2010 Legislation Affecting Sentencing, Corrections, and Detention

Jamie Markham
UNC School of Government
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Compared to recent years, in which the General Assembly made substantial changes affecting such things as the Structured Sentencing punishment chart, probation, and sex offender registration and monitoring, 2010 was a quiet session in the realm of sentencing, corrections, and detention. This paper summarizes the relatively short list of bills that made changes in those areas, with a particular focus on how each change impacts the Department of Correction and North Carolina's sheriffs. Those who work in the court system may also be interested in the lengthier list of Legislation of Interest to Court Officials prepared by School of Government faculty members Ann Anderson, Michael Crowell, Shea Denning, Janet Mason, John Rubin, and Jim Drennan. John Rubin also prepared a summary of 2010 legislation affecting criminal law and procedure, available at http://www.sog.unc.edu/dailybulletin/summaries10/category05.html. Portions of this summary borrow from the summaries prepared by those authors.

SENTENCING

Increased penalty for animal abuse—"Susie's Law." Named for Susie, a pit bull mix who was set on fire and left to die by a defendant who, to the chagrin of many, was punished for that particular offense by probation, S.L. 2010-16 (S 254) amends G.S. 14-360(a1) and (b) to increase from a Class A1 misdemeanor to a Class H felony the penalty for maliciously killing an animal by deprivation of sustenance, or maliciously torturing, mutilating, maiming, cruelly beating, disfiguring, poisoning, or killing an animal. The change is effective December 1, 2010, and applicable to offenses committed on or after that date.

PROBATION, POST-RELEASE SUPERVISION, AND PAROLE

District court supervision of therapeutic court probationers. The 2009 legislature amended G.S. 7A-271 and -272 and G.S. 15A-1344 to provide legal authority for the practice of district court judges supervising, modifying and revoking probation for defendants placed in drug court treatment program in superior court. A glitch in the 2009 legislation made it unclear whether such authority also extended to defendants placed in "therapeutic court" programs in superior court. (Under G.S. 7A-272, a therapeutic court is one, other than a drug treatment court, in which a criminal defendant is ordered to "participate in specified activities designed to address

underlying problems of substance abuse and mental illness that contribute to the person's criminal activity.") S.L. 2010-96 (S 1165), Section 26, clarifies that the authority does extend to therapeutic court programs. The change is effective July 20, 2010. S.L. 2010-97 (S 1242) also made a minor change to the effective date of the jurisdictional changes made in 2009. Under the amendment to the effective date language of S.L. 2009-516, the law is effective not just for probation judgments entered on or after December 1, 2009, but also to judgments modified on or after that date.

Electronic notification to the media upon consideration of parole for a life-sentenced inmate. The Post-Release Supervision and Parole Commission has an obligation to notify certain people and entities when a life-sentenced inmate is being considered for parole. Under prior law, G.S. 15A-1371(b)(3) required that the notification be by first class mail. Effective July 20, 2010, S.L. 2010-107 (H 1115) amends G.S. 15A-1371(b)(3) to allow the Commission to use electronic means rather than the mail to notify newspapers of general circulation and other media of its impending consideration of an inmate's parole if electronic notification would be more timely and cost-effective.

Retired probation officers exempt from weapons safety course. Effective December 1, 2010, S.L. 2010-104 (H 859), adds certain retired probation and parole officers to the short list in G.S. 14-415.12A of people who can obtain a permit to carry a concealed handgun without a taking a weapons safety and training course. The current list includes only qualified sworn and retired law enforcement officers. To be "qualified" an officer must:

1. Have been retired (other than for reasons of mental disability) for two years or less from the date of his or her concealed carry permit application;
2. Have met DOC firearms training standards and have been authorized to carry a handgun in the course of duty immediately before retirement;
3. Have retired in good standing;
4. Have never been the subject of disciplinary action by DOC that would have prevented him or her from carrying a handgun;
5. Have a vested right to benefits under the state employees' retirement system; and
6. Not be prohibited from receiving a firearm under State or federal law.

The law is retroactively effective to officers who retire before December 1, 2010, provided they meet the other requirements set out in new G.S. 14-415.10(4b).

DWI parole. Inmates imprisoned for impaired driving can, in certain circumstances, be paroled. In 1997 (S.L. 1997-379) the General Assembly amended G.S. 20-179(p) to provide that an inmate could not be paroled until he or she completed any recommended treatment or training program, unless he or she was paroled into a residential treatment program (that is, DART-

Cherry). The provision allowing an inmate to be paroled to a residential treatment program was stricken from the law in 2007 (S.L. 2007-493). This year, it was added back to the law by S.L. 2010-97 (S 1242) in precisely the same form that it first appeared in 1997, effective July 20, 2010.

LEGISLATION OF PARTICULAR INTEREST TO THE SHERIFF

Sex offender registration. Provisions near the end of S.L. 2010-174 (H 726), which is primarily devoted to making technical and conforming changes to the expunction legislation passed in 2009, broaden the effective-date coverage of North Carolina's registration requirement for offenders with reportable convictions from other jurisdictions. Section 16(a) of the law modifies the effective date in Section 19 of S.L. 2006-247 (H 1896), which amended G.S. 14-208.6(4)b to provide that a "reportable conviction" includes "a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state." The 2006 legislation made this change applicable to offenses committed and to individuals who move into North Carolina on or after December 1, 2006. The new law amends the effective-date language to make the change applicable to offenses committed and to individuals who move into North Carolina "*prior to*," as well as on or after, December 1, 2006.

However, this amendment to the effective date of the 2006 legislation has an effective date of its own: it is "effective October 1, 2010, and applies to any person required to register as a sex offender under Article 27A of Chapter 14 of the General Statutes, any person serving an active sentence or on supervised probation, parole, or post-release supervision, for any offense, on or after that date, and any person convicted of a felony offense on or after that date." Under that language, the change only applies to offenders who (1) are already registered in North Carolina for another crime; (2) are still in contact with the North Carolina criminal justice system by virtue of being incarcerated or under community supervision; or (3) come back into contact with the criminal justice system by virtue of a subsequent felony offense.

Constitutional amendment to bar convicted felon from serving as sheriff. A convicted felon cannot, under standards promulgated by the Sheriffs' Education and Training Standards Commission, serve as a deputy sheriff. But he or she could, under existing law, be elected or appointed as sheriff. Troubled by this disconnect, the North Carolina Sheriffs' Association expressed its strong support for S.L. 2010-49 (H 1307), which places on the November 2, 2010, general election ballot a proposed constitutional amendment to Article VII, Section 2, of the Constitution of North Carolina that would prohibit a convicted felon from being eligible to serve as a sheriff. The prohibition would apply regardless of whether the person's citizenship rights are restored. The amendment also makes clear that a "conviction," for the amendment's

purposes, includes any guilty plea or verdict or finding of guilt. If approved by a majority of the voters, the amendment would be effective upon the certification of the election returns.

Minimum certification age for criminal justice and sheriffs' commissions. Under existing law, G.S. 93B-9 provided that "no occupational licensing board may require that an individual be more than 18 years of age as a requirement for receiving a license." Notwithstanding that directive, the North Carolina Criminal Justice Education and Training Standards Commission had set its minimum age for certification at 20; the Sheriffs' Education and Training Standards Commission set its minimum age at 21. Two acts passed by the General Assembly, S.L. 2010-97 (S 1242), Section 8, and S.L. 2010-122 (H 1717), Section 27, excused this inconsistency by excepting both commissions from the general rule, albeit using slightly different language. The latter act, S.L. 2010-122, is effective July 21, 2010.

DNA samples at time of arrest. Nearly half of states collect at least some arrestees' DNA upon arrest. After years of considering the issue (various formulations of the bill have been proposed since 2000, *see* Senate Bill 165 of the 1999 session of the General Assembly), North Carolina joined them with the passage of S.L. 2010-94 (H 1403). That law amends the DNA collection statutes to provide that on arrest for certain offenses—mostly felonies, but some misdemeanors—a defendant must provide a DNA sample. The sample is to be a cheek swab unless a court order authorizes that a DNA blood sample be obtained. The law adds a new G.S. 15A-502A to require that the sample be obtained at the time of arrest, and it amends the pretrial release statutes (G.S. 15A-534(a)) to provide that if a defendant is required to provide fingerprints or a DNA sample and has refused to do so, the pretrial release must include a condition requiring that the person arrested provide the sample or prints.

The procedure to collect the sample and the list of offenses for which samples are required at time of arrest are in a new G.S .15A-266.3A. That statute requires law enforcement officers to obtain the sample from a person who is arrested. The officer must complete a form to be provided by SBI containing the details of the sampling process, and the form must be in the "case file" and be available to the prosecutor. The officer also must provide a form to the person arrested notifying him or her of the procedures to have the sample removed from the DNA database and the records of the sample expunged. The sample must be expunged if the prosecutor dismisses the charge, the person is acquitted, the person is convicted of a lesser-included misdemeanor not covered by the DNA sampling law, no charge is filed within any applicable statute of limitations, or three years pass from the date of the arrest without a conviction or an active prosecution.

Until June 1, 2012, the person arrested must petition the prosecutor to request expunction if no charges are filed or three years pass with no action in the case. After June 1, 2012, the prosecutor is responsible for seeking expunction without a request from the person arrested. If

there is a dismissal, acquittal, or conviction of a lesser-included offense, the prosecutor must initiate steps to expunge the sample. The court is not involved except to sign verification forms if the person is acquitted or the charge is dismissed. The person arrested may file a motion to compel the prosecutor to act or to contest a prosecutor's decision not to act. Any identification, warrant, probable cause to arrest, or arrest based on a DNA match that occurs after the statutory period for expunction is invalid and inadmissible in the prosecution of the person for any criminal offense. The offenses covered by the new arrest sampling provisions are murder, homicide, rape and sex offenses, specified assaults (G.S. 14-32, 14-32.4(a), 14-34.2, 14-34.5, 14-34.6, and 14-34.7), kidnappings or human trafficking offenses, burglary offenses, arson, armed robbery, sex offenses requiring registration, cyberstalking, and stalking, as well as attempts, solicitations, or aiding and abetting any of the covered offenses.

The law amends G.S. 15A-266.4 to include within the list of crimes that require DNA collection upon *conviction* all crimes that, under the new law, will require DNA collection upon *arrest*. It also amends various provisions of Article 13 of Chapter 15A of the General Statutes to expand the purposes for which the DNA database may be used to include forensic casework, analysis of unidentified persons, and missing persons.

The constitutionality under the Fourth Amendment of collecting a defendant's DNA prior to his or her conviction is unresolved. School of Government faculty member Jeff Welty discussed the issue on his North Carolina Criminal Law Blog, available at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=270.

The law is effective February 1, 2011.

Felon firearm rights. The past two years have seen landmark gun litigation in the Supreme Court of the United States and in North Carolina's appellate division. In 2008 the Supreme Court decided *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), striking the handgun ban in Washington, D.C., by holding that the Second Amendment protects an individual right to bear arms, not merely a right to bear arms pursuant to service in a "well regulated Militia." The Court then struck similar handgun bans in Illinois in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), concluding that its reading of Second Amendment rights in *Heller* is incorporated to the states through the Due Process Clause of the Fourteenth Amendment. In both cases, however, the Court made clear that it did not intend to prohibit all firearm regulations, especially those pertaining to firearm possession by felons.

On that latter front, North Carolina's courts have been active. In *Britt v. North Carolina*, 363 N.C. 546 (2009), the state supreme court held that G.S. 14-415.1, which purports to prohibit gun possession by any convicted felon, was unconstitutional as applied to a particular felon, Barney Britt. Mr. Britt was convicted of a single drug crime in 1979; his civil rights (including, at

that time, his right to possess a firearm) were fully restored in 1987. Later changes to North Carolina's gun laws prohibited him from possessing any type of gun for any purpose. Britt eventually challenged the law through a civil suit, arguing that it was unconstitutional under Article I, Section 30 of the North Carolina Constitution (which is very similar to Second Amendment to the United States Constitution). The state supreme court agreed, noting that G.S. 14-415.1 was unreasonable as applied to Mr. Britt in that: (1) his crime was nonviolent; (2) it occurred 30 years ago; and (3) he had not been convicted of another crime since. The state court of appeals reached a different result in *State v. Whitaker*, 689 S.E.2d 395 (2009), when it concluded that G.S. 14-415.1 was not unconstitutional as applied to a man who had three prior felony convictions, including one for indecent liberties with a child and another that was only a few years old.

With these cases as a backdrop, the legislature decided to weigh in on which felons it thought should be entitled to possess firearms. S.L. 2010-108 (H 1260) amends various statutes, described below, to allow people convicted of certain felonies to petition for restoration of the right to possess firearms and to create an exception from firearms restrictions for certain white collar criminal convictions. The new statute gives the responsibility for hearing restoration petitions to the district court in the district where the person resides. New G.S. 14-415.4(i) states that restoration does not constitute an expunction or pardon, and G.S. 14-415.4(l) states that the knowing and willful submission of false information in conjunction with a petition is a Class 1 misdemeanor and permanently bars restoration of firearm rights.

The initial prerequisite for restoration is that the person must have no more than one conviction for a "nonviolent felony," which is defined as not including any Class A, B1, or B2 felony or any Class C through I felony that (1) includes an assault as an essential element; (2) includes possession or use of a firearm or deadly weapon as an essential or nonessential element; (3) was an offense for which the offender was armed with or used a firearm or other deadly weapon; or (4) requires registration as a sex offender. For the purposes of the new law, multiple nonviolent felony convictions arising out of the same event and consolidated for sentencing count as one felony. A person is ineligible for restoration for various reasons listed in the statute, including having been adjudicated guilty of or having received a prayer for judgment continued or a suspended sentence for one or more misdemeanor crimes of violence or other listed misdemeanors.

To obtain restoration, the person must have had his or her civil rights restored (which, in North Caroilna, typically occurs automatically under G.S. 13-1 following a person's completion of all incidents of his or her sentence) for at least 20 years. The new statute also states that a person who was convicted of a nonviolent felony in another jurisdiction is eligible for restoration if his or her civil rights, including the right to possess a firearm, have been restored for at least 20

years in the other jurisdiction. The provision apparently requiring that the person's firearm rights already have been restored for 20 years in the other state may make the waiting period for restoration of firearm rights in North Carolina considerably longer for people with convictions from other jurisdictions. New G.S. 14-415.4 establishes other criteria a person must satisfy to obtain restoration of firearm rights, such as a one-year period of residency in North Carolina.

Procedurally, the clerk of court must provide notice of a pending petition to the district attorney of the district in which the petition is filed at least four weeks before the hearing on the matter. The petitioner must provide the sheriff with his or her fingerprints and a form consenting to a criminal record check. The sheriff must then forward the form and the fingerprints to the State Bureau of Investigations for a records check of state and national databases, for which the state Department of Justice may assess a fee. The petitioner must also pay a $200 filing fee unless indigent.

At the hearing itself, the petitioner presents evidence in support of the petition and the district attorney may present evidence in opposition. The burden is on the petitioner to demonstrate that he or she is entitled to relief. If the petition is denied, the person may generally petition again after one year. If the petition is granted, the clerk must forward a copy of the order granting the petition to the sheriff of the county where the petitioner resides. Additionally, if a person's petition is granted but he or she later gets convicted of another felony, firearm rights are automatically revoked and cannot be restored again.

The act amends G.S. 14-415.1 (possession of firearm by a felon) to provide that a convicted felon whose firearm rights have been restored is not subject to the prohibition in that statute. Similarly, the act amends G.S. 14-404(c) (handgun permits) and G.S. 14-415.12(b) (concealed handgun permits) to provide that people whose firearm rights have been restored are eligible to obtain the indicated permits if they meet the other criteria for issuance. The act also amends the above statutes to exempt from the firearms restrictions felony convictions pertaining to antitrust violations, unfair trade practices, or restraints of trade—an addition that goes beyond anything discussed in *Britt* or *Whitaker*, but that tracks an exception to the definition of "crime punishable by imprisonment for a term exceeding one year" in federal law under 18 U.S.C. § 921(a)(20)(A). People convicted of these felonies do not need to apply for restoration of their firearms rights (unless convicted of other nonviolent felonies); the changes exempt them from the firearms restrictions.

The law directs North Carolina Attorney General to request the U.S. Department of Justice and other federal agencies to review these changes and determine whether a person who qualifies under them may purchase and possess a firearm under federal firearms restrictions.

The effective date for the new firearm right restoration procedure is not entirely clear. The law states that it is effective February 1, 2011, and applicable to offenses committed on or after that date. A literal reading of that provision might suggest that only felons who *committed* their offenses on or after that date could eventually (that is, after serving their sentence, having their rights restored, and allowing 20 years to pass) petition to have their firearms rights restored. A more likely interpretation of the legislature's intent is that the "offenses committed" language was meant to apply only to violations of the new Class 1 misdemeanor created by the law, and that the petition procedure generally takes effect February 1, 2011, and applies to eligible persons regardless of the date they committed their felony.

Legal status of jail inmates. In 2007, S.L. 2007-494 added a new Section to Chapter 162 of the General Statutes requiring jail administrators to inquire into the legal residency status of any person charged with a felony or impaired driving offense who is confined for any period in a county jail, local confinement facility, or satellite jail/work release unit. The purpose of the inquiry is to determine, through questioning or examination of relevant documents, if the prisoner is a legal resident of the United States. Under that law, if a jail administrator was unable to ascertain whether or not a prisoner is a legal resident or citizen of the United States he or she was required, when possible, to make a query through the Division of Criminal Information (DCI) to the Law Enforcement Support Center of the federal Immigration and Customs Enforcement (ICE) office of the Department of Homeland Security. This query served as notice to federal authorities of the prisoner's status and confinement. The jail administrator was also required under G.S. 162-62(d) to report the number of queries performed and the results of those queries to the Governor's Crime Commission annually. S.L. 2010-97 (S 1242) amends G.S. 162-62 to provide that if jailer cannot determine if a person arrested for a felony or impaired driving is a legal resident of the United States, he or she is to make a query directly to ICE instead of going through DCI. The change is technical in nature and allows jail personnel to use the most current technology available to communicate with ICE. The law also repeals the requirement that the jail file an annual statistical report with the Crime Commission. The changes are effective July, 20, 2010**.**

Detention of court-martial defendants. S.L. 2010-193 (H 1412) makes various changes to the statutes relating to National Guard courts-martial in North Carolina. Of interest to the sheriff, the law revises G.S. 127A-54 to provide that court-martial defendants may be arrested and placed in pretrial confinement in a local jail, with the defendant entitled to bail the same as if charged with a state crime. A defendant who is not released on bail is to be transferred to the custody of the Wake County Sheriff and confined in the Wake County confinement facility pending trial, with the costs paid by the Department of Crime Control and Public Safety. A defendant sentenced by a military court to confinement is to be transferred to the Department

of Correction. The act takes effect December 1, 2010, and applies to offenses committed on or after that date.

STUDIES, REPORTS, AND BUDGETARY PROVISIONS

Misdemeanor reclassification. In S.L. 2010-31 (S 897) the General Assembly expressed its intent that there be only three classes of misdemeanors, Class A1, Class 1, and Class 2. That law charges the North Carolina Sentencing and Policy Advisory Commission, in consultation with the Conference of District Attorneys, the Office of Indigent Defense Services, and the School of Government, to review all Class 3 misdemeanors (and other misdemeanor offenses in the group's discretion) to provide a recommendation to the 2011 General Assembly as to whether each misdemeanor considered should be reclassified as a Class 2 misdemeanor or as an infraction.

Fees. To cope with a tight (and tightening) budget, the General Assembly increased a number of court- and corrections-related costs and fees. S.L. 2010-31 increases the supervision fee for probation (G.S. 15A-1343(c1)), post-release supervision (G.S. 15A-1368.4(f), and parole (G.S. 15A-1374(c)) from $30 to $40 per month, effective October 1, 2010, but also applicable to supervisees placed on supervision prior to that date. (The amendments do not, however, limit a controlling authority's power to exempt a person from paying the fee for good cause or if it amounts to an undue economic burden.) The same law increases the community service supervision fee under G.S. 143B-262.4 from $225 to $250. Under a technical correction in S.L. 2010-123 (S 1202), that change is effective October 1, 2010, and applicable only to persons ordered to perform community service on or after that date. G.S. 143B-262.4 was further amended by S.L. 2010-96 (S 1165) (effective July 20, 2010) to provide that offenders participating in the community service program as a condition of parole will pay their fees to the clerk in the county of conviction, not the county into which they were released on parole (as required under a change made to the law in 2009).

Privatization of probation services. Some states use private companies to supervise probationers and parolees, charging offenders a fee for the service. *See* Christine S. Schloss & Leanne F. Alarid, *Standards in the Privatization of Probation Services: A Statutory Analysis*, 32 *Criminal Justice Review* 233 (2007) (listing Alabama, Arkansas, Florida, Georgia, Missouri, Tennessee, and Utah as states that utilize private probation services). The practice is generally thought to generate some cost savings, although it is not without controversy. The Department of Correction (DOC), Division of Community Corrections (DCC) is tasked by S.L. 2010-31, Section 19.2, with developing a plan for implementing a pilot program on the privatization of probation services. DCC is to report on the plan by March 1, 2011. The plan must include a determination

of what resources and policy changes would be necessary to conduct a pilot program for fee-based supervision of low-risk or community-level offenders by private entities. The pilot program itself cannot be implemented without prior legislative approval.

Inmate medical cost control. As the prison population grows—and, in response to determinate sentences without the possibility of parole, grows older—medical costs are becoming an increasing percentage of the state corrections budget. A 2010 report from the Office of the State Auditor (available at http://www.ncauditor.net/EPSWeb/Reports/FiscalControl/FCA-2009-4500.pdf) indicated that DOC pays far more for some outside medical services than would be allowed under the State Health Plan or Medicaid. Under S.L. 2010-31, DOC may, as of July 1, 2010, reimburse providers of inmate medical services at a rate not to exceed 70 percent of usual and customary charges in effect for all other patients. The limitation does not apply to reimbursement rates set in contracts already in effect before that date.

The same law also directs DOC to make every effort to control costs by: (1) using its own health care facilities to provide inmate medical services when possible; (2) limiting admissions to outside hospitals; (3) giving preference to hospitals in the same county (or an adjoining county) as the correctional facility where an inmate requiring care is incarcerated; and (4) consulting with the Department of Health and Human Services about seeking Medicaid waivers for inmates whose Medicaid eligibility has been suspended on account of their incarceration. The law requires DOC to study the impact to inmate medical costs resulting from these cost-control measures and report its findings to the legislature by March 1, 2011. The law also encourages the Department to explore other options, such as contracting with a private third part to manage inmate medical services, treating inmates at federal correctional hospitals, and purchasing a fixed number of beds at a hospital. DOC must also report by October 1, 2010, on the anticipated effects on inmate medical care as a result of the new hospital at Central Prison and the updated facilities at the North Carolina Correctional Institute for Women.

S.L. 2010-31, Section 19.8, also allows the Legislative Research Commission to study inmate medical costs.

DOC federal grant matching funds. S.L. 2010-31, Section 19.9, allows DOC to use up to $1.2 million in fiscal year 2010–11 to provide the state match needed in order to receive federal grant funds.

Community-based residential reentry pilot. S.L. 2010-31, Section 19.7, allows DOC to contract with a community-based residential facility (such as Triangle Residential Options for Substance Abusers, or TROSA, in Durham) to pilot a two-year reentry program for selected low-risk inmates. If the Department conducts the pilot, it will begin during fiscal year 2010–11 and end

the following fiscal year. DOC must report on the pilot program to the legislature by February 1, 2012.

Prison maintenance. Effective July 1, 2010, S.L. 2010-31, Section 19.10, prohibits DOC from entering into contracts for maintenance services at prison facilities or from expanding any existing contracts to cover additional prison facilities. Existing maintenance contracts may, however, be renewed.