Criminal Law and Procedure

The 1998 session of the General Assembly was a relatively quiet one in the field of criminal law and procedure, or at least in what traditionally has been considered part of that field. Few changes were made in areas such as the elements of criminal offenses or pretrial and trial procedure.

The General Assembly was more active in areas that are less traditional but that more and more are being linked to the administration of criminal justice. The most extensive changes were to the state’s juvenile justice laws, which govern juveniles alleged to be delinquent or undisciplined. Those changes are discussed in Chapter 13 (Juvenile Law).

The General Assembly also passed the Crime Victims’ Rights Act, implementing the state constitutional amendment on victims’ rights passed by the North Carolina voters in 1996. The first part of this chapter discusses the victims’ rights legislation. The remainder describes other criminal legislation, primarily affecting controlled substance offenses but also addressing a few other criminal offenses and miscellaneous aspects of criminal procedure. Many of the changes with respect to criminal law and procedure appear in the Current Operations and Capital Improvement Appropriations Act of 1998, S.L. 1998-212 (S 1366), which will be referred to here simply as the 1998 Appropriations Act.

Victims’ Rights

Crime Victims’ Rights Act

In the 1996 general election, North Carolina voters approved an amendment to the state constitution articulating various rights of crime victims. The amendment, known as the “Victims’ Rights Amendment” (art. I, sec. 37 of the North Carolina Constitution), provides that victims have the right to be informed of and attend court proceedings, receive restitution, and present their views to agencies considering release of the defendant. The constitutional amendment, however, did not create any enforceable rights. Instead, it left to the General Assembly the responsibility of passing legislation.
to implement the constitutional rights of crime victims. As important, the amendment did not define the term “victim,” leaving that to the General Assembly as well.

During the 1997 session, because agreement could not be reached on legislation to implement the Victims’ Rights Amendment, the General Assembly directed the Legislative Research Commission and Governor’s Crime Commission to study the subject further.

This session, the General Assembly finally enacted legislation to implement the Victims’ Rights Amendment. The keystone of this legislation is the Crime Victims’ Rights Act, enacted by Section 19.4 of the 1998 Appropriations Act, S.L. 1998-212 (S 1366). It creates Article 45A in G.S. Chapter 15A detailing the rights of victims in criminal proceedings. The key provisions of the Crime Victims’ Rights Act, most of which are effective for offenses committed on or after July 1, 1999, are summarized below.

**Definition of “Victim”**

New G.S. 15A-830, the opening section of the Crime Victims’ Rights Act, defines several key terms—most importantly, the term “victim.” Only those persons who are victims as defined in the act are entitled to the rights enumerated in the remainder of the act. If the victim is deceased, then the victim’s next of kin is entitled to exercise those rights, except for the right to restitution, which may be exercised only by the personal representative of the victim’s estate. (New G.S. 15A-841 contains similar provisions concerning the rights of family members of a victim who is mentally incompetent or a minor.)

A person meets the definition of “victim,” and is entitled to the rights enumerated in the act, if there is probable cause to believe one of the following crimes has been committed against him or her:

- a Class A through E felony;
- a Class G through I felony if the felony is in violation of certain statutes;
- an attempt to commit one of the above felonies if the attempt is punishable as a felony;
- a misdemeanor in violation of certain statutes if the defendant and victim have a “personal relationship” as defined in G.S. 50B-1(b).

This last category of offenses is designed to include victims of certain acts of domestic violence. The misdemeanor offenses within the domestic violence category are: assault with a deadly weapon, assault inflicting serious injury, assault on a female, assault by pointing a gun, domestic criminal trespass, and stalking. The offense of communicating threats is not included in this category. In cases involving misdemeanor offenses in the domestic violence category, the act applies only if the defendant and the victim were in one of six different types of “personal relationships” (for example, as current or former spouses) described in G.S. 50B-1(b). (Chapter 50B of the General Statutes gives domestic violence victims who are within one of these relationships the right to file a civil action for a protective order against the alleged perpetrator.)

Because of the potential number of domestic violence victims who may be covered by the new Crime Victims’ Rights Act, the General Assembly directed the Conference of District Attorneys, with the assistance of the Administrative Office of the Courts and the Governor’s Crime Commission, to project the cost of full implementation of the act. The report must be submitted to the General Assembly by March 1, 1999. S.L. 1998-212, sec. 19.4(o). The Conference of District Attorneys also is charged with maintaining a repository of victims’ names, addresses, and other information for use by agencies charged with responsibilities under the act. G.S. 15A-835(e).

Those who do not meet the definition of victim under the Crime Victims’ Rights Act are covered by Article 45 of G.S. Chapter 15A (instead of new Article 45A), which has been in effect for several years. As amended by section 19.4(b) of S.L. 1998-212, Article 45 applies to felonies and serious misdemeanors not covered by the Crime Victims’ Rights Act and to acts of juveniles that, if committed by an adult, would constitute a felony or serious misdemeanor. The procedures in Article 45 resemble those in the Crime Victims’ Rights Act, except they are not mandatory. Law enforcement agencies, courts, and others in the criminal justice system are directed to make a reasonable effort to follow the procedures in Article 45 but are not required to do so.
Agency Responsibilities

The Crime Victims’ Rights Act gives victims different rights at each stage of a criminal case and designates the officials (law enforcement agencies, prosecutors, and others) responsible for affording victims those rights. Many responsibilities concern the giving of notice to victims (for example, notice of the date and time of court proceedings or the disposition of the case). At each stage, a victim has the option of electing (on forms provided by the officials responsible for communicating with victims at that stage of the case) whether or not to receive further notices. The notification and other responsibilities described below are effective for offenses committed on or after July 1, 1999.

Law Enforcement Agencies. New G.S. 15A-831 describes the responsibilities of investigating law enforcement agencies. Within seventy-two hours after identifying a victim covered by the act, the investigating law enforcement agency must provide the victim with various types of information, such as the address and telephone number of the district attorney’s office responsible for prosecuting the case and the name and telephone number of a law enforcement employee whom the victim may contact for further information. G.S. 15A-831 also describes the responsibilities of arresting law enforcement agencies. Within seventy-two hours of arrest, the arresting law enforcement agency must notify the investigating law enforcement agency of the arrest. The investigating law enforcement agency, in turn, must notify the victim of the defendant’s arrest and must provide to the district attorney’s office the victim’s name, address, telephone number, and other identifying information.

District Attorney Offices. New G.S. 15A-832 describes the responsibilities of district attorney offices. Within twenty-one days of arrest, but no less than twenty-four hours before the first-scheduled probable cause hearing, the district attorney’s office must provide to the victim a pamphlet or other written materials explaining, among other things, the victim’s rights, the steps generally taken by the district attorney’s office in prosecuting cases, and the name and telephone number of a victim/witness assistant in the district attorney’s office whom the victim may contact for further information. The district attorney’s office also must notify the victim of all trial court proceedings, provide a secure waiting area for the victim during the proceedings whenever practical, and offer the victim the opportunity to consult with the prosecuting attorney prior to disposition of the case.

Courts. G.S. 15A-832 also places some responsibilities on the courts. Subsection (e) provides that if the victim will be called as a witness, the court must make every effort to permit the fullest attendance of the victim during the trial without violating the defendant’s right to a fair trial. Subsection (g) provides that, at sentencing, the prosecuting attorney must submit to the court a form containing the victim’s name and other identifying information. The form must be included with the final judgment and commitment transmitted to any agency that receives custody of the defendant. [G.S. 15A-832(g) states that the custodial agency must keep this form confidential; this is the only provision in the Crime Victims’ Rights Act specifically addressing confidentiality.]

Post-Trial Responsibilities of District Attorneys and Attorney General. G.S. 15A-835 deals with post-trial responsibilities of district attorney offices and the Attorney General’s office. Within thirty days after the final proceeding in the trial court, the district attorney’s office responsible for the prosecution must notify the victim of the disposition of the case. If the defendant appeals, the district attorney’s office must forward to the Attorney General’s office the victim’s name, address, and telephone number; the Attorney General’s office must provide the victim with an explanation of the appellate process, notice of any appellate proceedings, and notice of the final disposition.

Custodial Agencies. G.S. 15A-836 and 15A-835(c) deal with the notification responsibilities of custodial agencies after conviction of the defendant. They must notify the victim of the projected date of release of the defendant, assignment of the defendant to a minimum custody unit, the defendant’s escape from custody and capture, and the defendant’s death. If the defendant appeals the conviction and obtains release on bail pending appeal, the agency with custody of the defendant must notify the investigating law enforcement agency, which then must notify the victim. [When the defendant is released on bail before trial, the victim is not automatically notified; rather, under new G.S. 15A-831(a)(6), the victim may call an employee designated by the investigating law enforcement agency to find out whether the defendant has obtained pretrial release.]
**Adult Probation and Parole.** G.S. 15A-837 requires the Division of Adult Probation and Parole to notify the victim of the terms of any probation, the date of any probation hearings, and other specified information.

**Governor.** G.S. 15A-838 requires the Governor’s Clemency Office to notify the victim when the Governor is considering whether to commute the defendant’s sentence or pardon the defendant. The victim has the right to present a written statement before the decision is made and has the right to notice of the decision.

**Victim Impact Evidence**

The Crime Victims’ Rights Act, G.S. 15A-833, gives a victim covered by the act (or the victim’s next of kin if the victim is deceased) the right to offer “admissible evidence of the impact of the crime,” to be considered by the court or jury in sentencing the defendant. According to the statute, the evidence may include a description of the physical, psychological, and emotional injuries suffered by the victim, an explanation of the victim’s economic or property losses, and a request for restitution and statement about whether the victim has applied for or received compensation under the Crime Victims’ Compensation Act in G.S. Chapter 15B. [Amendments to the Crime Victims’ Compensation Act are discussed in Chapter 23 (Sentencing, Corrections, Prisons, and Jails).] The victim’s (or family’s) right to present impact evidence appears to apply to sentencing both in noncapital cases, which is conducted by a judge, and in capital cases, which is by a jury. Unlike most other parts of the act, this provision is effective for offenses committed on or after December 1, 1998.

**Restitution**

New G.S. 15A-834 provides that a victim covered by the Crime Victims’ Rights Act has the right to receive restitution in accordance with new Article 81C of G.S. Chapter 15A. [The new article on restitution is discussed in Chapter 23 (Sentencing, Corrections, Prisons, and Jails).]

**Controlled Substances**

The General Assembly made several changes to the state’s controlled substance laws. Perhaps the most significant ones are to North Carolina’s tax on controlled substances, commonly known as the “drug tax.” Although the revisions to the drug tax are fairly limited, the stakes are potentially high—namely, the enforceability of the tax.

**Modification of the Drug Tax**

**Court Cases Regarding Constitutionality of the Drug Tax.** The drug tax provisions, contained in Article 2D of G.S. Chapter 105 (G.S. 105-113.105 through 105-113.113), impose a tax on individuals who illegally possess more than a specified amount of a controlled substance. Individuals who were assessed the tax and were also prosecuted for a controlled substance offense challenged the constitutionality of the drug tax, arguing that requiring them to pay the drug tax and then prosecuting them criminally concerning the drugs on which they were taxed violated the double jeopardy clause of the U.S. Constitution, which prohibits punishing a person, or placing a person in jeopardy of being punished, more than once for the same offense. The North Carolina Court of Appeals, in a two-to-one decision, rejected this argument, holding that the tax did not constitute a criminal punishment and that the defendant was placed in jeopardy only once—when he was tried for the criminal offense. State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff’d per curiam, 345 N.C. 626, 481 S.E.2d 84 (1997). The North Carolina Supreme Court affirmed the Ballenger decision without issuing its own opinion. The court of appeals and supreme court (without opinion) also rejected the defendant’s double jeopardy argument concerning the drug tax in State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996), aff’d per curiam, 346 N.C. 165, 484 S.E.2d 525 (1997).
After the rulings in *Ballenger* and *Creason*, the U.S. Court of Appeals for the Fourth Circuit assessed the constitutionality of North Carolina's drug tax. *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. denied, ___ U.S. ___,* 119 S. Ct. 47 (Oct. 5, 1998). The plaintiffs in the *Lynn* case brought a civil lawsuit against North Carolina and two of its tax officials. Contrary to the state appellate courts, the Fourth Circuit held that the tax was a criminal penalty and that the state therefore had to respect the constitutional safeguards accompanying criminal proceedings (for example, the right to trial by jury) when enforcing the tax. Because of the nature of the lawsuit, the Fourth Circuit did not address the specific double jeopardy question decided by the state appellate courts. But, by finding the drug tax to be a criminal penalty, the court clearly validated the double jeopardy argument rejected by the state courts. The U.S. Supreme Court refused to review the Fourth Circuit's decision, leaving unsettled the enforceability of North Carolina's drug tax and its impact on criminal prosecutions.

**1998 Amendments to the Drug Tax.** Against this background, the General Assembly passed S.L. 1998-218 (S 1554), effective October 31, 1998. The act does not modify any of the procedures for enforcement of the drug tax; rather, it affects only the amount of tax on some drugs and the penalties for failure to pay the tax. The act's preamble (which is not part of the drug tax statutes themselves) states that the General Assembly’s intent is to modify the tax in accordance with the federal court’s ruling in the *Lynn* case. Whether these changes accomplish this purpose, however, must await further litigation.

First, the act reduces the tax on two categories of controlled substances (the drug tax is levied on six different categories of controlled substances). As amended, G.S. 105-113.107 imposes a tax of $50 on each gram of cocaine (rather than $200 per gram, as under prior law) and a tax of $200 for each ten dosage units of a controlled substance that is not sold by weight and is not classified as a “low-street-value” drug (rather than $400 per ten dosage units, as under the prior law).

Second, the act reduces the monetary penalty for failure to pay the drug tax. Under former G.S. 105-113.110A, a person who failed to pay the tax was liable for a penalty of 50 percent of the tax due and interest. (The penalty had previously been reduced in 1995 from 100 percent to 50 percent of the tax due. 1995 N.C. Sess. Laws Ch. 340.) As amended, the statute imposes a penalty of 10 percent of the tax due. [The amended statute does not specifically refer to the amount of the penalty. Instead, it states that Article 9 of G.S. Chapter 105, which contains general penalty provisions for tax violations and imposes a 10 percent penalty for failing to pay a tax, applies to the drug tax.] A person who fails to pay the drug tax remains liable for interest on the unpaid tax [under G.S. 105-241.1(i) of Article 9] at the same rate as under the prior law.

The act also may have the effect of restoring criminal penalties for failure to pay the drug tax. In 1995, the General Assembly repealed the criminal penalties for failure to pay the drug tax. 1995 N.C. Sess. Laws Ch. 340 (repealing G.S. 105-113.110). Article 9 of G.S. Chapter 105, which now will apply to the drug tax, contains its own criminal penalties for failure to pay taxes. G.S. 105-236.

**Drug Offenses Involving Minors**

The General Assembly created several new drug offenses involving minors and revised the punishments for those types of offenses. This legislation, effective for offenses committed on or after January 1, 1999, was included in Sections 17.16(e), (f), and (h) of the 1998 Appropriations Act, S.L. 1998-212 (S 1366).

**Sale or Delivery to Minor.** G.S. 90-95(e)(5) was amended to create two offenses (formerly, there was one) involving sale or delivery to a minor of a controlled substance in violation of G.S. 90-95(a)(1). The two offenses are distinguished by the minor’s age. Sale or delivery to a minor who is more than thirteen but less than sixteen years of age is a Class D felony; sale or delivery to a minor thirteen years of age or younger is a class C felony. [Sale or delivery to a minor sixteen years of age or older remains subject to the general punishment provisions for illegal sale or delivery of a controlled substance, contained in G.S. 90-95(b).] The age of the minor appears to be an essential element of these offenses. Therefore, to obtain a conviction, the prosecution would have to allege the minor’s age in the indictment or other pleading. Likewise, instructions to the jury would have to indicate that the prosecution has the burden of proving the requisite age beyond a reasonable doubt.
**Hiring of Minor.** G.S. 90-95.4 was amended to create four offenses (formerly, there were two) involving hiring of a minor to violate G.S. 90-95(a)(1). (The amended statute clarifies that a person who hires or intentionally uses a minor for such a purpose may be found guilty of one of these offenses.) The offenses are differentiated according to the age of both the defendant and the minor.

- If the defendant is at least eighteen but less than twenty-one years of age and the minor is more than thirteen but less than eighteen years of age, the offense is punishable as a felony one class greater than the violation for which the minor was hired.
- If the defendant is at least eighteen but less than twenty-one years of age and the minor is thirteen years of age or younger, the offense is punishable as a felony two classes greater than the violation for which the minor was hired.
- If the defendant is twenty-one years of age or older and the minor is more than thirteen but less than eighteen years of age, the offense is punishable as a felony three classes greater than the violation for which the minor was hired.
- If the defendant is twenty-one years of age or older and the minor is thirteen years of age or younger, the offense is punishable as a felony four classes greater than the violation for which the minor was hired.

As with the offenses involving sale or delivery of a controlled substance to a minor, discussed above, the prosecution must allege and prove the requisite ages to obtain a conviction.

**New Drug Offenses Involving Minors.** Under new G.S. 90-95.6, a person is guilty of promoting drug sales by a minor, a Class D felony, if the person knowingly (1) entices, forces, encourages, or otherwise facilitates a minor in violating G.S. 90-95(a)(1); and (2) supervises, supports, advises, or protects the minor in violating G.S. 90-95(a)(1). [Although the new statute contains no conjunction between elements (1) and (2)—that is, no “and” or “or”—it appears to require proof of both elements for conviction. Thus, the statute lists the elements separately; if proof of only one element were required, the listed acts (enticing, supervising, and so on) could have been set out in a single clause. Further, element (1) refers to “a” minor, and element (2) refers to “the” minor, suggesting that the defendant must enlist a minor’s assistance and then oversee that minor’s activities. Last, the punishment for this offense is potentially greater than the punishment for hiring or intentionally using a minor to commit a drug violation under G.S. 90-95.4, discussed previously, suggesting that more is required for conviction than the acts listed in element (1) alone.] Because the statute does not specify the minor’s age, the general definition of “minor” in G.S. 48A-2 (a person under eighteen years of age) probably applies to this offense.

Under new G.S. 90-95.7, a person is guilty of participating in a drug violation by a minor, a Class G felony, if (1) the person is twenty-one years of age or older; (2) the person purchases or receives a controlled substance from a minor; (3) the minor is thirteen years of age or younger; and (4) the minor possesses, sells, or delivers the controlled substance in violation of G.S. 90-95(a)(1).

**Pretrial Release for Drug Trafficking**

G.S. 15A-533 recognizes that when a person is arrested for a noncapital offense, he or she has the right to have pretrial release conditions determined. The judicial official setting the conditions has the discretion to choose among different forms of pretrial release (for example, a secured bond or release to the custody of another person), but the judicial official must always set some pretrial release conditions, giving the defendant at least an opportunity to obtain liberty before trial.

Effective for offenses committed on or after January 1, 1999, S.L. 1998-208 (H 1023) amends G.S. 15A-533 to permit the denial of any form of pretrial release in a limited class of cases. The amended statute establishes a rebuttable presumption that when a defendant meets certain criteria, no condition of release will reasonably assure the defendant’s appearance or the safety of the community. This presumption arises if the judicial official finds

- reasonable cause to believe that the person committed a drug-trafficking offense;
- the drug-trafficking offense was committed while the person was on pretrial release for another offense; and
the person has been convicted previously of a Class A through E felony or a drug-trafficking offense and less than five years has elapsed since the date of conviction or the person’s release from prison, whichever is later.

If the defendant meets these criteria, only a district or superior court judge may set pretrial release conditions and then only upon finding that there is a reasonable assurance that the defendant will appear and that release does not pose an unreasonable risk of harm to the community.

The amended statute creates a form of “preventive detention”—that is, it allows a defendant to be held in custody before trial because he or she is deemed too dangerous or too great of a flight risk to be released. In United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), the U.S. Supreme Court held that preventive detention is constitutional in limited circumstances. North Carolina’s statute may not soon be put to the test of Salerno, however, as it potentially applies to very few defendants.

Criminal Offense Changes

Unless otherwise noted, the following changes apply to offenses committed on or after January 1, 1999.

Life Sentence for Second or Subsequent Class B1 Felony

New G.S. 15A-1340.16B, enacted by Section 17.16(a) of S.L. 1998-212 (S 1366), provides for life imprisonment without parole for a Class B1 felony in some circumstances. (The only Class B1 felonies are first-degree forcible or statutory rape; first-degree forcible or statutory sexual offense; and statutory rape or sexual offense against a person who is thirteen, fourteen, or fifteen years old if the defendant is at least six years older than the person.) New G.S. 15A-1340.16B provides for a life sentence for a Class B1 felony if

- the offense was against a person thirteen years of age or younger;
- the defendant has at least one prior conviction for a Class B1 felony; and
- the court finds no mitigating factors.

G.S. 15A-1340.16B(b) states that if the court finds any mitigating factors, it must sentence the defendant in accordance with the regular structured-sentencing rules, which prescribe a range of punishments based on the defendant’s prior record.

Injury to a Pregnant Woman

New G.S. 14-18.2, enacted by Section 17.16(b) of S.L. 1998-212, creates the offense of injury to a pregnant woman. A person violates new G.S. 14-18.2 if

- while committing a felony, or a misdemeanor that constitutes an act of domestic violence as defined in G.S. Chapter 50B,
- the person causes injury to a pregnant woman,
- knowing that the woman is pregnant,
- which causes a miscarriage or stillbirth.

It appears that the prosecution will have to allege and prove to the jury the underlying felony or misdemeanor, not simply present this evidence at sentencing. The new offense is punishable as a felony or misdemeanor one class higher than the underlying felony or misdemeanor committed by the defendant. If the underlying offense is a Class A1 misdemeanor, the offense is punishable as a Class I felony. The new statute provides that it does not apply to acts committed by a pregnant woman causing a miscarriage or stillbirth by the woman.
Cruelty to Animals

Section 17.16(c) of S.L. 1998-212 amends G.S. 14-360 to create two offenses involving cruelty to animals. Subsection (a) of G.S. 14-360 makes intentionally injuring, tormenting, or killing an animal a Class 1 misdemeanor. Subsection (b) makes maliciously torturing or killing an animal a Class I felony (but may not be construed as increasing the punishment for cockfighting in violation of G.S. 14-362). The amended statute exempts from the prohibition on cruelty to animals several activities, such as lawful hunting and lawful biomedical research. It also changes the definition of “animal” from every “living creature” to every “living vertebrate except human beings.”

Greyhound Racing

New G.S. 14-309.20, enacted by Section 17.16(d) of S.L. 1998-212, criminalizes greyhound racing. The new law makes it a Class 1 misdemeanor to do any of the following: (1) hold, conduct, or operate a greyhound race for public exhibition in North Carolina for monetary remuneration; or (2) transmit or receive interstate or intrastate simulcasts of greyhound races for commercial purposes in North Carolina.

Domestic Criminal Trespass

Section 17.19 of S.L. 1998-212 amends G.S. 14-134.3 to create a variation of the offense of domestic criminal trespass. A person is guilty of a Class G felony (instead of a Class 1 misdemeanor, the normal classification of domestic criminal trespass) if, in addition to committing the acts required for domestic criminal trespass, the person trespasses on property operated as a safe house or haven for domestic violence victims and the person is armed with a deadly weapon.

Escape from a Private Correctional Facility

New G.S. 14-256.1, enacted by Section 17.23 of S.L. 1998-212, creates a new offense of escape from a private correctional facility, a Class H felony. The new offense applies only to individuals who are (1) convicted in a jurisdiction other than North Carolina and (2) housed in private correctional facilities in North Carolina. Section 17.23 of S.L. 1998-212 also directs the Department of Correction to consult with the Department of Justice and report to the General Assembly on the appropriateness of this penalty for inmates serving sentences imposed by other jurisdictions.

Increased Punishment for Tax Violations

Effective for offenses committed on or after December 1, 1998, S.L. 1998-178 (S 1228) changes the punishment classifications for the following offenses from a Class I to Class H felony:

- attempting to evade or defeat a tax in violation of G.S. 105-236(7);
- aiding or assisting the filing of a false or fraudulent return in violation of G.S. 105-236(9a).

The act also deletes the provisions specifying the potential fine for these offenses (up to $25,000 for the first-listed violation and up to $10,000 for the second-listed violation). Under G.S. 15A-1340.17, which governs fines for felonies in general, the fine will be in the court’s discretion.

Local Regulation of Sexually Oriented Businesses

Effective July 15, 1998, S.L. 1998-46 (S 452) allows cities and counties to regulate sexually oriented businesses, defined as those that emphasize the anatomical areas and sexual activities specified in G.S. 14-202.10, the definitions section for adult establishments. [The act also broadens the definition of adult bookstore in G.S. 14-202.10(1).] New G.S. 160A-181.1 contains examples of the types of zoning, licensing, and other ordinances that local governments may enact, including restrictions on the location of sexually oriented businesses, limitations on hours of operation, and registration requirements for owners and employees. The new statute also provides that while a local government is
considering potential regulations it may enact a moratorium of reasonable duration on the opening and expansion of sexually oriented businesses. It also may require existing businesses to comply with any regulations within a reasonable period of time after adoption.

In conformity with this grant of authority to local governments, the act amends several statutes: G.S. 14-190.1 on obscene materials, G.S. 14-190.9 on indecent exposure, G.S. 14-202.11 on adult establishments, and G.S. 18B-904 on ABC permits. The amended statutes provide that they do not preempt local government regulation of sexually oriented businesses to the extent consistent with constitutional protections for free speech. [These amendments effectively overrule a contrary ruling in Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998), which found a local ordinance on sexually oriented businesses to be preempted.] The act also amends the description of nuisances in G.S. 19-1, providing that repeated violations of a local ordinance on sexually oriented businesses may constitute a nuisance in specified circumstances.

Recodification of Railroad Offenses

Effective September 4, 1998, S.L. 1998-128 (H 1094) recodifies two offenses relating to railroads. The offenses described in new G.S. 14-460 (riding on a train unlawfully) and G.S. 14-461 (unauthorized manufacture or sale of switch-lock keys) essentially duplicate the offenses contained in G.S. 62-319 and 62-322. In an apparent oversight, however, the act did not repeal the latter two statutes. The act also adds G.S. 136-197, which makes it a Class 1 misdemeanor for an intoxicated person to board a train after being forbidden by the conductor.

Criminal Procedure Changes

Execution by Lethal Injection Only

Effective for executions on or after October 30, 1998, Section 17.22 of S.L. 1998-212 (S 1366) amends state law to abolish executions by lethal gas. G.S. 15-187 and 15-188, as amended, provide that a person sentenced to death may be executed by lethal injection only.

Elimination of Review of Sentences of Life without Parole

As part of the Crime Victims’ Rights Act, the General Assembly repealed the right of a defendant to obtain review of a sentence of life without parole after he or she has served twenty-five years in prison. Under Article 85B of G.S. Chapter 15A (repealed by section 19.4(q) of S.L. 1998-212) a defendant could seek review by a superior court judge, who then had to recommend to the Governor whether the sentence should be altered or commuted. The repeal is effective for offenses committed on or after December 1, 1998. Of course, the repeal does not affect the power of the Governor, under Article III, Section 5(6) of the North Carolina Constitution, to grant pardons and commute sentences.

Involuntary Commitment of Defendants Acquitted by Reason of Insanity

G.S. 15A-1321 has required that a defendant found not guilty by reason of insanity be committed to a state twenty-four-hour facility (a state hospital providing services around the clock). Effective for offenses occurring on or after January 1, 1999, Section 12.35B of S.L. 1998-212 (S 1366) modifies the commitment procedure for criminal defendants who are acquitted by reason of insanity. As amended, G.S. 15A-1321 continues to require automatic commitment after a finding of not guilty by reason of insanity but it distinguishes among insanity acquittees based on the criminal charges against them. If an insanity acquittee is not alleged to have inflicted or have attempted to inflict serious physical injury or death, he or she may be sent to any state twenty-four-hour facility. Insanity acquittees who are alleged to have engaged in such conduct, however, must be sent to a forensic unit operated by the Department of Health and Human Services and must reside there until released in accordance with the
procedures in G.S. Chapter 122C. (The procedures on release in G.S. Chapter 122C continue to apply to all insanity acquittees, regardless of the facility to which they have been committed.)

The only facility that has a forensic unit meeting the description in the amended statute is Dorothea Dix Hospital in Raleigh. In 1997, the General Assembly appropriated approximately $3.5 million for the creation of a secure, seventy-two-bed forensic unit at Dorothea Dix for individuals who are found incompetent to stand trial or not guilty by reason of insanity and who are considered a risk of escape or violent behavior.

Inclusion of Judges’ and Attorneys’ Names in Criminal Case Records

Effective for records compiled on or after January 1, 1999, new G.S. 7A-109.2 [enacted by S.L. 1998-208 (H 1023)] requires the superior court clerk to include in the record of disposition in every criminal case the names of the presiding judge and the attorneys for the State and defendant.

Mileage Reimbursement for Out-of-State Witnesses

Section 16.25 of S.L. 1998-212 (S 1366) amends G.S. 7A-314(c) and 15A-813 to increase the amount of mileage reimbursement for out-of-state witnesses summoned to appear in a criminal case in North Carolina. Effective for expenses incurred on or after October 30, 1998, out-of-state witnesses are entitled to the same mileage reimbursement that in-state witnesses receive—that is, the rate allowed for state employees. If an out-of-state witness must appear for more than one day, he or she also is entitled to reimbursement for lodging and meal expenses up to the rate allowed for state employees.

Notice of Bond Forfeiture

Effective July 24, 1998, S.L. 1998-58 (H 354) changes the method of service of a court order declaring a bail bond to be forfeited. Amended G.S. 15A-544(b) allows the clerk of court to use first-class mail, instead of certified mail (return receipt requested), to notify the obligors on the bond of a forfeiture order.

Regulation of Bail Bondsmen

S.L. 1998-211 (H 926) revises several statutes regulating bail bondsmen. The changes discussed here were effective November 1, 1998.

Amended G.S. 58-71-20 requires that a bail bondsman return the premium paid for a bond within seventy-two hours after the bondsman surrenders a defendant; previously, the statute did not contain a specific time limit. The amended statute also clarifies the circumstances in which a bondsman may keep the premium despite surrendering the defendant. Amended G.S. 58-71-95(5) likewise sets a seventy-two-hour time limit on return by a bondsman of collateral security or other indemnity after the final termination of liability on a bond.

The act also revises G.S. 58-71-80 on licensing of bail bondsmen and runners. As amended, subsections (a)(2) and (6) provide that the Commissioner of Insurance may deny, suspend, revoke, or refuse to renew a license for conviction of any misdemeanor committed in the course of dealings under the license or for conviction of a crime involving moral turpitude. Subsection (b) provides that the commissioner shall deny, revoke, or refuse to renew a license if the person is or has ever been convicted of a felony.

John Rubin