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1994 Extra Session Legislation Affecting Criminal Law and Procedure

Thomas H. Thornburg

On January 12, 1994, North Carolina Governor James B. Hunt convened an Extra Session of the North Carolina General Assembly, to begin on February 8, 1994. The session was called pursuant to the Governor's authority under Article III, Section 5(7) of the Constitution of North Carolina. Governor Hunt's proclamation stated that the purpose of the Extra Session was for the General Assembly to consider legislation to (1) raise the inmate population "cap" for the State's prison system, (2) toughen sentences for criminals, (3) toughen punishment for youthful offenders, (4) expand crime deterrence programs for children, and (5) ensure the rights of victims of crime. The Extra Session lasted seven weeks, ending on March 26, 1994.

This Administration of Justice Memorandum summarizes acts of the 1994 Extra Session of the General Assembly that affect criminal law and procedure, juvenile law and procedure, criminal sentencing, adult and juvenile corrections, and courts. Additionally, the memorandum briefly discusses crime prevention measures enacted during the Extra Session. Each ratified act is referred to by its chapter number in the session laws and by the number of the original bill that became law—for example, Chapter 24 (S 150). The effective date of each new law is also given. If the law enacted a new section or article of the General Statutes, the section or article number designated in the act is used (with the abbreviation G.S.), though the reader should be aware that the codifier of statutes may change that number.

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CRIMINAL LAW AND PROCEDURE

Note on Effective Dates

A key act of the Extra Session was advancing the effective date of the Structured Sentencing Act (1993 Session Laws, Chapter 538) and a companion measure (1993 Session Laws, Chapter 539) which reclassifies felonies and misdemeanors to fit Structured Sentencing policies. Chapter 24 (S 150), Section 14 advances the effective date of these two laws

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to October 1, 1994, from January 1, 1995. This memorandum discusses new laws with the same effective date as Structured Sentencing in a section with Structured Sentencing changes. Laws with other effective dates are discussed separately, and the pertinent effective date for every measure is noted.

Criminal Law Changes

A person acquitted by reason of insanity may not possess a firearm. Chapter 13 (H 11) establishes a new criminal offense, G.S. 14-415.3. This new law makes it unlawful for a particular class of persons to purchase, own, possess, or have in the person's custody, care, or control, any firearm or any weapon of mass death and destruction as defined by G.S. 14-288.8(c).

This prohibition applies to:

(1) a person who has been acquitted by reason of insanity of any offense listed in G.S. 14-415.1(b)[felonious violations of Articles 3, 4, 6, 7A, 8, 10, 13, 14, 15, 17, 30, 33, 36, 36A, 52A, or 53 of G.S. Chapter 14 or a felony controlled-substance offense listed in Article 5 of G.S. Chapter 90], G.S. 14-33(b)(1) (misdemeanor assault inflicting or attempting to inflict serious injury upon another person or using a deadly weapon), G.S. 14-33(b)(8) (misdemeanor assault on a state employee or official), or G.S. 14-34 (misdemeanor assault by pointing a gun); and

(2) a person who has been determined to lack capacity to proceed as a defendant in a criminal prosecution, by the procedure provided in G.S. 15A-1002, for any of the same offenses listed under (1) above.

A violation of this statute is a Class H felony, and any weapons lawfully seized for a violation must be forfeited to the state and disposed pursuant to G.S. 15-11.1 (custody and disposition of property seized by law enforcement agencies). Chapter 13 is effective for offenses committed on or after May 1, 1994.

Willfully making false, misleading, or unfounded reports to law enforcement made a misdemeanor. Chapter 23 (H 128) amends G.S. 14-225, which formerly made making a false report to a police radio broadcasting stations a misdemeanor. As amended, G.S. 14-225 now makes it a misdemeanor for a person to willfully make or cause to be made to a law enforcement agency or officer any false, misleading, or unfounded report for the purpose of interfering with a law enforcement agency or hindering or obstructing law enforcement officers performing any duty. The amendment is effective July 1, 1994, and it applies to offenses occurring on or after that date. Until Structured Sentencing takes effect (October 1, 1994), a violation of this statute is a misdemeanor punishable by a fine not to exceed $500 and/or imprisonment of not more than six months. Offenses occurring on or after October 1, 1994 are punishable as Class 2 misdemeanors.

Other criminal law changes. Three other acts make important changes in the criminal law. Chapter 11 (H 7) makes it a felony to possess any amount of cocaine once the Structured Sentencing Act is in place (thus, retaining present law). Chapter 22 (H 39), Part 2, creates a new felony classification (B1) under the Structured Sentencing Act and reclassifies first-degree rape and first-degree sexual offense as Class B1 felonies. Chapter 22, Part 6, creates the criminal status of violent habitual offender. Because the most important impact of each of these changes is in criminal sentencing, they are discussed in detail in the next section.

Changes Affecting Present Sentencing Law as Well as Structured Sentencing

Sentence enhancement for use of firearms, effective for offenses committed on or after May 1, 1994. Part 4 of Chapter 22, effective for offenses committed on or after May 1, 1994, rewrites G.S. 14-2.2 and adds a new G.S. 15A-1340.16A to provide for an enhanced sentence for felonies committed with firearms. If a person is convicted of a Class A, B, B1, B2, C, D, or E felony, and used, displayed, or threatened to use or display a firearm during the offense, the person must be sentenced to an additional prison term of five years. The court may not sentence a person sentenced under this section as a committed youthful offender, nor may it suspend the additional five-year term. The additional term runs consecutively to all other terms imposed. The additional term does not apply if (1) the defendant is not sentenced to an active prison term, (2) evidence of firearm use or display is needed to prove an element of the underlying offense, or (3) the defendant did not actually possess a firearm. Evidence necessary to establish that an enhanced sentence is required may not be used to prove any factor in aggravation.

Part 4 also provides that when a person is found to have personally used a firearm in the commission or attempted commission of any felony and the defendant owns the firearm or the serial number has been defaced so that ownership cannot be traced, the court must order the firearm confiscated and disposed of as provided by law (G.S. 14-269.1).

New "violent" habitual felon law ("three strikes, you're in"), effective for offenses committed on or after May 1, 1994. Part 6 of Chapter 22, effective for offenses committed on or after May 1, 1994, adds a new Article 2B to G.S. Chapter 14 entitled "Violent Habitual Felons," also known as "Three Strikes, You're In." Under this new statute, any person who has been convicted of two "violent felonies" in North Carolina, in the federal courts, or in any other state is declared to be a violent habitual felon. Upon conviction of a third "violent felony," unless the person receives a death sentence (which would be possible only for first-degree murder), he or she must be sentenced to life imprisonment without parole. This sentence may not be suspended and the defendant may not be placed on probation. As explained below in the section about life imprisonment without parole, this sentence may be reviewed after 25 years.

"Violent felonies" include all Class A through E felonies as reclassified by the Structured Sentencing Act. Before the October 1, 1994 effective date of Structured Sentencing, Part 6 lists forty separate offenses that are defined as violent felonies for the purposes of this act (most of those listed are in Structured Sentencing's Class A through E). The portion of Chapter 22, Part 6 listing offenses expires on October 1, 1994, and thereafter, the definition is all Class A through Class E felonies. Note that some of the offenses defined as "violent" do not involve assault as an element—for example, first-degree burglary, first-degree arson, burning of a mobile home (Class D), and selling a controlled substance within 300 feet of a school (Class E). (In ordinary usage, the term "violent" applied to an offense means that assault is an element.)

Part 6 provides that when a person is charged with a third "violent" felony, he or she is tried first on the indictment for the principal felony and the jury is not informed that the defendant has also been charged as a violent habitual felon. This is similar to the present habitual felon sentencing procedure in G.S. Chapter 14, Article 2A. If the defendant is convicted of the principal felony, the indictment charging the defendant as a violent habitual felon may be presented to the same jury for trial.

Forfeiture of licensing privileges for felon who refuses probation or whose probation is revoked, effective for offenses committed on or after May 1, 1994. Chapter 20 (S 123), effective for offenses committed on or after May 1, 1994, adds a new G.S. 15A-1331A providing for forfeiture of licensing privileges, under certain circumstances, after conviction of a felony. Licenses affected by the new statute include regular and commercial drivers licenses, occupational licenses, and hunting and fishing licenses. Upon conviction of a felony committed between May 1, 1994 and the implementation of the Structured Sentencing Act on October 1, 1994, a person will automatically forfeit licensing privileges for the full term of the maximum prison sentence imposed on the person by the sentencing court at the time of conviction for the offense if: (1) the person is offered probation and refuses it in favor of an active prison sentence, or (2) the person's probation is revoked, and the judge finds that the person failed to make reasonable efforts to comply with the conditions of probation. Upon conviction for a felony committed on or after October 1, 1994, the forfeiture will be for the full term of the period for which the person was placed on probation by the court at the time of conviction if the person refuses probation or is found to have unreasonably failed to comply with conditions and had his or her probation revoked.

Chapter 20 also amends G.S. Chapter 20 (motor vehicles) to allow certain offenders who have forfeited their drivers licenses pursuant to G.S. 15A-1331A to receive limited driving privileges. To be eligible for this privilege, the person must have held a valid drivers license within the past year. In addition, the person must (1) be supporting dependents, (2) require a drivers license to be gainfully employed, or (3) have a dependent who needs serious medical treatment in a situation where the defendant is the only person who can provide transportation to the health care facility. Limited driving privileges granted under this provision may be used only in connection with one or more of these specified purposes.

The constitutionality of these provisions concerning forfeiture of licensing privileges is unclear. The North Carolina Constitution, Article XI, Section 1 authorizes only these punishments for crime: death, imprisonment, fine, and removal or disqualification

from public office. In effect, Chapter 20 makes forfeiture of certain licenses an additional punishment for crime in certain circumstances. On the constitutionality issue, see *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976).

Conditional discharge and expunction of records for first offense of possession of less than one gram of cocaine, effective May 1, 1994. Chapter 11 (H 7), effective May 1, 1994, amends G.S. 90-96, which provides a process for conditional discharge and expunction of records for first offense of specified drug offenses. Chapter 11 adds felonious possession of cocaine involving less than one gram of the substance, under G.S. 90-95(a)(3), to the offenses for which a guilty plea to a first offense may lead to deferral of further proceedings, placement on probation, and eventual expunction of criminal records. (Note: no offense is denominated as felony possession of less than one gram of cocaine. Apparently, evidence would have to be introduced showing that a conviction of possession of cocaine involved possession of less than one gram of the substance.)

Use of juvenile records in adult trials and sentencing. Chapter 7 (H 27), effective for offenses committed on or after May 1, 1994, amends G.S. 7A-675(a), G.S. 15A-1340.4(a)(1), and G.S. 15A-2000(e) to permit the use of juvenile records to prove an aggravating factor in the sentencing phase of a later adult criminal trial. The records may be used in these ways, however, only if the juvenile was adjudicated delinquent for an offense that would be a Class A, B, C, D, or E felony if committed by an adult. Chapter 7 also amends G.S. 15A-1340.16, a felony sentencing provision of the Structured Sentencing Act, to allow use of the same kinds of delinquency adjudications as aggravating factors after the Structured Sentencing Act is effective on October 1, 1994.

To be used as an aggravating factor in a capital sentencing hearing under G.S. 15A-2000(e)(2) or (e)(3), an adjudication of delinquency must be for an offense that would be a capital offense or Class A through E felony involving use or threat of violence if committed by an adult. The records may be used only on order of the court in the later criminal proceeding, upon motion of the prosecutor and after an *in camera* hearing to determine admissibility. Chapter 7 amends G.S. 7A-675(a) to allow the prosecutor in the subsequent criminal proceeding to examine the records without a court order.

Effective for trials begun on or after May 1, 1994, Chapter 7 amends G.S. 8C-1, Rule 404(b) to permit admission, during a trial's guilt phase, of evidence of an offense committed by a juvenile that would have been a Class A, B, C, D, or E felony if committed by an adult.

Chapter 7 also rewrites G.S. 7A-676(b) to prohibit expunction of juvenile records if the offense for which the person was adjudicated delinquent would have been a Class A, B, C, D, or E felony if committed by an adult.

Victim information required in commitment to prison. G.S. 148-59 requires the clerk of superior court to attach to a prisoner's commitment papers a statement containing the offense for which the prisoner was convicted, the name of the offender and the presiding judge, and other specified information. Chapter 12 (H 32), effective May 1, 1994, adds a requirement that, in the case of a prisoner convicted of a Class G or more serious felony, this statement must include the names and addresses (as found by the presiding judge) of any victims of the offense, the parent or guardian of any minor victim, and the next of kin of any homicide victim.

Structured Sentencing Act Changes

Effective dates of Structured Sentencing Act and Criminal Justice Partnership grant program advanced. Chapter 24 (S 150), Section 14 advances the effective dates of the Structured Sentencing Act (1993 Session Laws, Ch. 538) and its companion offense classification measure (1993 Session Laws, Ch. 539) from January 1, 1995 to October 1, 1994. For a detailed review of the Structured Sentencing Act as enacted in 1993, see Stevens H. Clarke, *Administration of Justice Memorandum No. 93/03, Sentencing and Corrections: 1993 North Carolina Legislation* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, September 1993). As amended during the Extra Session, these laws will apply only to offenses committed on or after the new effective date. Chapter 24 also amends the Criminal Justice Partnership Act (1993 Session Laws, Ch. 534, which became effective January 1, 1994), to make grants administered by the Department of Correction under the act become effective April 1, 1995, instead of July 1, 1995. One purpose of this grant program is to provide more community-based corrections programs to be used

for the intermediate punishments prescribed by the Structured Sentencing Act.

Life without parole created. Under the Structured Sentencing Act of 1993, an offender who was convicted of first-degree murder and sentenced to life imprisonment was required to serve 25 years without benefit of good time or gain time before becoming eligible to be considered for discretionary parole. Effective for offenses committed on or after October 1, 1994, Chapter 21 (S 2) requires such persons to serve a term of life imprisonment without parole.

Chapter 21 also creates new Article 85B of G.S. Chapter 15A providing for review of a sentence of life without parole by a resident superior court judge after the defendant has served 25 years. This review applies to the life-without-parole sentences imposed under the new violent habitual offender law (described above), those imposed for Class B1 felonies (described below), and those imposed for first-degree murder. In the review, the judge must consider the trial record and may consider the offender's prison record, the views of members of the victim's immediate family, the offender's health, the risk that he or she poses to society, and other information the judge considers appropriate. The judge then recommends to the Governor, or to any executive agency or board designated by the Governor, whether the sentence should be commuted. Although the Governor must consider this recommendation, final authority with respect to pardons and commutation is vested in the Governor by Article III, Section 5 of the North Carolina Constitution. The judge's recommendation may be reviewed on appeal only for an abuse of discretion. If the offender's sentence is not commuted, it must be reviewed again every two years after the initial review.

Rape and sexual offense sentencing (new Classes B1 and B2). Under current law, there are three Class B felonies: first-degree rape, first-degree sexual offense, and being an accessory before the fact to a capital offense under certain circumstances. The Structured Sentencing Act of 1993 added second-degree murder and killing an adversary in a duel to Class B, and set a presumptive minimum prison term for the class ranging from 108-135 months for a defendant with no prior convictions to 216-270 months for a defendant with 19 or more prior record points.

Part 2 of Chapter 22 (H 39), effective for offenses committed on or after October 1, 1994, replaces Class B with two new classes: B1 (including first-degree rape and sexual offense) and B2 (including second-degree murder, killing in a duel, and accessory before the fact to a capital offense in certain circumstances). New Class B1 felonies carry longer prison terms than Class B2 felonies. Class B2 keeps the minimum and maximum prison term guidelines specified by the original Structured Sentencing Act for Class B. The presumptive minimum prison term for Class B1 will range from 192-240 months for a defendant with no prior convictions to 384-480 months for a defendant with nineteen or more prior record points. If aggravating factors outweigh mitigating factors, the Class B1 presumptive minimum term ranges from 240-300 months for a defendant with no prior convictions to life imprisonment without parole for a defendant with fifteen or more prior record points.

Chapter 22 also states the formula for determining the maximum prison term in Class B1 through E felonies when the minimum term is 340 months or more (actually, this provision only applies to Class B1 felonies because such a long minimum term would only be possible in Class B1). Under this formula, the maximum term is computed as 120 percent of the minimum term, rounded to the next highest month, plus nine months. Class B1 offenses will not be subject to the possibility of "extraordinary mitigation" under G.S. 15A-1340.13(h), but Class B2 offenses (like the former Class B) will.

In sentencing for subsequent offenses, Class B1 offenses will carry nine prior conviction points; Class B2 offenses, like the former Class B offenses, will carry six points. For purposes of assigning points, convictions for first-degree rape or sexual offense committed before the effective date of Chapter 22 are treated as a Class B1 offense; other felonies formerly in Class B are treated as Class B2 felonies.

Revision of Structured Sentencing habitual felon law. Part 3 of Chapter 22 repeals the portion of the Structured Sentencing Act (1993 Sess. Laws Ch. 538, Sec. 9) that revised G.S. 14-7.6 concerning sentencing of habitual felons, and substitutes a new revision. A habitual felon will continue to be defined as in present law (a person convicted of three prior felonies), and will be sentenced for his fourth felony as a Class C felon (the previous rewrite had altered the definition and put the sentencing for the fourth felony in Class D). Part 3 retains the Structured Sentencing Act's provisions that (1) repealed present

provisions requiring a minimum fourteen-year sentence and at least seven years in prison excluding gain time for persons convicted as habitual felons, and (2) forbid the use in sentencing of convictions used to establish habitual felon status.

Changes in how prior record points are counted for misdemeanor convictions in felony sentencing. Chapter 22 (H 39), Section 10 amends G.S. 15A-1340.14(b)(5), as enacted by 1993 Sess. Laws Ch. 538, Sec. 1, to provide that Class 2 and Class 3 misdemeanor convictions are assigned no points for prior record level determination in felony sentencing under the Structured Sentencing Act. In the 1993 legislation, each misdemeanor conviction was assigned one prior record point, regardless of class. Under the new law, a Class 1 misdemeanor conviction is assigned one point for purposes of determining a person's prior record in felony sentencing, except that convictions for Class 1 misdemeanors under G.S. Chapter 20 (motor vehicles), other than convictions for misdemeanor death by vehicle [G.S. 20-141.4(a2)], are assigned no prior record points. Section 10 becomes effective on October 1, 1994, when the Structured Sentencing Act takes effect.

Simple possession of less than one gram of cocaine. Chapter 11 (H 7), effective May 1, 1994, repeals Section 1358.1 of 1993 Sess. Laws. Ch. 539. The effect is to repeal the proposed change made in G.S. 90-95(a)(3) by the 1993 Structured Sentencing Act, which was to make possession of less than one gram of cocaine a Class 1 misdemeanor. Chapter 11 makes possession of any amount of cocaine, once that act becomes effective on October 1, 1994, a Class I felony, as in present law.

Misdemeanor classification. Chapter 14 (H 55) makes numerous technical and conforming amendments related to the Structured Sentencing Act becoming effective on October 1, 1994. Chapter 14 also makes two substantive changes. First, it restores three minor misdemeanor offenses that would have been repealed by the Structured Sentencing Act and reclassifies them as Class 2 misdemeanors. The offenses are removing a shopping cart from shopping premises (G.S. 14-72.3), taking labeled milk crates (G.S. 14-72.4), and temporarily taking horses, mules, or dogs (G.S. 14-82). Second, Chapter 14 amends G.S. 14-269.2(d) and (e) to add stun guns to the list of weapons covered by the statute's provision that it is a Class 1 misdemeanor to possess or to cause, encourage, or aid a minor to carry certain weapons onto school property. The amendment also makes clear that stun guns are not covered by G.S. 14-269.2(c)'s provision that it is a Class I felony to cause, encourage, or aid a minor to carry certain firearms and explosives on educational property.

Miscellaneous Changes

Law enforcement agency disposition of confiscated weapons is modified. G.S. 14-269.1 provides for court-ordered confiscation and disposition of weapons seized from persons convicted of offenses involving deadly weapons, while G.S. 15-11.1 provides general guidelines about how law enforcement agencies maintain custody over and dispose of property they have lawfully seized. Effective May 1, 1994, Chapter 16 (H 10) modifies each of these statutes. It deletes subsections (2) and (3) from G.S. 14-269.1. G.S. 14-269.1(2) permitted a judge presiding over a trial of a defendant convicted of an offense specified in the statute to order weapons seized from the defendant to be turned over to a law enforcement agency to be used by that agency. Subsection (3) permitted the presiding judge to order that confiscated weapons be sold by the sheriff in the county of trial at a public auction. With the enactment of Chapter 16, a judge has four ways of disposing of weapons under G.S. 14-269.1: (1) returning weapons to the rightful owner on petition of the owner showing the owner was unlawfully deprived of the weapon without consent, (2) ordering that weapons be turned over to the sheriff to be destroyed, (3) ordering that weapons be turned over to the North Carolina State Bureau of Investigation's Crime Laboratory Weapons Reference Library for its official use, or (4) ordering that weapons be turned over to the North Carolina Justice Academy for its official use.

Chapter 16 amends G.S. 15-11.1 by adding a new subsection (b1), which specifically addresses the disposition of seized weapons. Subsection (b1) provides that the district attorney must apply to the court for an order of disposition of firearms that are no longer necessary or useful as evidence in a criminal trial. The judge, after a hearing, may dispose of such weapons in three ways. First, the court may order the firearm returned to its rightful owner, when the rightful owner is someone other than the defendant, and the court finds (i) that the rightful owner is entitled to possession of the firearm, and (ii) that the

rightful owner was unlawfully deprived of the weapon or had no knowledge or reasonable belief of the defendant's intention to use the firearm unlawfully. Second, the court may order the firearm returned to the defendant, but only if the defendant is not convicted of any criminal offense in connection with the possession or use of firearm, the defendant is the rightful owner of the firearm, and the defendant is not otherwise ineligible to possess such a firearm. If the offense involved possession or use of the firearm, disposition under G.S. 14-269.1 may apply. Third, the court may order that the firearms be turned over to the sheriff to be destroyed.

New subsection (b1) of G.S. 15-11.1 is not applicable to firearms seizures by the Wildlife Resources Commission or the Marine Fisheries Commission pursuant to G.S. 113-137, when the firearms were used only in connection with a violation of G.S. Chapter 113, Article 22 (wildlife regulations) or a local wildlife hunting ordinance.

Failure to wear seat belt made admissible in specified circumstances. G.S. 20-135.2A(d) provides that evidence of the failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding, except in an action based on violation of the seat belt law. Effective for trials, actions or proceedings beginning on or after March 3, 1994, Chapter 5 (H 34) adds a second exception making evidence of failure to wear a seat belt admissible. That is, if the evidence is offered as justification for the stop of a vehicle or detention of a vehicle operator and passengers, it will be admissible. This chapter was effective March 3, 1994, and applies to trials, actions, or proceedings beginning on or after that date. Note, the North Carolina Court of Appeals ruled in *State v. Williams*, ___ N.C. App.___, 440 S.E.2d 324 (1 March 1994) that where an officer stopped the defendant for a seat belt violation and later charged her with that violation and DWI, the trial judge properly dismissed the DWI charge because evidence of the seat belt violation was inadmissible in the DWI prosecution. Under the new law, however, G.S. 20-135.2A(d) would permit introduction of evidence of a seat belt violation to justify a stop leading to arrest for another crime.

Results of laser speed enforcement devises made admissible in court. Effective March 18, 1994, Chapter 18 (S 124) amended G.S. 8-50.2 to make speed measurements by laser speed enforcement devises admissible in any criminal or civil proceeding for the purpose of corroborating the opinion of a person, usually a law enforcement officer, as to the speed of a vehicle based upon the visual observation of the object by the person. Further, Chapter 18 requires: (1) that all laser speed enforcement instruments be tested in accordance with standards established by the North Carolina Criminal Justice Education and Training Standards Commission (hereafter, the Commission), (2) that the Commission certify such instruments, and (3) that a written certificate by a Commission-certified technician showing that a test was made within the required testing period and that the instrument was accurate shall be competent prima facie evidence of those facts in a criminal or civil proceeding. The chapter also amended the authority of the Commission, enumerated in G.S. 17C-6(a), to permit the required certification of laser speed devices.

Testing of defendants for sexually transmitted diseases expanded. G.S. 15A-615 provides that certain criminal defendants charged with specified sex offenses may be subject to testing for sexually transmitted diseases, pursuant to petition, findings, and court rulings described in the statute. Chapter 8 (H 53) adds to the list of offenses that trigger the statute's testing process, a violation of G.S. 14-202.1 (indecent liberties with a child) that involves vaginal, anal, or oral intercourse with a child less than 16 years of age. Chapter 8 also adds herpes to the list of sexually transmitted diseases for which a defendant may be tested. Further, the new law provides specific requirements for herpes testing. If a judge requires herpes testing, the defendant must be examined for oral and genital herpetic lesions, and "if a suggestive but nondiagnostic lesion is present, a culture for herpes must be performed." Chapter 8 is effective January 1, 1995, and applies to offenses occurring on or after that date.

Deferred prosecution changes. G.S. 15A-932 authorizes a prosecutor to enter a dismissal with leave when a defendant fails to appear at a criminal proceeding or cannot be readily found after a grand jury indictment. A dismissal with leave results in the removal of the case from the court docket, but allows the prosecutor to reinstate the case when the defendant has been or is about to be apprehended. Chapter 2 (S 84), effective March 1, 1994, amends G.S. 15A-932 to allow the prosecutor to enter a dismissal with leave pursuant to a deferred prosecution agreement under G.S. Chapter 15A, Article 82. If the defendant

fails to comply with the terms of the deferred prosecution agreement, the prosecutor may reinstate the proceedings by filing a written notice with the clerk.

Chapter 24 (S 150), Section 38 directs the Administrative Office of the Courts (AOC), in consultation with the Conference of District Attorneys, to study the problem of under-utilization of the deferred prosecution program established by G.S. 143B-475.1 and to recommend methods for encouraging greater use of it. The AOC must report findings to the 1995 General Assembly. Chapter 24 was effective March 26, 1994.

Willful probation violation treated as criminal contempt. Chapter 19 (S 50), effective May 1, 1994, amends G.S. 5A-11, which defines criminal contempt, and G.S. 15A-1344, which governs violations of probation, to provide that a willful violation of a condition of probation may be punished as criminal contempt. A finding of criminal contempt does not, however, revoke the probation. Under G.S. 5A-13, a probation violation will amount to indirect rather than direct criminal contempt because it does not occur in the courtroom. Indirect contempt under G.S. 5A-15 requires "plenary proceedings"—a hearing in district or superior court that resembles a hearing to revoke probation under G.S. 15A-1345(e), except that the standard of proof is stricter. In plenary contempt proceedings, the judge must find guilt of contempt "beyond a reasonable doubt;" in contrast, probation revocation requires only evidence that "reasonably satisfies" the judge of the violation [*State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)].

Chapter 19 also repeals G.S. 15A-1343.2(g), which provided that a defendant who violated probation imposed as intermediate punishment under the Structured Sentencing Act could be held in criminal contempt, and which described particular guidelines for such contempt proceedings beyond the requirements of G.S. Chapter 5A, Article 1.

Magistrates' issuance of domestic violence restraining orders. Chapter 4 (H 57) amends G.S. 50B-2 to provide that chief district court judges may allow magistrates in their judicial districts to hear requests for ex parte domestic violence protective orders and to issue show cause orders for contempt of domestic violence orders in certain limited circumstances. Chapter 4 is effective May 1, 1994, and applies to motions for relief from domestic violence filed on or after that date.

Grounds for denying claim from Crime Victims Compensation Commission broadened. Chapter 3 (H 30) amends G.S. 15B-11 to provide that if a claimant for compensation from the Commission was participating in a felony or a nontraffic misdemeanor at or about the time that the claimant's injury occurred, the Commission must deny the claim for compensation. Chapter 3 was effective February 28, 1994, and applies to victims' claims pending or in litigation on or after that date.

JUVENILE LAW CHANGES

Use of juvenile records in adult trials and sentencing. Chapter 7 (H 27) is discussed in the section above entitled "Changes Affecting Present Sentencing Law as well as Structured Sentencing."

Probable cause hearings and transfer of juvenile cases to superior court. G.S. 7A-609 requires probable cause hearings in all cases in which juveniles are alleged to have committed, while age fourteen or fifteen, acts that would be felonies if they were adults. G.S. 7A-608 permits a district court judge, after a finding of probable cause, to transfer jurisdiction over a juvenile to superior court, and it mandates transfer if the offense would be a Class A felony if committed by an adult. Sections 25 and 26 of Chapter 22 (H 39) expand these sections to apply to juveniles who are alleged to have committed felonies while age thirteen. Section 28 makes conforming changes in age references, from 14 to 13, in G.S. 7A-601 (destruction of records resulting from nontestimonial identification procedures). These provision are effective for offenses committed on or after May 1, 1994.

The General Assembly authorized further study of the transfer issue. Effective March 26, 1994, Chapter 22 (H 39), Section 29 authorizes the Juvenile Code Committee of the Legislative Research Commission to study whether district courts should be mandated to transfer to superior court jurisdiction over juveniles who have committed certain (unspecified) serious or violent felonies. The Committee may also study what is the appropriate age for mandatory transfer. The Committee must make an interim report to the 1994 Regular Session of the General Assembly and make a final report to the 1995 General Assembly.

Temporary custody changes. G.S. 7A-572(a) establishes procedures to be followed when a juvenile is taken into temporary custody without a court order under G.S. 7A-571(1), (2), or (3). Chapter 17 (H 229), effective July 1, 1994, amends G.S. 7A-572(a) to address cases of juveniles who are taken into temporary custody when they should be in school. When an authorized person has assumed temporary custody of a juvenile but determined that continued custody is not necessary and the juvenile is unlawfully absent from school, the custodian may deliver the juvenile to the juvenile's school or, if the local city or county government and the local school board adopt such a policy, to a place in the local school administrative unit. Previously, the law had provided only for release to parents, guardians, or custodians.

G.S. 7A-572(a)(4) generally prohibits temporary custody—custody authorized by statute without a court order—of a juvenile from lasting longer than 12 hours without a court order for secure or nonsecure custody. Chapter 27 (H 110), Section 3 amends this subsection to allow temporary custody to last up to 24 hours if any of the 12 hours generally permitted for custody falls on a Saturday, Sunday, or legal holiday. This amendment is effective July 1, 1994.

Chapter 27 also amends G.S. 7A-571(3) to provide that a Department of Social Services worker who takes temporary custody of a juvenile may arrange for the juvenile's placement, care, supervision, and transportation. Chapter 27 is effective July 1, 1994 and applies to offenses committed or causes of action arising on or after that date.

Secure custody hearings. G.S. 7A-577(a) provides that a juvenile may not be held under a secure custody order for more than five days without either a hearing on the merits or a hearing to determine the need for continued custody. Chapter 27 (H 110) amends G.S. 7A-577(a) to specify that this "five-day hearing" may not be continued or waived. G.S. 7A-577(g) continues to provide that after the five-day hearing, subsequent hearings on the need for continued secure custody must be held at intervals of no more than seven calendar days. However, new G.S. 7A-577(g1), created by Chapter 27, provides that these hearings, unlike the initial five-day hearing, may be waived with the consent of the juvenile, through counsel for the juvenile. The court may require consent of additional parties or schedule a hearing despite the juvenile's consent to waiver. Chapter 27 is effective July 1, 1994, and applies to offenses committed or cause of action arising on or after that date.

Nonsecure custody hearings. Chapter 27 (H 110) amends G.S. 7A-577(a) to lengthen from five days to seven calendar days the time that a juvenile may be held under a nonsecure custody order before there must be either a hearing on the merits or a hearing to determine the need for continued nonsecure custody. In addition, it provides that this hearing may be continued for up to ten business days with the consent of a juvenile's parent, guardian, or custodian, and the juvenile's guardian ad litem if one has been appointed. The court may require the consent of additional parties or may schedule the hearing despite a party's consent to a continuance. After this initial hearing, a further hearing on the need for continued nonsecure custody must be held within seven business days, excluding Saturdays, Sundays, and legal holidays; thereafter, hearings must be held at intervals of no more than 30 calendar days. Under new G.S. 7A-577(g1), these hearings subsequent to the initial hearing may be waived as follows: (1) in the case of a juvenile alleged to be abused, neglected, or dependent, only with consent of the juvenile's parent, guardian, or custodian, and the juvenile's guardian ad litem if one has been appointed; (2) in the case of a juvenile alleged to be delinquent, only with the consent of the juvenile, through counsel for the juvenile. In any case the court may require the consent of additional parties or schedule a hearing despite a party's consent to waiver. The statute does not address waivers in cases in which the juvenile is alleged to be undisciplined. Chapter 27 is effective July 1, 1994, and applies to offenses committed or causes of action arising on or after that date.

Concealment of merchandise and civil liability of merchants. G.S. 14-72.1(c) provides that merchants who detain or cause arrest of persons for concealment of merchandise may not be held civilly liable for detention, malicious prosecution, false imprisonment, or other related torts if they had probable cause to believe the person committed an offense under the section. Chapter 28 (H 145) amends G.S. 14-72.1(c) to provide that a merchant or merchant's agent who detains a minor who is eighteen years of age or younger (now, sixteen years of age or younger) must call or notify, or make a reasonable effort to call or notify the minor's parent or guardian. The chapter also adds a provision that a merchant or merchant's agent may not be held civilly liable for

failing to notify a minor's parent or guardian if such reasonable efforts are made. This change is effective for offenses committed on or after January 1, 1995.

Notice to parents of minor's arrest. Chapter 26 (S 89) amends G.S. 15A-505 to provide that when a minor is charged with certain crimes [limited exceptions are listed in G.S. 15A-505(b)], a law enforcement officer must notify the minor's parent or guardian as soon as practicable, either in person or by telephone, of the charge (presently, an officer must, without unnecessary delay, make a reasonable effort to inform parents or guardians of the charge). If the minor is taken into custody, the parent or guardian must be notified in writing of the detention within 24 hours of the arrest. If the parent or guardian cannot be found, notice of the arrest must be made to the minor's next-of-kin as soon as practicable. Chapter 26 is effective May 1, 1994 and applies to offenses committed on or after that date. These provisions relate to adult criminal procedures and apply only to sixteen- and seventeen-year-olds—minors who are treated as adults for purposes of their criminal behavior. Provisions in the Juvenile Code govern law enforcement officers' responsibilities in cases involving all other juveniles.

ADULT CORRECTIONS

Prisons

Prison population cap to be set by governor. G.S. 148-4.1, known as the prison population "cap" statute, sets out a procedure for releasing prison inmates when prison population exceeds 98 percent of prison capacity for 15 consecutive days. The statute currently defines prison capacity as 21,400 inmates. Chapter 15 (H 200), effective March 15, 1994, redefines prison capacity as "the number of prisoners housed in facilities located in North Carolina and owned or operated by the State of North Carolina, as set by the Governor." This definition excludes inmates housed in county jails, out-of-state facilities, and private facilities. The prison population capacity will now be set by the Governor but may not exceed 24,500 inmates.

Parole of nonviolent inmates to meet prison population cap. Chapter 15 also amends G.S. 148-4.1 to provide that whenever the Parole Commission is required to release inmates in order to meet the prison capacity cap, the commission may parole nonviolent inmates who would not otherwise be eligible for parole before it releases violent inmates who are eligible for parole. The chapter does not define "violent" and "nonviolent," and it is not clear whether it refers to inmates who were convicted of violent offenses or to inmates who have been violent while in prison. This provision became effective on March 15, 1994, and expires on July 1, 1996.

Department of Correction contracts to house prisoners in facilities not owned by State of North Carolina. G.S. 148-37 has provided in broad and general terms that the Department of Correction (DOC) may obtain additional prison space by "purchase or lease [of] existing facilities." Chapter 24 (S 150), Section 16 amends the statute to speak specifically to contracts for housing state prisoners in out-of-state facilities and in in-state facilities not owned by the State of North Carolina. As amended, G.S. 148-37(c) authorizes the Secretary of Correction to contract with out-of-state public correctional facilities for housing up to 1,000 prisoners. Prisoners may be sent to out-of-state facilities only when there are no available facilities in North Carolina within the state prison system to house them. Contracts under this subsection must expire no later than June 30, 1995, and must be approved by the Department of Administration.

New G.S. 148-37(e) authorizes the DOC to contract to house up to 1,500 prisoners in non-state-owned facilities in North Carolina, not including beds in private substance abuse treatment centers authorized by the General Assembly. If the maximum number of prisoners house in non-state-owned facilities exceeds 500, the maximum number that may be housed out-of-state under G.S. 148-37(c) is reduced by the excess over 500. This provision also expires on June 20, 1995.

New G.S. 148-37(f) ratifies contracts for out-of-state housing of prisoners made by the DOC before March 25, 1994, but requires the department to take such actions as are not inconsistent with those contracts to insure that they do not extend beyond June 30, 1995, without further approval by the General Assembly.

Prison substance abuse treatment programs. Chapter 24 (S 150) appropriates $1,545,345 to establish a substance abuse program in five or more prisons located near urban areas. Section 20 requires that each program comply with statutes governing the

DOC (G.S. Chapter 143B, Article 6) and that funds allocated to each prison be adequate to serve not more than 100 inmates.

Planning for work camp. Chapter 24, Section 21 directs the DOC to develop plans for a pilot program in which the department enters a partnership with a county or coalition of counties for operation of a 340-bed work camp at an agreed-upon site. The counties must agree to operate the camp in exchange for authorization to use minimum security prisoners housed at the camp for work at public facilities and "for any other suitable productive labor at sites within the county or coalition of counties entering the agreement." The plan must provide for making space available at the camp in such manner that judges holding court within the participating counties may assign defendants to the camp. The department must report on this plan to the Joint Legislative Commission on Governmental Operations by May 15, 1994.

Probation and Parole

Substance abuse treatment for probationers and parolees. Chapter 24 (S 150) appropriates $583,000 to a reserve for an intensive out-patient substance abuse pilot program for parolees and probationers with serious substance abuse histories, to be allocated by the 1994 Regular Session. Section 22 requires the Departments of Correction and Human Resources to jointly develop such a plan and to report to the General Assembly by May 15, 1994. The section specifies a number of agencies and groups to be consulted, including representatives of business and industry who have an interest in job placement for ex-offenders who are recovering substance abusers, and ex-offenders who are recovering substance abusers themselves.

Compliance with rules of educational or training institution as condition of probation. G.S. 15A-1343(b) specifies the regular conditions of probation. One of these is that the defendant must remain gainfully employed or faithfully pursue a course of study or vocational training that will equip him or her for employment. Chapter 9 (H 74), effective May 1, 1994, adds to this condition the requirement that a defendant pursuing a course of study or training must abide by all of the rules of the educational institution, and that the probation officer must forward a copy of the probation judgment to the institution with the request that the institution notify the officer of any violation of institutional rules by the probationer.

Boot camp and post-boot camp programs. "Boot camp," formally known as Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), is a program of military-style discipline intended to rehabilitate young offenders who are sentenced to special probation under G.S. 15A-1343(b1)(2a) and 15A-1343.1. Chapter 24 (S 150) appropriates $1,516,666 to a reserve to operate a new youthful offender boot camp to be brought on line in 1994-95. Section 19 requires that this camp be operated in accordance with guidelines for the boot camp program, set out in 1989 Sess. Laws Ch. 1010.

Chapter 24 also appropriates $452,619 to provide a post-boot camp program for probationers likely to benefit from such a program. Section 19 directs the Department of Correction to select up to 180 probationers for this program, specifies its content in general terms, and requires consultation with appropriate personnel in the Department of Human Resources in establishing appropriate community-based services and other intervention. The section also requires an evaluative study.

Publicizing parole hearings. G.S. 15A-1371(b)(3) requires the Parole Commission to give notice of a parole hearing and its outcome to certain parties if the prisoner up for parole was convicted of first- or second-degree murder, first- or second-degree rape, or first-degree sexual offense. Persons entitled to such notice include the prisoner, the district attorney of the district where the prisoner was convicted, the head of the law enforcement agency who arrested the prisoner, any of the victim's immediate family members who have required in writing to be notified, and the victim of first-degree rape or first-degree sexual offense if the victim has requested in writing to be notified. Chapter 25 (H 171) requires that notice be given also to "as many newspapers of general circulation and other media in the county where the prisoner was convicted and if different, in the county where the prisoner was charged, as reasonable." However, the notice given to news media may not include the name of the victim. Chapter 25 is effective May 10, 1994.

COURTS

Court/drug treatment program funding reserved. Whether to fund special "drug courts" to process only drug cases in selected areas of the state was a hotly debated topic during the Extra Session. Instead of funding a particular program, the General Assembly, in Chapter 24 (S 150), Section 41, required that the Judicial Department hold $800,000 in reserve for fiscal 1994-95 to be allocated for drug court programs during the 1994 Regular Session of the General Assembly.

Teen court program funded. Chapter 24, Section 40, appropriated $75,000 for fiscal 1994-95 to the Administrative Office of the Courts (AOC) for developing and implementing teen court programs in judicial districts selected by the AOC. Junior and senior high schools may apply for grants, which must be reviewed and approved by the chief district court judge for the district in which the program will be conducted. Section 40 requires that programs meet either or both of two objectives: (1) diversion of cases from district court to teen court, and (2) handling problems that have not yet been turned over to juvenile authorities. Section 40 also requires that the AOC report to the General Assembly by May 15, 1994, on the effectiveness of the Cumberland County Teen Court Program, which was authorized and funded by Section 80 of Chapter 561 (S 26) during the 1993 Regular Session of the General Assembly.

Courts Commission studies directed. Chapter 24 (S 150), Section 51 requires that the Courts Commission study the jurisdiction of magistrates, including whether their jurisdiction should be expanded to include disposition of infractions and some misdemeanors. Chapter 24, Section 52 requires that the Commission study whether to provide concurrent jurisdiction between district and superior courts for disposition of some felonies. Bills concerning both of these issues were introduced during the Extra Session, but no measures were enacted. The Commission is directed, for both studies, to make an interim report to the 1994 Regular Session by May 15, 1994, and a final report to the 1995 Session no later than the convening date.

CRIME PREVENTION PROGRAMS AND JUVENILE CORRECTIONS

The General Assembly spent considerable time during the Extra Session discussing and debating crime prevention programs. In the end, a number of new programs were created, and several existing programs received additional funding. While most of the $256 million appropriated during the Extra Session will fund prisons and sentencing, more than $68 million was appropriated for prevention programs and related education and social programs. All of these programs were included in Chapter 24 (S 150), which was effective on March 26, 1994. This memorandum, however, only briefly discusses this significant component of the Session.

Support Our Students. Section 30 establishes the Support Our Students (SOS) Program in the Department of Human Resources (DHR). SOS's purpose is to provide grant funding for local community development of high quality after-school programs for children in grades K-9. Specific program goals include: reducing juvenile crime, recruiting positive role models for children, and reducing the number of "latchkey" children. Chapter 24 appropriates $5 million for SOS grants in fiscal 1994-95.

Family Resource Center grants. Section 31 establishes the Family Resource Center Grant Program in DHR. This program's purpose is to provide grant funding to community organizations and schools to establish resource centers that provide services to children from birth through elementary school age and to their families. Program goals include: assuring smooth transition from pre-school child care to school and mobilizing public and private community resources to help children in need. Chapter 24 appropriates $2.055 million for grants and administration of this program in fiscal 1994-95.

School Intervention/Prevention grants. Section 42 establishes an Intervention/Prevention Grant Program in North Carolina's schools. The program's purpose is to fund school administrative units in designing and implementing innovative programs to combat juvenile crime. Efforts will focus on assisting

students at risk of failure and participating in crime, as well as providing safe schools. Chapter 24 appropriates $12 million for this program in fiscal 1994-95.

At-risk student assistance. Section 43 establishes guidelines for use of $18,237,120 appropriated in Chapter 24 for fiscal 1994-95 to assist local school administrative units in designing and providing services to students at risk of school failure and their families.

Welfare reform study. Section 47 establishes the Legislative Study Commission on Welfare Reform to study the need for welfare reform in light of the current social crisis, including increased crime.

Causes of crime study. Section 48 authorizes the Legislative Research Commission to study the causes of crime in North Carolina.

Youth Services' study. Chapter 24 appropriates $150,000 to DHR for 1993-94 for a comprehensive study of the Division of Youth Services' Juvenile Justice System.

Training schools and juvenile detention facilities. Chapter 24 appropriates $7.3 million to DHR for 1994-95 to provide staff for 147 additional beds in existing training schools (correctional institutions for adjudicated juvenile delinquents). The current capacity of these schools is reckoned at 664, although the actual population has been running well over 700 in recent months. Another $3.3 million is for construction and operation of two Wilderness Camps (residential treatment programs for delinquents). Establishment of new programs serving as alternatives to secure detention of juveniles (pending court disposition of their cases) accounts for $625,000, and $5 million was appropriated for improvement of DHR's Community-Based Alternatives Program, which provides community treatment of juveniles.

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