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THE NEW SEX OFFENSES LAW

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by Michael Crowell

INTRODUCTION

Chapter 682 of the 1979 Session Laws enacts a new sex offenses law for North Carolina. The act goes into effect January 1, 1980, at which time the old rape statutes, G.S. 14-21 through 14-27, are repealed. The new law applies to acts committed on and after January 1. A savings clause permits prosecutions under the old law for acts committed before that date.

The main features of the new law, discussed in detail below, are: (1) the sex offense statutes are made sex-neutral, permitting prosecutions of women as well as men; (2) generally, sexual acts other than intercourse, such as forced oral intercourse, are given the same penalty as intercourse; (3) under some circumstances, husbands and wives may now be prosecuted for sex acts against each other; (4) statutory rape can be charged only if the defendant is four years older than the victim; and (5) assault with intent to rape has been replaced with the crime of attempted rape.

There are two kinds of major offenses under the new law, labeled "rape" and "sex offense." Rape is sexual intercourse, just as under the old law, though some of the elements distinguishing first and second degree rape are different. Sex offense covers various other kinds of sexual activity, such as oral intercourse and anal intercourse. The statutes are parallel; that is, there is a first degree rape and a first degree sex offense, a second degree rape and a second degree sex offense, and so forth, and the aggravating elements that make rape first degree, such as use of a deadly weapon, are the same as the aggravating elements for first degree sex offense.

Immediately below are discussions of each of the offenses added by the new law. At the end of that section are some notes about conforming changes in other statutes, such as the felony-murder statute. Following that are two appendices giving the text of the new statutes and suggested arrest warrant forms.

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In the discussion of the new offenses the emphasis is on changes in the law. If an element of a new offense is the same as the old law, there is little or no discussion.

THE NEW OFFENSES

First degree forcible rape. The new statute is G.S. 14-27.2 and the elements of the offense are as follows:

A person is guilty of first degree forcible rape if that person
- (1) has vaginal intercourse;
- (2) with
  - (a) a person other than the defendant's spouse OR
  - (b) with the defendant's spouse if they are living apart pursuant to a written agreement or judicial decree
- (3) by force and against that person's will
- (4) and the defendant
  - (a) used or displayed a dangerous or deadly weapon (or what reasonably appeared to be such a weapon) OR
  - (b) inflicted serious personal injury on the victim OR
  - (c) inflicted serious injury on another person OR
  - (d) was aided and abetted by one or more other persons.

Punishment: Felony punishable by life imprisonment.

As mentioned earlier, the defendant might be either male or female. Because the act required for this offense is vaginal intercourse, the victim and defendant will have to be of the opposite sex. Vaginal intercourse is the same as sexual intercourse or carnal knowledge, and a separate statute, G.S. 14-27.10, provides that just as under the old law the intercourse is complete upon penetration, however slight, and it is not necessary to prove emission of seed.

New G.S. 14-27.8 provides that a spouse may not be charged with any of these offenses unless the couple are living separate and apart pursuant to a written agreement or judicial decree. There is no requirement that the written agreement be approved by a court or notarized or executed in front of someone else; a writing signed and executed by the husband and wife would be sufficient. If the husband and wife have been separated for some time, say a year and a half, but they have no written agreement and there is no court order, forcible intercourse between them would still not be a crime. If they separate, have a written agreement to do so, and then resume living with each other, presumably that agreement has been voided and even if they separate again forcible intercourse would not be a crime. If a man and woman are living together but are not married, forcible intercourse would be a crime just as it has always been (though proof may not be easy).

The requirement that the intercourse be by force is the same as previous law. Case law has held that the threatened use of force will suffice (State v. Overman, 269 N.C. 453 (1967)) and that evidence of the victim's physical resistance is not necessary to prove a lack of consent (State v. Hall, 293 N.C. 559 (1977)). Use of force need not continue throughout the act (State v. Dull, 289 N.C. 55 (1975)).

One way rape can become first degree is if the defendant "employs or displays a dangerous or deadly weapon." Note the difference between this and the old law that required that for first degree rape the victim must have had "her resistance overcome or her submission procured" by the use of the deadly weapon. The new requirement that the defendant employ or display a weapon requires significantly less proof. It would seem sufficient to prove only that the defendant had a gun or knife in his belt or sitting on the dashboard or seat of the car. Presumably a weapon can be displayed without being pointed at the victim and without any actual threat of use being made.

The term "dangerous or deadly weapon" is not defined. Deadly weapon would have the same meaning as in various other statutes, such as assault with a deadly weapon. Some weapons are deadly because of their very nature (guns, long knives, etc.) while others become deadly only because they are used in a manner likely to cause death or serious bodily injury. Dangerous weapon is not a term used elsewhere in North Carolina law. One must assume that it is something less than a deadly weapon. Thus if there were some question whether the knife the defendant had was vicious enough to be a deadly weapon, it might still be called a dangerous weapon and the aggravating element for first degree rape would be satisfied.

The statute goes on to say that the defendant need not actually have a dangerous or deadly weapon so long as it reasonably appears to the victim that that is what he has. First degree rape could be committed, then, by a defendant with a toy pistol, if that toy looked like a real gun or the circumstances of its use--the gun flashed briefly at night--would keep the victim from telling that it was not real.

Another way that first degree rape might be shown is if the defendant seriously injures the rape victim or some other person. Again, the language of the old statute is omitted about the injury being used to overcome the victim's resistance or to procure the victim's submission. Under previous law a broken arm inflicted to force the woman to submit to intercourse made the crime first degree rape, but a broken arm inflicted after the intercourse was complete did not. The wording of the new statute means that the crime becomes first degree regardless of the timing of the serious injury. And the statute provides that the person injured need not be the person who was raped. A common sense view would be that the other person injured must have some connection with the rape; that is, the crime of first degree rape would be committed if the defendant beat and seriously injured the victim's young child who was present or near the scene, but first degree rape would not have been committed if the only person seriously injured was a bystander several blocks from the scene who knew nothing about the rape but just happened to be attacked by the defendant while leaving.

Serious personal injury is not defined in the new statute, but it should mean the same thing as the term "serious injury" used in the assault statutes. That has been defined as "such physical injury as causes great pain and suffering" (State v. Williams, 29 N.C. App. 24 (1976)). Note that the injury must be physical or bodily injury (State v. Jones, 258 N.C. 89 (1962)); mental suffering is not enough.

The last way rape can become a first degree offense is if the defendant is aided or abetted by one or more other persons. Aid and abet is an old term with a well defined meaning. Simply being present does not constitute aiding and abetting unless the person has actually aided or encouraged the person committing the crime (State v. Hargett, 255 N.C. 412 (1961); State v. Ham, 238 N.C. 94 (1953)). But a person can be an aider and abettor without being next to the person who commits the crime, so long as he is standing by to help, is in a position to help, and that is known by the person committing the crime (State v. Chastain, 106 N.C. 900 (1889)). An aider and abettor would be guilty of first degree rape just as the person who commits the intercourse.

The punishment for first degree forcible rape is life imprisonment; no lesser sentence is provided for. The punishments in these statutes were not amended by the presumptive sentencing act, but the General Assembly meets before the presumptive sentencing law goes into effect next July 1 and these punishments will most likely be amended then.

Second degree forcible rape. The statute containing this offense is G.S. 14-27.3 and the elements are as follows:

A person is guilty of second degree forcible rape if that person
- (1) has vaginal intercourse
- (2) with
  - (a) someone other than the defendant's spouse OR
  - (b) the defendant's spouse if they are living apart pursuant to a written agreement or judicial decree
- (3) and the intercourse is
  - (a) by force and against the person's will OR
  - (b) with someone who is
    1. mentally defective OR
    2. mentally incapacitated OR
    3. physically helpless

  which is or should be known to the defendant.

Punishment: Felony punishable by imprisonment for up to 40 years.

Although the statute is worded differently, there really is not much difference between this offense and the old second degree rape. Of course the new offense may be committed by either a man or woman and in a very limited circumstance the defendant and victim may be married, but otherwise the elements are essentially the same. Second degree rape includes any forcible sexual intercourse for which the aggravating elements of first degree rape are not present. It also includes intercourse that is not necessarily by force, when the victim is mentally defective, mentally incapacitated or physically helpless. Adding that language to the statute may make people think the law has changed, but the substance of those provisions seems little different from the common law rule previously applicable in North Carolina. No North Carolina cases on the subject have been found, but treatises such as Perkins On Criminal Law, 2nd Edition, report that "Unlawful sexual intercourse by a man with a woman he has reduced to a state of insensibility by intoxicating liquors or drugs is rape. . . . " (p. 167). This follows the view that rape is intercourse against the victim's will and that any intercourse with someone incapable of giving consent is against that

person's will (p. 163). The terms "mentally defective," "mentally incapacitated," and "physically helpless," which overlap to some extent, are defined in G.S. 14-27.1 and generally include victims who are mentally retarded or suffer from mental disorders making them incapable of knowing what is happening or consenting, or being in such a state from some other reason. The most obvious example would be the victim who has been knocked unconscious or who has been given so much to drink, or such a dose of drugs, that she (or he, of course) does not know what is happening. It is not necessary that the defendant be the one who put the victim in that state; a defendant is liable for taking advantage of such a situation whether or not he created it.

Statutory rape. This offense is found in subsection (a)(2) of G.S. 14-27.2 and the elements are:

> A person is guilty of statutory rape if that person
> (1) has vaginal intercourse
> (2) with a child "of the age of 12 years or less"
> (3) who is at least 4 years younger than the defendant.
> Punishment: Felony punishable by life imprisonment.

To repeat what hardly seems necessary at this point, the defendant may be male or female and the victim may be male or female, but because sexual intercourse is required they must be of opposite sexes. The necessary act is what used to be called sexual intercourse or carnal knowledge and is complete upon the slightest penetration of the vagina by the penis.

As has always been the case with statutory rape the victim's consent is no defense (State v. Temple, 269 N.C. 57 (1966); State v. Johnson, 226 N.C. 266 (1946)). It does not even matter if the intercourse was the victim's idea. And the defendant is not excused because he was mistaken or misled as to the age of the victim (State v. Wade, 224 N.C. 760 (1944)).

The phrase "of the age of 12 years or less" has been quoted because there is a difference of opinion about its meaning. The sponsors of the legislation apparently think that statutory rape may now be charged whenever the victim is less than 13 years old; case law from other states would seem to indicate, though, that the wording quoted above means the victim must not have passed the 12th birthday. The sponsors' view is that a child is "of the age of 12 years or less" until the 13th birthday. The strongest argument in their favor is that the old statute said the victim had to be "under the age of 12 years" (G.S. 14-21); by replacing that language with the new phrase they must have meant to change the law and the courts should enforce that legislative intent. The answer to that argument is a rule of legislative interpretation from an old English case (the cite for which I do not remember) that goes something like this: "If Parliament means to do other than what Parliament says, then Parliament must say so." In other words, the language of the statute is what controls, and if the language is clear enough on its face it does not matter whether something entirely different was intended by the draftsman.

Well, if nothing were known of the sponsors' intent, what meaning would be given to those words? There do not seem to be any North Carolina cases on the subject, but it has been litigated elsewhere. The leading case is Knott v. Rawlings, 250 Iowa 892, 96 N.W.2d 900, 73 A.L.R.2d 868 (1959). Iowa

had a statute that made it unlawful to commit a lascivious act with "a child of the age of sixteen years or under . . . ." The victim was 16 years, 6 months old, and the prosecution argued that a child was "of the age of sixteen years" until she reached her 17th birthday. The Iowa Supreme Court rejected that view, holding that once the 16th birthday was passed the victim was over the age of 16 years. The child was then 16 years and 1 day or 16 years and 1 month or 16 years and 6 months or whatever. The court made an analogy to a contract where the agreed price for goods was $16 or less, noting that the buyer would feel cheated if he went to pick up the goods and was told that the bill was $16.50.

The Knott v. Rawlings opinion cites cases from several other states reaching the same conclusion. My research has not uncovered any authority the other way. If the Iowa view is followed then there has been no change in the age for statutory rape, the victim must still be under 12 years of age.

The new requirement for statutory rape is that there must be four years difference in the ages of the defendant and victim. That difference would be measured from the birthdays. For example, if the defendant were born on 1/1/64 and the victim on 1/15/68 the crime would be statutory rape because there is four years and 15 days difference in age. But if the defendant in that case had not been born until 1/16/64, there would not be statutory rape since there would be one day less than four years difference in the ages. And there is no lesser offense that applies: if there is four years difference in age the offense is statutory rape punishable by life imprisonment, but if there is less than four years difference there is no crime. (A separate act rewrote the contributing to delinquency statute, G.S. 14-316.1, to remove sexual intercourse as a form of contributing to delinquency. Of course if forcible rape is charged the four years difference does not matter.)

First degree forcible sexual offense. This offense is included in G.S. 14-27.4 and the elements are:

> A person is guilty of first degree forcible sexual offense if that person
> (1) engages in a sexual act other than vaginal intercourse
> (2) with
> (a) a person other than the defendant's spouse OR
> (b) the defendant's spouse if they are living apart pursuant to a written agreement or judicial decree
> (3) by force and against that person's will
> (4) and the defendant
> (a) uses or displays a dangerous or deadly weapon (or what reasonably appears to be such a weapon) OR
> (b) inflicts serious personal injury on the victim OR
> (c) inflicts serious personal injury on another person OR
> (d) is aided and abetted by one or more other persons.
> Punishment: Felony punishable by life imprisonment.

This offense is exactly identical to first degree forcible rape except for the kind of sexual act committed. For rape, the act is vaginal intercourse; for sexual offense the defendant must commit a "sexual act," which is defined by G.S. 14-27.1(d) as: "cunnilingus, fellatio, analingus, or

anal intercourse . . . also . . . the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." Cunnilingus, fellatio and analingus are all forms of oral intercourse and case law has held that penetration of the sexual organ or anus (or, in the case of fellatio, penetration of the mouth by the penis) is required for the offense to be complete (State v. Whittemore, 255 N.C. 583 (1961)). A statute, G.S. 14-27.10, specifies that for anal intercourse only the slightest penetration of the anus by the penis needs to be proved.

Sexual act also includes penetration of the vagina or anus by "any object." A defense is given for the doctor who inserts an object for medical reasons. The only question about this provision seems to be whether a hand or finger is an object. One of the draftsmen of the act reports that the sponsors understood that phrase to not include hands and fingers, but again the meaning of the words themselves, not the intent, is what matters. The legislative history sheds no light on the subject since this phrase remained unchanged from the original bill through enactment. For what it's worth, Websters defines "object" as "a thing that can be seen or touched; material thing that occupies space."

For sexual offenses, the nature of the act would determine whether the defendant and victim need to be of opposite sexes. Cunnilingus requires one female participant, but the other party might be male or female. Likewise, fellatio and anal intercourse require one male participant but the other party might be either male or female.

Cunnilingus, fellatio and anal intercourse, which are all forms of sexual offense, are also ways of commiting crime against nature. Thus where there is forcible cunnilingus, fellatio or anal intercourse, the district attorney will have a choice between prosecuting for sexual offense (first or second degree) or crime against nature. First degree forcible sexual offense carries life imprisonment and second degree is a 40-year felony, but crime against nature is only a 10-year felony. If the cunnilingus, fellatio or anal intercourse is with consent, and the victim is over the age limit for statutory sexual offense, then sexual offense cannot be charged but crime against nature may still be used since that offense is for consensual as well as forcible acts.

Second degree forcible sexual offense. The new statute is G.S. 14-27.5 and the elements are:

> A person is guilty of second degree forcible sexual offense if that person
> (1) engages in a sexual act other than vaginal intercourse
> (2) with
> (a) a person other than the defendant's spouse OR
> (b) the defendant's spouse if they are living apart pursuant to a written agreement or judicial decree
> (3) and the act is
> (a) by force and against that person's will OR
> (b) with someone who is
> 1. mentally defective OR
> 2. mentally incapacitated OR
> 3. physically helpless
> which is or should be known by the defendant.

Punishment: Felony punishable by imprisonment for up to 40 years.

Everything that needs to be said about second degree forcible sexual offense has already been said. The elements are the same as for second degree forcible rape except for the kind of sexual act. The sexual act is the same as required for first degree forcible sexual offense.

Statutory sexual offense. This crime is contained in G.S. 14-27.4(a)(2) and the elements are:

> A person is guilty of statutory sexual offense if that person
> (1) engages in a sexual act other than vaginal intercourse
> (2) with a child "of the age of 12 years or less"
> (3) who is at least four years younger than the defendant.
> Punishment: Felony punishable by life imprisonment.

Except for the kind of sexual act, this offense is identical to statutory rape. If the sexual act is cunnilingus, fellatio or anal intercourse, crime against nature could be charged when statutory sexual offense is inappropriate because there is not four years difference in age.

Attempts. The assault with intent to rape statute has been repealed and instead defendants may simply be charged with attempted rape or attempted sexual offense. Most often that charge will be used when there is no evidence of penetration. An attempt to commit any one of the offenses discussed above may be charged. The statute setting out the punishment for the various attempt offenses is G.S. 14-27.6.

Sexual activity by a substitute parent. This offense is found in new G.S. 14-27.7 and has the following elements:

> A person is guilty of sexual activity by a substitute parent if that person
> (1) has assumed the position of parent in the home of a person less than 18 years old
> (2) and has vaginal intercourse or engages in a sexual act
> (3) with a person less than 18 years old residing in the home.
> Punishment: Felony punishable by imprisonment for 2 to 15 years.

Like rape and sexual offense, this crime may be committed by either a male or female and the victim may be either male or female (but sometimes must be of the opposite sex, depending on the sexual act). This offense applies if there is either sexual intercourse or any other sexual act or penetration of the vagina or anus by any object (see the discussion under first degree forcible sexual offense on the meaning of sexual act).

Because this offense requires that the defendant have assumed the position of parent, it would not apply to an actual parent. If the act is sexual intercourse, the parent may still be charged with incest, G.S. 14-178, which has not been changed. If the act is cunnilingus, fellatio or anal intercourse, the actual parent could be charged with crime against nature.

To be a person who has assumed the position of parent it would seem that the defendant must have moved into the house. Someone simply visiting for a short while or taking care of children during the day would not seem to qualify as a substitute parent, but the boyfriend who has moved in with the divorced woman and her 15-year old daughter would be a substitute parent. The crime need not take place in the home.

The statute specifies that consent is not a defense. And the case law that a mistake as to the victim's age is not a defense would apply here (see discussion of that subject under statutory rape).

If the child is "of the age or 12 years of less," then statutory rape or statutory sexual offense might be an appropriate charge. Or first or second degree forcible rape or sexual offense would be appropriate if the act was done by force. Crime against nature would apply to consensual cunnilingus, fellatio and anal intercourse, but the punishment for that offense is less than for this one.

Sexual activity by a custodian. This offense is also in G.S. 14-27.7 and the elements are:

> A person is quilty of sexual activity by a custodian if that person
> (1) is someone who
> (a) has custody of the victim OR
> (b) is an agent or employee of a person or institution having custody of the victim
> (2) and has vaginal intercourse or engages in a sexual act
> (3) with the person who is in custody.
> Punishment: Felony punishable by imprisonment for 2 to 15 years.

For this offense, the victim's age does not matter. Again, the statute specifies that consent is not a defense. The sexual activity may be either intercourse, cunnilingus, fellatio, anal intercourse or penetration of the vagina or anus by any object.

Most likely this offense will be used against jailers, prison guards, hospital attendants, nursing home attendants, and others employed in strict custody institutions. The institution may be private or public. "Custody" would seem to mean something more than temporary care, so this offense would not be applicable to the babysitter who is in charge of the child for only a few hours. Nor would this seem appropriate for someone like a school teacher who has responsibility for a child but not fulltime custody. However, the meaning of custody is not altogether clear and prosecutors will have some tough decisions to make.

The defendant need not be the individual responsible for custody of the victim; the defendant need only be someone employed by the institution where the victim is in custody. And note that the sexual activity does not have to take place in the institution.

CONFORMING AMENDMENTS TO OTHER LAWS

Evidence. The sex offenses legislation included an amendment to G.S. 8-58.6, the statute concerning evidence in rape cases. That amendment

extends to the new rape and sex offense crimes the same provisions as previously applied to rape cases limiting the use of evidence concerning prior sexual behavior. No other substantive change is made in that statute. Similarly, G.S. 15-166 is amended to allow exclusion of the public from trials involving all these new offenses.

Accessory before the fact. Also amended was G.S. 14-6 concerning punishment for accessories before the fact. In an apparent oversight, the amendment provides that the punishment for being an accessory before the fact to any rape or sex offense is life imprisonment. Thus an accessory before the fact to second degree forcible rape or sexual offense would get life while the principal who committed the crime could receive no more than 40 years. This appears to be one of those mistakes that happens in the rush of legislative business and may be changed in the short legislative session scheduled next June. Meanwhile, there is case law holding that it is permissible to provide a greater punishment for an accessory before the fact than for the principal (State v. Holmes, 296 N.C. 47 (1978)--second degree murder).

Murder. The murder statute, G.S. 14-17, was also amended, effective January 1, to provide that any killing committed in the course of committing or attempting "rape or a sex offense" is first degree murder. "Sex offense" is apparently used there as a generic term referring to any offense in the new sex offenses article (which is entitled "Rape and Other Sex Offenses"), so the felony-murder rule would apply to a killing committed during any of the offenses described above, even sexual activity by a substitute parent or custodian.

Similarly, the capital punishment statute, G.S. 15A-2000 is amended to add to the list of aggravating factors to be considered in deciding whether to impose the death penalty the fact that the murder occurred while commiting or attempting rape or any other sex offense.

Venue. Finally, there is new G.S. 15A-136. That section provides that whenever a victim of one of the offenses described in this memo is transported to commit the crime, the trial may be held in either of the counties where the victim was picked up, transported or let out.

APPENDIX A--NEW RAPE AND SEX OFFENSE STATUTES

ARTICLE 7A.

Rape and Sex Offenses.

§ 14-27.1. (Effective January 1, 1980). Definitions.--As used in this Article, unless the context requires otherwise: (a) "Mentally defective" means (1) a victim who suffers from mental retardation, or (2) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

(b) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

(c) "Physically helpless" means (1) a victim who is unconscious; or (2) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.

(d) "Sexual act" means cunnilungus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: Provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes. (1979, c. 682)

§ 14-27.2. (Effective January 1, 1980). First Degree Rape.--(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(1) with another person by force and against the will of the other person, and:
  (i) employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
  (ii) inflicts serious personal injury upon the victim or another person; or
  (iii) the person commits the offense aided and abetted by one or more other persons.

(2) with a victim who is a child of the age of 12 years or less and the defendant is four or more years older than the victim.

(b) Any person who commits the offense defined in this section is guilty of a felony and upon conviction shall be imprisoned in the State's prison for life. (1979, c. 682)

§ 14-27.3. (Effective January 1, 1980). Second degree rape.--(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) by force and against the will of the other person; or

(2) who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for a term of not more than 40 years. (1979, c. 682)

§ 14-27.4. (Effective January 1, 1980). First degree sexual offense.--(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) with another person by force and against the will of the other person, and:

(i) employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

(ii) inflicts serious personal injury upon the victim or another person; or

(iii) the person commits the offense aided and abetted by one or more other persons.

(2) The victim is a child of the age of 12 years or less and the defendant is four or more years older than the victim.

(b) Any person who commits the offense defined in this section is guilty of a felony and upon conviction shall be imprisoned in the State's prison for life. (1979, c. 682)

§ 14-27.5. (Effective January 1, 1980). Second degree sexual offense.--(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) by force and against the will of the other person; or

(2) who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for a term of not more than 40 years. (1979, c. 682)

§ 14-27.6. (Effective January 1, 1980). Penalty for attempt.--An attempt to commit first degree rape as defined by G.S. 14-27.2, or an attempt to commit a first degree sexual offense as defined by G.S. 14-27.4 is a felony, and upon conviction, the defendant shall be punished by imprisonment in the State's prison for not more than 20 years. An attempt to commit second degree rape as defined by G.S. 14-27.3, or an attempt to commit a second degree sexual offense as defined by G.S. 14-27.5 is a felony and upon conviction the defendant shall be punished by imprisonment in the State's prison for not more than 10 years. (1979, c. 682)

§ 14-27.7. (Effective January 1, 1980). Intercourse and sexual offenses with certain victims; consent no defense.--If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a felony and shall be punished by imprisonment in the State's prison for not less than two nor more than 15 years. Consent is not a defense to a charge under this section. (1979, c. 682)

§ 14-27.8. (Effective January 1, 1980). Defense that victim is spouse of person committing act.--A person may not be prosecuted under this Article if the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart pursuant to a written agreement or a judicial decree. (1979, c. 682)

§ 14-27.9 (Effective January 1, 1980). No presumption as to incapacity.--In prosecutions under this Article, there shall be no presumption that any person under the age of 14 years is physically incapable of committing a sex offense of any degree or physically incapable of committing rape, or that a male child under the age of 14 years is incapable of engaging in sexual intercourse. (1979, c. 682)

§ 14-27.10. (Effective January 1, 1980). Evidence required in prosecutions under this Article.--It shall not be necessary upon the trial of any indictment for an offense under this Article where the sex act alleged is vaginal intercourse or anal intercourse to prove the actual emission of semen in order to constitute the offense; but the offense shall be completed upon proof of penetration only. Penetration, however slight, is vaginal intercourse or anal intercouse. (1979, c. 682)

APPENDIX B--ARREST WARRANT FORMS FOR RAPE AND SEX OFFENSES

Note: The format used here is that found in the Institute of Government publication Arrest Warrant Forms. Words typed in gothic type are words already printed on the AOC arrest warrant form. Words typed in prestige elite (what you are reading now) are words that can be written without change each time one of these warrants is issued. Words typed in *italic type* give instructions on words to be added by the magistrate or other issuing official.

G.S. 15-144.1 and G.S. 15-144.2 set out the requirements for indictments for rape and sexual offenses, allowing the omission of certain elements of those offenses. In State v. Lowe, 295 N.C. 596 (1978), the North Carolina Supreme Court held constitutional an earlier version of the statute on simplified pleadings in rape indictments.

The crime of assault with intent to commit rape has been repealed. Instead, an attempt to commit any one of the rape or sex offense crimes may be charged. To charge an attempt, use these same forms and simply add the words "attempt to" following the word feloniously, except for the SEXUAL ACTIVITY BY A SUBSTITUTE PARENT charge. For that charge the words "attempt to" will have to be added just before the words "engage in." The attempt punishments are set out in G.S. 14-27.6.

FIRST DEGREE RAPE* G.S. 14-27.2

FORM OF CHARGE:

I. Forcible rape**

. . . did unlawfully, willfully, and feloniously ravish and carnally know *(name victim)*, by force against the victim's will

in violation of the following law: G.S. 14-27.2

II. Statutory rape***

. . . did unlawfully, willfully, and feloniously carnally know and abuse *(name victim)*, a child *(state child's age)* years old and thus of the age of 12 years or less****

in violation of the following law: G.S. 14-27.2

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* For rape to be committed the defendant must have vaginal intercourse with the victim. The slightest penetration is sufficient.

** Forcible rape is made first degree rape if the defendant employs or displays a deadly or dangerous weapon (or what appears to be such a weapon), inflicts serious personal injury on the victim or another person, or is aided and abetted by one or more other persons.

*** Any intercourse with a child "of the age of 12 years or less" is first degree rape if the defendant is at least four years older than the victim.

**** "Of the age of 12 years or less" is the language used in the statute. Sponsors of the legislation apparently take the view that a person is 12 years old until the 13th birthday. But case law from other states, most notably Knott v. Rawlings, 250 Iowa 892, 96 NW2d 900, 73 ALR2d 868 (1959), indicates that a person is no longer" of the age of 12 years or less" after passing the 12th birthday. Because of the confusion on this issue it is suggested in the form that the exact age of the victim be stated.

SAMPLE AFFIDAVITS:

I. Forcible rape

. . . did unlawfully, willfully, and feloniously ravish and carnally know Wilma C. Sutton, by force and against the victim's will in violation of the following law: G.S. 14-27.2

II. Statutory rape

. . . did unlawfully, willfully, and feloniously carnally know and abuse Linda J. Williams, a child 11 years and 8 months old and thus of the age of 12 years or less in violation of the following law: G.S. 14-27.2.

PUNISHMENT:

Felony punishable by life imprisonment.

FIRST DEGREE SEXUAL OFFENSE* G.S. 14-27.4

FORM OF CHARGE:

I. Forcible sexual offense**

. . . did unlawfully, willfully, and feloniously commit a sexual offense with *(name victim)* by force and against that victim's will

in violation of the following law: 14-27.4

II. Statutory sexual offense***

. . . did unlawfully, willfully, and feloniously commit a sexual offense with *(name victim)*, a child *(state child's age)* years old and thus of the age of 12 years or less****

in violation of the following law: G.S. 14-27.4

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* For sexual offense to be committed, the defendant must engage in cunnilingus, fellatio, analingus or anal intercourse with the victim, or insert an object into the victim's vagina or anus.

** Forcible sexual offense is made first degree sexual offense if the defendant employs or displays a dangerous or deadly weapon (or what reasonably appears to be such a weapon), inflicts serious personal injury on the victim or another person, or is aided and abetted by one or more other persons.

*** Any sexual act (as defined in the first note above) with a child "of the age or 12 years or less" is first degree sexual offense if the defendant is at least four years older than the victim.

**** "Of the age of 12 years or less" is the language used in the statute. Sponsors of the legislation apparently take the view that a person is 12 years old until the 13th birthday. But case law from other states, most notably Knott v. Rawlings, 250 Iowa 892, 96 NW2d 900, 73 ALR 2d 868 (1959), indicates that a person is no longer "of the age of 12 years or less" after passing the 12th birthday. Because of the confusion on this issue, it is suggested in the form that the exact age of the victim be stated.

SAMPLE AFFIDAVITS:

I. Forcible sexual offense

. . . did unlawfully, willfully, and feloniously commit a sexual offense with Susan F. Underwood, by force and against that victim's will
in violation of the following law: G.S. 14-27.4

FIRST DEGREE SEXUAL OFFENSE, continued

II. Statutory sexual offense

. . . did unlawfully, willfully, and feloniously commit a sexual offense with Walter R. Kincaid, a child 11 years and 4 months old and thus of the age of 12 years or less
in violation of the following law: G.S. 14-27.4

PUNISHMENT:

Felony punishable by life imprisonment.

SECOND DEGREE RAPE* G.S. 14-27.3

FORM OF CHARGE:

I. Forcible rape

. . . did unlawfully, willfully, and feloniously ravish and carnally know *(name victim)* by force and against the victim's will in violation of the following law: G.S. 14-72.3.

II. Mentally defective, mentally incapacitated or physically helpless victim

. . . did unlawfully, willfully, and feloniously carnally know and abuse *(name victim)* who was at the time *(choose one or more:* mentally defective; mentally incapacitated; physically helpless**) in violation of the following law: G.S. 14-27.3.

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* For rape to be committed the defendant must have vaginal intercourse with the victim. The slightest penetration is sufficient.

** These terms are defined in G.S. 14-27.1.

SAMPLE AFFIDAVITS:

I. Forcible rape

. . . did unlawfully, willfully, and feloniously ravish and carnally know Louisa G. Applemyer by force and against the victim's will in violation of the following law: G.S. 14-27.3.

II. Mentally defective, mentally incapacitated or physically helpless victim

. . . did unlawfully, willfully, and feloniously carnally know and abuse Roberta G. Exman who was at the time physically helpless in violation of the following law: G.S. 14-27.3

PUNISHMENT:

Felony punishable by imprisonment for up to 40 years.

SECOND DEGREE SEXUAL OFFENSE* G.S. 14-27.5

FORM OF CHARGE:

I. Forcible sexual offense

. . . did unlawfully, willfully, and feloniously commit a sexual offense with *(name victim)* by force and against that victim's will

in violation of the following law: G.S. 14-27.5.

II. Mentally defective, mentally incapacitated or physically helpless victim

. . . did unlawfully, willfully, and feloniously commit a sexual offense with *(name victim)* who was at the time *(choose one or more:* mentally defective; mentally incapacitated; physically helpless**)

in violation of the following law: G.S. 14-27.5

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* For sexual offense to be committed, the defendant must engage in cunnilingus, fellatio, analingus or anal intercourse with the victim, or insert an object into the victim's vagina or anus.

** These terms are defined in G.S. 14-27.1.

SAMPLE AFFIDAVITS:

I. Forcible sexual offense

. . . did unlawfully, willfully, and feloniously commit a sexual offense with Wilbur S. Washington by force and against that victim's will
in violation of the following law: G.S. 14-27.5.

II. Mentally defective, menatlly incapacitated or physically helpless victim

. . . did unlawfully, willfully, and feloniously commit a sexual offense with Deborah Baker who was at the time mentally incapacitated and physically helpless
in violation of the following law: G.S. 14-27.5.

PUNISHMENT:

Felony punishable by imprisonment for up to 40 years.

SEXUAL ACTIVITY BY A SUBSTITUTE PARENT G.S. 14-27.7

FORM OF CHARGE:

. . . did unlawfully, willfully, and feloniously, having assumed the position of a parent in the home in which *(name the minor)*, a child *(state child's age)* years old and thus under 18 years of age, was residing, engage in *(choose one or both:* vaginal intercourse; a sexual act*) with that child in violation of the following law: G.S. 14-27.7.

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* For vaginal intercourse there must be penetration, however slight, of the vagina by the penis. Sexual act is defined by G.S. 14-27.1 to include cunnilingus, fellatio, analingus, anal intercourse and insertion of an object into the vagina or anus.

SAMPLE AFFIDAVIT:

. . . did unlawfully, willfully, and feloniously, having assumed the position of a parent in the home in which Rachael T. Plavern, a child 15 years old and thus under 18 years of age, was residing, engage in vaginal intercourse and a sexual act with that child in violation of the following law: G.S. 14-27.7.

PUNISHMENT:

Felony punishable by imprisonment for two to 15 years.

SEXUAL ACTIVITY BY A CUSTODIAN G.S. 14-27.7

FORM OF CHARGE:

. . . did unlawfully, willfully, and feloniously engage in *(choose one or both:* vaginal intercourse; a sexual act*) with *(name victim)* at a time when that person was *(choose one:* in custody of the defendant; in the custody of *name institution*, an institution at which the defendant was then employed*)*

in violation of the following law: G.S. 14-27.7.

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* For vaginal intercourse there must be penetration, however slight, of the vagina by the penis. Sexual act is defined by G.S. 14-27.1 to include cunnilingus, fellatio, analingus, anal intercourse and insertion of an object into the vagina or anus.

SAMPLE AFFIDAVIT:

. . . did unlawfully, willfully, and feloniously engage in vaginal intercourse and a sexual act with Sally Wilson Montgomery at a time when that person was in the custody of the Mecklenburg County Jail, an institution at which the defendant was then employed
in violation of the following law: G.S. 14-27.7.

PUNISHMENT:

Felony punishable by imprisonment for two to 15 years.