permittees, such as restaurants and bars, to recycle all recyclable beverage containers sold at retail on the premises. The statute has provided that failure to comply with the statute is not grounds for revoking a permit. The technical corrections bill, S.L. 2008-187, Sec. 35.5 (S 1632), revises the statute to clarify that a conviction for a violation of the statute does not constitute an alcoholic beverage offense under G.S. 18B-900(a)(4), which otherwise would disqualify a person from holding a permit if the con-

5. The summaries in this part of the bulletin are drawn from "Motor Vehicles," by Shea Denning, in North Carolina Legislation 2008 (forthcoming), online at www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html. For a comprehensive discussion of the motor vehicle changes made by the 2008 General Assembly, consult that publication.

viction was within the preceding two years. The change is effective August 7, 2008. A violation of the statute remains a Class 1 misdemeanor under G.S. 18B-102(b), the general punishment statute for violations of G.S. Chapter 18B.

Massage therapy. S.L. 2008-224 (S 1314) amends various statutes in Article 36 of G.S. Chapter 90, the North Carolina Massage and Bodywork Therapy Practice Act. Effective for offenses committed on or after December 1, 2008, the act makes one criminal change, revising G.S. 90-634 to make it a Class 3 misdemeanor to open, operate, or advertise a massage and bodywork therapy school without first having obtained the approval required by G.S. 90-637.1. The statutory reference is incorrect, however. The correct reference is new G.S. 90-631.1. Other violations of the massage therapy act remain punishable as a Class 1 misdemeanor under G.S. 90-634.

Effective for applications for licensure on or after August 17, 2008, the act also adds G.S. 90-629.1 to require applicants for licensure as massage and bodywork therapists to consent to a criminal history record check. The act adds G.S. 114-19.11B to authorize the North Carolina Department of Justice to provide criminal record information to the North Carolina Board of Massage and Bodywork Therapy.

Regulation of mortgage lenders and servicers. S.L. 2008-228 (H 2463) amends various statutes in Article 19A of G.S. Chapter 53, the North Carolina Mortgage Lending Act. Effective for anyone engaged in the business of mortgage servicing on or after January 1, 2009, the act requires *mortgage servicers,* as defined in revised G.S. 53-243.01, to be licensed under revised G.S. 53-243.02. The act also revises G.S. 53-243.14, which has made it a Class I felony to act as a mortgage broker or banker without a license, to reduce the penalty to a Class 3 misdemeanor and to make that penalty applicable to acting as a mortgage servicer without a license.

Election law offenses. S.L. 2008-150 (S 1263) addresses a number of election-related issues. A violation of some provisions, such as contribution limits, is a criminal offense. For a discussion of this law, see "Elections," by Robert P. Joyce, in North Carolina Legislation 2008 (forthcoming), online at www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html.

Drought preparedness. Effective for offenses committed on or after December 1, 2008, S.L. 2008-143 (H 2499) adds G.S. 143-355.6(d) to provide that a violation of emergency water conservation rules adopted by the Secretary of Environment and Natural Resources pursuant to new G.S. 143-355.3(b) is a Class 1 misdemeanor. This provision is part of a larger set of measures intended to improve drought preparedness and response.

Substance abuse professionals. The North Carolina Substance Abuse Professionals Practice Act, Article 5C of G.S. Chapter 90, regulates the substance abuse professionals described therein. Effective July 28, 2008, S.L. 2008-130 (S 2117) revises the definitions and titles of certain of the positions covered by that article and makes those positions subject to G.S. 90-113.43, which provides that it is a Class 1 misdemeanor to engage in an illegal practice described therein.

Juveniles[6]

Release of information about escaped juvenile. G.S. 7B-3102 prescribes conditions under which the juvenile justice system may release specified information to the public about a juvenile when

6. The summary in this part of the bulletin is drawn from "Children and Juvenile Law," by Janet Mason, in North Carolina Legislation 2008 (forthcoming), online at www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html. For a comprehensive discussion of the juvenile law changes made by the 2008 General Assembly, consult that publication. The sex offender and gang acts discussed earlier in this bulletin also have implications for juveniles.

that juvenile escapes. As rewritten by S.L. 2008-169 (H 2492), effective October 1, 2008, the statute provides as follows:

1. When a juvenile who has been adjudicated delinquent for any offense escapes from a detention facility, secure custody, or a youth development center, the Department of Juvenile Justice and Delinquency Prevention (DJJDP) is required to release to the public, within 24 hours,
   a. the juvenile's first name, last initial, and photograph;
   b. the circumstances and location of the escape, including the name of any institution from which the juvenile escaped; and
   c. a statement, based on the juvenile's record, of the level of concern DJJDP has about the juvenile's threat to self or to others.
2. DJJDP is authorized to release the same information when a juvenile who is alleged, but not adjudicated, to be delinquent escapes from a detention facility or secure custody, but only if
   a. the juvenile is alleged to have committed an offense that would be a felony if committed by an adult, and
   b. DJJDP determines, based on the juvenile's record, that the juvenile presents a danger to self or others.

In either circumstance DJJDP is required to make a reasonable effort to notify the juvenile's parent, legal guardian, or custodian before releasing information to the public. If an escaped juvenile is taken into custody before the information is released, DJJDP shall not release the information.

Law Enforcement

Interstate Wildlife Violator Compact. Effective October 1, 2008, S.L. 2008-120 (S 175) enacts the Interstate Wildlife Violator Compact (G.S. 113-300.5 through 113-300.8) and directs the Governor to enter into the Compact with other states on behalf of North Carolina. Beginning October 1, 2008, the Compact is effective when adopted by at least two states (pursuant to the procedures described in Article VIII in new G.S. 113-300.6).

The legislative findings in the Compact, in Article I of new G.S. 113-300.6, focus on arrest and bond practices for violations of wildlife laws. They state that a person cited for a wildlife violation in a state other than the person's home state often has been required to post bond to secure appearance for trial and, if unable to post bond, has been taken into custody. According to the findings, the purpose of this practice is to ensure compliance by out-of-state residents, who otherwise might disregard the charge upon returning home. The findings recognize, in contrast, that a person charged with a wildlife violation in the person's home state is usually cited at the scene and released immediately. The findings conclude that the practice of arresting and requiring bond of nonresidents causes unnecessary inconvenience and at times hardship for the person charged and consumes an undue amount of law enforcement time. In light of these findings, the Compact restricts the authority of law enforcement officers to arrest and require the posting of bond by out-of-state residents for wildlife violations. In lieu of these powers, the Compact establishes a procedure for suspending the hunting and fishing licenses of out-of state residents who fail to comply with or are convicted of wildlife charges.

Article III of new G.S. 113-300.6 provides that if a resident of one state, called the *home state,* commits a wildlife violation in another state, called the *issuing state,* the officer in the issuing state may only issue a citation to the person and may not take the person into custody or require the

person to post collateral to secure the person's appearance in the issuing state. These restrictions apply if: (1) the home state is a member of the Compact; (2) the cited person gives the officer his or her *personal recognizance,* defined in the Compact as the person's agreement that he or she will comply with the terms of the citation; and (3) the person provides adequate proof of identification to the officer. A *wildlife violation* is defined as any violation of a statute, law, regulation, ordinance, or rule developed and enacted to manage wildlife resources and their use. If the person fails to comply with the terms of the citation or is convicted, the failure to comply or conviction is reported to the licensing authority of the home state.

Article IV in G.S. 113-300.6 provides that upon receiving a report of a failure to comply, the home state must initiate an action to suspend the person's license privileges and must suspend those privileges unless satisfactory evidence of compliance with the wildlife citation is furnished by the issuing state to the home state. If the home state receives a report of conviction from the issuing state, the home state must enter the conviction in its records and treat the conviction as if it occurred in the home state for purposes of license privileges. Article V in G.S. 113-300.6 provides that all states that are party to the Compact must recognize the suspension of license privileges as if the violation on which the suspension is based had occurred in their state.

Last, effective for offenses committed on or after October 1, 2008, new G.S. 113-300.8 makes it a Class 1 misdemeanor for a person to hunt, fish, trap, possess, or transport wildlife, or to purchase or possess a license to do those things, in violation of a suspension or revocation under the Compact.

General Assembly police. G.S. 120-32.2 describes the jurisdiction of members of the General Assembly police. Effective August 2, 2008, S.L. 2008-145 (S 1957) amends that statute to authorize General Assembly police officers to exercise their powers anywhere in the state while performing advance work or providing security for legislative members, staff, and the public for study, standing, select, or joint select committee meetings, commission meetings of the General Assembly, regional, state, or national meetings of legislative bodies, and while accompanying a member of the General Assembly to or from such events.

Immigration enforcement funds. The sum of $600,000 in nonrecurring funds for fiscal year 2008–09 is appropriated to the Department of Crime Control and Public Safety to contract with the North Carolina Sheriffs' Association for immigration enforcement services. The funds are to be used for technical assistance and training associated with immigration enforcement. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Sec. I, Crime Control and Public Safety. The Sheriffs' Association must report to the General Assembly on the use of the funds by March 1, 2009. *See* S.L. 2008-107, Sec. 18.3 (H 2436).

Reporting of recurrent illness or serious physical injury of minor to law enforcement. In addition to the duty to report suspected child abuse, neglect, dependency, and death by maltreatment to the department of social services under G.S. 7B-301, hospitals and physicians have a duty under G.S. 90-21.20 to report certain types of injury or illness to law enforcement. Effective December 1, 2008, S.L. 2008-179 (H 2338) adds G.S. 90-21.20(c1) to require hospitals and physicians to report to law enforcement cases involving recurrent illness or serious physical injury of a person under 18 years of age when, in the doctor's professional opinion, the illness or injury appears to be the result of nonaccidental trauma.

Report of death at state mental health facility. Effective July 28, 2008, S.L. 2008-131 (S 1770) amends G.S. 122C-31 to require state mental health facilities to report the death of any client of the facility, regardless of the manner of death, to the medical examiner of the county in which the body of the deceased is found. The act makes a conforming amendment to medical examiners' jurisdiction, described in G.S. 130A-383.

Limitation of public duty doctrine as defense. Effective for claims arising on or after October 1, 2008, S.L. 2008-170 (H 1113) adds G.S. 143-299.1A to limit the use of the public duty doctrine as an affirmative defense to a civil lawsuit for acts by state law enforcement officers and other state employees. The statute states that it does not limit the assertion of the public duty doctrine as a defense on the part of a unit of local government or its officers, employees, or agents. The impact of this act is discussed in more detail in "Courts and Civil Procedure," by Michael Crowell and Ann Anderson, in North Carolina Legislation 2008 (forthcoming), online at www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html.

Sentencing and Corrections[7]

Sentencing

New aggravating factor. Effective for offenses committed on or after December 1, 2008, S.L. 2008-129 (H 1003) adds a new felony sentencing aggravating factor to the list of statutory aggravators in G.S. 15A-1340.16(d). Under the new factor, a defendant who, during the ten-year period prior to the commission of the offense for which he or she is now being sentenced, has been found to be in willful violation of probation, parole, or post-release supervision, may be sentenced in the aggravated range.

The law states that this aggravating factor may, like a previous juvenile adjudication for a serious felony under G.S. 15A-1340.16(d)(18a), be found by the court and not by the jury. This provision appears to rest on the assumption that prior revocations of probation, parole, or post-release supervision would fall within the prior-record exception to the rule set out in *Blakely v. Washington*, 542 U.S. 296 (2004), which requires facts other than a "prior conviction" to be admitted to or submitted to a jury and proved beyond a reasonable doubt before they may be used to increase the sentence beyond the presumptive statutory maximum. The North Carolina Court of Appeals has determined juvenile adjudications to be sufficiently analogous to "prior convictions" to fall within the prior-record exception to *Blakely. See State v. Boyce,* 175 N.C. App. 663 (2006). Whether the courts would reach the same conclusion with respect to probation revocations is an open question.

Broadened sentence enhancement for use of firearm or deadly weapon. For a discussion of the broadened sixty-month sentence enhancement for use of a firearm *or* deadly weapon, added by the North Carolina Street Gang Suppression Act (S.L. 2008-214), see Gangs, above.

Sex offenders. The 2008 General Assembly made numerous changes to the sex offender registration and monitoring laws, many of which have sentencing and corrections implications. For a discussion of those changes, see Sex Offenders, above.

Prisons

Medical release for ill and disabled inmates. Under S.L. 2008-2 (S 1480), the Post-Release Supervision and Parole Commission (the Commission) is directed to establish a program, to be

7. The summaries in this part of the bulletin are drawn from "Sentencing, Corrections, Prisons, and Jails," by James Markham, in North Carolina Legislation 2008 (forthcoming), online at www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html. For a comprehensive discussion of the sentencing and corrections changes made by the 2008 General Assembly, consult that publication.

administered by the Department of Correction (DOC), for medical release of certain disabled, terminally ill, or geriatric inmates. The law is effective June 10, 2008.

An inmate is eligible to be considered for medical release if DOC determines that he or she

- is diagnosed as *permanently and totally disabled,* or *terminally ill*, or *geriatric*;
- is incapacitated to the extent that he or she does not pose a public safety risk;
- was not convicted of a capital felony, a Class A, B1, or B2 felony, or an offense requiring registration as a sex offender; and
- meets whatever additional eligibility conditions are established by the Commission.

The statute defines each of the above italicized terms. An inmate is *permanently and totally disabled* when he or she suffers from a "permanent and irreversible physical incapacitation" that was unknown at the time of sentencing or has progressed since sentencing. *Terminally ill* describes an inmate with an incurable illness or disease that was unknown at the time of sentencing or has progressed since sentencing such that the inmate is likely to die within six months. *Geriatric* means 65 years of age or older and suffering from an age-related chronic infirmity, illness, or disease related to aging. Each of the defined terms also requires that the condition be such that the inmate "does not pose a public safety risk"—seemingly making the requirement of "incapacitation" under G.S. 15A-1369.2(a)(2) redundant.

The procedure for medical release is set out in G.S. 15A-1369.3. The initial referral for release is made by DOC to the Commission, based on a request from the inmate, the inmate's attorney, or the inmate's next of kin, or upon a recommendation from within DOC. The referral, which must be completed within 45 days of receiving a request for release, must include an assessment of the inmate's "medical and psychosocial condition" and the risk he or she poses to society. The Commission then has fifteen days to make its determination of whether to grant release to a terminally ill inmate, or twenty days in the case of permanently and totally disabled and geriatric inmates. An inmate denied release under the program may not reapply absent a demonstrated change in medical condition.

Inmates granted release are subject to conditions that apply through the date upon which the inmate's sentence would have expired, including supervision by the Division of Community Corrections (DCC). The inmate must allow DCC offers to "visit the inmate at reasonable times at the inmate's home or elsewhere." Upon receipt of "credible information that an inmate has failed to comply with any reasonable condition" of release, the Commission shall order an inmate returned to DOC custody pending a revocation hearing, probably governed by the hearing procedures set out in G.S. 15A-1368.6, although the statute does not expressly say so.

Under existing law, the Secretary of Correction has authority to "extend the limits of the place of confinement" of certain terminally ill or permanently and totally disabled prisoners by authorizing them to "leave the confines of that place unaccompanied" to receive palliative care. G.S. 148-4(8). This authority (used sparingly in recent years) is presumably unaffected by the new medical release program, though the new program may have greater appeal as a means to reduce state liability for the cost of medical care for eligible inmates.

Limited release of inmates for deportation. Effective August 8, 2008, under S.L. 2008-199 (S 1955), the Post-Release Supervision and Parole Commission (the Commission) may, in its discretion, conditionally release certain inmates into the custody and control of United States Immigration and Customs Enforcement (ICE) pursuant to new G.S. 148-64.1. That section sets out the following eligibility criteria:

- ICE must submit to DOC a final order of removal for the inmate;
- the inmate must be incarcerated only for non-violent offenses, defined in the statute as including *only* impaired driving; breaking and entering buildings under G.S. 14-54; breaking and entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft under G.S. 14-56; possessing stolen goods under G.S. 14-71.1; obtaining property by false pretenses under G.S. 14-100, where the thing of value is less than $100,000; and possession of a Schedule VI controlled substance under G.S. 90-95(d)(4);
- the inmate must have served at least half of the minimum sentence imposed by the court, or must be parole eligible in the case of impaired driving under G.S. 20-138.1;
- the inmate must not have been convicted of an impaired driving offense resulting in death or serious bodily injury; and
- the inmate must agree not to reenter the United States unlawfully.

If ICE does not deport the inmate, the inmate must be returned to DOC custody to serve the remainder of his or her sentence. If an inmate released under the new law returns unlawfully to the United States, the release will be revoked and the inmate will serve the maximum of his or her sentence, less time already served. Additionally, the inmate will be ineligible from that point forward for any form of release other than post-release supervision.

Parole and Post-Release Supervision

Parole reviews for inmates convicted of murder. The parole laws still apply to inmates sentenced for crimes committed before October 1, 1994. Previously, under G.S. 15A-1371, the Post-Release Supervision and Parole Commission (the Commission) considered parole-eligible inmates for release on parole once each year. Under S.L. 2008-133 (H 1624), the Commission will review the cases of prisoners convicted of first- or second-degree murder once every three years, unless exigent circumstances or the interests of justice demand more frequent consideration.

Limit on release of sex offender following arrest for violation of post-release supervision. A provision in Jessica's Law, S.L. 2008-117 (H 933), restricts release of a sex offender following arrest for a violation of post-release supervision. For a discussion of that provision, see Sex Offenders: Jessica's Law, above.

Probation

Probation revocation after period of probation expires. G.S. 15A-1344(f) grants jurisdiction to hold a probation revocation hearing after the period of probation has expired. The statute previously required the State to file a written motion of its intent to conduct a revocation hearing prior to the expiration of the period of probation, and required the court to make a finding that the State had made a "reasonable effort to notify the probationer and to conduct the hearing earlier." G.S. 15A-1344(f). For at least two reasons the statute had been a source of concern. First, the statute's prior wording only granted a judge authority to "revoke" probation after the period of probation expired—not to extend or modify it. *State v. Reinhardt*, 183 N.C. App. 291 (2007). Second, it was sometimes difficult to determine what constituted a "reasonable effort" by the State to hold the hearing earlier. *See, e.g., State v. Burns,* 171 N.C. App. 759 (2005); *State v. Bryant,* 361 N.C. 100 (2006).

Changes to the statute under S.L. 2008-129 (H 1003), applicable to probation violation hearings held on or after December 1, 2008, address both issues. The law adds the words "extend" and "modify" to the statute, making clear that the court is empowered to do everything after the period of probation expires that it could have done during the period itself. The law also does

away entirely with the requirement of a judicial finding as to the State's "reasonable efforts." In its place, the amended statute requires findings that the probationer violated "one or more conditions of probation prior to the expiration period of probation," and that probation should be extended, modified, or revoked "for good cause shown and stated." The state also must file a written violation report with the clerk before the expiration of the period of probation indicating its intent to hold a hearing on one or more violations of the conditions of probation. Extensions under the amended statute are governed by existing G.S. 15A-1342(a), although it is unclear whether new 15A-1344(f)(4) authorizes the court to order the special extension for restitution or treatment after the period of probation has expired, as that extension may be ordered only in the last six months of the original period of probation. If that special extension is not possible after the period has expired, then extensions would be limited by the maximum authorized period of probation, five years.

Limit on bail following arrest of sex offenders. Jessica's Law, S.L. 2008-117 (H 933), restricts bail following arrest for a probation violation by certain sex offenders. For a discussion of that provision, see Sex Offenders: Jessica's Law, above.

Interstate Compact for Adult Offender Supervision

Changes in membership of State Council; clarification of procedures. The Interstate Compact for Adult Offender Supervision (the Compact) allows a person who is sentenced to probation or granted parole in one state, and who wants to reside in another state, to be supervised in the other state. The Compact is a source of some confusion for magistrates and others in the criminal justice system, who confuse Compact supervisees with fugitives from justice subject to extradition, or who are unaware of the hearing procedures required under the Compact and related state law.

Under S.L. 2008-189 (S 1214), three new positions are added to the North Carolina State Council for Interstate Adult Offender Supervision, including a district court judge (appointed by the Chief Justice), a district attorney (appointed by the governor), and a sheriff (also appointed by the governor). The law also enacts new G.S. 148-65.7(a), implementing a $150 transfer application fee for persons convicted in North Carolina who desire to transfer supervision to another State under the Compact. The fee may waived by the Commissioner or his or her designee if it constitutes an undue economic burden. Persons supervised in North Carolina under the Compact are still subject to a $30 monthly fee under what is now G.S. 148-65.7(b).

Compact supervisees in North Carolina may be detained for up to fifteen days pending a hearing to determine whether or not North Carolina officials will recommend returning the supervisee to his or her state of conviction (the "sending state") for a parole, probation, or post-release supervision violation. The new law clarifies that the offender is not entitled to bail pending this hearing (though a similarly-situated North Carolina probationer would be entitled to bail under 15A-1345(b)). With respect to the hearing itself, the new law requires that a record of the hearing be made and, as soon as practicable, be forwarded with recommendations to the supervisee's sending state. If the recommendation is that the sending state retake or re-incarcerate the supervisee, then he or she may be detained pending notice of a final decision from the sending state. If the sending state agrees, the supervisee may be further detained as long as reasonably necessary to arrange for the retaking.

Collateral Consequences, Proceedings, and Services

Increased compensation for erroneous conviction. Article 8 of G.S. Chapter 148 authorizes the state to compensate people who were convicted of a felony, were imprisoned, and received a pardon of innocence from the Governor. Effective for pardons of innocence granted on or after January 1, 2004, S.L. 2008-173 (H 2105) amends G.S. 148-84(a) to increase the compensation for each year of wrongful incarceration from $20,000 to $50,000 and the maximum compensation from $500,000 to $750,000. The amended statute also states that no compensation is due for any portion of a prison sentence during which the person was serving a concurrent sentence for a conviction for which a pardon of innocence was not granted.

New G.S. 148-84(c) provides additional compensation for lost educational or training opportunities. It authorizes an award of compensation for at least one year of job skills training through an appropriate state program and for expenses for tuition and fees at any public North Carolina community college or university for any degree or program. A person is also entitled to assistance in meeting admission standards for these institutions, including assistance in satisfying the requirements for a certificate of equivalency of completion of secondary education; a person may apply for this aid up to ten years after his or her release from incarceration, and this aid may continue for a total of five years. The additional compensation received under new G.S. 148-84(c) is included in calculating whether the person has reached the total compensation limit for an erroneous conviction.

Restoration of firearm rights of individual involuntarily committed for mental health treatment. North Carolina sheriffs have the responsibility for issuing permits to purchase or receive pistols and crossbows and permits to carry concealed handguns. G.S. 14-404 has prohibited the sheriff from issuing a pistol or crossbow permit to a person who has been adjudicated mentally incompetent or committed to a mental institution. G.S. 14-415.12 has prohibited the sheriff from issuing a concealed handgun permit to a person who has been adjudicated as mentally ill or lacking mental capacity. Effective December 1, 2008, S.L. 2008-210 (S 2081) creates a restoration process to allow a person who was involuntarily committed for either inpatient or outpatient mental health treatment to obtain a firearms permit from the sheriff. This process may also have the effect of removing the federal disqualification by reason of mental commitment to the purchase, possession, or transfer of firearms.

New G.S. 122C-54.1 sets forth the procedure by which a person may petition for the removal of the mental commitment bar. The new statute states that a person who has been found not guilty by reason of insanity may not petition for restoration of firearms rights. The act makes conforming changes to G.S. 14-404 and 14-415.12 to allow the sheriff to issue a permit to a person who has had his or her rights restored pursuant to new G.S. 122C-54.1. The sheriff may still deny a permit on other grounds.

The act also adds G.S. 122C-54(d1) to require the clerk of superior court to report to the National Instant Criminal Background Check System (NICS) any individual who is

1. involuntarily committed for inpatient mental health treatment;
2. involuntarily committed for outpatient mental health treatment if the individual has been found to be a danger to self or others;
3. acquitted of a crime by reason of insanity; or
4. found mentally incapable to proceed to trial.

Reporting of the first two grounds is by the clerk of court in the county where the judicial determination was made. (Since North Carolina law does not require a finding of dangerousness

for outpatient commitment, in practice the clerk will only submit information on inpatient commitment orders.) Reporting of the third and fourth grounds is by the clerk in the county where the person was found not guilty by reason of insanity or found incapable to proceed to trial.

NICS is a national information system used by federally licensed firearms dealers to determine whether a prospective purchaser is disqualified from receiving a firearm. 18 U.S.C. 922(g) disqualifies a person from receiving a firearm on nine separate grounds, including having been "adjudicated a mental defective" or having been "committed to a mental institution." Federal law does not require states to submit information to NICS, and until enactment of the above provision, North Carolina law did not require state or local officials to provide information to NICS.

Sexual assault victims' assistance program. Victims of a rape or sexual offense or an attempt to commit those crimes are eligible for financial assistance as provided in G.S. 143B-480.1 through 143B-480.3. G.S. 143B-480.2 has provided that a victim of such an offense may apply for assistance if he or she reports the alleged offense to a law enforcement officer within five days of the occurrence of the act. Effective July 1, 2008, S.L. 2008-107, Sec. 18.2 (H 2436), as amended by S.L. 2008-118, Sec. 2.5 (H 2438), reduces this time limit to 72 hours; the Department of Crime Control and Public Safety, which administers the assistance program, may still waive the time limit. The act also authorizes payment for the full cost of a victim's forensic medical examination up to a maximum of $800, payable directly to the service provider. Revised G.S. 143B-480.3 provides for payment of any co-payment that the victim is required to pay for the forensic medical examination, up to the maximum amount payable for the examination. The act appropriates $1,078,078 in recurring funds to the Department for fiscal year 2008–09 to enhance the ability of the program to pay claims.

Sexual assault and rape crisis center fund. Effective July 1, 2008, S.L. 2008-107, Sec. 19.1 (H 2436) adds G.S. 143B-480.20 to create the Sexual Assault and Rape Crisis Center Fund, administered by the North Carolina Council for Women within the Department of Administration. The fund is to be used to make grants to centers for victims of sexual assault or rape crisis and to the North Carolina Coalition against Sexual Assault, Inc. The act appropriates $1 million in recurring funds for fiscal year 2008–09 for the program. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Sec. J, Administration.

Criminal record checks of employees and contractors of the Division of Motor Vehicles. Effective August 8, 2008, S.L. 2008-202 (S 1799) adds G.S. 114-19.24 to authorize the North Carolina Department of Justice to provide to the Division of Motor Vehicles (DMV) the criminal history of job applicants, employees, contractors, and employees of contractors if these individuals are or will be involved in the production of driver's licenses or identification cards or if they have or will have the ability to affect the identity information that appears on driver's licenses or identification cards. When making a request, DMV must submit a signed consent to the criminal record check by the affected individual.

Other acts, discussed earlier, provide for a criminal record check of applicants for licensure as a massage therapist and sex offender registry checks of contractual personnel at schools.

Expunctions. Effective August 7, 2008, S.L. 2008-187, Sec. 35 (S 1632), the technical corrections bill, revises G.S. 15A-145 to clarify that a person who meets the criteria for expunction of a first offense may petition for the expunction (1) two years after the date of the conviction or (2) after the completion of any period of probation, whichever occurs later.

Studies

The General Assembly authorized the following studies on criminal law. For studies relating to topics or legislation already discussed in this bulletin, see the applicable discussion above. For additional studies that may bear on criminal law, see the chapters on Children and Juvenile Law, Courts and Civil Procedure, Motor Vehicles, and Sentencing, Corrections, Prisons, and Jails in North Carolina Legislation 2008 (forthcoming), online at www.sog.unc.edu/pubs/nclegis/nclegis2008/index.html.

S.L. 2008-181 (H 2431) authorizes the Legislative Research Commission to study

- prohibiting execution of a person with a severe mental disability;
- streamlining and making more cost effective the determination of whether first-degree murder may be tried capitally;
- felony murder;
- reporting of a denial of a pistol permit;
- time limits on review of renewal applications for concealed handgun permits;
- expunction of youthful offenders' criminal records.

The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee may study

- whether the prescription drug database maintained by the Department of Health and Human Services should be accessible to county sheriffs and deputies; and
- methods for increasing inmates' access to educational and vocational training opportunities at state prison facilities and increasing the number of work release slots at minimum security prisons.

The act authorizes the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse to study the involuntary commitment statutes to determine if an individual ordered to undergo an examination by a physician or eligible psychologist is being appropriately supervised during the period of the individual's examination.

S.L. 2008-83 (H 2523) directs the UNC School of Government, in consultation with the Autism Society of North Carolina, UNC-CH TEACCH Autism Program, and appropriate legal associations and organizations to study the training needs of the various groups in the judicial system on the legal issues and appropriate responses regarding individuals with autism. The School of Government must report to the Joint Study Committee on Autism Spectrum Disorder and Public Safety by October 1, 2008.

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