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Administration OF JUSTICE Memorandum

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This memorandum will discuss acts of the 1988 session of the General Assembly that affect criminal law and procedure. Each new law is referred to by the Session Laws chapter number of the ratified act and by the number of the original bill that became law--for example, Chapter 1040 (S 1837). The effective date of each new law is also given.

The statutory changes are not reproduced here. You may obtain a free copy of any bill by writing the Printed Bills Office, State Legislative Building, Raleigh, North Carolina 27611, or by calling that office at (919) 733-5648. Your request should be by bill number rather than chapter number.

Chapter 1112 (H 2489), which created a new offense of impaired driving in a commercial motor vehicle, will not be discussed in this memorandum. Chapter 1112 is effective June 1, 1989 and expires twenty-nine days later on June 30, 1989. A discussion of this law will be sent to you if the 1989 session changes the law's expiration date.

DRUG LAW CHANGES

Drug trafficking grand jury law extended. The 1986 law authorizing the use of an investigative grand jury to investigate drug trafficking offenses was to expire October 1, 1988. Chapter 1040 (S 1837) extends the law's expiration date to October 1, 1991.

Chapter 1040 also made other changes, effective October 1, 1988, which include: (1) amending G.S. 5A-12(h) to reduce the maximum term from eighteen months to six months for criminal contempt when a person refuses to testify after being granted immunity; (2) amending G.S. 15A-623(h) to permit a district attorney to disclose the record of witnesses' grand jury testimony to witnesses and their attorneys; (3) amending G.S. 15A-623(h) to permit a district attorney to subpoena out-of-state witnesses under Article 43 of Chapter 15A; (4) amending G.S. 15A-622(h) to add a requirement that a district attorney's petition to convene an investigative grand jury must be approved by

a committee of at least three members of the Conference of District Attorneys; and (5) amending G.S. 15A-623(h) to require that the grand jury testimony be transcribed as well as recorded.

Anabolic steroids included as controlled substance. Chapter 1055 (H 1130), effective October 1, 1988, includes anabolic steroids in Schedule III of the North Carolina Controlled Substances Act. Possession of 100 or fewer pills without a prescription is a misdemeanor punishable by a maximum imprisonment of two years and a fine. Possession of more than 100 pills without a prescription is a Class I felony punishable by a maximum imprisonment of five years and a fine. Selling any amount without authorization is a Class I felony.

PEN REGISTERS AND TRAP-AND-TRACE DEVICES AUTHORIZED

As part of the Electronic Communications Privacy Act of 1986, the United States Congress imposed restrictions on the use of pen registers, which record the telephone numbers dialed from a telephone, and on the use of trap-and-trace devices, which determine the telephone numbers of calls made to a telephone. The act sets forth certain standards that must be met before federal, state, and local enforcement officers may use these investigative tools. The act allows state and local officers to use them until October, 1988, without meeting the standards, but their use would be prohibited thereafter unless a state enacted legislation to authorize their use. Chapter 1104 (S 1868), codified as G.S. 15A-260 through -264 and applicable to the installation and use of pen registers and trap-and-trace devices on or after October 1, 1988, does so.

Application to superior court judge. G.S. 15A-262 authorizes a law enforcement officer to apply in writing under oath or affirmation before a superior court judge for an order (or extension of an order under G.S. 15A-263) authorizing the installation and use of a pen register or trap-and-trace device. The officer's application must identify the officer-applicant and the agency conducting the investigation and contain the officer's certification that information likely to be obtained is relevant to the agency's ongoing criminal investigation. Although the statute does not specifically require the following information in the application, it also should include (because the judge's order must include this information and that order must be supported by judicial findings) facts to support a finding that (1) there is reasonable suspicion that an offense punishable by more than one year's imprisonment has been committed; (2) there is reasonable suspicion that a person (to be named or described, if known) committed the offense; and (3) the results of the use of the pen register or trap-and-trace device will materially aid in determining whether the named person committed the offense.

The judge's order must include the findings in (1)-(3) above and must also specify (1) the identity, if known, of the person to whom the telephone line to which the pen register or trap-and-trace device is to be attached is leased or in whose name it is listed; (2) the identity, if known, of the person who is the subject of the criminal investigation; (3) the number and, if known, physical location of the telephone line to which the pen register or trap-and-trace device is to be attached and, for a trap-and-trace device, the geographic limits of the order.

The judge's order must direct, upon the officer-applicant's request, the furnishing of information, facilities, or technical assistance necessary to install the pen register or trap-and-trace device. The order must also direct that the (1) order be sealed until otherwise ordered by the judge; and (2) the person owning or leasing the line to which the pen register or trap-and-trace device is attached, or who has been ordered by the judge to provide assistance to the officer-applicant, not disclose the existence of the pen register or trap-and-trace device or the existence of an investigation to the listed subscriber or any other person--unless otherwise ordered by the judge.

The judge's order may direct the installation and use of a pen register or trap-and-trace device for a period not to exceed sixty days. An extension of the order may be granted, but only with a new application. The extension cannot exceed sixty days.

(Note: a sample (1) application and affidavit and (2) order authorizing the use of a pen register or trap-and-trace device is provided at the end of this memorandum.)

Assistance in installation and use. G.S. 15A-264 sets out the duties of telephone companies, landlords, etc. to furnish assistance in installing a pen register or trap-and-trace device and the right to compensation for reasonable expenses in doing so.

When court order unnecessary. A court order is not required when the telephone company uses a pen register or trap-and-trace device (1) with the consent of the telephone user; (2) to protect a telephone user from unlawful or abusive use of the telephone service; (3) to maintain or test telephone service; or (4) to record that fact that telephone service was begun or completed.

Penalty for unlawful use. G.S. 15A-261(c) provides that the willful and knowing violation (i.e., using or installing a pen register or trap-and-trace device without a court order when a court order is required) is a misdemeanor punishable by a fine, imprisonment by up to one year, or both.

Criminal discovery. G.S. 15A-263 states that the "provisions of G.S. 15A-903 and 15A-904 shall apply to this Article." G.S. 15A-903 describes what information the state must disclose to a defendant, and G.S. 15A-904 describes what information the state does not need to disclose to a defendant.

MISCELLANEOUS CHANGES

Fraudulent disposal of property. Chapter 1065 (H 1240), effective October 1, 1988, makes several changes to criminal laws affecting the fraudulent disposal of property. It amends G.S. 14-114(a), which prohibits the fraudulent disposal of personal property on which there is a security interest, to delete the current prohibition of a fraudulent disposal made with the intent to hinder or delay the secured party's rights; it retains the prohibition against a fraudulent disposal made with the intent to defeat the secured party's rights. [In the Institute of Government's publication Arrest Warrant Forms, strike the words "hinder, delay, and" in the Form of Charge for DISPOSING OF SECURED (MORTGAGED) PERSONAL PROPERTY, G.S. 14-114.] It also states that a person's refusal to turn over secured property to a secured

party who is attempting to repossess the property without a judgment or order for possession is not, by itself, a violation of the statute. Chapter 1065 also deletes the prima facie evidence provision and instead provides that the intent to commit a violation of the statute may be presumed by proof of possession of the property embraced in the security agreement by the grantor after executing the agreement, and while it is in force, the additional proof that the sheriff or other officer charged with execution of the process cannot with due diligence find the property to satisfy the agreement. A defendant may rebut the presumption by offering evidence that the property has been, without the defendant's fault, stolen, lost, damaged beyond repair, or otherwise disposed of without an intent to defeat the secured party's rights.

Chapter 1065 amends G.S. 14-115, which prohibits the secreting of personal property on which a lien or security interest exists, to make it apply only after a judgment or order for possession for that property has been issued. [In Arrest Warrant Forms, in the Form of Charge for SECRETING PERSONAL PROPERTY TO HINDER ENFORCEMENT OF LIEN, G.S. 14-115, add between the word "exists" and the comma immediately following that word: ", after a (select one or both: judgment; order for possession) for that property had been issued".]

Chapter 1065 adds a new statute, G.S. 14-168.4, to prohibit a person from failing to return rented property with intent to defeat the owner's rights, if the property is rented under a written rental agreement in which there is an option to purchase the property. The statute applies (a) when the person fails to return the property after the termination date in the agreement has occurred or (b) when the person fails to return the property after occurrence of an event specified in the agreement, if the agreement specifies that the event terminates the agreement. G.S. 14-168.4 also provides that the intent to commit a violation of the statute may be presumed from (1) evidence that the defendant had disposed of the property or had encumbered the property by allowing a security interest to be placed on the property or by delivering the property to a pawnbroker; or (2) evidence that the defendant had refused to deliver the property to the sheriff or other officer who is attempting to seize the property under a writ of possession or a claim and delivery order of seizure; or (3) evidence that the defendant had moved the rental property out of state and has failed to notify the owner of the new location of the property. However, this presumption may be rebutted by evidence that the defendant did not intend to defeat the owner's right to the property. Violation of this statute is a misdemeanor punishable by a maximum imprisonment of two years and a fine.

A subsection of new G.S. 14-168.4 states that a violation of this Article (which is Article 24, consisting of G.S. 14-165 through 14-169) for failing to return rented property that is rented under a written rental agreement with an option to purchase may be prosecuted only under this section, G.S. 14-168.4. Thus, when the charge is based on a written rent-to-own contract, G.S. 14-167 (failure to return hired property) may not be charged. G.S. 14-167 may continue to be charged for a rental agreement that did not contain an option to purchase.

Bingo licenses transferred to Department of Human Resources. Chapter 1001 (H 2169), effective September 1, 1988, transfers responsibility for issuing and renewing bingo licenses from the Department of Revenue to the Department of Human Resources.

Revenue law penalties increased to two-year misdemeanors. Chapter 1076 (H 1144), effective for offenses committed on or after October 1, 1988, increases to two years' imprisonment the maximum punishment set out in G.S. 105-236(7), (8), and (9), which include offenses of tax evasion, failure to withhold taxes, etc. It also adds a new G.S. 105-236(9a) to make it punishable by a maximum of two years' imprisonment to willfully assist in the filing of a fraudulent return or other document.

Technical change for term "judicial district". To reflect the fact that recent superior court redistricting changes are significant only for electoral purposes, Chapter 1037 (H 2216), effective January 1, 1989, amends the General Statutes, particularly Chapters 7A (Judicial Department) and 15A (Criminal Procedure Act), to substitute for "judicial district" a new term, "superior court district or set of districts," or, when appropriate, to substitute "prosecutorial district" or "district court district" for "judicial district." These changes do not make substantive changes in the law.

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STATE OF NORTH CAROLINA
In The General Court of Justice
Superior Court Division
_____ County

APPLICATION AND AFFIDAVIT FOR
PEN REGISTER/TRAP AND TRACE DEVICE
G.S. 15A-262

I, the undersigned affiant, being first duly sworn, say that:

1. I have reasonable suspicion to believe that an offense punishable by imprisonment for more than one year has been committed.

Name of offense _____
County in which offense committed _____
Offense date(s) _____

Facts that establish reasonable suspicion _____

2. I have reasonable grounds to suspect that the person named and/or described below committed the offense.

Name and/or description of person _____
[Note: If the person is unknown, write that fact in the space above]

Facts that establish reasonable grounds to suspect _____

3. The results of the pen register/trap and trace device will be of material aid in determining whether the person named above committed the offense.

Reason(s) why procedure will be of material aid _____

4. I certify that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the agency named below.

5. I request that the court issue an order for the installation and use of a:
(Check only one)
 Pen Register
 Trap and Trace Device

6. (Complete if applicable) I request _____
to furnish information, facilities, and technical assistance necessary to accomplish the installation of the pen register/trap and trace device.

Sworn and Subscribed To Before Me
Date _____
Signature _____
Superior Court Judge

Date _____
Affiant's Signature _____
Title or Position _____
Investigating Agency _____

STATE OF NORTH CAROLINA

ORDER AUTHORIZING INSTALLATION AND USE OF
PEN REGISTER/TRAP AND TRACE DEVICE
G.S. 15A-263

In The General Court Of Justice
Superior Court Division

_____ County

I, the undersigned superior court judge, find from the application and affidavit of officer _____ (name officer) that there is reasonable suspicion to believe that an offense punishable by imprisonment for more than one year has been committed, that there are reasonable grounds to suspect that the person named or described in the officer's affidavit committed the offense, and that the results of the procedures involving a pen register/trap and trace device will be of material aid in determining whether the person named in the officer's affidavit committed the offense.

Therefore, I authorize by this order the installation and use of a:

(Check only one)

_____ Pen Register
_____ Trap and Trace Device

for a period not to exceed 60 days from the date of this order.

The telephone number and (if known) physical location of the telephone line to which the pen register/trap and trace device is to be attached, and (if trap and trace device) the geographic limits of the trap and trace device are as follows: _____

The identity (if known) of the person to whom is leased or in whose name is listed the telephone line to which the pen register/trap and trace device is to be attached is: _____

The identity (if known) of the person who is the subject of the criminal investigation is: _____

The offense to which the information likely to be obtained by the pen register/trap and trace device relates to is: _____

(Complete if applicable) I direct, upon the applicant's request, that _____ furnish information, facilities, and technical assistance necessary to accomplish the installation of the pen register/trap and trace device.

This order shall be sealed. I order that the person owning or leasing the line to which the pen register/trap and trace device is to be attached, and the person who has been directed in the preceding paragraph to provide assistance to the applicant, is not to disclose the existence of the pen register/trap and trace device or the existence of the investigation to the listed subscriber or any other person.

Superior Court Judge (Signature)

(Date)