2003-2004

HOUSE
JUDICIARY II

COMMITTEE
MINUTES

HOUSE COMMITTEE ON JUDICIARY II

2003-2004 Legislative Session



Rep. Martin L. Nesbitt, Chairman



ep. Alice Bordsen



Rep. Donald Bonner



Rep. Sam Ellis



Rep. Jean Farmer-Butterfield



Rep. Wayne Goodwin
Vice Chair



Rep. Jim Gulley



Rep. Tim Moore
Vice Chair



Rep. Paul Stam



Rep. Trudi Walend

HOUSE COMMITTEE ON JUDICIARY II
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Rep. Tim Moore, Vice- Chair	Rm 502 LOB	733-4838
Rep. Donald Bonner	Rm 1313 LB	733-5803
Rep. Alice Bordsen	Rm 533 LOB	733-5820
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Rep. Jim Gulley	Rm 1307 LB	733-5860
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Rep. Trudi Walend	Rm 418A LOB	715-3012

Committee Staff:
Karen Cochran-Brown
Jeff Hudson
Robin Johnson
Drupti Chauhan
Legislative Research Division
Rm 545 LOB
733-2578

Committee Assistant:
Jan Lee
Rm 420 LOB
715-3001

ATTENDANCE

HOUSE JUDICIARY II COMMITTEE

(Name of Committee)

15 min. after session

DATES	3-4-03	3-6-03	3-11-03	3-18-03	3-18-03	3-20-03	3-25-03	3-27-03	4-1-03	4-3-03	4-8-03	4-10-03	4-15-03	4-22-03	4-22-03—15 min. after session
Rep. Bonner	✓	✓	✓	EX	✓	✓	✓	✓	✓	✓	✓	✓	✓	EX	✓
Rep. Bordsen	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Ellis	✓	✓	✓	✓	✓	✓	EX	✓	EX	✓	✓	✓	✓	✓	✓
Rep. Farmer-Butterfield	EX	EX	EX	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Gulley	✓	✓	✓	✓	✓	✓	EX	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Stam	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Walend	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Nesbitt, Chairman	✓	✓	✓	✓	✓	✓	✓	✓	✓	EX	✓	✓	EX	✓	✓
Rep. Goodwin, Vice Chairman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Moore, Vice Chairman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Ex officios:															
Rep. Culpepper															
Rep. Cunningham															
Rep. Eddins															
Rep. Brubaker															

ATTENDANCE

HOUSE JUDICIARY II COMMITTEE

(Name of Committee)

DATES	4-23-03 9:00	4-23-03 After Session	4-24-03	4-29-03	4-29-03 2:00 pm	4-29-03 15 min. after Session	4-30-03 9:00 am	4-30-03 1:00 pm	4-30-03 15 min. after Session	5-8-03	5-13-03	5-15-03	5-20-03	5-22-03	5-22-03
Rep. Bonner	EX	✓	EX	EX	✓	✓	EX	✓	✓	✓	✓	✓		✓	✓
Rep. Bordsen	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Ellis	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
Rep. Farmer-Butterfield	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Gulley	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			✓
Rep. Stam	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	EX	✓	✓	✓	✓
Rep. Walend	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Nesbitt, Chairman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Goodwin, Vice Chairman	✓	✓	✓		✓	✓	✓	✓	✓	✓		✓	✓	✓	
Rep. Moore, Vice Chairman	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Rep. Culpepper							✓								
Rep. Cunningham							✓								
Rep. Eddins							✓								
Rep. Brubaker							✓								

ATTENDANCE

HOUSE JUDICIARY II COMMITTEE

(Name of Committee)

DATES	5-29-03	6-3-03	6-5-03	6-10-03	6-11-03 session after session	6-12-03	6-17-03	6-19-03 after session						
Rep. Bonner	✓		✓	✓	✓	✓	✓	✓						
Rep. Bordsen	✓	✓	✓	✓	✓	✓	✓	✓						
Rep. Ellis	✓	✓	✓	✓	✓	✓	✓	✓						
Rep. Farmer-Butterfield	✓		✓		✓	✓	✓	✓						
Rep. Gulley	✓			✓	✓	✓	✓	✓						
Rep. Stam	✓	✓	✓	✓	✓	✓	✓	✓						
Rep. Walend		✓		✓	✓		✓	✓						
Rep. Nesbitt, Chairman	✓	✓	✓	✓	✓	✓	✓	✓						
Rep. Goodwin, Vice Chairman	✓	✓	✓		✓	✓	✓	✓						
Rep. Moore, Vice Chairman	✓	✓		✓		✓	✓	✓						

House Judiciary II
Committee

Minutes

March 4, 2003

The House Judiciary II Committee held its first meeting for the 2003 Legislative Session in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and welcomed members and visitors.

HB 65 (*Autopsy Photos Not Public Record)* was the first bill for consideration and Bill Sponsor, Rep. Karen Ray was recognized to explain the bill. She presented a proposed committee substitute to the Committee, copy of which is attached to these minutes as *Attachment I.*

Rep. Ellis moved that the proposed committee substitute be adopted for consideration and the motion passed.

Rep. Ray was recognized for comments. She distributed a "Reference Booklet" to the members, copy of which is attached to these minutes as *Attachment II*. She that her goal in introducing this legislation was to provide a balance of right of privacy, the right of freedom of the press, the right of people to have access to public records and the right to be left alone. She acknowledged that the Dale Earnhart tragedy was associated with this bill.

When Rep. Ray had finished her comments, Committee Counsel Karen Cochran Brown was recognized to explain the bill, section by section. A copy of the Bill Analysis is a part of these minutes as *Attachment III.*

Interested parties who spoke on the bill were John Bussian with the NC Press Assoc., John Dressuer, Editorial Department Managing Editor, News & Observer, Bill Hoener with the Sanford Herald who was President of the NC Press Association.

Mr. Dressuer said he felt strongly about **HB 65.** He said it was a sensitive issue and that he is sympathetic to families of victims. Newspapers are not interested in publishing autopsy photos, but they want to preserve the public's right to view all elements of

autopsy reports, including photos. He said that NC newspapers have never published autopsy photos in the 50 years they have been available to the public, nor has any NC television stations ever-aired an autopsy photo. The right to public access of autopsy records has helped maintain the public confidence in the cause of death in several recent cases, including the arsenic poisoning case in Wake County, the Peterson murder case in Durham where the defense is challenging the medical examiner's findings, and the Santiann transplant at Duke Hospital. If you remove the public's right to view autopsy photos, the people of the state will become suspicious of the autopsy process and will question whether medical examiners have told the whole story. Sometimes the circumstances of death involve questions about the government itself. North Carolinians die in jail, foster homes, nursing homes, and day care. For government to restrict access to records that might have played a roll in the death is doubly wrong.

Mr. Dressuer said the current law protects all North Carolinians and insures that if they die an unnatural death, they will receive an autopsy that will stand up to public scrutiny. That doesn't dishonor the dead; it protects them and insures that the true cause of death will be known. Sometimes the words in the autopsy are enough, but sometimes aren't. Sometimes the photographs are a key part of the autopsy report, containing more truth than any words on a page. **HB 65** does include a provision enabling a citizen to file court papers and ask the court's permission to see autopsy photos. This turns the public records act on its head. Practically speaking, HB 65 would end public access to autopsy photos. The few large newspapers and TV stations that could afford to underwrite the legal proceedings would be shackled with conditions. Government records should be open to the public and Mr. Dressuer said he felt North Carolina has better government because of its open records policy. He said he hopes the committee will leave the law as it is.

Upon conclusion, Rep. Nesbitt said that the bill was not about the traditional press, but about the world we live in today.

The President of the North Carolina Press Association, Bill Hoener who is the publisher of the Sanford Herald, was recognized to speak.

He said **HB 65** will begin the process of tearing our state's very strong public records laws, a process that could very well lead to a process that is closed, not open to the public. The NC Press Association's roll in the discussion of this bill is about principle. The public interest discussed by Rep. Ray has long ago been established by this General Assembly. Autopsy records, including photos, have been determined to be public records, accessible to every North Carolinian to give the public confidence that cause of death reports are honest and true. The General Attorney's decision to make materials public record did not hinge on the privacy of those who are the subject of public records. It's about the public's right to know that what is done by those who are paid with tax dollars, truthfully explains causes of death. It is important for members of this committee and the public to understand that autopsy reports and autopsy photos taken at public expense are important parts of those reports. He said it is the desire of North Carolina newspapers for those reports and photographs remain a part of the public record and the

public trust, without having to ask permission to see them. This isn't about keeping gory autopsy photos from racetrack accidents showing up on the Internet, this is about newspapers and the public having access to autopsy photos for legitimate public information purposes.

There is a provision in this bill to allow a judge to grant access to photos with restrictions. This places an unfair burden on the newspapers and citizens. Cost prohibitive for the public to have to go to court to get permission to get copies of autopsy photos. Dangerous precedent relating to the public's right to know.

Discussion followed. Rep. Bordsen asked if this bill was really addressing only one incident, the Earnhart tragedy.

Rep. Nesbitt said he was as much concerned about his next-door neighbor as he was concerned about Teresa Earnhart. It is not uncommon, however, for one incident to create the need for legislation.

The meeting adjourned at 11:00 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 65
PROPOSED COMMITTEE SUBSTITUTE H65-CSRO-1 [v.1]

3/3/2003 5:44:53 PM

Short Title: Autopsy Photos Not Public Record. (Public)

Sponsors:

Referred to:

February 24, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT PHOTOGRAPHS AND VIDEO OR AUDIO RECORDINGS MADE PURSUANT TO AN AUTOPSY ARE NOT A PUBLIC RECORD.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 132 of the General Statutes is amended by adding the following new section to read:

"**§ 132-1.5A. Photographs and video or audio recordings made pursuant to autopsy.**

(a) Findings. – The General Assembly finds the following:

(1) Photographs or video or audio recordings of an autopsy show or describe the deceased in a graphic and often disturbing fashion. The photographs or video or audio recordings may depict the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions of the deceased which, if copied and publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased.

(2) The existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video or audio recordings 24 hours a day and that widespread dissemination of autopsy photographs and video or audio recordings would subject the immediate family of the deceased to continuous injury.

(3) There are other types of information available, such as the text of the autopsy report, which are less intrusive and injurious to the immediate

family members of the deceased but which provide for public oversight.

(4) Given the likelihood of injury to immediate family members by the dissemination of autopsy photographs and video or audio recordings and the availability of less intrusive means of providing public oversight, it is a public necessity to provide by law that photographs and video or audio recordings of an autopsy are not a public record under G.S. 132-1.

(b) Access Restricted. – Except as otherwise provided in this subsection, a photograph or video or audio recording of an autopsy is not a public record as defined by G.S. 132-1. The custodian of a photograph or video or audio recording of an autopsy shall grant access to the photograph or video or audio recording to the following:

(1) Chief Medical Examiner.

(2) Authorizing medical examiner.

(3) District attorney.

(4) Superior court judge.

(5) An individual entitled to bring a wrongful death action on behalf of the deceased under G.S. 28A-18-2.

(6) The surviving spouse of the deceased may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents of the deceased may have access to the photograph or video or audio recording of the autopsy. If there are no surviving parents, then an adult child of the deceased may have access to the photograph or video or audio recording of the autopsy.

(7) Law enforcement officials conducting an investigation of the death. A law enforcement official may provide a copy of the photograph or videotape to the media for the purpose of aiding in the identification of the deceased through publication of the photograph or videotape.

(8) A local government entity, or a State or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential.

(9) A person authorized by the court pursuant to subsection (c) of this section.

(10) The guardian or custodian of a minor child of the deceased.

(11) After redacting all information identifying the decedent, including name, address, and Social Security number, and after anonymizing facial recognition, a medical examiner, coroner or physician who uses such material for;

a. medical or scientific teaching or training purposes;

b. teaching or training of law enforcement personnel;

HOUSE BILL 65

AUTOPSY PHOTOS NOT PUBLIC RECORD

REFERENCE BOOKLET
FOR JUDICIARY II USE

MARCH 4, 2003

Prepared by:
Rep. Karen Ray

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Winston-Salem Journal

Sun, February 23, 2003

Bill draws ire of media

Autopsy photos belong on record, news group says

By David Rice
JOURNAL RALEIGH BUREAU

RALEIGH

An Iredell County legislator who represents Dale Earnhardt's family in the N.C. House filed a bill last week to remove autopsy photographs as public records.

But officials at the N.C. Press Association promise to oppose the legislation.

Under the bill sponsored by Rep. Karen Ray, R-Iredell, court officials, investigators and family members of the deceased would have access to autopsy photos, videos and audiotapes.

But others would have to ask a judge for a court order to release photos or tapes or allow copies.

"It doesn't shut a door. It just makes it harder to open the door," Ray said. "It provides a mechanism for obtaining the information through a court proceeding.

"The text is available - you would have the text of the autopsy. You just wouldn't have the graphic information. So it provides the families the privacy I think they deserve, and protects them from the potential public display of graphic findings from an autopsy."

Ray said that the bill was prompted by the furor two years ago when newspapers and other media outlets asked for photos from the autopsy in Florida of NASCAR driver Dale Earnhardt after his fatal wreck at the Daytona 500.

Earnhardt's widow, Teresa Earnhardt, was on the steering committee for Ray's campaign last year in a Mooresville-based district that is heavily populated by NASCAR drivers, team members, crews and companies.

Ray's own company, BSCI Inc., makes foam padding for roll bars and seat inserts for race cars.

"What Teresa and his children went through - can you imagine the emotional struggle that Teresa was trying to go through with his death, and then trying to fight this battle?" Ray said.

Ray says that protection in the bill extends beyond NASCAR drivers.

"We could all lose a member of our family to death," she said. "It provides the same kind of privacy after death that you have before death."

The bill would make it a felony to illegally provide a photo or recording from an autopsy to an unauthorized official.

But Teri Saylor, the executive director of the N.C. Press Association, said that her group of newspaper publishers is likely to oppose Ray's bill, just as it did a similar bill that died in the 2001 legislature.

Saylor said that information such as autopsy photos can be critical to a newspaper's watchdog role.

She said that editors at The Orlando Sentinel newspaper said they wanted Earnhardt's autopsy photos not to publish them, but to use them to consult with an independent examiner about a government medical examiner's findings about Earnhardt's death.

"I've never seen an autopsy photo published in a newspaper," Saylor said.

"It's an issue of accountability. If autopsy photos are available to the general public, then that makes the custodian of the public records more accountable for what's in them. It just adds a layer of accountability - which is why we have a public-records law in the first place."

Saylor said that many newspapers have strict guidelines about photos. "Most newspapers have internal rules about publishing wreck photos - no bodies, no blood," she said. "For the most part, newspapers exercise discretion."

Some newspapers provide links to autopsy reports on their Web sites, but not to autopsy photos, Saylor said.

Though some Web sites have published autopsy photos of John F. Kennedy, Marilyn Monroe and Tupac Shakur, "It's not like it's some big proliferation," Saylor said.

"Yeah, it can happen," she said. "But they're not really out there in the public domain. It doesn't necessarily mean there should be a law banning them from the public domain."

Florida's legislature removed autopsy photos from the state's public records after the flap over the Earnhardt photos.

But John Bussian, a lobbyist for the press association, said that Florida voters

Go to pages 22-23 for an explanation.

passed a ballot proposal last year that requires a two-thirds vote in the legislature to remove items from the state's public-records law.

"The public was so enraged (at the legislature's action) ... that the public reacted with a 73 percent margin in November," Bussian said.

• David Rice can be reached in Raleigh at (919) 833-9056 or at drice@wsjournal.com

Dale Earnhardt autopsy photos to stay private

A circuit judge says the harm that may come to the driver's wife, Teresa Earnhardt, is sufficient reason.

By KEVIN KELLY

© St. Petersburg Times,
published June 14, 2001

DAYTONA BEACH -- Siding with the widow of race-car driver Dale Earnhardt, a circuit judge ruled Wednesday that autopsy photos of the NASCAR legend should remain private.

"The harm which could come to Mrs. Earnhardt alone is sufficient under the testimony in this particular case," Judge Joseph Will said. "The court considers the seriousness of the invasion to be of the highest degree.

"It's unspeakable and doesn't really require further factual definition to satisfy this court," he said. "An invasion of this kind does not cut deeper."

Surrounded by her lawyers, Teresa Earnhardt, 42, sat expressionless as the judge read his decision after a 75-minute recess.

Mrs. Earnhardt, who filed a lawsuit four days after her husband died to stop the release of the photos, left the courtroom without speaking to reporters.

"She seem to be pleased," said Thom Rumberger, a lawyer for Mrs. Earnhardt. "I got a little squeeze on the hand. . . . She's going about her business now. Hopefully, at least for a while, this will kind of simmer down."

That isn't likely.

Attorneys for the Independent Florida Alligator, a student-run newspaper at the University of Florida, and a Deland-based Web site vowed immediately to seek a new trial and, if that is denied, to appeal to the Florida Supreme Court the constitutionality of a new law that protects the release of autopsy photos.

The Alligator and Michael Uribe, who operates websitecity.com, sought the photographs to explore the validity of investigations performed by the Volusia County medical examiner and Daytona Beach Police Department and to help prevent further deaths in NASCAR.

"This ruling denies the public access to important information that could protect, in this case, other drivers from the same type of injury that occurred here," Alligator attorney Tom Julin said.

Dale Earnhardt, a seven-time Winston Cup champion, was the fourth NASCAR driver to die of a basal skull fracture since May 2000.

NASCAR, along with Dr. Steve Bohannon, director of emergency medical services at Daytona International Speedway, held a news conference five days after his accident to announce a broken left lap belt might have contributed to the driver's death on Feb. 18.

"We want to know what happened," Julin said. "We want to know what was the (cause) of death, what killed Dale Earnhardt and whether NASCAR was covering up that cause.

"These autopsy photographs could offer important information about that. We still need to see them and that's why we're going to continue."

Mrs. Earnhardt testified for an hour and 45 minutes Tuesday, saying no one should be allowed to view the photos, particularly on the Internet, because of their disturbing nature.

"The photos are humiliating, disgusting and negative," she said. "They could be nothing but harmful and painful to my family, my company, our fans . . . anybody."

Uribe recently published the autopsy photos of NASCAR drivers Rodney Orr and Neil Bonnett on his Web site. Relatives of the two drivers testified Tuesday as to the grief caused by Uribe's action.

"My personal beliefs on all this, no matter what, is that these records should be available to the public with unfettered access," he said. "That got me into this ballgame."

Will's judgment was the second favorable ruling for Mrs. Earnhardt during the three-day hearing.

He ruled Monday that the Family Protection Act passed by the Legislature in March was a valid and constitutional exercise. The law made it a felony to release autopsy photos without a judge's approval.

"I think our strongest argument is attacking the statute because it's got a lot of defects in it," Julin said. "It's overbroad."

Attorneys for Mrs. Earnhardt asked Will to issue a permanent injunction to keep the photos sealed.

"There is a Legislature," Volusia County attorney Dan Eckert stated, "and we are not it."

Will said it would be inappropriate for a circuit judge to rule on such a request, given the new law. Therefore, lawyers for Mrs. Earnhardt are prepared for several more rounds of challenges.

"I don't think it brings closure," Rumberger said. "I think it's part closure. It's the start of something else we'll just deal with as the days and weeks and months and years go on."

Middle ground

Foundation proposes autopsy photo compromise

Posted: Saturday March 10, 2001 9:06 PM

Click here for more on this story



The proposed compromise would allow the public unlimited access to view the photos, but ban copying them. Robert Laberge/Allsport

TALLAHASSEE, Florida (AP) -- The fight over race driver Dale Earnhardt's autopsy photos has led to a proposed compromise that would maintain the public's right to see such photos but ban their copying.

The First Amendment Foundation, a Tallahassee-based organization that advocates open government, suggested the compromise after Earnhardt's widow and race fans attacked *The Orlando Sentinel* for seeking access to the photos, which are normally public record under Florida law.

Barbara Peterson, executive director of the First Amendment Foundation, said she will ask legislators to consider allowing the public unlimited access to view the photos, but ban copying them -- unless a judge determines it to be of great public concern.

The compromise will be proposed this week in the Senate Criminal Justice Committee, which will hold hearings Tuesday on a bill submitted in the state Legislature this week.

The bill would exempt autopsy pictures from the state's public records law. It would make the release of autopsy photos a felony punishable by up to five years in jail and a $5,000 fine. Photos could still be released if a judge ordered it.

Death of The Intimidator

- **End of an era:** "This is understandably one of the toughest announcements we've ever had to make. ... We've lost Dale Earnhardt," NASCAR president Mike Helton said.
- **Teresa speaks out:** A subdued Teresa Earnhardt presented herself to the media for the first time since her husband's death in order to read a statement designed to put to rest the continuing controversy surrounding Dale Earnhardt's death.
- **Help from high place:** A bill sought by Dale Earnhardt's widow that would exempt autopsy photographs and videos from Florida's public-records law was filed Wednesday with the support of Gov. Jeb Bush.
- **A matter of record:** A national editors group backed *The Orlando Sentinel*'s attempt to gain access to Dale Earnhardt's autopsy photos and criticized state officials for trying to stop release of the pictures.
- **Middle ground:** The First Amendment Foundation, a Tallahassee-based organization that advocates open government, suggested a compromise after Dale Earnhardt's widow and race fans attacked *The Orlando Sentinel* for seeking access to the photos, which are normally public record under Florida law.

The bill has the support of Earnhardt's widow, Teresa Earnhardt, Gov. Jeb Bush, State Senate Majority Leader Jim King, and House Speaker Tom Feeney.

Meanwhile, a Daytona International Speedway doctor said experts should be allowed to examine Earnhardt's autopsy photos to answer questions about how he died.

Dr. Steve Bohannon's statement bolsters the position of the *Sentinel*, which has been blasted by Earnhardt's widow and race fans for seeking access to the photos. The newspaper wants a head injury expert to examine the pictures and has said it has no intentions of publishing them.

Bohannon, the track's director of emergency medical services, said the three theories about how Earnhardt died in a crash during last month's Daytona 500 are equally plausible. Letting experts view the photos could help determine which is right, he said.

"I would certainly support that," Bohannon said.

Earnhardt -- stock-car racing's most popular driver -- died of head injuries Feb. 18 when he crashed into a wall on the race's final turn at 180 mph, but there is a debate on how those injuries were caused.

Some say Earnhardt died when his head snapped forward, causing a fracture at the base of his skull. Three other NASCAR drivers died that way in the last year and some say such deaths could be cut dramatically if drivers were required to wear a head and neck brace.

But five days after Earnhardt's death, NASCAR officials announced that his seat belt broke at impact. That could have allowed his chin or the top of his helmet to hit the steering wheel, causing his head injuries.

Under Florida law, autopsy photos are public records, but a judge has sealed Earnhardt's. A hearing is set for March 19 on the temporary injunction issued in favor of Mrs. Earnhardt.

A bill is pending before the Legislature that would ban the public disclosure of autopsy photos. A competing proposal, supported by some First Amendment groups, is expected

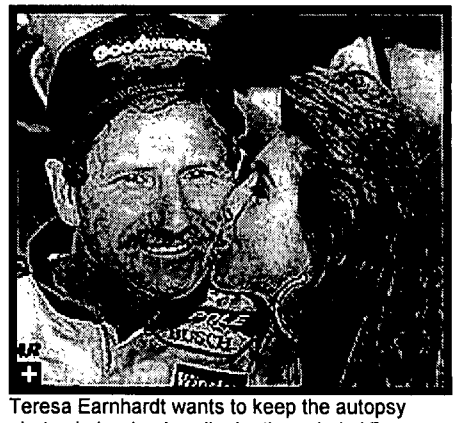
to be introduced this week that would allow the public to examine autopsy photos but make it illegal to copy or publish them.

Teresa speaks out

The controversy that won't die given added life

Posted: Sunday March 04, 2001 2:13 PM

Click here for more on this story



Teresa Earnhardt wants to keep the autopsy photos in her husband's death sealed. AP

By Stephen Thomas, CNNSI.com

LAS VEGAS -- A subdued Teresa Earnhardt presented herself to the media Sunday for the first time since her husband's death two weeks ago in order to read a statement designed to put to rest the continuing controversy surrounding Dale Earnhardt's death.

So Mrs. Earnhardt hoped. The unfortunate irony, at least as far as the family and NASCAR might be concerned, is that her statement, while effective and eminently understandable, will likely only lead to further speculation about the exact nature and cause of The Intimidator's death.

Joined on the dais by Dale Earnhardt Jr. and accompanied by DEI drivers Michael Waltrip and Steve Park, Mrs. Earnhardt pleaded both with the media and with the public to consider the family before even considering or allowing her husband's autopsy photos to be released. The *Orlando Sentinel* has been the leader of an effort to have medical experts view the photos in an attempt to either determine or otherwise eliminate likely or unlikely causes of Earnhardt's death following a last-lap crash in the Daytona 500 on Feb. 18.

Judge Joseph Will has issued a temporary injunction. He said the photos have no "bona fide newsworthiness" and could cause the family "additional anguish and grief."

Under Florida's public records law, autopsy reports and photographs are public record unless they are part of an active criminal investigation.

A hearing on whether to make the injunction permanent was originally set for last Thursday but was postponed for one week because of a scheduling conflict.

In an article Sunday, Tim Franklin, a *Sentinel* editor, said the newspaper wanted the photos so a head trauma expert could make an independent determination of the cause of death.

Sentinel attorney David Bralow has said the newspaper has no desire to cause Teresa Earnhardt more pain. The *Sentinel*'s editors have said they have no intention of publishing the photos.

However, "if these photos will help elucidate the nature of what exactly went wrong or what happened to Dale Earnhardt, then the public is served," Bralow said.

NASCAR has hired a consultant and is investigating the death. A broken left lap belt was found on the floor of the battered Chevrolet after the accident and could have been responsible for Earnhardt's death.

"We can't believe and are saddened that anyone would invade our privacy during this time of grief," an emotional Mrs. Earnhardt read. "I want to let you know that if access to the photos is allowed, others will demand them too. And make no mistake, sooner or later the photos will end up unprotected and published ... and most certainly on the Internet.

"We are thankful to the Florida court," she continued, "which has denied access to the private photos for the time being. We hope it will order that these images remain where they belong -- in the medical examiner's confidential records. Ensuring that the media or others cannot violate Dale's dignity and our family's privacy will make the healing process possibly less painful."

Indeed, unfettered access to those macabre photos would clearly be a disaster of stunning proportions both to the Earnhardt family and the DEI organization. However, according to sources for the *Sentinel*, the paper proposes that the photos be viewed by qualified experts under the very strict observance of designated Florida authorities. In other words, according to the *Sentinel*, the paper has no desire to publish or otherwise take advantage of the photos; the paper is simply interested in perhaps reaching a definitive conclusion to the mystery surrounding the exact cause of death.

By preventing qualified experts from viewing those photos, the state of Florida and the Earnhardt family thereby lessen the probability that NASCAR and its drivers will ever know definitively whether or not Dale Earnhardt Sr. was the fourth driver in nine months to die as a result of basal skull fracture. "Releasing the pictures will serve *only* to violate the privacy of our family and the integrity of Dale's legacy," Mrs. Earnhardt read.

Help from high places

Governor supports bill to make autopsy photos private

Posted: Wednesday March 07, 2001 10:01 AM

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Dale Earnhardt Jr. and Teresa Earnhardt (right) make a plea for keeping Dale Earnhardt's autopsy photos private. AP

TALLAHASSEE, Fla. (AP) -- A bill sought by Dale Earnhardt's widow that would exempt autopsy photographs and videos from Florida's public-records law was filed Wednesday with the support of Gov. Jeb Bush.

"The possibility of graphic and sensitive photos being leaked and exploited is a major public policy concern," said state Senate Majority Leader Jim King, who filed the bill.

He was flanked at a news conference by co-sponsor Sen. Bill Posey, Bush and two House members who have filed a similar measure.

"One may ask where you draw the line on a public-records exemption," King said. "I can tell you that line has got to be drawn beyond photographs as graphic as these."

King's bill would make it a third-degree felony for someone to release the records with a maximum sentence of five years in jail and a $5,000 fine.

The Orlando Sentinel's request for the autopsy photos of Dale Earnhardt has brought a torrent of angry calls and e-mail from race fans and prompted an effort by lawmakers to prevent the release of such pictures in future cases.

Opinion: Jim Litke

More people watched Sunday's Las Vegas 400 than saw Duke play North Carolina in college basketball. More compelling than either was a prerace news conference in which Teresa Earnhardt discussed her attempt to keep *The Orlando Sentinel* from publicizing her husband's autopsy, then appealed to the public for help.

During the past two days, *Sentinel* Editor Tim Franklin has taken about 3,000 of the almost 7,000 e-mails and calls.

"Some of the e-mails have been quite ugly, but I understand it's an emotional issue," Franklin said. "While we feel sorry for the Earnhardt family and what they're going through, there's a big issue here about NASCAR safety and we're simply trying to provide more information about how Dale Earnhardt died."

Franklin has said repeatedly that the newspaper has no intention of publishing the photos but wants to view them so that a head trauma expert can make an independent determination of the cause of death. The Sentinel ran a series last month that showed three NASCAR drivers who died last year suffered fractures at the base of the skull.

"He's the fourth driver in nine months to die," Franklin said. "This isn't a fight that we seek or asked for, but we believe that there are big issues at stake here as far as NASCAR safety. There's also a big principle at stake, access to state records."

Bush said his office has received more than 14,000 e-mails and hundreds of telephone calls from Earnhardt fans in recent days protesting the *Sentinel*'s request to obtain the autopsy photos.

"This is timely legislation," said Bush, who talked with Earnhardt's widow, Teresa, on Monday about the bill. "I told her I felt we could craft legislation that protected the traditions of this state in terms of public information when the public interest is at stake, but also be sensitive to the right of privacy as well."

The Senate bill would not affect written autopsy records, King said. Teresa Earnhardt wrote to King on Monday asking that a bill be filed.

"I do not believe that any bereaved family should be forced to allow access to photographs of deceased loved-ones, particularly since complete information is available through written autopsy records," she said in her letter.

But Barbara Petersen, the executive director of the First Amendment Foundation in Tallahassee, said the restrictions would be a mistake.

"A report can be slanted," Petersen said. "A medical examiner can be under political and public pressure. A photograph cannot be. This is not about Dale Earnhardt, it's about public oversight and creating an exception to the Constitution."

King said anyone wanting to see the photos could still do so by getting permission from a judge, but Petersen said that avenue would be arduous and expensive.

Earnhardt was killed in a crash Feb. 18 at the Daytona 500. Teresa Earnhardt sued Volusia County four days later to stop release of the medical examiner's photos. The next day, a *Sentinel* reporter made a public-records request for the pictures.

Several news organizations support the Sentinel's efforts to view the photos, the Sentinel said in a statement released Tuesday. The groups include the Society of Professional Journalists, The Associated Press Sports Editors, *The Miami Herald*, *The Tampa Tribune*, the *Chicago Tribune*, the *Los Angeles Times* and WFLA-TV in Tampa.

Franklin has said repeatedly that the newspaper has no intention of publishing the photos but wants to view them so that a head-trauma expert can make an independent determination of the cause of death. *The Sentinel* reported in a series last month that three

Judge: Man may have some autopsy photos

DAYTONA BEACH, Fla. (AP) -- Lawyers battling over whether Dale Earnhardt's autopsy photos are public record were told by a judge that an Oak Hill man may have copies of some of the pictures.

Circuit Judge Joseph Will said in a letter Wednesday to lawyers for both Teresa Earnhardt, Dale Earnhardt's widow, and *The Orlando Sentinel* that his office received an anonymous phone call from someone claiming that Timothy Campbell had some of the photos in his house.

The caller said Campbell planned to distribute the photographs, Will's letter noted. The judge ordered police to Campbell's home, located roughly 27 miles south of Daytona Beach.

Campbell told Volusia County Sheriff's deputies that he had one photo but kept it for sentimental reasons and never intended to make it public. Police did not take the photo from the home, Campbell said.

Campbell said he obtained the photo from a friend who got it from an unidentified worker at the Volusia County Medical Examiner's Office. Campbell may be charged with a crime if the photo was stolen from the office, Sheriff's detective Steve White said.

Medical examiner Thomas Beaver said the photo might be a fake, saying that the actual autopsy photographs were taken with a digital camera, saved on a compact disk and sealed in a vault.

Sentinel attorney David Bralow told Will that his client contacted Campbell but stressed that the newspaper "would refrain ... from looking at this autopsy photograph, and we're as good as our word."

Will agreed Wednesday to delay a hearing on the photo requests until March 19. Legislation aimed at exempting autopsy photos and videos from Florida's public records law is scheduled to be heard on the state House floor the same week.

NASCAR drivers who died last year suffered fractures at the base of the skull.

Sentinel officials were not immediately available Wednesday to comment on the legislation.

Agreement reached on Earnhardt autopsy photos

March 17, 2001
Web posted at: 9:22 a.m. EST (1422 GMT)

ORLANDO, Fla. (CNN) -- Representatives of Dale Earnhardt Friday reached an agreement with the Orlando Sentinel to allow the newspaper access to autopsy photographs of the NASCAR legend, but only under strict court supervision.

The settlement came after two days of court-mandated talks, in which Earnhardt's widow, Teresa, took part. The paper itself will not look at the photographs, only an independent medical doctor chosen by the court.

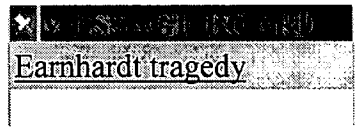
Earnhardt was killed in a crash on the last lap of the Daytona 500 in February

The Sentinel has said it wants access to the photos to further an ongoing review of NASCAR safety issues, and maintains it has no plans to publish any of the photographs. Mrs. Earnhardt had fought the newspaper and even asked a Florida state senator to sponsor legislation making it a felony to release the autopsy photographs.

Thom Rumberger, an attorney representing Mrs. Earnhardt, said the agreement is evidence the court believes "families do have some rights."

"The court is siding with the right of privacy," Rumberger told CNN.

"That doesn't suggest any retreating by Mrs. Earnhardt."



Kathleen M. Waltz, the president and publisher of the Sentinel, said her paper was happy with the decision.

"The Sentinel is pleased to have amicably reached an accord with Mrs. Earnhardt that allows the newspaper to continue to do its job and at the same time addresses Mrs. Earnhardt's concerns," she said.

Under the agreement, a court-appointed mediator will select an independent medical doctor, an expert in automotive biomechanics, within seven days to privately examine the autopsy photographs and a videotape under strict court supervision. No copies of the photos or videotape will be made.

"It is important to Mrs. Earnhardt that no more time than necessary be spent reviewing the photographs. It is anticipated that no more than 30 minutes will be required," according to court documents filed with the Seventh Judicial Circuit Court for Volusia County.


(AP PHOTO)

Teresa Earnhardt said she was happy with the agreement

The documents say that the doctor will only deal with three issues: cause of death, whether Earnhardt's skull fracture resulted from head whip or from striking the steering wheel and whether Earnhardt suffered a blow to the top of his head.

Following the review, the photographs and videotape will be "totally and permanently sealed in the most secure manner possible," the court documents say. In addition, the medical examiner will be "permanently enjoined from ever allowing anyone to view or copy" the material.

The examiner will file his report with the court-appointed mediator, who in turn will send the report to the court, Earnhardt's estate and the paper.

"That's it and then there's no more intrusion," Rumberger said.

Rumberger stressed it was important to the Earnhardt estate that the medical examiner be chosen by the court, not the Sentinel.

Earnhardt was killed last month when his black, No. 3 Monte Carlo slammed into an outside wall in the final lap of the Daytona 500.

The paper said four NASCAR drivers have died in racetrack crashes in the past nine months as a result of violent head whip, a potentially preventable injury, and access to the photographs could "bring to light facts that can help further the public discourse on matters of such great public importance."

Posted on Fri, Jul. 12, 2002

Appeals court says restricted access to autopsy photos constitutional

By TIM REYNOLDS
Associated Press

MIAMI – A state appeals court ruled Friday that Florida's law restricting public access to autopsy photos is constitutional, but said the matter could be appealed further to state Supreme Court.

The law, which was passed in March 2001 after race car driver Dale Earnhardt was killed earlier that year in the Daytona 500, is being challenged by several Florida news organizations who contend the law is unconstitutional.

In its opinion, the Fifth District Court of Appeal in Daytona Beach said the unauthorized viewing of autopsy photos is a violation of privacy.

"The Florida Constitution gives every citizen the right to inspect and copy public record so that all may have the opportunity to see and know how the government functions," Judge Thomas D. Sawaya wrote in the opinion.

"It is also a declared constitutional principle that every individual has a right of privacy," he said.

The appeals court opinion is similar to one filed last week by a Florida circuit judge in South Florida.

"I'm very pleased," said Miami attorney Parker Thomson, one of the attorneys for the Earnhardt family. "I was concerned, but after the briefs and the oral arguments, I was at least cautiously optimistic."

Mrs. Earnhardt was expected to release a statement later Friday. "I'm sure she's absolutely thrilled," Thomson said.

Had the appeals court chosen to not certify the decision to state Supreme Court, the matter would have been closed. There is little room in Florida law for direct appeals to the state Supreme Court.

Tom Julin, the attorney for the Independent Florida Alligator, one of the plaintiffs, said he believes the matter will be pursued in Supreme Court but that the decision has not been made.

"We're disappointed that the court didn't rule in our favor but I am very pleased that the court has certified the decision to the Florida Supreme Court," Julin said. "I'm still optimistic that we will prevail."

Earnhardt, a seven-time NASCAR Winston Cup champion, was killed Feb. 18, 2001 when his car hit the wall on the final turn of the Daytona 500. He died instantly of head injuries, doctors said. An autopsy was performed the next day.

The Orlando Sentinel sought to have Earnhardt's 33 autopsy photos, which then were generally considered public record, examined by an independent safety expert. The newspaper said the expert could determine from the photos if better safety equipment would have saved Earnhardt's life.

Earnhardt's wife, Teresa, quickly obtained an injunction barring medical examiners from

Posted on Wed, Jul. 03, 2002

Earnhardt photo law upheld in Florida

By DAVID POOLE
The Charlotte Observer

A judge in Broward County Circuit Court has upheld Florida's so-called "Earnhardt Law" that restricts public access to autopsy photos.

The law was passed in March 2001, just more than a month after the death of seven-time Winston Cup champion Dale Earnhardt in a crash during the Daytona 500. Earnhardt's widow, Teresa, lobbied for the law that makes it a felony punishable by up to five years in prison and a $5,000 fine for unauthorized persons to view or copy autopsy photos without a court order.

Judge Leroy Moe's court order issued Wednesday says the Florida legislature "applied a proper balancing" of "the right to privacy, the right to freedom of press and speech, the right of the people to have access to public records and the right to be left alone," rights which sometimes clash.

The law also was upheld by Volusia County Circuit Judge Joseph Will last year. That ruling was appealed to the 5th District Court of Appeals in Daytona Beach.

After Will's ruling, the Sun-Sentinel newspaper in Broward County requested to see photos from all autopsies performed in five Florida counties in the past year.

Broward County, citing the "Earnhardt Law," said the photos from that county would be provided only if the newspaper got permission from the families involved or showed just cause for the release of the photos. Wednesday's ruling by Judge Moe came in the newspaper's challenge of that decision by Broward County.

Keeping an eye on the Constitution: State solicitor general speaks at GOP Lincoln Day fund-raiser

By JENNIFER BRADFORD
Lake City Reporter
May 17, 2001

As Florida's first solicitor general for the Attorney General's Office, Tom Warner has supervised several high-profile cases, including the Dale Earnhardt autopsy photos and challenges to the governor's "A+" plan and tort reform.

"Anything where the public interest is involved," said Warner, who was appointed to the position by Attorney General Bob Butterworth in July 1999.

Warner, who was a member of the state House of Representatives from 1992-99, made a stop in Lake City as guest speaker for the Republican Executive Committee's annual Lincoln Day fund-raising dinner Tuesday night, just hours after appearing in court in Daytona Beach.

As solicitor general, Warner's job is to represent the state in the U.S. and Florida supreme courts in civil cases involving constitutional issues.

"When Earnhardt came up, no one thought about how that would affect the autopsy photos," he said. "The idea (of the public records laws) is to have an open and honest government, but the government collects a lot of private information."

The reasoning behind the public records exemption for autopsy photos was so they would not be published. Such photos had been open records as part of Florida's Sunshine Law, the most liberal public-records rule in the country.

"Virtually anyone can get them," he said of autopsy photos before the new law, which bars public access to the photos unless a judge approves their release. The law was signed by Gov. Jeb Bush on March 29. "We have to balance and open and honest government with a citizen's right to privacy."

It is also his responsibility to decide whether the state will appeal legal issues, coordinate appeals with other state agencies, and advise the attorney general, governor and other Cabinet members.

Another important duty for Warner is deciding whether the state will provide information or argue for another state involved in a Supreme Court appeal that might have an affect in Florida. For example, he said, the Attorney General's Office got involved in a Kansas suit affecting taxes on American Indian reservations. "That could affect us a lot in Florida with the Seminoles and gambling."

The new position was needed because of the state's growth and the need to coordinate policies on legal issues, he said. "It has become government by lawsuit," Warner said, because people are unhappy with policies set by the political process.

The attorney general's office, which has more than 400 attorneys and 20 divisions, has locations in Daytona Beach, Fort Lauderdale, Fort Myers, Jacksonville, Miami, Tallahassee, West Palm Beach, Orlando and Tampa.

In 1998, the office handled 626 civil appeals, 73 in the state Supreme Court, 128 in the federal 11th Circuit Court of Appeals and 72 in the U.S. Supreme Court, as well as 2,989 cases in trial courts.

"It is the most fun job in the state of Florida," said Warner, a graduate of the University of Florida. "It is very challenging and very rewarding. I love this job and I am happy to do it."

Earnhardt law delays cops' use of photos

Sandra Pedicini | of the Sentinel Staff

Posted April 28, 2001

Brevard County authorities investigating the death of a woman whose body washed ashore got a court order Friday so they could use an autopsy photo to help identify the body.

Otherwise, they feared they would run afoul of the Earnhardt Family Protection Act, which was intended to shield such photos from public view.

Investigators said the hassle cost them hours they could have used to track down the identity of the victim whose body was found near Melbourne Beach on Thursday morning.

"It has delayed the investigation," Assistant State Attorney Michael Hunt said. "In any suspicious death or homicide investigation, time is of the essence."

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STORY GALLERY
Racing Safety

The new law, hastily passed by the Legislature after the Feb. 18 death of NASCAR legend Dale Earnhardt, bars medical examiners from distributing autopsy photos without a judge's permission.

Deputies got court order

Wary of violating the law, the Brevard medical examiner refused to hand over the woman's autopsy photos to sheriff's investigators. So, the Sheriff's Office took its own photos and then got the court order.

Friday's events highlighted the confusion that some critics predicted would result from the law. Teresa Earnhardt pushed for the law after the Orlando Sentinel requested access to her husband's autopsy photos. The newspaper did not plan to publish the photos but wanted an independent medical expert to examine them. The aim was to establish how the race driver died during the final lap of the Daytona 500.

Medical examiners say the law has two loopholes. One allows police to distribute their own photos for investigations, even if those photos are taken during autopsies. The other allows anyone to get the pictures from law enforcement once an investigation is closed.

Both loopholes stem from the fact that the law deals strictly with photos in the custody of the medical examiner, they say.

"If the police take the photo, it's in their custody," said Vernard Adams, past president of the Florida Medical Examiners Association. "It's got nothing to do with the Earnhardt act."

Sentinel attorney David Bralow agreed, and said the law, which the newspaper and other news organizations are challenging in court, has many problems because "the statute is poorly written."

Bralow said the bill's sponsor, Sen. Jim King, R-Jacksonville, "ramrodded this thing through because it was politically popular to do, regardless of being told how problematic the bill was and what problems it would cause."

Brevard officials were troubled by a provision in the law that makes it apply to anyone assisting medical examiners, which they say includes deputies.

Even those who supported the bill disagreed about that interpretation.

The law was meant to cover medical examiners and deputy sheriffs, said Elizabeth Hirst, spokeswoman for Gov. Jeb Bush.

But King, who sponsored the bill, said the law was not intended to hinder police officers.

"The law allows law enforcement to show the photos, if they are being used as part of an investigation," King said. "I'm sure they could convince a judge in two minutes that it's worthwhile if it's needed to complete an investigation."

Law called hassle

Police say that's a hassle.

"We see the Earnhardt bill, the way it's worded, as a hindrance," Brevard County sheriff's Cmdr. Mark Riley said.

Spokesmen for a number of law-enforcement agencies contacted Friday said they've yet to encounter problems because of the law.

But Steve Olsen, spokesman for the Seminole County Sheriff's Office, said a lot of people are uncertain.

"We'll be watching what happens in Brevard County very closely," Olsen said. "I think the law is still too new to have impacted us yet, but it certainly could in the future."

Olsen recalled a case late last year in which autopsy photos were used to help identify a woman's body found dumped in Seminole County.

"They [the photos] weren't the only thing that was used to help identify her, but they were helpful in that case," he said.

Meanwhile, a Florida Supreme Court decision regarding a Daytona Beach newspaper's separate public-records battle could impact the Earnhardt case, attorneys say.

The Daytona Beach News-Journal had been seeking access to records created by a hospital authority before the Legislature created a public-records exemption for it. In its ruling earlier this week, the Florida Supreme Court essentially said that public-records exemptions cannot be retroactively applied, attorneys for the newspaper and the First Amendment Foundation said.

The Independent Florida Alligator is fighting the sealing of Dale Earnhardt's autopsy photos and is challenging the law closing all autopsy photos to public view. Attorney Tom Julin says that is unconstitutional and cannot be applied to the Earnhardt photos, which were requested before the legislation took effect.

"It lends a lot of ammunition to people who say any public-records exemption is not retroactive," Robert Rivas of the First Amendment Foundation said.

John Kennedy, Purvette Bryant, Charlene Hager-Van Dyke and Ludmilla Lelis of the Sentinel staff contributed to this report.

Election 2002: Amendment requires two-thirds vote for public records exemptions

Wednesday, November 6, 2002

By RANDOLPH PENDLETON, Associated Press

TALLAHASSEE – Floridians made it harder Tuesday for the Legislature to grant exemptions to Florida's open-meetings and public-records laws.

Constitutional Amendment 4, which requires a two-thirds majority of each house of the Legislature to approve new exemptions, passed easily.

With 6,481 of 6,716 precincts reporting, the amendment had a favorable vote of 3,248,554, or 77 percent, compared to 989,714 or 23 percent opposed.

The Legislature placed the amendment on the ballot at the urging of First Amendment advocates, who contended the lawmakers were creating too many loopholes.

Barbara Petersen, president of the First Amendment Foundation, said the measure will force the Legislature to be more deliberative in considering exemptions.

"It won't make it impossible, but it will make it a little more difficult," Petersen said. "It's just raising the bar."

Election 2002: Public records amendment attracts national interest

Thursday, November 7, 2002

By RANDOLPH PENDLETON, Associated Press

TALLAHASSEE – Florida's passage of a constitutional amendment to strengthen the state's public-records and open-meetings laws attracted national interest Wednesday.

The amendment requires a two-thirds majority of both houses of the Legislature to approve exemptions to the laws.

Barbara Petersen, president of the First Amendment Foundation, said she received calls from open-government advocates and media groups around the country following the passage of the amendment Tuesday with 76.5 percent of the vote.

Petersen said the state already had the nation's strongest guarantee of open government in its constitution and the new amendment provides help in fending off exceptions.

"That we are reinforcing the constitutional guarantee is national news," Petersen said.

The strong vote in favor of the amendment was particularly heartening, she said. Of the nine amendments that passed, only one requiring financial impact statements for amendments proposed by citizens' initiative received a higher percentage of votes.

She said the margin would provide ammunition when legislators contend that only the news media care about open-government issues.

"I think this is leverage with the Legislature," she said.

Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press in Arlington, Va., said Florida enjoyed a reputation as a leader in open government until the controversy last year over autopsy records for race car driver Dale Earnhardt, who was killed in a crash.

"Florida completely wigged out and started retrenching on open government," Dalglish said.

The Legislature quickly passed a law exempting autopsy records from the public-records law after Earnhardt's death.

Dalglish said she was also concerned about laws restricting public-records access that passed in the wake of the Sept. 11, 2001, terrorist attacks.

She said the passage of the amendment showed that the people of Florida care about open government.

Patrick A. Yack, editor of The Florida Times-Union in Jacksonville and president of the Florida Society of Newspaper Editors, said the organization has encouraged public support for First Amendment issues by showing how they affect ordinary citizens, not just journalists.

"Open-records and open-meetings laws were under attack in the last legislative session," Yack said.

He said the amendment was among a number of initiatives that the newspaper editors have supported to further their goal and the vote showed progress was being made.

"It tells me that despite all the issues that were on this year's ballot, that people took this issue very seriously," Yack said.

Posted on Sun, Mar. 10, 2002

The following is summarized information on the proposed Florida constitutional amendments on the Nov. election ballot.
Amendments: 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11

AMENDMENT #4:
TITLE: LAWS PROVIDING PUBLIC RECORDS OR MEETINGS EXEMPTIONS; TWO-THIRDS VOTE RE

Requires that laws providing exemptions from public records or public meetings requirements must be pa vote of each house of the legislature.

Voters approve open records amendment – 11.6.02

- ***A successful ballot initiative will make it harder to restrict access to government records and documents***

Seventy-six percent of Florida voters approved an amendment to the state constitution that will make it harder for lawmakers to grant exemptions to the state's open-meetings and public-records laws.

Amendment 4 requires a two-thirds majority of the state legislature to pass any new exemptions to the state's open record or open meeting laws.

"I'm really pleased we won by this overwhelmingly large margin. It reinforces the importance that citizens place on open government," said Barbara Petersen, president of the First Amendment Foundation, a Florida based group that fights for greater public access to government openness.

Although Florida has one of the country's best open government laws, lawmakers in recent years have chipped away at it, enacting more than 860 exemptions. While many exemptions were enacted in response to heightened security concerns in the post Sept. 11 period, many were unrelated to security concerns.

According to one report by the *St. Petersburg Times*, the 2001 Legislature voted to exempt adverse incident reports submitted by nursing homes, in spite of reported horror stories "such as that of a woman attacked by ants in her nursing home bed."

"One of the few positive things in state government here is that our open records laws are quite strong, but every year the legislature tries some sneaky way to clip away at this," said Robert Friedman, deputy editor at the *Times*.

Friedman added that public involvement in the access debate mushroomed when the government tried to "sneak into law" a piece that would have allowed untreated sewage water to be pumped into a state aquifer.

This "really got the public involved in the openness issue," Friedman said, adding that the "stealthy way" in which the government tried to pass this law contributed to the reaction.

The Florida Society of Newspaper Editors coordinated a statewide "Sunshine Sunday" in mid-March. Newspapers printed editorials condemning the large number of exemptions passed by the legislature with relatively little debate.

"After this we saw real and true debate," Petersen said.

"When legislators say it's just whiny advocates who want this and the public does not care about these issues, we can tell them they're wrong. The public really cares and here's the proof."

(Constitutional Amendment 4) -- GS

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Posted on Sun, Mar. 10, 2002 Miami Herald

Public records under attack

Legislators pushing for many exemptions

BY LESLEY CLARK

lclark@herald.com <mailto:lclark@herald.com>

TALLAHASSEE - Citing potential terrorist threats to domestic security, a surge in identity theft and the increasing use of the Internet, state legislators have launched an unprecedented attempt to shield public records from prying eyes.

But the bid to seal what the public can learn about its government is prompting a backlash, from journalists who pride themselves on serving as government watchdogs to companies that depend on state and county records to track down deadbeat parents or investigate insurance fraud.

Even some legislators who back keeping some information confidential are worried about the encroachment on Florida's Constitution, which guarantees the public's right to know.

"The step-by-step elimination of public access remains possible, and that's what concerns me," said Rep. Fred Brummer, R-Apopka, who nonetheless is pushing legislation to take some court records off the Internet. ``It's not going to happen today or tomorrow, but when you start walking down that road, little by little, you get there."

Voters in 1992 enshrined Florida's vaunted public records laws into the Constitution. But Brummer believes there would be little appetite for that now.

"I don't think it would pass today," Brummer said. ``Hopefully, six months from now, we will have regained our self-confidence, and people will again see the benefits of open government and open records."

Legislators have proposed nearly 60 new exemptions to Florida's public records laws, the highest number ever. Some, like those passed in two emergency special sessions in the fall, are related to fears of terrorism -- including a bill that would keep confidential blueprints of publicly owned buildings -- and others address privacy concerns, like access to Social Security and bank account numbers.

But open-government advocates point to a troubling trend of legislation they say bears little relation to any concerns other than protecting special interests.

MEDICAL MISTAKES

For example, one proposal would seal reports of medical mistakes that doctors make. Another would seal the identities of utility customers.

The medical mistakes measure, backed by the Florida Medical Association and sponsored by Rep. Gus Bilirakis, R-Palm Harbor, and Sen. Charlie Clary, R-Destin, would keep confidential the reports that doctors must file when they make a mistake in their offices. The "adverse incident reports" cover patient deaths, brain or spinal damage and surgical procedures performed on the wrong patient -- or the wrong limb.

Doctors are required to report the incidents, but the association said they are reluctant because the documents are public. Sealing them would encourage reporting, the association argues.

IMPORTANT DATA

Barbara Petersen, executive director of the Tallahassee-based First Amendment Foundation, contends that doctors shouldn't need an incentive to comply with the law.

"They're not protecting our interests, which is to know who is committing mistakes and what the Department of Health is doing about it," Petersen said. ``That is critically important information to consumers."

Another controversial measure, sponsored by Sen. Rudy Garcia, R-Hialeah, and Rep. Rob Wallace, R-Tampa, would prevent the public from attending meetings at which state, county and city officials negotiate contracts, some worth hundreds of millions of taxpayer dollars.

"They would preclude any opportunity for public oversight or accountability," Petersen said. ``Whose interest are they protecting? They're spending our money."

She questions the value of blocking the names of public utility customers, noting that the public has a right to know who is using public resources.

The Senate sponsor said the bill addresses a "fairness issue," and he contends that it's only a coincidence that a friend of his with a busted water line was singled out in The Jacksonville Times-Union as a water hog.

"They connected it, but in the meantime, he was publicly humiliated in town," said Sen. Stephen Wise, R-Jacksonville.

NOT REQUIRED

He argues that private utilities are not required to disclose their customers' names. And he says it would prevent domestic violence; angry spouses couldn't use utility records to track down their prey.

"I guess the First Amendment people think you ought to be able to find people and beat them up," he notes. ``Maybe I'm missing something."

But open-government advocates note the press is not the only business with an interest in public records. Private investigators, creditors, real estate agents and data collection firms all make frequent use of public records -- to run credit checks, track down deadbeat

parents -- and several of their lobbyists have testified against the proposed records closures.

"The first blush is that it's just the media that is interested in this information," said Curt Kiser, a former state senator who was hired by the Florida Society of Newspaper Editors to fight the onslaught of proposed closures. ``But that's not the entire picture. There are a lot of very legitimate businesses who are important to our economy who rely on public records for their operations."

LEGITIMATE PURPOSES

Although the First Amendment Foundation has said it's not opposed to sealing Social Security numbers, a lobbyist for information giant LexisNexis testified before legislators that the bill would make it more difficult to identify individuals. One Senate version of the legislation allows access to the numbers ``for legitimate business purposes."

Wise noted his bill drew opposition from the companies that repossess automobiles from delinquent bill payers.

With the state budget, a sales tax overhaul plan, the redrawing of political district boundaries and Cabinet reorganization taking up most of the Legislature's time and energy, none of the public records bills is a priority for the chamber's leadership.

Senate President John McKay, who during one of last fall's budget-cutting emergency sessions pushed through a highly controversial but not yet used rule to allow the chamber to meet secretly, said he doesn't have a position on the open-records laws.

"The members will decide," McKay said. ``I'm not pushing those one way or another."

House Speaker Tom Feeney said he hasn't seen the details of the bills.

"This has been sort of big-picture time for Tom Feeney," the speaker said. ``Hopefully, the members will be responsible and responsive to the First Amendment concerns."

Opponents of the exemptions can point to some victories.

A terrorist-related measure that would have sealed the identities of crop-dusters, along with the aircraft number of the planes, was limited after open-government advocates pointed out that much of that information is available in the Yellow Pages. Instead, only preflight plans and pesticide application numbers will be restricted.

"We've got a right to know who is flying and applying pesticides," Petersen said.

CAUSE FOR PAUSE

The Senate has passed a resolution that would require a two-thirds vote in each chamber to create a public records exemption.

Another bill makes it a crime to commit a crime using a public record.

The resolution may not accomplish much. Petersen said most public records exemption bills pass with great acclaim and with more than a two-thirds vote. But it might make legislators pause before tinkering with the Constitution, she said.

"This is saying that closing public records requires some sort of super action, more than just a regular bill," Petersen said of the resolution. ``I don't think many of our legislators

realize that every time they suggest a change, they're creating an exception to the Constitution. That should require a heightened level of scrutiny, but it rarely does."

The House sponsor said he was prompted to act by the flurry of proposed public records exemptions.

"While I recognize that after September 11th, many are concerned about public information that could be used against us, I believe an open government is the best government," said Rep. John Carassas, R-Belleair, noting that Florida's history of open records ``is unique in America."

Earnhardt victory marred by Web exposure

By Dave Rodman, Turner Sports Interactive

March 30, 2001
11:00 AM EST (1600 GMT)

TALLAHASSEE, Fla. -- On a day when Teresa Earnhardt flew to the Florida state capital to witness the signing of a bill designed to protect the autopsy photographs of her late husband, the NASCAR world was sent reeling by news that autopsy pictures of two deceased NASCAR drivers had been posted on the World Wide Web.

Mrs. Earnhardt traveled to Florida with her personal attorney and a close friend, Laura McEachern.

The Florida Senate Thursday by a 40-0 vote passed SB 1356, also dubbed the "Earnhardt Family Protection Act," which made releasing autopsy photographs a third-degree felony. The bill contained a clause making it retroactive, thereby sealing Earnhardt's autopsy materials from individuals seeking to capitalize on his celebrity.

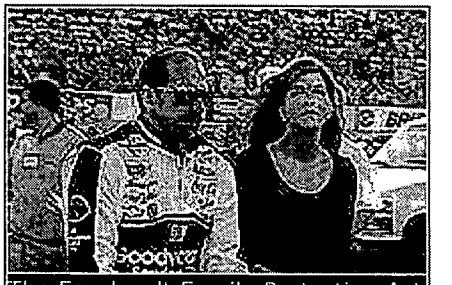
"I am pleased and grateful for what has happened here in Tallahassee today," Teresa said in a statement released by her spokesperson. "I would like to recognize and say thank you to Fla. Governor Jeb Bush, Senators Jim King and Bill Posey, Representatives Jeff Miller and Randy Johnson and most of all, the tens of thousands of people in Florida and elsewhere who spoke out in defense of my family's fundamental right to privacy."

RELATED STORIES
> Video: Gov. Jeb Bush signs bill
> Teresa Earnhardt statement
> Video: Teresa Earnhardt speaks
> Mike Helton statement

"These men acted swiftly during a very difficult time for Teresa and the entire Earnhardt family and they are to be commended for their efforts," NASCAR president Mike Helton said. "I would also like to extend our thanks to fans of NASCAR and fans of Dale

Earnhardt, both in and outside the state of Florida who took the time to voice their support of the act to the Florida State House."

But Thom Rumberger, lead attorney for Dale Earnhardt's widow in the case to seal his autopsy photographs, said prior to the 3:30 p.m. bill signing in the Governor's cabinet room at the state capitol building that he was sickened by the sight of 34 autopsy pictures of NASCAR Winston Cup drivers Neil Bonnett and Rodney Orr on an Internet Web site.


The Earnhardt Family Protection Act passed Thursday with a vote of 40-0.

The NASCAR community quickly closed ranks against the perceived attack.

"This is a disgusting example of the exploitation of these photographs," Helton said at Texas Motor Speedway near Fort Worth, where NASCAR Busch Series cars qualified Thursday. "It is exactly what Teresa Earnhardt fought against and championed the legislation that was signed into law today by Governor Jeb Bush.

"It is a perfect example of an opportunist with no morals. Our hearts go out to the victims, Susan Bonnett, her children and the family of Rodney Orr."

"We live in a time where information can be transmitted around the world instantly, but often without respect or a full understanding of the consequences," Teresa said. "We have said from the beginning that if one news organization is granted access to these private and painful images of my husband, others will request access, and sooner or later, they would be published on the Internet and elsewhere.

"Even now there are others, including a college newspaper and a Web site, attempting to get their hands on Dale's autopsy photos. In fact, today I've just learned that a Web site had the indecency to go ahead and post graphic photos taken at the autopsies of two other NASCAR drivers. We hope this new law will stop these organizations, and others, from further exploiting such tragic events."

Earnhardt, the seven-time Winston Cup champion and winner of 34 races at Daytona, was killed Feb. 18 in a crash in Turn 4 of Daytona International Speedway on the last lap of the Daytona 500. Teresa Earnhardt sued Volusia County three days after his autopsy to seal the file and a temporary injunction was granted.

A group of Florida and national media outlets, informally led by the Central Florida newspaper, the *Orlando Sentinel*, launched a counter-suit a day later, citing Florida public records law, in an attempt to simply view the photographs for the purpose of making an independent determination of the cause of Earnhardt's death.

Teresa Earnhardt had maintained from the suit's beginning, however, that she feared publication of Earnhardt's autopsy materials, particularly on the Internet. On Thursday, NASCAR reported that a Web site owned by Michael Uribe of DeLand, Fla., had published the other drivers' photos.

"It repulses me, as an advocate and as a person, what those creeps are doing," Rumberger said of the posting of the images of the drivers who were killed at Daytona three days apart during Speedweeks 1994. "You know exactly where they were going with the Earnhardt photographs."

Uribe joined the media suit after it was initiated, but was excluded from a mediated settlement between Mrs. Earnhardt and her attorneys and the *Sentinel* and its representatives. That agreement enabled Dr. Barry Myers, a Ph.D. and associate professor at Duke University who is a head and neck injury specialist, last Monday to view Earnhardt's photos for no more than 30 minutes.

He is scheduled to file a report on his findings in up to two weeks.

Uribe, meanwhile, continued his legal action by filing actions to gain possession of various materials from Earnhardt's autopsy file. In addition, a hearing on a suit filed by *The Independent Florida Alligator* will be held on April 5 at the Volusia County Courthouse Annex in Daytona Beach, Fla., on the legality of the temporary injunction.

The Alligator, an independent production of University of Florida students in Gainesville, has also said it was not interested in publishing the photos, but it was concerned over the infringement on Florida's public records laws.

Earnhardt family seeks calming of the waters

By Dave Rodman, Turner Sports Interactive
May 7, 2001
4:32 PM EDT (2032 GMT)

DAYTONA BEACH, Fla. -- Two and a half months after the accident in the Daytona 500 that took the life of father and husband Dale Earnhardt, the late seven-time Winston Cup champion's family has asked for closure in a media circus that has reached a near-frenzied state at times.


Teresa Earnhardt

"It should be known that a number of Florida-based news organizations are mounting an aggressive legal and public opinion campaign to overturn the new Florida law that protects any family's right to privacy," the family told NASCAR.com. **"Our request would be that the Florida media accept the situation and end the undeserved attacks on this very**

reasonable legislation that was unanimously approved by the Florida senate in late March."

The bill severely limits access to autopsy photos. An identical bill in the Senate is expected to advance rapidly.
By LUCY MORGAN

© St. Petersburg Times, published March 23, 2001

TALLAHASSEE -- With little debate or opposition, a bill that would close public access to autopsy photos passed the Florida House on Thursday night, 91-12.

Rep. Randy Johnson, R-Celebration, one of the sponsors of the bill, denounced the state's news media for seeking access to the autopsy photos of NASCAR racing hero Dale Earnhardt as he urged approval of the bill.

"Imagine dealing with a lost husband and trying to deal with the ghoulish requests of the media for autopsy photos," Johnson said as he described the plight of Earnhardt's widow after the Orlando Sentinel requested the photos.

The request set off howls of outrage from racing fans around the nation who sent thousands of e-mails to Gov. Jeb Bush and members of the Legislature in protest.

Johnson, Senate Majority Leader Jim King and other legislators quickly cobbled together bills to cut off access to autopsy photos. The bills are on a fast track.

The House bill approved Thursday is identical to one pending in the Senate. It would allow access to autopsy photos only when permitted by a judge after a showing of good cause by an interested party.

If it becomes law it would be retroactive, although the Sentinel's effort to view Earnhardt's autopsy photos is being handled in mediation.

In Daytona Beach on Thursday, an associate professor of biomedical engineering at Duke University was chosen to review the autopsy photos.

Barry Myers was picked by special master John Upchurch, who last week helped work out a settlement between Earnhardt's widow, who wanted the photos sealed, and the Sentinel, which wanted its own medical expert to review the pictures.

An attorney for the newspaper said he was pleased with the selection of Myers, who has written extensively on crash injuries.

"The real winners are the public because it looks like we're going to get answers to our questions," said David Bralow. "We couldn't be happier."

Myers, reached at the North Carolina school, was reticent about his role.

"I'm pleased that the court has contacted me, and I'll do my best," he said. "I don't have any opinions beyond

what I'm asked to do. My only comment is that I'll do my best to respond to the needs of the court and the mediator."

[redacted]yers has no ties to either NASCAR, the Sentinel or the newspaper's parent Tribune Co., said Thom [redacted]mberger, an attorney for Teresa Earnhardt.

"From his credentials, he sounds pretty snazzy," Rumberger said. "He meets all the criteria."

Earlier this week, Bralow expressed concern about the agreement after learning that a NASCAR physician had reviewed the photos before a circuit judge sealed them at Mrs. Earnhardt's request.

Bralow and lawyers for Mrs. Earnhardt met Thursday for a second round of mediation. But after Myers was chosen as the expert, the talks ended with last Friday's settlement still in place.

As the legal battle has continued to play out in Daytona Beach, newspaper editorial boards and First Amendment supporters have voiced their opposition to the bills pending in the Legislature. The opponents say the photos should be available for public inspection under Florida's long tradition of open records.

In the House Thursday, Rep. Dan Gelber, D-Miami Beach, tried to win approval of a last-minute amendment that would have left the photos accessible for viewing, but not copying, at the discretion of medical examiners.

"We ought not to pass laws in the wake of a tragedy," Gelber argued. "I know there are ghouls out there, but sometimes there is a good reason why they need to be reviewed."

But the House rejected the amendment, 72-29.

Moments later the lawmakers voted overwhelmingly in favor of the more restrictive bill.

[redacted]he vote came after Rep. Jeff Miller, R-Milton, read an anguished letter from the mother of a 6-year-old child who died in a fire in 1993.

"I want to know my son's pictures are not available to be seen," Miller said as he concluded the letter.

The 12 members who voted against the bill were Reps. Susan Bucher, D-West Palm Beach; Anne Gannon, D-Delray Beach; Ken Gottlieb, D-Miramar; Sally Heyman, D-North Miami Beach; Arthenia Joyner, D-Tampa; Cindy Lerner, D-Miami; Perry McGriff, D-Gainesville; Frank Peterman, D-St. Petersburg; Nan Rich, D-Sunrise; Chris Smith, D-Fort Lauderdale; Mark Weissman, D-Deerfield Beach; and Gelber.

The bill is likely to be heard by the Senate and sent to the governor, who supports it, by the end of next week.

A similar bill received preliminary approval Wednesday in a House subcommittee of South Carolina's legislature. Lawmakers agreed to the concept that autopsy photos should be available for inspection in some cases, but not for copying or publication.

Gov. Jim Hodges had called for the legislation earlier this month, reacting to developments in the Earnhardt case.

-- Information from the Associated Press was used in this report.

Recent coverage
[redacted]Florida Legislature Session 2001

Media Wrong To Oppose Making Autopsy Photos Private

By Rep. Karen Ray, (R-Iredell)

2/28/2003

Last week I introduced a bill on behalf of every family in our state -- to keep visual autopsy records private to families, investigators and court officials only.

With all due respect to my friends in the news media, the unfortunate reaction of some has been to criticize and oppose my bill - which protects the traditions of North Carolina in terms of public information when a public interest is at stake, but also is sensitive to the right of privacy as well.

Families do have rights, and that's why so many people were upset about how events unfolded in Florida two years ago in the tragic aftermath of Dale Earnhardt's fatal wreck, when attempts were made to release extremely graphic autopsy photos to the media.
No less than three media outlets demanded access to the photos, including a website that published disturbing autopsy photos of NASCAR drivers Rodney Orr and Neil Bonnett. Relatives from both drivers testified in a Florida court as to the deep grief their families were caused by this action.

Teresa Earnhardt said in 2001 that her husband's autopsy photos "are humiliating, disgusting and negative," and that "they could be nothing but harmful and painful to my family, my company, our fans...anybody." *(St. Pete Times, 6.14.01)* She said, "we can't believe and are saddened that anyone would invade our privacy during this time of grief. I want to let you know that if access to the photos is allowed, others will demand them too. And make no mistake, sooner or later the photos will end up unprotected and published ... and most certainly on the Internet." *(CNNSi, 3.4.01)*

The Florida judge who first issued a temporary injunction that Earnhardt's autopsy photos should be kept private said "The harm which could come to Mrs. Earnhardt alone is sufficient under the testimony in this particular case. The court considers the seriousness of the invasion to be of the highest degree." The judge also ruled that Florida's Family Protection Act, making it a felony to release autopsy photos without a judge's approval and exempting it from the state's public records law, was in fact constitutional. *(St. Pete Times, 6.14.01)*

The bottom line is that just as legislators and public officials cannot be blind to the need for public information when the public interest is at stake, the news media must respectfully be sensitive to a families' right to privacy as well. Especially given that complete information is already available through written autopsy reports.

I would ask my friends in the press to acknowledge, that in any case where the public interest is at stake with regard to public information, my bill allows for a judge to release such visual material at their discretion if good cause is shown.

The Fifth District Court of Appeals in Daytona Beach said the unauthorized viewing of autopsy photos is a "violation of privacy," according to the Associated Press. The Judge wrote that "every citizen" has the right to inspect public records so that all can see how the government functions. However, "It is also a declared constitutional principle that every individual has a right of privacy."

On July 3rd of 2002, the Charlotte Observer noted another judge upholding the restriction of access to autopsy photos. "Judge Leroy Moe's court order issued Wednesday says the Florida legislature "applied a proper balancing" of "the right to privacy, the right to freedom of the press

and speech, the right of the people to have access to public records and the right to be left alone."

Last year Florida voters, in a public referendum, passed a two-thirds legislative requirement making it tougher to exempt items from the state's public record and public meeting laws. Misguided critics of my bill claimed it was a negative reaction to legislation exempting autopsy photos from the public record. "The public was so enraged (at the legislature's action)...that the public reacted with a 73 percent margin in November," said the NC Press Association's lobbyist. (*Winston Salem Journal, 2.23.03*)

But the truth is, the ballot referendum doesn't mention autopsy photos, and the Family Protection Act passed the Florida Senate 40-0 and the Florida House 91-12 the year before – well beyond a two-thirds majority anyway.

That year, Florida legislators proposed "nearly 60 new exemptions" on a wide range of issues not involving autopsy photos at all. *(Miami Herald, 3.10.02)* In fact, *The Reporters Committee for Freedom of the Press* noted, "Although Florida has one of the country's best open government laws, lawmakers in recent years have chipped away at it, enacting more than 860 exemptions." *(RCFP, 11.6.02)* Among these exemptions were keeping social security and bank account numbers private as well as blue prints for public buildings.

So what was the public upset about?

One report by the St. Petersburg Times said the 2001 Legislature voted to exempt adverse incident reports submitted by nursing homes, in spite of reported horror stories "such as that of a woman attacked by ants in her nursing home bed." (RCFP, 11.6.02) Other public record exemptions or privacy measures in question were sealing reports from doctors who made mistakes. Florida voters were also frustrated with things like a controversial measure to "prevent the public from attending meetings at which state, county and city officials negotiate contracts, some worth hundreds of millions of taxpayer dollars." (Miami Herald, 3.10.02)

So again, I would ask my friends in the media to refrain from unfounded and misguided criticism on the issue of making autopsy photos public so we can work together to foster a sound policy of protecting open records when a public interest is at stake, while also respecting the privacy and rights of grieving families across North Carolina.

Karen Ray

State Representative, NC's 95th District

- *Ray is a member of the NC General Assembly representing Iredell and Catawba Counties. Ray owns BSCI, Inc., a company that manufactures safety tested roll bar padding and molded seat inserts used in auto racing. Ray listed several NASCAR leaders on her campaign steering committee.*

According to the National Coalition Acting for Autopsy Privacy website, below is the status of States with regard to the release of autopsy photographs.

CLOSED STATES

Alabama
Alaska
Arkansas
California
Delaware
Florida
Georgia
Hawaii
Indiana
Iowa
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Missouri
Montana
Nevada
New Hampshire
New Jersey
Oklahoma
Oregon
Rhode Island
South Carolina
Texas
Utah
Vermont
Virginia
Washington
West Virginia

OPEN STATES

Arizona
Colorado
Connecticut
Idaho
Illinois
Kansas
Mississippi
Nebraska
New Mexico
Ohio
Pennsylvania
South Dakota
Tennessee
Wisconsin
Wyoming

PENDING

North Carolina
North Dakota

IN PROGRESS

Kentucky
New York

WEBSITES

www.websitecity.com

www.celebritymorgue.com

www.rotten.com

www.cadaver.org

www.findadeath.com

www.choosedeath.com

www.ogrish.com

www.absolutelysick.com

The above list are examples of sites located on the internet for your reference if needed.

HOUSE BILL 65:
Autopsy Photos Not Public Record.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Ray
Date:	March 4, 2003	**Summary by:**	Karen Cochrane Brown Committee Counsel
Version:	Proposed Committee Substitute (H65-CSRO-1[v1])		

SUMMARY: ***This bill creates a specific exemption from the Public Records Law for photographs and video or audio recordings of an autopsy. The bill also restricts access to these documents to a limited list of individuals and authorizes the court to grant access to others not listed, upon a showing of good cause. Violation of this provision is punishable as a Class H felony.***

CURRENT LAW: Under current law, autopsy reports, including photographs, video and audio recordings made in connection with the autopsy, are public records as defined in G.S. 132-1. This statute defines the term "public record" very broadly to include any "documentary material, regardless of physical form or characteristics, made or received by an agency of North Carolina government or its subdivisions in connection with the transaction of public business". The statute goes on to provide that "it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law."

In addition, the law (G.S. 130A-389) that authorizes the medical examiner to conduct an autopsy, also provides that a "copy of the report shall be furnished to other persons upon request."

BILL ANALYSIS: Section 1 of the bill creates a new section, G.S. 132-1.5A which provides:

- Subsection (a) contains findings by the General Assembly that public access to photographs, video and audio recordings of an autopsy may cause emotional distress and trauma, particularly due to widespread dissemination through computer technology; that other less intrusive and less injurious types of information, such as the text of the autopsy report, are available to provide for public oversight; and that it is a public necessity to provide that photographs and video and audio recordings of an autopsy are not public records.
- Subsection (b) directs the custodian of a photograph or video or audio recording to grant access to the certain people, including, the Chief Medical Examiner, the authorizing medical examiner, district attorney, Superior court judge, a surviving spouse or next of kin, a individual entitled to bring a wrongful death action, law enforcement officials, a State, local or federal government agency, in furtherance of its official duties, a person authorized by the court; the guardian or custodian of a deceased minor; and after the custodian redacts all identifying information, access can be granted to a medical examiner, coroner or physician to be used for scientific, teaching or training purposes.
- Subsection (c) provides that any other person may apply to the court for an order granting them access to the photographs, video or audio recording. Upon a showing of good cause the court may issue an order and impose any restrictions or stipulations it deems appropriate. In determining

whether there is good cause, the court is directed to consider whether disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy; whether the disclosure is the least intrusive means available; and the availability of similar information in other public records.

- Subsection (d) directs the petitioner to provide reasonable notice of the petition to the surviving spouse, next of kin; or guardian of the deceased. The notice must offer the opportunity to be present and heard at any hearing on the matter.
- Subsection (e) exempts criminal and administrative proceedings from the application of this section.
- Subsection (f) makes any person who provides a photograph, video or audio recording in violation of this section or anyone who violates a court order issued pursuant to this section guilty of a Class H felony. Conviction of a Class H felony has a presumptive minimum sentence of from five to six months' community, intermediate or active punishment, assuming no prior convictions.

Section 2 of the bill makes a conforming change to G.S. 130A-389 which authorizes the medical examiner to conduct an autopsy. This change subjects disclosure of the autopsy report to the limitations created in Section 1 of the bill.

Section 3 makes the act effective when it becomes law and makes it applicable to all photographs or video or audio recordings of any autopsy regardless of whether the autopsy was performed before or after the effective date of the act.

BACKGROUND: The accidental death of Dale Earnhardt at the Daytona 500 and attempts by the media to obtain visual recordings of the autopsy helped to motivate the Florida legislature to create an exception to its public records law, similar to the one proposed in this bill. The Florida law was enacted in 2001, and since then various media representatives have challenged the legislation in the Florida courts. Florida, unlike North Carolina and every other state, has placed its public records protection in the State Constitution. The case primarily involves a challenge to the legislation on State constitutional grounds. The case is currently pending before the State Supreme Court.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 4, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
W Beason	Capitol Group
Barry Smith	Freedom Newspapers
Dan Lewis	NCG
Mark Beason	Capitol Group
Michelle Frazier	NC Bar Ass'n
Donna Pygott	NCVAN
Greg Mcleod	
JOHN BUSSIAN	NC Press Assn.
Scott Mason	AP
Ted Vaden	Chapel Hill News
John Drescher	News + Observer, Raleigh

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 4, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jana Stam	LA
Randy Fraser	TNC
Bill Scoggin	Kennedy Covington
Jennifer McGinnis	Research-staff
Jon Williams	CCPS
Sam Skinner	CCPS
Julie Allen	NC Statewatch
Cam Cover	BPMHC
Haley Montgomery	NC Secretary of State
Pamela Best	AOC
John McKay	Gov Office

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 4, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bill Horner III	The Sanford Herald / NCPA
Teri Saylor	NC Press Association
Stella McKenzy	NC DHHS
Bob Lawrence	" "
Hubert Tilson	NCHA
[illegible]	NCRA

Janette Lee (Rep. Nesbitt)

From: Pamela [Pamela.W.Best@nccourts.org]
Sent: Tuesday, March 04, 2003 2:40 PM
To: Martinn@ncleg.net; karenr@ncleg.net
Cc: Karenc@ncleg.net
Subject: HB 65 Autopsy Photos

Representatives Nesbitt and Ray:

I am writing on behalf of the Administrative Office of the Courts concerning the above referenced bill and comments made today by committee members concerning the proper court procedure to follow. I realize that decision has not been made, but wanted to encourage the committee to consider defining a petition to gain access to autopsy photos as a civil action, not a special proceeding, for the following reasons.

First, a special proceeding is heard by the Clerk of Superior Court, not by a Judge. The bill as written requires a judge to hold the hearing.

Second, G.S. 1-72.1 enacted in 2001 by the General Assembly (SESSION LAW 2001-516 HOUSE BILL 1284) provided a similar procedure for the media to gain access to public records, in that instance court proceedings and court records. The procedure was a civil action.

In that instance, since the media was requesting access to an existing case file or proceeding it was treated as a motion in the cause. In this bill, the petition will likely be the first filing in the action (that is there will very likely not be an existing court case) so the filing would be more akin to a civil superior court initial filing (complaint).

If you have any questions or need further information, please contact me.

Thank you for your time.

Pamela Weaver Best
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AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, March 4, 2003
10:00 a.m.
Room 421 LOB

1. **Opening remarks.**

2. **Consideration of the following bills:**

   HB 65 (Autopsy Photos Not Public Record)
   Rep. Karen Ray, Bill Sponsor

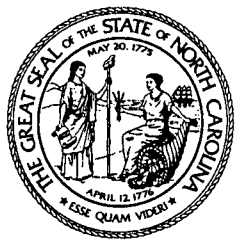
   HB 42 (Criminal Unauthorized Recordings)
   Rep. Wayne Goodwin, Bill Sponsor

3. **Adjourn**

2003-2004

HOUSE
JUDICIARY II

COMMITTEE
MINUTES



House Judiciary II

Committee

Minutes
March 6, 2003
10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order. He said that the meeting would be devoted to hearing from interested parties on HB 65, but that no vote would be taken. He said that his plan is to appoint a subcommittee to work on the bill.

Mr. John Bussian with the NC Press Association was recognized. He said that the Association had another witness to testify before the committee about the public's right to access. He introduced Candace Zamperini, whose sister, Kathleen Peterson died in early December 2001 in Durham, North Carolina.

Mrs. Zamperini said that she had read the autopsy report on her sister, who died on December 9, 2001, but it was only after seeing two autopsy photographs at the Durham District Attorney's office that led her to understand how she died. "To me I instantly knew my sister had been murdered." She said.

She said **HB 65** would hurt people who don't have resources to gain access to autopsy information. She said under HB 65, she never would have seen the photos.

She showed the Committee the written autopsy report and then she showed the actual autopsy photographs of her sister's head to the Committee.

Mrs. Zamperini said that the press had helped her immensely. She said two Triangle newspapers and a television station sent copies of the medical examiner's report, including the photographs, to forensic experts in other parts of the country as part of their reporting on the case. She was grateful that the photographs had not been published and thankful that news organizations had access to them.

"The press forms a system of checks and balances, " she said.

When Mrs. Zamperini had concluded her comments, Rep. Nesbitt recognized Katherine Prescott, State Victim Advocate from MADD. Mrs. Prescott spoke in favor of the bill. A copy of her comments is made a part of these minutes as *Attachment I.*

Ms. Donna Pygott, executive director of the N.C. Victim Assistance Network was then recognized. She said public access to autopsy photographs is insensitive to the families of murder and accident victims. A copy of her comments is a part of these minutes as *Attachment II.*

Ms. Mel Chilton, Victim Research Director, with the North Carolina Victim Assistance Network also came before the Committee to speak of her support for the bill. A copy of her comments is a part of these minutes as *Attachment III.*

Rep. Ray was then recognized for comment. She read a letter from Mack Mahoney, the advocate for 17-year old transplant patient, Jesica Santillan, who died in February from a botched heart-lung transplant. In the letter Mr. Mahoney said that he supported limiting access to autopsy photographs and that he was offended that Santillan's death was mentioned this week as a rationale for maintaining public access to autopsy photographs.

Committee discussion followed. Rep. Gulley felt that newspapers were not causing the problem. Rep. Stam said there needed to be more balance. Rep. Moore was concerned about who would have access to the photos. Rep. Ellis felt the process of copying photos needed clarification. Rep. Bordsen was also concerned about the "surviving spouse" issue.

Rep. Nesbitt appointed the following members of the Committee to a Subcommittee to study **HB 65**: Rep. Nesbitt, Chair, Rep. Bordsen, Rep. Ellis, Rep. Goodwin, and Rep. Stam.

The meeting adjourned at 10:50 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chair

Janette W Lee

Janette W. Lee
Committee Assistant

Statement of Katherine Prescott
March 6, 2003

Good morning, Mr. Chairman and committee members. Thank you for allowing me to speak with you today in support of House Bill 65.

My name is Katherine Prescott. I am former National President of Mothers Against Drunk Driving and am currently serving on the board of North Carolina MADD.

I regret to say that I have had the personal experience of losing a child to an impaired driver. My 16 year old son, Jay, was killed in 1981. While helping to push a disabled vehicle off the street, Jay was struck from behind and died instantly from an open skull fracture. I can honestly tell you that my life and the lives of my family were changed forever that night. I sat in my living room horrified when the local newscast showed a picture of the two vehicles involved in the crash.

For years, I couldn't stand to see a picture of a crashed vehicle. It seemed that every time I opened the newspaper, there was another crash and it made me think again and again of how violently Jay died. For years, I could not drive past the place where the crash occurred.

You may be wondering what does this have to do with House Bill 65? Let me explain. It has to do with my strong objection to further traumatizing innocent victims and their surviving family members by the media having access to autopsy photos and audio and video tapes.

Victims of impaired driving crashes have been forced into immense pain and suffering they didn't ask for. Why should they have to be further victimized by their loved ones' autopsy reports and photos being made available to anyone who would like to see them? When do these victims lose their identity and the families lose their right to the control over what happens to them? At death? Does a victim's body become public property once some criminal kills him? I don't think so. I haven't noticed that the "public" is paying for the burial of these innocent victims. If my medical records are not public records, then why should my autopsy information be?

Over the past 15 years, I have traveled over this country and met hundreds of families of victims of impaired driving crashes. One of the things we victims of impaired driving crashes have difficulty dealing with is the violence to the bodies of our loved ones. Being involved in an automobile crash can cause severe damage to the body. In many cases, bodies are so mutilated and damaged that family members are advised not to view them. How devastating would it be to you if you were advised not to view your child, your spouse, or your parent and then later saw these disturbing and graphic photos on tv or on the internet?

I personally chose not to look at the autopsy photos of my son. I did not think I could handle it then and I don't think I could handle it now. That was my choice.

MADD is the voice of the victim. Some victims may wish to see photographs. For those who want to see the photos and want to share their information with the media, let them do so. But, please, let it be their choice—not the choice of the media.

I speak to you today not only as the mother of a drunk driving victim, but also an advocate for other victims. I have the unique ability to speak from personal experience and also from the perspective of how other victims react to the exposure of violent and disturbing photographs. I work for the District Attorney in Pitt County as Director of Victim Services.

Time and time again, after one, two, or even three years, I see the devastating effect of crash photos on victims. We work with them from the time of the death to the time of trial, trying to prepare them for what will take place in the courtroom. There is no preparation for it. You just simply can't prepare yourself to look at the mangled mass of steel and metal where of your loved one was violently killed. It usually upsets victims so badly we have to take them out of the courtroom when photos and autopsy reports are covered. But, even then, we do have the option of taking them out of the room. If this material is openly available, we will have no way to protect them from the further victimization of the media.

Thank you again for allowing me to speak on behalf of the many victims of impaired driving in North Carolina. Let us maintain some sense of dignity on behalf of our loved ones. They do not deserve to be exploited and their bodies exposed to the public. I urge you to support this bill.

North Carolina Victim Assistance Network
410 Morson Street
Raleigh, NC 27601

Office: (919) 831-2857 Fax: (919) 831-0824

Thursday, March 6, 2003
10:00 AM – Room 421
Judiciary II Committee

Supportive Points Related to H65 – Autopsy Photos Not Public Record

- This bill is sensitive to the privacy needs of surviving family members of homicide victims.
- We as citizens are already continuously exposed to violent footage – September 11th, the fire in Rhode Island, the fire in Kinston, and the police pursuit of domestic violence victims just before their deaths for example.
- Public exposure of autopsy photos and other graphic material only serves to:
  - further sensationalize the crime of a criminal;
  - cause severe trauma to surviving family members – especially children;
  - harm a murder investigation; and
  - bring more violence into an already violent world.
- The majority of the media and others do not meet the qualifications required to evaluate autopsy photos. Nor were they elected to perform this duty.
- Most survivors do not have the financial means to prevent the publication of autopsy photos.
- This bill provides more than adequate opportunities for autopsy photo and other graphic information to be released – i.e. the surviving family members and all entities involved in investigation and prosecuting a crime.

WRAL.com

Peterson Motions, Statements & Autopsy Reports

POSTED: 5:50 p.m. EDT May 10, 2002
UPDATED: 10:00 a.m. EDT February 11, 2003

Peterson Defense Files Motion To Prevent Trial Delay
(Motion to Enforce Scheduling Order, Filed February 10, 2003 by Peterson Defense)
Page 1 | Page 2 | Page 3 | Page 4 | Page 5
Page 6 | Page 7 | Page 8 | Page 9 | Page 10 | Page 11

Wrongful Death Civil Lawsuit (Filed October 30, 2002 by Caitlin Atwater)
Page 1 | Page 2 | Page 3 | Page 4 | Page 5 | Page 6

Motion For Discovery (Filed May 21, 2002):
Page 1

Motion To Designate Case As Exceptional: (Filed May 16, 2002)
Page 1 | Page 2 | Page 3 | Page 4 | Page 5 | Page 6 | Page 7

Motion For Production Of Exculpatory Information (Filed May 10, 2002):
Page 1 | Page 2 | Page 3 | Page 4| Page 5 | Page 6 | Page 7 | Page 8

Exhibit A:
Certificate Of Death and Autopsy Report Of Elizabeth A. Ratliff
Page 1 | Page 2 | Page 3 | Page 4 | Page 5 | Page 6 | Page 7 | Page 8

Exhibit B:
Motion To Preserve Exculpatory Evidence And To Disclose Any Such Evidence In The Possession Of The Police Immediately (Filed Jan. 10, 2002)
Page 1 | Page 2 | Page 3 | Page 4 | Page 5 | Page 6
Page 7 | Page 8 | Page 9 | Page 10 | Page 11 | Page 12

Statement From Michael Peterson
- Statement From Michael Peterson About Kathleen Peterson's Family, 20/20 Segment

Statements From Kathleen Peterson's Family
- Statement From Kathleen Peterson's Family About Autopsy Pictures
- Statement From Kathleen Peterson's Family About 20/20 Segment

Statements From Peterson's Defense Team
- Statement To Kathleen Peterson's Family About Autopsy Pictures
- Statement From Peterson Defense Team In Response To 20/20 Segment

Kathleen Peterson Autopsy Selections
- Evidence Of Injury

- Evidence Collected
- Cause Of Death
- Front Of Head Diagram
- Back Of Head Diagram

Kathleen Peterson Full Autopsy Report

Page 1 | Page 2 | Page 3 | Page 4 | Page 5 | Page 6
Page 7 | Page 8 | Page 9 | Page 10 | Page 11 |Page 12
M.E. Report, Page 1 | M.E. Report, Page 2 | M.E. Summary

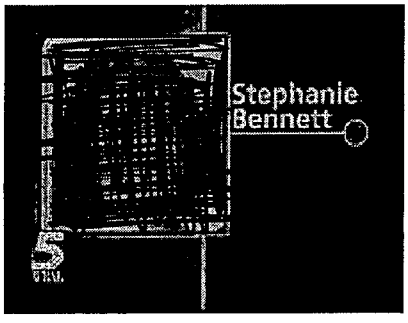
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Investigators Release More Information About Raleigh Murder

POSTED: 11:36 a.m. EDT June 20, 2002
UPDATED: 1:43 p.m. EDT June 21, 2002

RALEIGH -- Stephanie Bennett was found dead in her north Raleigh apartment about a month ago. New information suggests she was bound and gagged, strangled and sexually assaulted.



Stephanie Bennett was found dead in her Raleigh apartment in May.

"It was a brutal murder. There's no doubt about that. The autopsy report makes it clear," says Raleigh Police Lieutenant Chris Morgan.

The autopsy released Thursday says the 23-year-old was naked when her body was found in one of the bedrooms.

Bennett was found with cloth, possibly undergarments, stuffed in her mouth.

The report goes on to say that Bennett had a 13-inch bruise around her neck, several bruises on her face, and the medical examiner also found bruises on her mid-section.

Smaller marks found on her wrists and ankles suggest she was bound, possibly with handcuffs.

Detectives say she appears to have been sexually assaulted and the report indicates that Bennett tried to fight off her attacker.

AUTOPSY REPORT
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The medical examiner lists the offical cause of death as strangulation.

According to the report, a screen was missing from one of the bedroom windows, and investigators believe that is how the suspect entered the apartment.

Bennett's bedroom appeared to have been ransacked.

"I consider this a very dangerous person," Morgan says.

Despite a flood of tips, no suspects have been identified, causing frustration and concern.

"It frustrates me every day, it frustrates me every time I have to talk with Stephanie Bennett's family and say, 'We don't have a suspect in custody yet,'" Morgan says.

The situation is also frustrating and frightening to neighborhood residents.

"I don't sleep as well at night ... but I've just got to hope that they find whoever did it," says Suzanne Marrone.

Investigators have entered the case into a national database called VICAP, violent criminal apprehension program, to see whether any similar crimes have been reported elsewhere in the country. So far, nothing has turned up.

Police are also using a profiler to get a better sense of the suspect, but at this point they have little to go on.

"They haven't given us any information as to tall, short, dark, so you look at everyone and wonder, 'Could that have been the man?'" says neighborhood resident Nancy Hartley.

"I think it's important to know what happened just so you can be more careful," says resident Erin Gough. "When you don't know you kind of make up things about what could have been. So it's better to know."

Police would like to know more, too.

"If the question arises, 'Could this possibly happen again?' Certainly," Morgan says.

Investigators say the suspect stole Bennett's 1995 compact JVC MXC-220 stereo system and that he may be holding on to it, perhaps as some type of memento. If you know someone who came into possession of this type of system in the last few weeks, or was trying to sell one, police would like to hear from you.

Previous Stories:

- June 17, 2002: Raleigh Apartment Complex Schedules Memorial For Murder Victim
- June 7, 2002: Police: Campen Not Suspect In Raleigh Woman's Murder
- May 27, 2002: Police Release Sketch Of Man Wanted For Questioning In Raleigh Murder
- May 24, 2002: Police Looking For Male Suspect In Raleigh Woman's Death

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Autopsy: Wake County Teacher Died Of Strangulation

Teacher's Fiance Charged With Murder, May Have Been Involved With Other Woman

Kamal Wallace, Staff Writer

POSTED: 10:41 a.m. EDT August 26, 2002
UPDATED: 5:16 p.m. EDT August 26, 2002

RALEIGH, N.C. -- An autopsy report on a murdered Raleigh teacher shows she was strangled to death. Meanwhile, authorities have uncovered more information about her fiance, who is charged with her death.

HEATHER DOMENIE AUTOPSY REPORT
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The medical examiner's report also shows that 33-year-old Heather Domenie, a first-grade teacher at Fred A. Olds Elementary School, had some scratches and bruises. The autopsy report also reveals "blunt force injuries" on various parts of her body including her arms, abdomen and neck.

Her fiance, Ian Campbell, is charged with her murder. He remains in the Wake County Jail. He is scheduled to appear in court next month.

Authorities are looking at whether Campbell had an inappropriate relationship with another woman, Magalie Lelong.

Police say two weeks after Domenie's death, Campbell and Lelong went to Fins Restaurant in Raleigh, where employees claim the two were holding hands, and they had been at that restaurant before.

Court records show police searched Lelong's apartment for a number of items, including information about life insurance.

In court, defense lawyer Tommy Manning told the judge that Campbell would probably not be able to afford an attorney. However, county records show that Campbell owns the $200,000 Cary home on North Becket Street he shared with Domenie. A police affidavit also indicates that Campbell owns a BMW Z3.

Until his arrest, Campbell worked as a computer engineer at CIBER on Six Forks Road in Raleigh.

When asked if anyone else could be charged in Domenie's murder, the district attorney says the investigation is ongoing. Prosecutors have not decided whether or not they will seek the death penalty.

Previous Stories:

- August 22, 2002: Police Look At Possible Relationship Between Fiance Of Wake Teacher, Other Woman
- August 22, 2002: Fiance Of Cary Teacher Hears Charges Against Him
- August 20, 2002: Body Of Wake County Teacher Being Sent To Canada
- August 20, 2002: Friends, Family Pay Respects To Cary Teacher

Reporter: Amanda Lamb
Photographer: Ed Wilson
OnLine Producer: Kamal Wallace

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Mr. Chairman and Committee Members, thank you for allowing me this opportunity to speak with you today about House Bill 65.

I want to take this opportunity to share with you my support for House Bill 65. This bill is sensitive to the ~~needs~~ privacy rights of surviving family members of homicide victims.

Today we live in a world where information is readily available – too much information I might add.

You can turn on your television and see the horrifying display of people jumping to their deaths or hear the terrified screams of people begging for help to escape from a burning building.

Just think back to the attention of September 11th and the recent fire in Rhode Island. To me, we

are just one step away from allowing the exposure of autopsy photos.

Autopsy reports have already been posted on media Web sites and other outlets – Mrs. Peterson and Ms. Bennett. While I realize that the Peterson family asked for the release, did the Bennett family?

Premature release of this type of information can only serve to harm a murder investigation –
Only serve to further traumatize a victim's family –
Only serve to further sensationalize the crime of a criminal and bring more violence into an already violent world.

Further, I believe that neither most of you nor I have the qualifications required to evaluate autopsy photos. Nor were we elected by the citizens of

North Carolina to perform this duty. So why the great and extended need for public access?

Please remember that not every surviving family member has the financial means to prevent the publication of the documents listed in House Bill 65. Yet, this bill does provide survivors with the opportunity to share this information with the media or others **if** they so choose.

Once again, I ask that you support House Bill 65. This bill addresses a problem that all of us could have the potential to face.

An ounce of prevention is worth a pound of cure.

Thank you.

Mack Mahoney

March 6th, 2003

Representative Karen Ray
1315 Legislative Office Building
Raleigh, NC 27601

Dear Rep. Ray:

On behalf of the family of Jessica Santillan, I am contacting you to extend their fullest support to your legislation to protect the privacy rights of families by keeping the autopsy photos of their deceased loved ones private.

We are rightly concerned that unless your bill passes, unscrupulous and disturbed individuals seeking to make a fast buck may very well exploit disturbing pictures of Jessica on the Internet.

It is also necessary to correct an inaccurate characterization of the Santillan family position on this issue, and the actual record, by a representative of the North Carolina Press Association – who favors keeping autopsy photos public – during testimony before a House Committee on Tuesday. A representative of the NC Press Association, according to the March 5th Winston-Salem Journal, noted:

"Access to autopsy records has helped maintain public confidence in recent investigations, including an arsenic-poisoning case in Wake County, the Peterson murder case in Durham in which the defense is challenging a medical examiner's findings, and the death of Jessica Santillan after a botched heart-lung transplant at Duke Medical Center, Drescher said." (WSJ, 3.65.03)

As a spokesman for the Santillan family and someone who has been intimately involved in the unfortunate occurrences of the last month, I can say first hand that access to autopsy photos has not been an issue in this case. I would state for the record that the Santillan family does not wish for autopsy photos of their daughter to be made public or publicized in any way to the general public, and Rep. Ray's bill is the only way to guarantee their privacy.

We are offended that the NC Press Association would exploit the Santillan family's situation by using them as an example of why we need to keep such disturbing photos public when in fact the Santillan family position is completely the opposite. To imply that the Santillans have benefited in some way by autopsy photos being public is an injustice to them that deserves a written apology to every citizen in our state.

I would implore all members of the NC legislature to vote in favor of Rep. Ray's bill, House Bill 65, in order to protect the dignity and rights of the family of Jessica Santillan, who clearly have suffered enough already, and to keep her pictures from being exploited on the Internet.

Respectfully,

Mack Mahoney
Medical Power of Attorney for Jessica Santillan

Janette Lee (Rep. Nesbitt)

From: Janette Lee (Rep. Nesbitt)
Sent: Thursday, March 06, 2003 1:59 PM
To: 'ecaroll@WLFL.sbgnet.com'
Subject: FW: Judiciary II Subcommittee on HB 65

-----Original Message-----
From: Janette Lee (Rep. Nesbitt)
Sent: Thursday, March 06, 2003 12:44 PM
To: Karen Cochrane-Brown (Research); Robin Johnson (Research); Jeffrey Hudson (Research); Janette Lee (Rep. Nesbitt); Rep. Alice Bordsen; Rep. Donald Bonner; Rep. Jean Farmer-Butterfield; Rep. Jim Gulley; Rep. Paul Stam; Rep. Sam Ellis; Rep. Tim Moore; Rep. Trudi Walend; Rep. Wayne Goodwin
Cc: Ken Walend (Rep. Walend); Barry Smith; Cam Cover; Crissy P. Porter; Donna Pygott; John Bussian; Julie Allen; Katherine P. Prescott; Pamela W. Best; Rep. Karen B. Ray
Subject: Judiciary II Subcommittee on HB 65

The following members will serve on the Subcommittee on HB 65:

Rep. Alice Bordsen
Rep. Sam Ellis
Rep. Wayne Goodwin
Rep. Paul Stam
Rep. Martin Nesbitt, Chair

The Subcommittee will meet 15 miniutes after Session on Tuesday, March 11, 2003 in Room 421.

Jan Lee
Legislative Assistant

HOUSE BILL 65:
Autopsy Photos Not Public Record.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Ray
Date:	March 4, 2003	**Summary by:**	Karen Cochrane Brown Committee Counsel
Version:	Proposed Committee Substitute (H65-CSRO-1[v1])		

SUMMARY: ***This bill creates a specific exemption from the Public Records Law for photographs and video or audio recordings of an autopsy. The bill also restricts access to these documents to a limited list of individuals and authorizes the court to grant access to others not listed, upon a showing of good cause. Violation of this provision is punishable as a Class H felony.***

CURRENT LAW: Under current law, autopsy reports, including photographs, video and audio recordings made in connection with the autopsy, are public records as defined in G.S. 132-1. This statute defines the term "public record" very broadly to include any "documentary material, regardless of physical form or characteristics, made or received by an agency of North Carolina government or its subdivisions in connection with the transaction of public business". The statute goes on to provide that "it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law."

In addition, the law (G.S. 130A-389) that authorizes the medical examiner to conduct an autopsy, also provides that a "copy of the report shall be furnished to other persons upon request."

BILL ANALYSIS: Section 1 of the bill creates a new section, G.S. 132-1.5A which provides:

- Subsection (a) contains findings by the General Assembly that public access to photographs, video and audio recordings of an autopsy may cause emotional distress and trauma, particularly due to widespread dissemination through computer technology; that other less intrusive and less injurious types of information, such as the text of the autopsy report, are available to provide for public oversight; and that it is a public necessity to provide that photographs and video and audio recordings of an autopsy are not public records.
- Subsection (b) directs the custodian of a photograph or video or audio recording to grant access to the certain people, including, the Chief Medical Examiner, the authorizing medical examiner, district attorney, Superior court judge, a surviving spouse or next of kin, a individual entitled to bring a wrongful death action, law enforcement officials, a State, local or federal government agency, in furtherance of its official duties, a person authorized by the court; the guardian or custodian of a deceased minor; and after the custodian redacts all identifying information, access can be granted to a medical examiner, coroner or physician to be used for scientific, teaching or training purposes.
- Subsection (c) provides that any other person may apply to the court for an order granting them access to the photographs, video or audio recording. Upon a showing of good cause the court may issue an order and impose any restrictions or stipulations it deems appropriate. In determining

whether there is good cause, the court is directed to consider whether disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy; whether the disclosure is the least intrusive means available; and the availability of similar information in other public records.

- Subsection (d) directs the petitioner to provide reasonable notice of the petition to the surviving spouse, next of kin; or guardian of the deceased. The notice must offer the opportunity to be present and heard at any hearing on the matter.
- Subsection (e) exempts criminal and administrative proceedings from the application of this section.
- Subsection (f) makes any person who provides a photograph, video or audio recording in violation of this section or anyone who violates a court order issued pursuant to this section guilty of a Class H felony. Conviction of a Class H felony has a presumptive minimum sentence of from five to six months' community, intermediate or active punishment, assuming no prior convictions.

Section 2 of the bill makes a conforming change to G.S. 130A-389 which authorizes the medical examiner to conduct an autopsy. This change subjects disclosure of the autopsy report to the limitations created in Section 1 of the bill.

Section 3 makes the act effective when it becomes law and makes it applicable to all photographs or video or audio recordings of any autopsy regardless of whether the autopsy was performed before or after the effective date of the act.

BACKGROUND: The accidental death of Dale Earnhardt at the Daytona 500 and attempts by the media to obtain visual recordings of the autopsy helped to motivate the Florida legislature to create an exception to its public records law, similar to the one proposed in this bill. The Florida law was enacted in 2001, and since then various media representatives have challenged the legislation in the Florida courts. Florida, unlike North Carolina and every other state, has placed its public records protection in the State Constitution. The case primarily involves a challenge to the legislation on State constitutional grounds. The case is currently pending before the State Supreme Court.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 65
PROPOSED COMMITTEE SUBSTITUTE H65-CSRO-1 [v.1]

3/3/2003 5:44:53 PM

Short Title: Autopsy Photos Not Public Record. (Public)

Sponsors:

Referred to:

February 24, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT PHOTOGRAPHS AND VIDEO OR AUDIO RECORDINGS MADE PURSUANT TO AN AUTOPSY ARE NOT A PUBLIC RECORD.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 132 of the General Statutes is amended by adding the following new section to read:

"**§ 132-1.5A. Photographs and video or audio recordings made pursuant to autopsy.**

(a) Findings. – The General Assembly finds the following:

(1) Photographs or video or audio recordings of an autopsy show or describe the deceased in a graphic and often disturbing fashion. The photographs or video or audio recordings may depict the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions of the deceased which, if copied and publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased.

(2) The existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video or audio recordings 24 hours a day and that widespread dissemination of autopsy photographs and video or audio recordings would subject the immediate family of the deceased to continuous injury.

(3) There are other types of information available, such as the text of the autopsy report, which are less intrusive and injurious to the immediate

family members of the deceased but which provide for public oversight.

(4) Given the likelihood of injury to immediate family members by the dissemination of autopsy photographs and video or audio recordings and the availability of less intrusive means of providing public oversight, it is a public necessity to provide by law that photographs and video or audio recordings of an autopsy are not a public record under G.S. 132-1.

(b) Access Restricted. – Except as otherwise provided in this subsection, a photograph or video or audio recording of an autopsy is not a public record as defined by G.S. 132-1. The custodian of a photograph or video or audio recording of an autopsy shall grant access to the photograph or video or audio recording to the following:

(1) Chief Medical Examiner.

(2) Authorizing medical examiner.

(3) District attorney.

(4) Superior court judge.

(5) An individual entitled to bring a wrongful death action on behalf of the deceased under G.S. 28A-18-2.

(6) The surviving spouse of the deceased may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents of the deceased may have access to the photograph or video or audio recording of the autopsy. If there are no surviving parents, then an adult child of the deceased may have access to the photograph or video or audio recording of the autopsy.

(7) Law enforcement officials conducting an investigation of the death. A law enforcement official may provide a copy of the photograph or videotape to the media for the purpose of aiding in the identification of the deceased through publication of the photograph or videotape.

(8) A local government entity, or a State or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential.

(9) A person authorized by the court pursuant to subsection (c) of this section.

(10) The guardian or custodian of a minor child of the deceased.

(11) After redacting all information identifying the decedent, including name, address, and Social Security number, and after anonymizing facial recognition, a medical examiner, coroner or physician who uses such material for;

a. medical or scientific teaching or training purposes;

b. teaching or training of law enforcement personnel;

c. teaching or training of attorneys or others with a bona fide professionalneed to use or understand forensic science;
d. conferring with medical or scientific experts in the field of forensic science; or
e. publication in a scientific or medical journal or textbook.
A medical examiner, coroner or physician who has in good faith complied with this subsection shall not be subject to any penalty under this section.

(c) Court Order. – A person who is denied access to photographs or video or audio recordings under this section may apply to the appropriate division of the General Court of Justice for an order. The court, upon a showing of good cause, may issue an order authorizing the person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court shall consider whether the disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether the disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to, or other handling of a photograph or video or audio recording of an autopsy shall be under the direct supervision of the custodian of the record or the custodian's designee.

(d) Notice of Petition. – The petitioner shall provide reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording of an autopsy, a copy of the petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. The notice shall be provided to a surviving spouse of the deceased. If there is no surviving spouse, then the notice shall be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased or to the guardian or custodian of a minor child of the deceased.

(e) Criminal and Administrative Proceedings. – This section does not apply to a criminal or administrative proceeding except that nothing in this section prohibits a court or administrative proceeding, upon good cause shown, from restricting or otherwise controlling the disclosure of an autopsy, crime scene, or similar photograph or video or audio recordings in the manner provided under this section.

(f) Penalties. – Any person who provides one or more photographs or video or audio recordings in violation of this section is guilty of a Class H felony. Any person who willfully and knowingly violates a court order issued pursuant to this section is guilty of a Class H felony."

SECTION 2. G.S. 130A-389 reads as rewritten:

"**§ 130A-389. Autopsies.**

(a) If, in the opinion of the medical examiner investigating the case or of the Chief Medical Examiner, it is advisable and in the public interest that an autopsy or other study be made; or, if an autopsy or other study is requested by the district attorney of the county or by any superior court judge, an autopsy or other study shall be made by

the Chief Medical Examiner or by a competent pathologist designated by the Chief Medical Examiner. A complete autopsy report of findings and interpretations, prepared on forms designated for the purpose, shall be submitted promptly to the Chief Medical Examiner. Copies of the report shall be furnished the authorizing medical examiner, district attorney or superior court judge. ~~A~~ Subject to the limitations of G.S. 132-1.5A, a copy of the report shall be furnished to other persons upon request. A fee for the autopsy or other study shall be paid by the State. However, if the deceased is a resident of the county in which the death or fatal injury occurred, that county shall pay the fee. The fee shall be one thousand dollars ($1,000).

(b) In deaths where the Chief Medical Examiner and the medical examiner investigating the case do not deem it advisable and in the public interest that an autopsy be performed, but the next-of-kin of the deceased requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform the autopsy and the cost shall be paid by the next-of-kin.

(c) When the next-of-kin of a decedent whose death does not fall under G.S. 130A-383 or 130A-384 requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform that autopsy and the cost shall be paid by the next-of-kin.

(d) The report of autopsies performed pursuant to subsections (b) and (c) shall be a part of the decedents' medical records and therefore not public records open to inspection."

SECTION 3. This act is effective when it becomes law and applies to all photographs or video or audio recordings of an autopsy regardless of whether the autopsy was performed before or after the effective date of this act.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 6, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sonya Pfeiffer	WTVD
Julie Allen	NC statewatch
Rob Lamar	HHS
Cassandra Skinner	CCPS
Devon White	PCNC
Kim Heibbard	NCLM
Mary Doug	VIF Program
[illegible]	NCRA
Katherine Prescott	MADD NC
Donna Pygott	NC VAN
Mel L. Chilton	NCVAN

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 6, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Cam Cover	BPMHL
John McHug	GOV OFFICE
Crissy Porter	Smith Anderson
Lu-Ann Coe	NC Psychiatric Assoc
Barbara S. Carslon	MFSS
Pamela Best	AOC
Gregg Jo Horne	NCMS
Bill Thomas	NCPA / The Sanford Herald
Mark Binson	Capitol Broadcasting
Barry Smith	Freedom Newspapers
Carol Donnell	The Insider / Nash Medical

VISITOR REGISTRATION SHEET

Name of Committee

Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Richard Gurley	RIAA
Mark Bibbs	Davis Bibbs + Smith PLLC
Lynn Bonner	News + Observer
Ted Vaden	Chapel Hill News
JOHN BORRIAN	NC Press Assn.
Duke Chen	Intern
Alison Anderson	Time Warner Cable
Jane Pulley	NCATL
Keri Saylor	NC Press Association
C. MEARS	JOE KISOR
Carole Lauer	EGHS
Scott Mayhew	Associated Press

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, March 6, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

HB 65 (Autopsy Photos Not Public Record) ***Committee Substitute adopted 3/4/03*** **Rep. Karen Ray, Bill Sponsor**

HB 42 (Criminal Unauthorized Recordings)
Rep. Wayne Goodwin, Bill Sponsor

3. **Adjourn**

House Judiciary II

Committee

Minutes
March 11 2003
10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Rep. Goodwin to explain **HB 42** (Criminal Unauthorized Recordings).

Rep. Goodwin said that a senate bill was introduced last session upon the recommendation of the Joint Select Committee on Information Technology. It passed through the Senate and received a favorable report from House Judiciary III, but failed to pass the House before adjournment.

Committee Counsel, Robin Johnson, was recognized to explain the bill. A copy of her Bill Analysis is a part of these Minutes as *Attachment I.*

Mr. Richard (Gus) Gusler representing the Recording Industry Association of America was recognized. He said this bill was only for those folks who copy movies, audio tapes, and CDs and sell these pirated copies for profit. He said the main crux of the bill was that it altered the penalty phase. It also increases the labeling requirements, but it mainly deals substantially with changing the penalty phase. It drops the requirement of 1,000 to 100 as the number of "articles" involved to qualify the offense as a Class I felony. The term "article" includes both sound recordings and audiovisual works.

Rep. Stam said larceny should have a penalty based on the value of other things, not just particularly for this. Also Rep. Stam wondered what was the profit on a typical pirated CD would be.

Mr. Gusler said the penalty is based on retail value. He said the average price for a CD is $18.98 and that a pirated copy, at the flea market, would sell for $8.00-$10.00.

Committee Counsel Robin Johnson was recognized to explain the distinction between various larceny charges. She said larceny of goods with a value of $1000 or over is a Class H Felony and larceny of goods where the value is not more than $1000 is a Class 1 Misdemeanor. There are various exceptions that are listed.

Rep. Stam wondered about Section 5 of the bill, in particular where the fine of $150,000 came from. He said that we normally let courts set the fine.

Mr. Gusler said that came right out of the Federal copyright law for pirating. When the statute was passed, they just incorporated the language from the Federal Copyright Act.

Discussion followed regarding the difference between State and Federal law. Rep. Asked Mr. Gusler if the federal law wasn't working. That under federal law, making the copy itself was a violation of federal law but that is not a violation under state law. Making the copy itself is not a violation of state law, but selling the copy without labeling is a violation. For example, you are just not going to get a federal investigator to go to a flea market in Alamance County and arrest someone selling pirated copies. Under this legislation, the Secretary of State's office is going to enforce this law, which is a consumer protection issue.

Rep. Stam was concerned about the $150,000 fine and told the Committee that he felt the penalty should be a Class I Felony.

Rep. Nesbitt was concerned about Section 3 of the bill, which he interpreted as saying that possession of the article was a violation of the law. He also wondered about the requirement for a second offense.

Mr. Gusler said that was the current law.

Rep. Goodwin moved to amend the bill and his motion passed, a copy of which is a part of these minutes as *Attachment II*.

Rep. Stam moved to amend the bill and his motion passed, a copy of which is a part of these minutes as *Attachment III.*

Robin Johnson told the committee that a Class I Felony sentence is 4 to 6 months community service and that a second offense would be 6 to 8 months or 12 months.

Rep. Moore moved to have the amendments incorporated into a committee substitute, give the committee substitute a favorable report and the original bill an unfavorable report.

Rep. Nesbitt said he had a problem with the "second offense." He said he had a problem making a felon of someone who had only one tape.

Rep. Bordsen told the Committee that she would like to hold the bill to work further on the penalty aspect.

The Chair agreed and appointed a subcommittee to work on the bill. Members appointed were Rep. Stam, Rep. Bordsen, and Rep. Goodwin.

The meeting was adjourned at 10:55 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

HOUSE BILL 42:
Criminal Unauthorized Recordings.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Reps. Goodwin, Hall, Moore & Stiller
Date:	March 4, 2003		
Version:	First	**Summary by:**	Robin Johnson Committee Counsel

SUMMARY: ***This bill would clarify the statutory provisions that prohibit the transfer of a copyrighted work to another medium, the recording of a live performance, and the manufacture and distribution of unlawfully transferred recordings. The penalty provisions would be amended to reduce the number of unlawful articles involved to categorize the offense as a felony. The act would be effective December 1, 2003, and would apply to offenses committed on or after that date.***

CURRENT LAW: Federal copyright law preempts State law with regard to prosecutions of persons who transfer copyrighted works from one fixed medium to another. However, federal law provides one exception: a State may prosecute persons who unlawfully transfer sound recordings that were originally fixed prior to February 15, 1972. In addition, and regardless of the date when a sound recording was fixed, the State may prosecute a person for selling the recording if the person has not put the true name of the manufacturer on the product. Federal courts have held that these types of statutes (e.g., G.S. 14-435) have a consumer protection function, and therefore do not protect rights that are merely "equivalent" to those rights protected by federal copyright law.

BACKGROUND: Last Session, a similar bill (SB 1123), was introduced upon the recommendation of the Joint Select Committee on Information Technology. It passed through the Senate and received a favorable report from House Judiciary III, but failed to pass the House before adjournment.

BILL ANALYSIS:

Section 1 would amend G.S. 14-432 by reorganizing the definitions and adding a new term -"fixed" – that would be defined using the definition from federal copyright law.

Section 2 would make clarifying changes to G.S. 14-433, which prohibits the transfer of sound recordings from one medium to another, the recording of live performances, and the manufacture, distribution, wholesale, or transport of these articles.

Section 3 would amend G.S. 14-435, which currently requires that the actual true name of the manufacturer must appear on an article, by expanding this requirement to include the actual true name of the author, artist, performer, producer, programmer, or group. Original manufacturers of software or authorized licensees of software producers would not be required to disclose contributing authors or programmers. Disclosure of the manufacturer of the packaging, cover, box, jacket or label associated with the article would not be required.

Section 4 would amend G.S. 14-436 by substituting "Article" for "Chapter."

Section 5 would rewrite G.S. 14-337(a) to reduce (from 1,000 to 100) the number of "articles" involved to qualify the offense as a Class I felony. The term "article" includes both sound recordings and audio visual works, which is the current law. The changes would clarify, for example, that it is not the number of individual recordings on a compact disc (the tangible medium) that are counted to determine the classification of the offense; it is the number of compact discs (the "articles" to be counted).

Section 6: The act is effective December 1, 2003, and applies to offenses committed on or after that date.

H42-SMRH-01 (Hal Pell, Staff Attorney, substantially contributed to this summary.)

HOUSE BILL 42

Short Title:	Criminal Unauthorized Recordings.	(Public)
Sponsors:	Representatives Goodwin, Hall, Moore, and Stiller (Primary Sponsors).	
Referred to:	Judiciary II.	

February 20, 2003

A BILL TO BE ENTITLED

AN ACT MODIFYING THE FELONY AND MISDEMEANOR OFFENSES RELATED TO CONDUCTING CERTAIN UNAUTHORIZED SOUND AND VIDEO RECORDINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-432 reads as rewritten:

"**§ 14-432. Definitions.**

~~As used in this Article "owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance; "article" means the tangible medium upon which sounds or images are recorded or any original phonograph record, disc, tape, audio or video cassette, wire, film or other medium now known or later developed on which sounds or images are or can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.~~The following definitions apply in this Article:

(1) "Article" means the tangible medium upon which sounds or images are recorded or otherwise stored, including any original phonograph record, disc, tape, audio or video cassette, wire, film, or other medium now known or later developed on which sounds or images, or both, can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.

(2) "Fixed" means that the work has been recorded in a tangible medium of expression, by or under the authority of the author, and its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or

both, that are being transmitted, is "fixed" for the purposes of this section if a fixation of the work is being made simultaneously with its transmission.

(3) "Owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film, or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films, or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance."

SECTION 2. G.S. 14-433 reads as rewritten:

"**§ 14-433. Recording of live ~~concerts~~ performances or recorded sounds and distribution, etc., of such recordings unlawful in certain circumstances.**

(a) It shall be unlawful for any person to:

(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which sounds are so transferred, without consent of the ~~owner,~~owner.

(2) Manufacture, distribute, wholesale or transport any article for profit, or possess for ~~such~~ these purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a)(1) of this section. ~~are so transferred, without consent of the owner,~~

(a1) It shall be unlawful for any person to:

~~(3)~~(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds at a live ~~concert,~~ performance, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, ~~such~~ the article on which sounds are so transferred, without consent of the ~~owner,~~owner.

~~(4)~~(2) Manufacture, distribute, transport or wholesale any ~~such~~ article for profit, or possess for ~~such~~ those purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a1)(1) of this section. ~~are so transferred, without consent of the owner.~~

(b) Subdivisions (a)(1) and (a)(2) of this section shall apply only to sound recordings that were initially fixed prior to February 15, 1972. Federal copyright law, 17 U.S.C. § 101 et seq., preempts State prosecution of the acts described in subdivisions (a)(1) and (a)(2) with respect to sound recordings initially fixed on or after February 15, 1972.

(c) This section shall not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds other than from the sound track of a motion picture intended for, or in connection with broadcast or telecast transmission or related uses, or for archival purposes."

SECTION 3. G.S. 14-435 reads as rewritten:

"**§ 14-435. Recorded devices to show true name and address of manufacturer.**

~~Ninety days after January 1, 1975, every article knowingly sold or transferred or possessed for the purpose of sale, advertising or offering for sale or resale, renting or transporting or causing to be rented or transported by any manufacturer, distributor, or wholesale or retail merchant shall contain on its packaging the true name and address of the manufacturer. The term "manufacturer" shall not include the manufacturer of the cartridge or casing itself.~~

(a) A person is guilty of failure to disclose the origin of an article when, for commercial advantage or private financial gain, the person knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any article, the packaging, cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer of the article and the name of the actual author, artist, performer, producer, programmer, or group.

(b) This section does not require the original manufacturer or authorized licensees of software producers to disclose the contributing authors or programmers. As used in this section, the term "manufacturer" shall not include the manufacturer of the article's packaging, cover, box, jacket, or label itself."

SECTION 4. G.S. 14-436 reads as rewritten:

"**§ 14-436. Recorded devices; civil action for damages.**

Any owner of an article as defined in this ~~Chapter~~ Article whose work is allegedly the subject of a violation of G.S. 14-433 or ~~14-434,~~G.S. 14-434, shall have a cause of action in the courts of this State for all damages resulting ~~therefrom~~ from the violation, including actual, compensatory and incidental damages."

SECTION 5. G. S. 14-437(a) reads as rewritten:

"(a) Every individual act in contravention of the provisions of this Article shall constitute a Class 1 misdemeanor, except that the offense is a Class I felony, with a maximum fine of one hundred fifty thousand dollars ($150,000), if (i) the offense involves at least 100 unauthorized articles during any 180-day period, or (ii) is a second or subsequent conviction for an act in violation of this Article.

~~(1) A Class I felony, which may include a fine of not more than one hundred fifty thousand dollars ($150,000), if the offense involves at least 1,000 unauthorized sound recordings or at least 100 unauthorized audio visual recordings during any 180-day period or is a second or subsequent conviction under either subdivision (1) or (2) of this section;~~

~~(2) A Class 1 misdemeanor, if the offense involves more than 100 but less than 1,000 unauthorized sound recordings or more than 10 but less than 100 unauthorized audio visual recordings during any 180□day period;~~

~~(3) A Class 2 misdemeanor, for any other violation of these sections.~~"

SECTION 6. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the

effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT *Attachment II*

(Please type or use ballpoint pen)

EDITION No. 1

H. B. No. 42 DATE 3-11-03

S. B. No. _____ Amendment No. 1
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.) Goodwin
Sen.)

1 moves to amend the bill on page 3, line 28
2 ( ) WHICH CHANGES THE TITLE
3 by deleting the comma following the word "felony".
4
5
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19

SIGNED Goodwin

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT *Attachment III*

(Please type or use ballpoint pen)

EDITION No. 1

H. B. No. 42 DATE 3-11-03

S. B. No. _____ Amendment No. 2
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.) Stam
)
Sen.)

moves to amend the bill on page 3, line 10

( ) WHICH CHANGES THE TITLE

by deleting the word "knowingly"; and

and on page 3, line 27,

by inserting between the words "in" and "contravention" the word "knowing".

SIGNED Stam

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, March 11, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bill:**

   HB 42 (Criminal Unauthorized Recordings)
   Rep. Wayne Goodwin, Bill Sponsor

3. **Adjourn.**

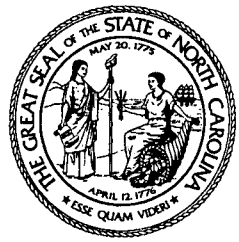
VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 11, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
	NCRA
John Phelps	NCLM
Richard Guller	RIAA
Bill Scoggin	KCLH
C Porter	Smith Anderson
Robert Wilson	Sec. of State
Randy Fraser	TWC
Charlene Durkin	Sec. of State
J. Jason Daniel	Sec. of State
Julie Allen	NC Statewatch



House Judiciary II

Committee

Minutes

March 13, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order.

Bills on the Agenda were **HB 42** (Criminal Unauthorized Recordings), sponsored by Rep. Goodwin and **HB 357** (No Credit Card Number on Receipts) sponsored by Rep. Jeff Barnhart.

HB 42 was before the Committee. Rep. Goodwin moved to adopt a proposed committee substitute for consideration and his motion passed. A copy is attached as *Attachment I.*

Robin Johnson, Committee Counsel, was recognized to explain the changes made in the proposed committee substitute. She said the PCS clarifies that the maximum $150,000 penalty applies only to offenses that are Class I felonies, deletes "knowingly" from Section 3 and inserts "knowing" in Section 5. It also changes the number of unauthorized articles for offenses that can be Class I felonies. The committee substitute Bill Analysis is a part of these Minutes as *Attachment II.*

Rep. Nesbitt requested that a fiscal note be prepared. He also observed that the bill might have to be re-referred to the Committee on Appropriations.

Rep. Ellis moved to give the committee substitute a favorable report and unfavorable to the original bill.

Rep. Stam said that the subcommittee had made the proposed committee substitute consistent with other "stealing laws."

Rep. Ellis observed that a copied product might not have the quality of the original recording. He said this act protects the public.

Ms. Montgomery, with the Secretary of State was again recognized. She said 80.11.1 is the statute that applies to counterfeit trademarks. When the retail value of the merchandise is less than $3000, the offense is a Class 2 Misdemeanor, when $3000 - $10,000, it is a Class I felony, and it is a Class H when the amount exceeds $10,000. It is easy for these counterfeit goods to add up to $3000.

Rep. Stam supported the motion for a favorable report. The motion passed.

HB 357 ((No Credit Card Number on Receipts) was before the Committee. Rep. Barnhart, the bill sponsor, was recognized to explain the bill. He said identity theft and credit card fraud have become very serious problems. He said his bill would require that receipts not have a credit card numbers printed on them.

There were, however, some parts of the bill that needed additional work and Rep. Barnhart said he was working with the Retail Merchant's Association to iron out those areas. The bill was displaced.

There being no further business, the Committee adjourned at 10:50 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H D

HOUSE BILL 42
PROPOSED COMMITTEE SUBSTITUTE H42-CSRH-3 [v.1]

3/12/2003 6:55:09 PM

Short Title: Criminal Unauthorized Recordings. (Public)

Sponsors:

Referred to:

February 20, 2003

A BILL TO BE ENTITLED

AN ACT MODIFYING THE FELONY AND MISDEMEANOR OFFENSES RELATED TO CONDUCTING CERTAIN UNAUTHORIZED SOUND AND VIDEO RECORDINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-432 reads as rewritten:

"**§ 14-432. Definitions.**

~~As used in this Article "owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance; "article" means the tangible medium upon which sounds or images are recorded or any original phonograph record, disc, tape, audio or video cassette, wire, film or other medium now known or later developed on which sounds or images are or can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.~~The following definitions apply in this Article:

(1) "Article" means the tangible medium upon which sounds or images are recorded or otherwise stored, including any original phonograph record, disc, tape, audio or video cassette, wire, film, or other medium now known or later developed on which sounds or images, or both, can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.

(2) "Fixed" means that the work has been recorded in a tangible medium of expression, by or under the authority of the author, and its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of

more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for the purposes of this section if a fixation of the work is being made simultaneously with its transmission.

(3) "Owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film, or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films, or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance."

SECTION 2. G.S. 14-433 reads as rewritten:

"**§ 14-433. Recording of live ~~concerts~~ performances or recorded sounds and distribution, etc., of such recordings unlawful in certain circumstances.**

(a) It shall be unlawful for any person to:

(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which sounds are so transferred, without consent of the ~~owner,~~owner.

(2) Manufacture, distribute, wholesale or transport any article for profit, or possess for ~~such~~ these purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a)(1) of this section. ~~are so transferred, without consent of the owner,~~

(a1) It shall be unlawful for any person to:

~~(3)~~(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds at a live ~~concert,~~ performance, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, ~~such~~ the article on which sounds are so transferred, without consent of the ~~owner,~~owner.

~~(4)~~(2) Manufacture, distribute, transport or wholesale any ~~such~~ article for profit, or possess for ~~such~~ those purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a1)(1) of this section. ~~are so transferred, without consent of the owner.~~

(b) Subdivisions (a)(1) and (a)(2) of this section shall apply only to sound recordings that were initially fixed prior to February 15, 1972. Federal copyright law, 17 U.S.C. § 101 et seq., preempts State prosecution of the acts described in subdivisions (a)(1) and (a)(2) with respect to sound recordings initially fixed on or after February 15, 1972.

(c) This section shall not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds other than from

the sound track of a motion picture intended for, or in connection with broadcast or telecast transmission or related uses, or for archival purposes."

SECTION 3. G.S. 14-435 reads as rewritten:

"**§ 14-435. Recorded devices to show true name and address of manufacturer.**

~~Ninety days after January 1, 1975, every article knowingly sold or transferred or possessed for the purpose of sale, advertising or offering for sale or resale, renting or transporting or causing to be rented or transported by any manufacturer, distributor, or wholesale or retail merchant shall contain on its packaging the true name and address of the manufacturer. The term "manufacturer" shall not include the manufacturer of the cartridge or casing itself.~~

(a) A person is guilty of failure to disclose the origin of an article when, for commercial advantage or private financial gain, the person advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any article, the packaging, cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer of the article and the name of the actual author, artist, performer, producer, programmer, or group.

(b) This section does not require the original manufacturer or authorized licensees of software producers to disclose the contributing authors or programmers. As used in this section, the term "manufacturer" shall not include the manufacturer of the article's packaging, cover, box, jacket, or label itself."

SECTION 4. G.S. 14-436 reads as rewritten:

"**§ 14-436. Recorded devices; civil action for damages.**

Any owner of an article as defined in this ~~Chapter~~ Article whose work is allegedly the subject of a violation of G.S. 14-433 or ~~14-434~~,G.S. 14-434, shall have a cause of action in the courts of this State for all damages resulting ~~therefrom~~ from the violation, including actual, compensatory and incidental damages."

SECTION 5. G. S. 14-437(a) reads as rewritten:

"(a) Every individual act in knowing contravention of the provisions of this Article shall constitute a Class 1 misdemeanor, except that the offense is a Class I felony with a maximum fine of one hundred fifty thousand dollars ($150,000), if (i) the offense involves at least 100 unauthorized articles during any 180-day period, or (ii) is a third or subsequent conviction for an offense that involves at least 26 unauthorized articles during any 180 day period.

~~(1) A Class I felony, which may include a fine of not more than one hundred fifty thousand dollars ($150,000), if the offense involves at least 1,000 unauthorized sound recordings or at least 100 unauthorized audio visual recordings during any 180-day period or is a second or subsequent conviction under either subdivision (1) or (2) of this section;~~

~~(2) A Class 1 misdemeanor, if the offense involves more than 100 but less than 1,000 unauthorized sound recordings or more than 10 but less than 100 unauthorized audio visual recordings during any 180□day period;~~

~~(3) A Class 2 misdemeanor, for any other violation of these sections.~~"

SECTION 6. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

HOUSE BILL 42: Criminal Unauthorized Recordings.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Reps. Goodwin, Hall, Moore & Stiller
Date:	March 13, 2003		
Version:	H42-CSRH-3[v.1]	**Summary by:**	Robin Johnson Robin Committee Counsel

SUMMARY: ***This bill would clarify the statutory provisions that prohibit the transfer of a copyrighted work to another medium, the recording of a live performance, and the manufacture and distribution of unlawfully transferred recordings. The penalty provisions would be amended to reduce the number of unlawful articles involved to categorize the offense as a felony. The act would be effective December 1, 2003, and would apply to offenses committed on or after that date.***

The PCS clarifies that the maximum $150,000 penalty applies only to offenses that are Class I felonies, deletes "knowingly" from Section 3 and inserts "knowing" in Section 5, and changes the number of unauthorized articles for offenses that can be Class I felonies.

CURRENT LAW: Federal copyright law preempts State law with regard to prosecutions of persons who transfer copyrighted works from one fixed medium to another. However, federal law provides one exception: a State may prosecute persons who unlawfully transfer sound recordings that were originally fixed prior to February 15, 1972. In addition, and regardless of the date when a sound recording was fixed, the State may prosecute a person for selling the recording if the person has not put the true name of the manufacturer on the product. Federal courts have held that these types of statutes (e.g., G.S. 14-435) have a consumer protection function, and therefore do not protect rights that are merely "equivalent" to those rights protected by federal copyright law.

BACKGROUND: Last Session, a similar bill (SB 1123), was introduced upon the recommendation of the Joint Select Committee on Information Technology. It passed through the Senate and received a favorable report from House Judiciary III, but failed to pass the House before adjournment.

BILL ANALYSIS:

Section 1 would amend G.S. 14-432 by reorganizing the definitions and adding a new term -"fixed" – that would be defined using the definition from federal copyright law.

Section 2 would make clarifying changes to G.S. 14-433, which prohibits the transfer of sound recordings from one medium to another, the recording of live performances, and the manufacture, distribution, wholesale, or transport of these articles.

Section 3 would amend G.S. 14-435, which currently requires that the actual true name of the manufacturer must appear on an article, by expanding this requirement to include the actual true name of the author, artist, performer, producer, programmer, or group. Original manufacturers of software or authorized licensees of software producers would not be required to disclose contributing authors or programmers. Disclosure of the manufacturer of the packaging, cover, box, jacket or label associated with the article would not be required.

Section 4 would amend G.S. 14-436 by substituting "Article" for "Chapter."

Section 5 would rewrite G.S. 14-337(a) to reduce (from 1,000 to 100) the number of "articles" involved to qualify the offense as a Class I felony and to reduce the number of articles involved to qualify the offense as a Class 1 misdemeanor. The term "article" includes both sound recordings and audio visual works, which is the current law. The changes would clarify, for example, that it is not the number of individual recordings on a compact disc (the tangible medium) that are counted to determine the classification of the offense; it is the number of compact discs (the "articles" to be counted).

PENALTY	CURRENT LAW	1ST EDITION	PCS (H42-CSRH-1[v.1]
CLASS I FELONY	*1ST Offense*: 1000+ sound 100+ AV During 180-day period *2nd & Subseq Offense:* 101+ sound 11-99 AV During 180 day period	*1st Offense:* 100+ articles During 180-day period *2nd Offense & Subseq:* 1+ articles No time period	*1st & 2nd Offense*: 100+ articles During 180-day period *3rd & Subseq. Offense:* 26+ articles During 180-day period
CLASS 1 MISDEMEANOR.	*1st Offense:* 101-999 sound 11-99 AV During 180 day period	*1st Offense:* 1-99 articles No time period	*1st & 2nd Offense:* 1-99 articles No time period *Subseq Offense:* 1-25 articles No time period
CLASS 2 MISDEMEANOR	*All Offenses:* 1-100 sound 1-10 AV No time period		

Section 6: The act is effective December 1, 2003, and applies to offenses committed on or after that date.

H42-SMRH-02 (Hal Pell, Staff Attorney, substantially contributed to this summary.)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 357

Short Title:	No Credit Card Number on Receipts.	(Public)
Sponsors:	Representatives Barnhart; Alexander, Bowie, Frye, Gulley, Hilton, Holliman, Howard, Justus, Luebke, McAllister, McHenry, Miller, Pate, Preston, Ray, Rhodes, Setzer, Sherrill, Tolson, West, K. Williams, C. Wilson, and Wood.	
Referred to:	Judiciary II.	

March 10, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT ANY PERSON ENGAGED IN COMMERCE, IN CONNECTION WITH ANY SALE OF GOODS OR SERVICES TO A CONSUMER PAID BY CREDIT CARD, FROM PRINTING THE ENTIRE NUMBER OF THE CREDIT CARD ON ANY RECEIPT FOR THE SALE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 75 of the General Statutes is amended by adding a new section to read:

"**§ 75-36. Disclosure of credit card information prohibited.**

(a) No person, firm, association, or corporation engaged in commerce shall, in connection with any sale of goods or services to a consumer in which the consumer pays by credit card, print or cause to be printed on any receipt for the sale the credit card number in its entirety.

(b) A violation of this section is an unfair trade practice under G.S. 75-1.1."

SECTION 2. This act becomes effective January 1, 2004, and applies to any sale of goods or services that occurs on or after that date.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 13, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Dolegas. Montgomery	Secretary of State
Kiki Dunton	NCPIRG
Betty Turner	Bank of America
Tom Sri	NCRMA
Andy Elken	NCRMA
Paula A. Wolf	Covenant w/NC's Children
Amy Fullbright	Hunton & Williams
Karen Stam	
Jerry Wilkins	NCRA
Michelle Frazier	NC Bar Ass'n

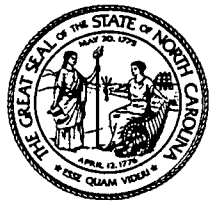
VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 13, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Camille Steele	Kennedy Covington
Richard Rusler	RIAA
Julie Allen	NC Statewatch
Porter	Smith Anderson.
Mark Benson	Capitol Group
Chris Nichols	Hunton + Williams
B.M. Westbrook	UTC
Mike Okun	NC State AFL CIO
Paul Stock	NC Bankers Assn.
Roz Sawyer	NCCC
Charlene Dawkins	Sec. of State



AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, March 13, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

   HB 42 (Criminal Unauthorized Recordings)
   Rep. Wayne Goodwin, Bill Sponsor

   HB 357 (No credit Card Number on Receipts)
   Rep. Jeff Barnhart, Bill Sponsor

3. **Adjourn.**

HOUSE BILL 42:
Criminal Unauthorized Recordings.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Reps. Goodwin, Hall, Moore & Stiller
Date:	March 13, 2003		
Version:	H42-CSRH-3[v.1]	**Summary by:**	Robin Johnson Robin Committee Counsel

SUMMARY: ***This bill would clarify the statutory provisions that prohibit the transfer of a copyrighted work to another medium, the recording of a live performance, and the manufacture and distribution of unlawfully transferred recordings. The penalty provisions would be amended to reduce the number of unlawful articles involved to categorize the offense as a felony. The act would be effective December 1, 2003, and would apply to offenses committed on or after that date.***

The PCS clarifies that the maximum $150,000 penalty applies only to offenses that are Class I felonies, deletes "knowingly" from Section 3 and inserts "knowing" in Section 5, and changes the number of unauthorized articles for offenses that can be Class I felonies.

CURRENT LAW: Federal copyright law preempts State law with regard to prosecutions of persons who transfer copyrighted works from one fixed medium to another. However, federal law provides one exception: a State may prosecute persons who unlawfully transfer sound recordings that were originally fixed prior to February 15, 1972. In addition, and regardless of the date when a sound recording was fixed, the State may prosecute a person for selling the recording if the person has not put the true name of the manufacturer on the product. Federal courts have held that these types of statutes (e.g., G.S. 14-435) have a consumer protection function, and therefore do not protect rights that are merely "equivalent" to those rights protected by federal copyright law.

BACKGROUND: Last Session, a similar bill (SB 1123), was introduced upon the recommendation of the Joint Select Committee on Information Technology. It passed through the Senate and received a favorable report from House Judiciary III, but failed to pass the House before adjournment.

BILL ANALYSIS:

Section 1 would amend G.S. 14-432 by reorganizing the definitions and adding a new term -"fixed" – that would be defined using the definition from federal copyright law.

Section 2 would make clarifying changes to G.S. 14-433, which prohibits the transfer of sound recordings from one medium to another, the recording of live performances, and the manufacture, distribution, wholesale, or transport of these articles.

Section 3 would amend G.S. 14-435, which currently requires that the actual true name of the manufacturer must appear on an article, by expanding this requirement to include the actual true name of the author, artist, performer, producer, programmer, or group. Original manufacturers of software or authorized licensees of software producers would not be required to disclose contributing authors or programmers. Disclosure of the manufacturer of the packaging, cover, box, jacket or label associated with the article would not be required.

Section 4 would amend G.S. 14-436 by substituting "Article" for "Chapter."

Section 5 would rewrite G.S. 14-337(a) to reduce (from 1,000 to 100) the number of "articles" involved to qualify the offense as a Class I felony and to reduce the number of articles involved to qualify the offense as a Class 1 misdemeanor. The term "article" includes both sound recordings and audio visual works, which is the current law. The changes would clarify, for example, that it is not the number of individual recordings on a compact disc (the tangible medium) that are counted to determine the classification of the offense; it is the number of compact discs (the "articles" to be counted).

PENALTY	CURRENT LAW	1ST EDITION	PCS (H42-CSRH-1[v.1]
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CLASS 1 MISDEMEANOR.	*1st Offense:* 101-999 sound 11-99 AV During 180 day period	*1st Offense:* 1-99 articles No time period	*1st & 2nd Offense:* 1-99 articles No time period *Subseq Offense:* 1-25 articles No time period
CLASS 2 MISDEMEANOR	*All Offenses:* 1-100 sound 1-10 AV No time period		

Section 6: The act is effective December 1, 2003, and applies to offenses committed on or after that date.

H42-SMRH-02 (Hal Pell, Staff Attorney, substantially contributed to this summary.)

HOUSE BILL 42

Short Title:	Criminal Unauthorized Recordings.	(Public)
Sponsors:	Representatives Goodwin, Hall, Moore, and Stiller (Primary Sponsors).	
Referred to:	Judiciary II.	

February 20, 2003

A BILL TO BE ENTITLED

AN ACT MODIFYING THE FELONY AND MISDEMEANOR OFFENSES RELATED TO CONDUCTING CERTAIN UNAUTHORIZED SOUND AND VIDEO RECORDINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-432 reads as rewritten:

"**§ 14-432. Definitions.**

~~As used in this Article "owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance; "article" means the tangible medium upon which sounds or images are recorded or any original phonograph record, disc, tape, audio or video cassette, wire, film or other medium now known or later developed on which sounds or images are or can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.~~The following definitions apply in this Article:

(1) "Article" means the tangible medium upon which sounds or images are recorded or otherwise stored, including any original phonograph record, disc, tape, audio or video cassette, wire, film, or other medium now known or later developed on which sounds or images, or both, can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.

(2) "Fixed" means that the work has been recorded in a tangible medium of expression, by or under the authority of the author, and its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or

both, that are being transmitted, is "fixed" for the purposes of this section if a fixation of the work is being made simultaneously with its transmission.

(3) "Owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film, or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films, or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance."

SECTION 2. G.S. 14-433 reads as rewritten:

"**§ 14-433. Recording of live ~~concerts~~ performances or recorded sounds and distribution, etc., of such recordings unlawful in certain circumstances.**

(a) It shall be unlawful for any person to:

(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which sounds are so transferred, without consent of the ~~owner,~~owner.

(2) Manufacture, distribute, wholesale or transport any article for profit, or possess for ~~such~~ these purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a)(1) of this section. ~~are so transferred, without consent of the owner,~~

(a1) It shall be unlawful for any person to:

~~(3)~~(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds at a live ~~concert,~~ performance, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, ~~such~~ the article on which sounds are so transferred, without consent of the ~~owner,~~owner.

~~(4)~~(2) Manufacture, distribute, transport or wholesale any ~~such~~ article for profit, or possess for ~~such~~ those purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a1)(1) of this section. ~~are so transferred, without consent of the owner.~~

(b) Subdivisions (a)(1) and (a)(2) of this section shall apply only to sound recordings that were initially fixed prior to February 15, 1972. Federal copyright law, 17 U.S.C. § 101 et seq., preempts State prosecution of the acts described in subdivisions (a)(1) and (a)(2) with respect to sound recordings initially fixed on or after February 15, 1972.

(c) This section shall not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds other than from the sound track of a motion picture intended for, or in connection with broadcast or telecast transmission or related uses, or for archival purposes."

SECTION 3. G.S. 14-435 reads as rewritten:

"**§ 14-435. Recorded devices to show true name and address of manufacturer.**

~~Ninety days after January 1, 1975, every article knowingly sold or transferred or possessed for the purpose of sale, advertising or offering for sale or resale, renting or transporting or causing to be rented or transported by any manufacturer, distributor, or wholesale or retail merchant shall contain on its packaging the true name and address of the manufacturer. The term "manufacturer" shall not include the manufacturer of the cartridge or casing itself.~~

(a) A person is guilty of failure to disclose the origin of an article when, for commercial advantage or private financial gain, the person knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any article, the packaging, cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer of the article and the name of the actual author, artist, performer, producer, programmer, or group.

(b) This section does not require the original manufacturer or authorized licensees of software producers to disclose the contributing authors or programmers. As used in this section, the term "manufacturer" shall not include the manufacturer of the article's packaging, cover, box, jacket, or label itself."

SECTION 4. G.S. 14-436 reads as rewritten:

"**§ 14-436. Recorded devices; civil action for damages.**

Any owner of an article as defined in this ~~Chapter~~ Article whose work is allegedly the subject of a violation of G.S. 14-433 or ~~14-434~~,G.S. 14-434, shall have a cause of action in the courts of this State for all damages resulting ~~therefrom~~ from the violation, including actual, compensatory and incidental damages."

SECTION 5. G. S. 14-437(a) reads as rewritten:

"(a) Every individual act in contravention of the provisions of this Article shall constitute a Class 1 misdemeanor, except that the offense is a Class I felony, with a maximum fine of one hundred fifty thousand dollars ($150,000), if (i) the offense involves at least 100 unauthorized articles during any 180-day period, or (ii) is a second or subsequent conviction for an act in violation of this Article.

~~(1) A Class I felony, which may include a fine of not more than one hundred fifty thousand dollars ($150,000), if the offense involves at least 1,000 unauthorized sound recordings or at least 100 unauthorized audio visual recordings during any 180-day period or is a second or subsequent conviction under either subdivision (1) or (2) of this section;~~

~~(2) A Class 1 misdemeanor, if the offense involves more than 100 but less than 1,000 unauthorized sound recordings or more than 10 but less than 100 unauthorized audio visual recordings during any 180□day period;~~

~~(3) A Class 2 misdemeanor, for any other violation of these sections.~~"

SECTION 6. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the

effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

2003 COMMITTEE REPORT
HOUSE OF REPRESENTATIVES

The following report(s) from standing committee(s) is/are presented:
By Representative(s) **Nesbitt** (Chair) for the Committee on **Judiciary II.**

☐ Committee Substitute for
H.B. 42 A BILL TO BE ENTITLED AN ACT MODIFYING THE FELONY AND MISDEMEANOR OFFENSES RELATED TO CONDUCTING CERTAIN UNAUTHORIZED SOUND AND VIDEO RECORDINGS.

☐ With a favorable report.

☐ With a favorable report and recommendation that the bill be re-referred to the Committee on Appropriations ☐ Finance ☐ ☐.

☐ With a favorable report, as amended.

☐ With a favorable report, as amended, and recommendation that the bill be re-referred to the Committee on Appropriations ☐ Finance ☐ ☐.

☒ **With a favorable report as to the committee substitute bill , ☒, unfavorable as to the original bill.**

☐ With a favorable report as to House committee substitute bill (#), ☐ which changes the title, unfavorable as to Senate committee substitute bill.

☐ With an unfavorable report.

☐ With recommendation that the House concur.

☐ With recommendation that the House do not concur.

☐ With recommendation that the House do not concur; request conferees.

☐ With recommendation that the House concur; committee believes bill to be material.

☐ With an unfavorable report, with a Minority Report attached.

☐ Without prejudice.

☐ With an indefinite postponement report.

☐ With an indefinite postponement report, with a Minority Report attached.

☐ With recommendation that it be adopted. (HOUSE RESOLUTION ONLY)

1/29/03

FOR JOURNAL USE ONLY

____ Pursuant to Rule 36(b), the bill is placed on the Calendar of _____.

____ The (committee substitute) bill/resolution (, as amended,) is (ordered engrossed and) re-referred to the Committee on _____.

____ The bill/resolution is re-referred to the Committee on _____.

____ On motion of (Rep. _____,) (the Chair,) the (committee substitute) bill/resolution is (ordered engrossed and) re-referred to the Committee on _____.

____ Pursuant to Rule 36(b), the (House)committee substitute bill (No. ____)/resolution is placed on the Calendar of _____. (The original bill) (House Committee Substitute Bill No. ____)/resolution is placed on the Unfavorable Calendar.

____ On motion of Rep. _____, (the rules are suspended) (Rule ____ is suspended) and the bill/resolution is placed on today's calendar. (for immediate consideration.)

____ On motion of Rep. _____, Committee Amendment No.(s) _____ is/are adopted (by EV____ ____).

____ On motion of Rep. _____, Committee Amendment No.(s) _____ is/are adopted (by EV____ ____).

____ Rep. _____ offers Amendment No. _____ which (is adopted.) (fails of adoption.) (by EV ____ ____.) ( ) This amendment changes the title.

____ The bill/resolution (, as amended,) passes its second reading (by following vote, ____ ____ RC) (, by EV ____ ____,) and (remains on the Calendar,) (and there being no objection is read a third time).

____ The bill/resolution (, as amended,) passes its third reading (by the following vote, ____ ____ RC) (, by EV ____ ____,) and is ordered
____ sent to the Senate.
____ without engrossment. ____ by Special message.
____ sent to the Senate for concurrence in
_____ the House amendment (s).
_____the House committee substitute bill.
____ enrolled.

____ On motion of Rep. _____, the House concurs in the (material) Senate _____ (by the following vote, ____ ____ RC) (, by EV ____ ____,) and the bill is ordered enrolled.

3-13-03

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H D

HOUSE BILL 42
PROPOSED COMMITTEE SUBSTITUTE H42-CSRH-3 [v.1]

3/12/2003 6:55:09 PM

Short Title: Criminal Unauthorized Recordings. (Public)

Sponsors:

Referred to:

February 20, 2003

A BILL TO BE ENTITLED

AN ACT MODIFYING THE FELONY AND MISDEMEANOR OFFENSES RELATED TO CONDUCTING CERTAIN UNAUTHORIZED SOUND AND VIDEO RECORDINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-432 reads as rewritten:

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~~As used in this Article "owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance; "article" means the tangible medium upon which sounds or images are recorded or any original phonograph record, disc, tape, audio or video cassette, wire, film or other medium now known or later developed on which sounds or images are or can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.~~The following definitions apply in this Article:

(1) "Article" means the tangible medium upon which sounds or images are recorded or otherwise stored, including any original phonograph record, disc, tape, audio or video cassette, wire, film, or other medium now known or later developed on which sounds or images, or both, can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.

(2) "Fixed" means that the work has been recorded in a tangible medium of expression, by or under the authority of the author, and its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of

more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for the purposes of this section if a fixation of the work is being made simultaneously with its transmission.

(3) "Owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film, or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films, or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance."

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(2) Manufacture, distribute, wholesale or transport any article for profit, or possess for ~~such~~ these purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a)(1) of this section. ~~are so transferred, without consent of the owner,~~

(a1) It shall be unlawful for any person to:

~~(3)~~(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds at a live ~~concert,~~ performance, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, ~~such~~ the article on which sounds are so transferred, without consent of the ~~owner,~~owner.

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(b) Subdivisions (a)(1) and (a)(2) of this section shall apply only to sound recordings that were initially fixed prior to February 15, 1972. Federal copyright law, 17 U.S.C. § 101 et seq., preempts State prosecution of the acts described in subdivisions (a)(1) and (a)(2) with respect to sound recordings initially fixed on or after February 15, 1972.

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the sound track of a motion picture intended for, or in connection with broadcast or telecast transmission or related uses, or for archival purposes."

SECTION 3. G.S. 14-435 reads as rewritten:

"**§ 14-435. Recorded devices to show true name and address of manufacturer.**

~~Ninety days after January 1, 1975, every article knowingly sold or transferred or possessed for the purpose of sale, advertising or offering for sale or resale, renting or transporting or causing to be rented or transported by any manufacturer, distributor, or wholesale or retail merchant shall contain on its packaging the true name and address of the manufacturer. The term "manufacturer" shall not include the manufacturer of the cartridge or casing itself.~~

(a) A person is guilty of failure to disclose the origin of an article when, for commercial advantage or private financial gain, the person advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any article, the packaging, cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer of the article and the name of the actual author, artist, performer, producer, programmer, or group.

(b) This section does not require the original manufacturer or authorized licensees of software producers to disclose the contributing authors or programmers. As used in this section, the term "manufacturer" shall not include the manufacturer of the article's packaging, cover, box, jacket, or label itself."

SECTION 4. G.S. 14-436 reads as rewritten:

"**§ 14-436. Recorded devices; civil action for damages.**

Any owner of an article as defined in this ~~Chapter~~ Article whose work is allegedly the subject of a violation of G.S. 14-433 or ~~14-434~~,G.S. 14-434, shall have a cause of action in the courts of this State for all damages resulting ~~therefrom~~ from the violation, including actual, compensatory and incidental damages."

SECTION 5. G. S. 14-437(a) reads as rewritten:

"(a) Every individual act in knowing contravention of the provisions of this Article shall constitute a Class 1 misdemeanor, except that the offense is a Class I felony with a maximum fine of one hundred fifty thousand dollars ($150,000), if (i) the offense involves at least 100 unauthorized articles during any 180-day period, or (ii) is a third or subsequent conviction for an offense that involves at least 26 unauthorized articles during any 180 day period.

~~(1) A Class I felony, which may include a fine of not more than one hundred fifty thousand dollars ($150,000), if the offense involves at least 1,000 unauthorized sound recordings or at least 100 unauthorized audio visual recordings during any 180-day period or is a second or subsequent conviction under either subdivision (1) or (2) of this section;~~

~~(2) A Class 1 misdemeanor, if the offense involves more than 100 but less than 1,000 unauthorized sound recordings or more than 10 but less than 100 unauthorized audio visual recordings during any 180□day period;~~

~~(3) A Class 2 misdemeanor, for any other violation of these sections.~~"

SECTION 6. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

House Judiciary II

Committee

Minutes

March 18, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order.

HB 147 (Left Turn on Red), sponsored by Rep. Jim Gulley, and **HB 393** (Modify County Tax Certification authority) sponsored by Rep. Paul Stam were on the Agenda.

Rep. Gulley was recognized to explain his bill. He presented the Committee with a proposed committee substitute and Rep. Goodwin moved for its adoption. The motion carried. A copy is a part of these Minutes as *Attachment I.*

Rep. Gulley said the committee substitute was entirely technical. He said the bill would permit a left turn on red from the leftmost lane of travel of an intersecting one-way street. He said the bill would be good for the environment because traffic would flow better. The legislation would allow conformity with other states as well. But the best thing, he said, is there is little cost involved.

Rep. Bonner wanted to know how many states have this law in place.

Rep. Gulley said the numbers of states that have adopted this law are between 43 and 47. Staff added that it was legal in the State of New York, but not for New York City.

Committee Counsel, Robin Johnson was asked to give a bill analysis of the Committee Substitute bill. A copy of this analysis is a part of these Minutes as *Attachment II.*

Rep. Walend commented that the DMV Driving Manuals would need to be updated if this law passed.

Ken Ivey from the Department of Transportation, Traffic Engineering Branch, said that the department did not object to the bill.

Rep. Goodwin told the Committee that he had introduced similar legislation in past sessions and that he believed this would increase public safety.

Rep. Ellis disagreed. He said the convenience it would give the citizens as drivers wasn't worth the possible risks it might create for visually impaired people.

Mr. Ben Eason, representing the North Carolina Association of the Blind, as well as blind citizens of North Carolina, spoke against the bill. A copy of his comments is a part of these Minutes *Attachment III.*

When Mr. Eason concluded his remarks, Rep. Stam moved to give the proposed committee substitute bill a favorable report and the original bill an unfavorable report. He said he supported this legislation because it would provide consistency with laws of other states. The motion carried.

Rep. Stam was recognized to explain **HB 393** (Modify County tax Certification Authority). He said he just wanted to give a brief explanation, but would prefer that no vote would be taken. He explained that he does many real estate closings and that **HB 393** would amend N.C. G.S. 161-31 which provides that in certain counties, the board of county commissioners may adopt a resolution to require the register of deeds to refuse to register a deed unless the county tax collector has certified that no delinquent taxes are due on the property. This provision applies to approximately forty-five counties. **HB 393** would provide that a register of deeds, serving in a county where tax collector certification of a deed is normally required prior to registration, shall accept, without certification, pursuant to a resolution adopted under subsection (a) of Section 1 of G.S. 161-31, a deed submitted for recording under the supervision of a closing attorney and containing the following statement on the deed: *"This instrument prepared by _____. Delinquent taxes to be paid upon disbursement of closing proceeds."* A copy of HB 393 is a part of these Minutes as *Attachment IV.*

Rep. Nesbitt said that another problem with this requirement is that it might result in un-recorded deeds.

Rep. Nesbitt referred to a letter written by W. A. (Pete) Rodda, CAE, Forsyth County Tax Assessor/Collector in which Mr. Rodda said he and Tax Assessors and Collectors Joint

Legislative Committee oppose the bill in its current form. A copy of this letter is a part of these Minutes as *Attachment V.*

Mr. Ed Regan with the Association of County Commissioners said the he feels the bill is well intentioned, but needs clarification.

HB 393 was carried over.

The meeting adjourned at 10:50 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H D

HOUSE BILL 147
PROPOSED COMMITTEE SUBSTITUTE H147-CSRQ-3 [v.1]

3/17/2003 6:11:26 PM

Short Title: Left Turn on Red. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT LEFT TURNS ON RED IN CERTAIN SITUATIONS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-158(b) reads as rewritten:

"(b) Control of Vehicles at Intersections. –

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) ~~Vehicles facing a red light controlling traffic passing straight through an intersection from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light controlling traffic passing straight through an intersection; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light controlling traffic passing straight through an intersection, after coming to a complete stop at the intersection, may enter the intersection to make a right turn but such vehicle shall yield the right of way to pedestrians and to other traffic using the intersection.~~ When a steady or strobe beam stoplight is emitting a red light controlling traffic passing through an intersection, an approaching vehicle facing the red light shall come to a stop and shall not enter the intersection. After coming to a complete stop and unless prohibited by an appropriate sign, that approaching vehicle may turn under one of the following conditions:

a. That vehicle may make a right turn. The turning vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection.

b. If that vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with traffic traveling from the turning driver's right to the turning driver's left, then that vehicle may enter the intersection and make a left turn into the extreme left-hand lane lawfully available to traffic. The turning vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection.

(2a) When ~~the~~ a stoplight is emitting a steady yellow circular light on a traffic signal controlling traffic passing straight through an intersection or a steady yellow arrow light on a traffic signal controlling traffic turning at an intersection, vehicles facing the yellow light are warned that the related green light is being terminated or a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) of this section requires a vehicle to stop at an intersection, the driver shall stop (i) at an appropriately marked stop line, or if none, (ii) before entering a marked crosswalk, or if none, (iii) before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street."

SECTION 2. This act becomes effective October 1, 2003.

HOUSE BILL 147: Left Turn on Red.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Gulley
Date:	March 18, 2003	**Summary by:**	Robin S. Johnson
Version:	First		Committee Counsel

SUMMARY: ***House Bill 147 would permit a left turn on red from the leftmost lane of travel on a one-way street to the leftmost lane of travel of an intersecting one-way street. The turning driver must first come to a complete stop and must yield the right-of-way to pedestrians and traffic using the intersection.***

The bill would take effect October 1, 2003.

CURRENT LAW: At present, a right turn on red is allowed in North Carolina, except where prohibited by a sign. Left turns on red are prohibited.

BILL ANALYSIS: The bill would amend G.S. 20-158(b), by allowing certain drivers to make a left turn after stopping at a red light, unless prohibited by a sign at that intersection. If not so prohibited, and after coming to a complete stop and yielding the right-of-way to pedestrians and traffic using the intersection, the driver of a vehicle in the leftmost lane of a one-way street would be allowed to turn left into the leftmost lane lawfully available to traffic. The street onto which the left turn is made must also be a one-way street with traffic traveling from the turning driver's right to the driver's left.

Violation of this provision would be a moving violation that is an infraction, punishable by a maximum penalty of $100. Three driver's license points would be assigned for failure to yield right-of-way or running through a red light. Only one insurance point would be assigned.

The bill would become effective October 1, 2003.

BACKGROUND: In the last two Sessions, the House passed similar bills, which subsequently failed to pass in the Senate. As of November 2002, 44 states and the District of Columbia allow some form of left turn on red.

POSITION PAPER
RE: HOUSE BILL 147 (TURN LEFT ON RED)
BY: BLIND CITIZENS OF NORTH CAROLINA

Due to many factors, including favorable legislation that has enabled blind citizens to compensate for their loss of vision through education, vocational training, environment, etc., blind persons of this state have prospered as contributing citizens. The passage of Turn Left on Red (House Bill 147) will create a safety hazard that will be detrimental to blind persons of this state, or to any pedestrian, as they will no longer be able to listen to traffic flow as a guide for crossing streets. Furthermore, it can be determined by standing at one of Raleigh's busy intersections that drivers no longer give pedestrians the opportunity to cross before turning right on red. The situation will be exacerbated when drivers following the same pattern of not giving the pedestrian the right of way are allowed to Turn Left on Red. If you were a blind person, would you take that chance?

Misconceptions of proponents of House Bill 147:

1. The majority of states have Turn Left on Red, therefore passage of the bill will give blind persons experience that will enable them to travel in other states.

   Answer:
   A. Blind persons in other states do not cross at busy Turn Left on Red intersections.

   B. Most cities the size of Charlotte and Raleigh have more travel assistance, such as United Way volunteers, audible signals, and more sophisticated public transportation systems.

   C. A blind person does not visit an unknown city and walk unknown routes. You cannot cross intersections unless you know cars will stop at red lights.

2. Blind persons oppose everything. They opposed Turn Right on Red, and that turned out all right.

   Answer: Blind persons, as do other citizens, oppose legislation that will interfere with a normal, productive lifestyle. Blind persons did not oppose Turn Right on Red. We did not know that it was law until after the General Assembly acted upon it. In the late seventies, the US Highway Safety Council indicated pedestrian accidents had risen about 17% since Turn Right on Red was enacted.

3. The majority of other states have Turn Left on Red. Therefore, because of driver expectations, we should have similar laws. Drivers will turn left on red anyway.

Answer: If a state is not to determine what is best for its citizens, considering the minority, why not have national regulations? After a majority of states have passed a regulation, should it become law for all states? Then why not let the US Congress pass all highway regulations?

4. Turn Left on Red will help large cities eliminate gasoline fumes.

   Answer: Passage of this bill will allow more cars to pack our streets and will discourage pedestrians from using the street. They will use their cars to travel a few blocks because it is unsafe to cross at intersections. Many large cities that exceed US pollution standards have Turn Left on Red.

5. North Carolina will lose federal funds if Turn Left on Red is not adopted.

   Answer:

   A. The 1992 Federal Legislation was concerned about pedestrian safety. Therefore, the phrase "safety permitting" was incorporated and a study by Highway Safety was requested within two years. The report to the Congress by this body essentially stated that no studies were available. We can furnish you with these documents.

   B. Last year, a Federal Grant was given to Western Michigan University to study the complex safety problems of visually impaired persons. This study should, in our opinion, be completed before North Carolina considers Turn Left on Red.

   C. Read "Walking Can Be Risky in Triangle" (The News and Observer, June 16, 2000) – This study finds that Triangle pedestrian injuries ranked 23rd in the country, but the greater Charlotte area was 13th.

A Truth: Legislators of this state have always wanted to hear from the opponents as well as the proponents of legislation. They want to know how the legislation will affect minority groups as well as the majority. That is the reason that if you have to be blind, it is better to be blind in North Carolina.

Thank you for continuing to listen to blind persons. Sighted proponents of a bill cannot walk in our shoes.

For more information, please contact Ben Eason (919) 833-7661.

WESTERN MICHIGAN UNIVERSITY
WESTERN NEWS

Volume 26, Number 20 www.wmich.edu/wmu/news July 13, 2000

Pedestrian mobility focus of new blind rehabilitation research

A $4 million, five-year federal grant to a research project based at WMU will fund a multidisciplinary effort aimed at finding solutions to mobility challenges facing people who are blind and visually impaired—challenges that are cropping up more and more in today's complex pedestrian environments.



Long

The project, titled "Blind Pedestrians' Access to Complex Intersections," is funded by the National Eye Institute, part of the National Institutes of Health. It was proposed and is being coordinated by the Department of Blind Rehabilitation and the College of Health and Human Services. The effort pairs WMU researchers with teams of engineers, orientation and mobility instructors, highway safety researchers and experimental psychologists at four partner institutions—Boston College, Vanderbilt University, the Maryland School for the Blind and the University of North Carolina's Highway Safety Research Center.

The total grant amount is $4,047,834, which will be awarded over the five-year period. The first year's award is expected to be $850,037. Grant funds will be shared among the participating institutions.

"This is a very substantial award and a very exciting opportunity for us," says Richard Long, blind rehabilitation and director of the project. "The size and scope of the partnership and the substantial expertise of our collaborators will allow us to make significant progress in improving the pedestrian environment for persons who are blind and visually impaired."

Also playing key roles in the effort will be David Guth and Paul Ponchillia, both blind rehabilitation, and John W. Gesink, electrical and computer engineering.

"Probably the greatest strength of this project is that it involves a multidisciplinary approach," says William Wiener, chairperson of blind rehabilitation. "It is not just one department at Western Michigan University. It is a team of departments at a number of universities all working together.

"Through collaboration, the universities can do much more than on their own," Wiener says, "and the institutions involved are leading the way in their respective fields of expertise." For example, Wiener notes the Highway Safety Research Center at the University of North Carolina is among the top research centers for highway safety in the United States.

The institutions involved will bring their combined resources to bear on issues of increasing concern to blind individuals, orientation and mobility instructors, and transportation officials. For example, the increasing sophistication of traffic control devices and intersection designs is making city streets more challenging and potentially more risky for some people with visual impairments.

"The pedestrian travel environment has been getting much more complex in recent

(Continued on page two)

Pedestrian mobility *(Continued from page one)*

years," Wiener says. "Traffic signals used to be timed, so that you always had 25 or 30 seconds to complete a street crossing. Those fixed-timed signals are going the way of the dinosaur."

Wiener says that with the advent of signals activated by vehicle sensors and pedestrian call buttons at intersections, a number of new devices and systems have been developed that allow pedestrians who are blind to activate signals.

"We're going to be experimenting with all of those systems and working to improve them," Wiener says.

In addition to vehicle-activated signals, other challenges abound in the complex traffic landscape, say Wiener and Long.

"The environment is changing in ways that are not always friendly to people who are blind," Long says. "So we proposed a bioengineering research partnership to identify problems and to address them from a multidisciplinary perspective."

An example of such a multidisciplinary approach is a gyroscope-based training device designed by Gesink and Guth. The device, worn by the user, provides precise verbal feedback about an individual's trajectory while he or she is walking. It shows promise as a tool for improving blind people's ability to walk in a straight line.

The grant includes funds for engineering development and field testing of the "anti-veering training device."

In 1999, almost one-fourth (24 percent) of all children between the ages of 5 and 9 years who were killed in traffic crashes were pedestrians. Nearly one-fifth (19 percent) of all traffic fatalities under age 16 were pedestrians, and 7 percent of all the people under age 16 who were injured in traffic crashes were pedestrians.

Older pedestrians (ages 70+) accounted for 18 percent of all pedestrian fatalities and 6 percent of all pedestrians injured. The death rate for this group, both males and females, was 3.49 per 100,000 population — higher than for any other age group.

"Almost one-fourth of the children between 5 and 9 years old killed in traffic crashes in 1999 were pedestrians."

Table 1. Pedestrians Killed and Injured by Age Group, 1999

Age Group (years)	Total Killed	Pedestrians Killed	Percentage of Total Killed
0–4	733	163	22
5–9	795	194	24
10–15	1,403	210	15
16–20	5,917	273	5
21–24	3,884	231	6
25–29	3,641	286	8
30–34	3,180	334	11
35–39	3,423	454	13
40–44	3,296	451	14
45–49	2,702	382	14
50–54	2,206	310	14
55–59	1,814	271	15
60–64	1,421	212	15
65–69	1,471	208	14
70+	5,617	876	16
Unknown	108	51	—
Total	**41,611**	**4,906**	**12**

Age Group (years)	Total Injured	Pedestrians Injured	Percentage of Total Injured
0–4	76,000	3,000	4
5–9	112,000	10,000	9
10–15	185,000	14,000	8
16–20	574,000	8,000	1
21–24	315,000	4,000	1
25–29	331,000	7,000	2
30–34	296,000	7,000	2
35–39	288,000	5,000	2
40–44	237,000	6,000	2
45–49	211,000	5,000	3
50–54	170,000	4,000	2
55–59	115,000	2,000	2
60–64	78,000	2,000	3
65–69	75,000	3,000	4
70+	171,000	5,000	3
Total	**3,236,000**	**85,000**	**3**

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H **1**

HOUSE BILL 393

Short Title:	Modify County Tax Certification Authority.	(Public)
Sponsors:	Representative Stam.	
Referred to:	Judiciary II.	

March 11, 2003

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE AUTHORITY OF COUNTY COMMISSIONERS IN CERTAIN COUNTIES TO REQUIRE REGISTERS OF DEEDS NOT TO ACCEPT ANY DEED FOR REGISTRATION UNLESS THE COUNTY TAX COLLECTOR CERTIFIES THAT NO DELINQUENT TAXES ARE DUE ON THAT PROPERTY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 161-31(a) reads as rewritten:

"(a) Tax Certification. – The board of commissioners of a county may, by resolution, require the ~~register~~ registers of deeds not to accept any deed transferring real property for registration unless the county tax collector has certified that no delinquent ad valorem county taxes, ad valorem municipal taxes, or other taxes with which the collector is charged are a lien on the property described in the deed. The county commissioners may describe the form the certification must take in its resolution.

The registers of deeds shall accept without certification, pursuant to a resolution adopted under this subsection, a deed submitted for recording under the supervision of a closing attorney and containing this statement on the deed: 'This instrument prepared by: _____. Delinquent taxes to be paid upon disbursement of closing proceeds.'."

SECTION 2. This act is effective when it becomes law.

Rep. Paul Stam

From: roddawa@co.forsyth.nc.us
Sent: Tuesday, March 18, 2003 8:09 AM
[redacted] Martinn@ncleg.net; Wayneg@ncleg.net; Timm@ncleg.net
[redacted] Pauls@ncleg.net; eregan@ncacc.org
Subject: H 393

Good morning -

I am Pete Rodda, the Forsyth County Tax Assessor/Collector. I chair the North Carolina Tax Assessors and Collectors Joint Legislative Committee and I work closely with the Association of County Commissioners regarding legislative issues. Please do not hesitate to contact me if you have any questions or ideas regarding the property tax. The Forsyth County Commissioners fully support my involvement and assistance in legislative matters, so you are welcome to call.

I apologize for not being able to attend todays Judiciary II meeting. But I would like to comment on Rep. Stam's bill so that you will be aware of the reason for the certification process.

I would say that many attorneys practicing in real estate do a good job in making sure that taxes are paid before certifying title to real estate. Unfortunately, there are a number of circumstances in which property is conveyed with no title search, no certification of title or just plain sloppy work at closing. In Forsyth County alone I have well over 1,000 transfers a year in which taxes are NOT paid timely despite the existence of a proration agreement. When [redacted]ntacted, the attorneys involved in these transactions usually [redacted]e it clear that this is my problem - not theirs - and I should just [redacted]eclose on the property. Because the new owners did not own the property on January 1, I cannot proceed with attachment, garnishment or levy on the new owners - foreclosure is all that is left. All of this could be avoided by the attorney simply collecting and paying the prorated taxes.

In Forsyth County we have some 700 parcels with delinquent taxes that were owed at the time of transfer. The most common answer we get is "the buyer was going to pay after closing." The point is, if the buyer or seller doesn't pay, the only remedy the tax collector has is the expensive and time-consuming foreclosure process.

The point of the certification requirement before a deed may be recorded is to put an end to these situations. In my view H 393 would remove the clout from the certification process. There is no provision in H 393 for what happens if taxes are not paid from the proceeds, nor is there any obligation for the attorney to see that the taxes are paid. In short, H 393 would be a return to the problems that got us here.

We are certainly willing to meet with Representative Stam and others to further discuss this matter. But the Tax Assessors and Collectors must oppose this bill in its current form.

Thanks.

-Pete Rodda
[redacted]A. (Pete) Rodda, CAE
[redacted]syth County Tax Assessor/Collector
[redacted] Box 757
[redacted]inston-Salem, NC 27102
Work Telephone: (336) 727-2022

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, March 11, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bill:**

   HB 147 (Left Turn on Red.) Rep. Jim Gulley, Bill Sponsor

   HB 393 (Modify County Tax Certification Authority) Rep. Paul Stam, Bill Sponsor

3. **Adjourn.**

Representative Martin L. Nesbitt
Chairman
Committee on Judiciary II

Re: HB 393 (Modify County Tax Certification Authority)

March 14, 2003

Dear Representative Nesbitt:

I am writing to offer an explanation of the need for House Bill 393 sponsored by Rep. Paul Stam, and to express strong support of this legislation. The North Carolina Legislature has authorized certain counties to adopt resolutions requiring the certification of payment of all delinquent taxes prior to recording a conveyance of real property. This legislation aids county tax collectors in the recovery of delinquent ad valorem taxes.

In its present form, the legislation poses serious problems for real property closing attorneys. The requirements of the Good Funds Settlement Act and North Carolina State Bar ethical requirements prohibit disbursement prior to recording. The sellers with delinquent taxes rarely are able to pay the taxes prior to disbursement. The Tax Collector can not certify payment without unconditional receipt of funds without violating a criminal statue.

This Bill will permit an Attorney (or someone under the attorney's supervision) responsible for closing to record prior to payment if the conveyance states that the funds for delinquent taxes will be disbursed at closing. This adds no burden to closing attorneys since they are already responsible for clearing encumbrances. Nor, does it add to the risk of tax collection for the very same reason.

I am certain that most attorneys will agree with the concept, but many will criticize the text. It is best to keep such matters simple. Those with whom I have discussed the issue seem to have their concerns allayed after it is pointed out that the closing attorney is already fully responsible to see that these taxes are paid and thereby incurs no new liability.

This is a rather concise explanation in the interest of valuing your time. If you wish to discuss it in greater depth, I am at your service.

Chris Burti
Vice President and Legal Counsel,
Statewide Title, Inc.
800-522-8694

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

March 18, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Julie Allen	NC Statewatch
John Bailey	N.C. D.O.R.
Ed Regan	N.C. Assoc. of Co. Comm.
Patricia Ramey	NCACC
R. Paul Wilms	NCHBA
Ken Ivey	NCDOT
Mary Thomsen	REBIC
Jack Cozort	Parker Poe
Mark Roberts	NRAL-TVS
Paige Johnson	Planned Parenthood
Patricia A. Yancey	APPCNC/LCPP

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

March 18, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Stephanie Simpson	NC Assn. of Realtors
Tim Crowley	UNC TV
Mark Benson	Capitol Group
Mark Bibbs	Davis Bibbs & Smith PLLC
Matt Wellington	ICANN

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, March 20, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

HB 327 (Increase Penalties/Bomb Offenses-AB)
Rep. Wayne Goodwin, Bill Sponsor

HB 510 (Improper Equipment Included in Speeding)
Rep. Tim Moore, Bill Sponsor

3. **Adjourn.**

House Judiciary II

Committee

Minutes

March 20, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order.

HB 327 (Increase Penalties/Bomb Offenses.-AB) sponsored by Rep. Goodwin and **HB 510** (Improper Equipment Included in Speeding) sponsored by Rep. Moore were on the agenda.

Rep. Goodwin was recognized to explain his bill. He recalled an incident that occurred in his District, which includes Richmond and Stanley Counties, in which two men detonated a pipe bomb in the Richmond County courthouse. In prosecuting the case, the District Attorney learned that the penalty for this offense was much greater in federal court than in the state court. The DA had no option but to send them to federal court.

Rep. Goodwin introduced this bill to conform the two penalties, as much as possible. He said the Sentencing Commission had studied this issue and that the Commission had recommended an increased penalty.

Rep. Nesbitt told the Committee about "structured sentencing," which was started back in the 1980s when the state had 18,000 prisoners with only 13,000 beds. At that time the state was under a consent decree, which said that it must fix this situation. In 1992, 1993 in the midst of a recession, the State of North Carolina had to build prisons and cut everybody else's budget. Structured sentencing was put into place that reduced the sentences people got, but did away with parole, which meant that some served longer

sentences. Most bills increase, but never decrease sentences. The Sentencing Commission was created as a separate independent body to oversee the prison situation.

Ms. Karen Jones said that the Commission was made up of thirty members. She said the Commission studied the issue of increasing penalties on bomb offenses and it determined that an increase in penalty would be appropriate.

Committee Counsel, Jeff Hudson, was recognized to give an analysis of the bill. A copy of the bill analysis is attached to these Minutes as *Attachment I.*

Rep. Stam was recognized. He said that he wanted to look not only at whether this legislation is consistent with federal law but also to look at the amount of harm perpetuated. He pointed out that many years ago another body made it more serious to talk with somebody about murder than it was to actually commit murder, inaccurately considering the harm done. Does this consider the actual harm done as sufficient? He was concerned that the penalty for willful and malicious injury of another by use of an explosive or incendiary device or material had a greater penalty than to actually commit 2nd degree murder.

Staff was directed to get a reference chart on the various crimes for the next meeting.

Rep. Ellis wondered why some buildings are more valuable than other buildings.

Rep. Nesbitt suggested that the title of the bill be changed to reflect what the bill actually does.

After considerable discussion, the bill was displaced.

Rep. Moore was recognized to explain **HB 510**. He said it was a simple bill that would add a provision to the GS section under speeding to say that a faulty or improper speedometer is a lesser-included offense of the speeding violation. In some counties the District Attorney will reduce a speeding violation down, under certain circumstances, to an improper equipment offense. Generally there are certain thresholds that the prosecutor requires; the speeds cannot be anymore than a certain amount over the limit, oftentimes, the person 's driving record is considered. It also allows them to avoid additional driver license points. Usually prosecutors who implore this acquire proper discretion in allowing this relief. This legislation would create a statutory basis for this throughout the state.

Fine for an improper equipment conviction is greater than the conviction of speeding. All sides seem to like this better. It appears to be a win-win situation for everybody.

Robin Johnson, Committee Counsel, said that according to case law, a lesser-included offense is one that has some, but not all of the elements of the greater offense. Elements for two offenses overlap, but are different. She wasn't certain that the General Assembly could do this.

Rep. Ellis moved that the bill be given a favorable report and the motion carried.

The meeting adjourned at 10:50 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

HOUSE BILL 327:
Increase Penalties/Bomb Offenses.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Goodwin
Date:	March 20, 2003	**Summary by:**	Jeff Hudson, Committee Counsel
Version:	First Edition		

SUMMARY: ***House Bill 327 increases the criminal penalties for offenses related to the malicious use of explosive or incendiary devices.***

BACKGROUND: During the 2001 Session, the General Assembly directed the North Carolina Sentencing and Policy Advisory Commission to study whether the State's penalties for detonation of explosive devices within courthouses and other public buildings should be enhanced. The Commission studied this issue and submitted its report to the General Assembly in January of 2003. House Bill 327 encompasses the recommendations of the Commission. The following table outlines the increased penalties for four offenses related to the malicious use of explosive or incendiary devices or material as recommended by the Commission and contained in House Bill 327, as well as the current penalties for these offenses.

Statutory Provision	Current Penalty	Penalty recommended by the Commission/contained in H327*
G.S. 14-49(a) – Willful and malicious injury of another by use of an explosive or incendiary device or material	**Class D felony** – 51 to 86 months of Active Punishment	**Class B1 felony** – 192 to 297 months of Active Punishment
G.S. 14-49(b) – Willful and malicious damage of real or personal property belonging to another by use of an explosive or incendiary device or material	**Class G felony** – 10 to 16 months of Intermediate or Active Punishment	**Class D felony** – 51 to 86 months of Active Punishment
G.S. 14-49(b1) – Willful and malicious damage or aid, counsel, or procurement of damage of any building of worship by use of an explosive device or material	**Class E felony** – 20 to 39 months of Intermediate or Active Punishment	**Class C felony** – 58 to 97 months of Active Punishment
G.S. 14-49.1 – Willful and malicious damage of real or personal property occupied by another by use of an explosive or incendiary device or material	**Class D felony** – 51 to 86 months of Active Punishment	**Class B1 felony** – 192 to 297 months of Active Punishment

*Penalty ranges assume no prior convictions and no aggravating or mitigating factors.

EFFECTIVE DATE: This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE BILL 327

Short Title:	Increase Penalties/Bomb Offenses.-AB	(Public)
Sponsors:	Representatives Goodwin; Gorman and Lewis.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE CRIMINAL PENALTY FOR DETONATING AN EXPLOSIVE DEVICE WITHIN A COURTHOUSE OR OTHER PUBLIC BUILDING AND FOR COMMITTING CERTAIN OTHER EXPLOSIVE DEVICES OFFENSES, AS RECOMMENDED BY THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-49 reads as rewritten:

"**§ 14-49. Malicious use of explosive or incendiary; punishment.**

(a) Any person who willfully and maliciously injures another by the use of any explosive or incendiary device or material is guilty of a Class ~~D~~ B1 felony.

(b) Any person who willfully and maliciously damages any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a Class ~~G~~ D felony.

(b1) Any person who willfully and maliciously damages, aids, counsels, or procures the damaging of any church, chapel, synagogue, mosque, masjid, or other building of worship by the use of any explosive or incendiary device or material is guilty of a Class ~~E~~ C felony.

(c) Repealed by Session Laws 1993, c. 539, s. 1149."

SECTION 2. G.S. 14-49.1 reads as rewritten:

"**§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; punishment.**

Any person who willfully and maliciously damages any real or personal property of any kind or nature, being at the time occupied by another, by the use of any explosive or incendiary device or material is guilty of a felony punishable as a Class ~~D~~ B1 felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 510

Short Title:	Improper Equipment Included in Speeding.	(Public)
Sponsors:	Representatives Moore, Glazier, Hunter, and Goodwin (Primary Sponsors).	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO INCLUDE A VIOLATION OF G.S. 20-123.2 AS A LESSER INCLUDED OFFENSE IN A SPEEDING VIOLATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-141 is amended by adding a new subsection to read:

"(o) A violation of G.S. 20-123.2 shall be a lesser included offense in any violation of this section."

SECTION 2. This act becomes effective December 1, 2003. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

3-20-03

HOUSE BILL 510:
Improper Equipment Included in Speeding.

BILL ANALYSIS

Committee:	House Judiciary Ii	**Introduced by:**	Reps. Moore, Glazier, Hunter & Goodwin
Date:	March 20, 2003		
Version:	First	**Summary by:**	Robin Johnson Committee Counsel

SUMMARY: ***House Bill 510 would provide that a speeding violation includes a lesser included offense of operating a motor vehicle with a faulty speedometer. The bill would become effective December 1, 2003.***

CURRENT LAW: It is an infraction under G.S. 20-123.2 to operate a motor vehicle on the highway if it is not equipped with a speedometer that is maintained in good working order. No drivers license points, insurance points, or premium surcharge may be imposed as a result of a violation of this offense.

G.S. 20-141 provides, generally, that it is unlawful for a person to drive a vehicle on the highway at a speed that is "greater than is reasonable and prudent under the conditions then existing." This section also enumerates more specific speeding offenses. Generally, a violation is an infraction punishable by not more than $100. However, a person who drives more than 15 miles per hour (mph) over the speed limit or 80 mph is guilty of a Class 2 misdemeanor. In addition, two drivers license points are assigned for conviction of 55 mph or less; three drivers license points are assigned for convictions of speeding in excess of 55 mph. Depending on the speed involved and the number of convictions, it is possible that the Division of Motor Vehicles may suspend the driver's license. Finally, each speeding conviction can earn the driver one to four insurance points, depending on the speed involved.

BILL ANALYSIS: The bill would amend G.S. 20-141 by adding a new subsection (o) that declares that a violation of the faulty speedometer statute is a lesser included offense under a speeding violation. The effect of this would be to allow defendants to plead to the lesser offense, thereby avoiding the penalties, including drivers license and insurance points, which are the consequence of a speeding conviction.

NC case law defines a "lesser included offense" as one that has some, but not all, of the elements of the greater offense and that has no element that the greater offense does not have. A person commits a speeding offense if that person (1) drives; (2) a vehicle; (3) on a highway or public vehicular area; and (4) at a speed greater than is reasonable and prudent under the conditions then existing. A person would commit the faulty speedometer offense if that person (1) operates; (2) a self-propelled motor vehicle; (3) on a highway; and (4) with a speedometer that is not maintained in good working order.

The two offenses involved in this bill are related, but have different elements. As a result, they may not meet the test for a "lesser included offense." (It is unclear whether a statute can make it so.) The NC Court of Appeals once held that the superior court could not accept a guilty plea to reckless driving when the defendant was charged with driving under the influence. State v. Craig, 21 N.C. App. 51 (1974). The Court stated, "[Even if reckless driving is a related charge, it] is not a lesser offense included in the charge of driving under the influence of intoxicating liquor. The two offenses are separate and distinct even though they may both arise out of the same transaction." At that time, the offense of reckless driving did not include an element of driving under the influence. The Session immediately following the Craig decision, the General Assembly amended the statute governing reckless driving to include the following subsection: "*Any person who operates a motor vehicle upon a highway ... after consuming such quantity*

of intoxicating liquor as directly and visible affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence...." This added provision was repealed four years later, but while in effect the Court of Appeals found that it created a lesser included offense of driving under the influence.

EFFECTIVE DATE: The bill would become effective December 1, 2003. Prosecutions for offenses committed before that date would not be abated or affected by this act.

H510-SMRH-01 (Ben Loeb, Jr., Institute of Government, assisted with information in this summary.)

§ 20-123.2 Speedometer.

(a) Every self-propelled motor vehicle when operated on the highway shall be equipped with a speedometer which shall be maintained in good working order.

(b) Any person violating this section shall have committed an infraction and may be ordered to pay a penalty of not more than twenty-five dollars ($25.00). No drivers license points, insurance points or premium surcharge shall be assessed on or imputed to any party on account of a violation of this section. (1989 (Reg. Sess., 1990), c. 822, s. 2.)

§ 20-141. Speed restrictions.

(a) No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

(1) Thirty-five miles per hour inside municipal corporate limits for all vehicles.

(2) Fifty-five miles per hour outside municipal corporate limits for all vehicles except for school buses and school activity buses.

(c) Except while towing another vehicle, or when an advisory safe-speed sign indicates a slower speed, or as otherwise provided by law, it shall be unlawful to operate a passenger vehicle upon the interstate and primary highway system at less than the following speeds:

(1) Forty miles per hour in a speed zone of 55 miles per hour.

(2) Forty-five miles per hour in a speed zone of 60 miles per hour or greater.

These minimum speeds shall be effective only when appropriate signs are posted indicating the minimum speed.

(d) (1) Whenever the Department of Transportation determines on the basis of an engineering and traffic investigation that any speed allowed by subsection (b) is greater than is reasonable and safe under the conditions found to exist upon any part of a highway outside the corporate limits of a municipality or upon any part of a highway designated as part of the Interstate Highway System or any part of a controlled-access highway (either inside or outside the corporate limits of a municipality), the Department of Transportation shall determine and declare a reasonable and safe speed limit.

(2) Whenever the Department of Transportation determines on the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe under the conditions found to exist upon any part of a highway designated as part of the Interstate Highway System or any part of a controlled-access highway (either inside or outside the corporate limits of a municipality) the Department of Transportation shall determine and declare a reasonable and safe speed limit. A speed limit set pursuant to this subsection may not exceed 70 miles per hour.

Speed limits set pursuant to this subsection are not effective until appropriate signs giving notice thereof are erected upon the parts of the highway affected.

(e) Local authorities, in their respective jurisdictions, may authorize by ordinance higher speeds or lower speeds than those set out in subsection (b) upon all streets which are not part of the State highway system; but no speed so fixed shall authorize a speed in excess of 55 miles per hour. Speed limits set pursuant to this subsection shall be effective

when appropriate signs giving notice thereof are erected upon the part of the streets affected.

(e1) Local authorities within their respective jurisdictions may authorize, by ordinance, lower speed limits than those set in subsection (b) of this section on school property. If the lower speed limit is being set on the grounds of a public school, the local school administrative unit must request or consent to the lower speed limit. If the lower speed limit is being set on the grounds of a private school, the governing body of the school must request or consent to the lower speed limit. Speed limits established pursuant to this subsection shall become effective when appropriate signs giving notice of the speed limit are erected upon affected property. A person who drives a motor vehicle on school property at a speed greater than the speed limit set and posted under this subsection is responsible for an infraction and is required to pay a penalty of not less than twenty-five dollars ($25.00).

(f) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe, or that any speed hereinbefore set forth is greater than is reasonable and safe, under the conditions found to exist upon any part of a street within the corporate limits of a municipality and which street is a part of the State highway system (except those highways designated as part of the interstate highway system or other controlled-access highway) said local authorities shall determine and declare a safe and reasonable speed limit. A speed limit set pursuant to this subsection may not exceed 55 miles per hour. Limits set pursuant to this subsection shall become effective when the Department of Transportation has passed a concurring ordinance and signs are erected giving notice of the authorized speed limit.

The Department of Transportation is authorized to raise or lower the statutory speed limit on all highways on the State highway system within municipalities which do not have a governing body to enact municipal ordinances as provided by law. The Department of Transportation shall determine a reasonable and safe speed limit in the same manner as is provided in G.S. 20-141(d)(1) and G.S. 20-141(d)(2) for changing the speed limits outside of municipalities, without action of the municipality.

(g) Whenever the Department of Transportation or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway considerably impede the normal and reasonable movement of traffic, the Department of Transportation or such local authority may determine and declare a minimum speed below which no person shall operate a motor vehicle except when necessary for safe operation in compliance with law. Such minimum speed limit shall be effective when appropriate signs giving notice thereof are erected on said part of the highway. Provided, such minimum speed limit shall be effective as to those highways and streets within the corporate limits of a municipality which are on the State highway system only when ordinances adopting the minimum speed limit are passed and concurred in by both the Department of Transportation and the local authorities. The provisions of this subsection shall not apply to farm tractors and

other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(h) No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law; provided, this provision shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(i) The Department of Transportation shall have authority to designate and appropriately mark certain highways of the State as truck routes.

(j) Repealed by Session Laws 1997, c. 443, s. 19.26(b).

(j1) A person who drives a vehicle on a highway at a speed that is either more than 15 miles per hour more than the speed limit established by law for the highway where the offense occurred or over 80 miles per hour is guilty of a Class 2 misdemeanor.

(j2) A person who drives a motor vehicle in a highway work zone at a speed greater than the speed limit set and posted under this section shall be required to pay a penalty of two hundred fifty dollars ($250.00). This penalty shall be imposed in addition to those penalties established in this Chapter. A "highway work zone" is the area between the first sign that informs motorists of the existence of a work zone on a highway and the last sign that informs motorists of the end of the work zone. This subsection applies only if a sign posted at the beginning of the highway work zone states the penalty for speeding in the work zone. The Secretary shall ensure that work zones shall only be posted with penalty signs if the Secretary determines, after engineering review, that the posting is necessary to ensure the safety of the traveling public due to a hazardous condition.

A law enforcement officer issuing a citation for a violation of this section while in a highway work zone shall indicate the vehicle speed and speed limit posted in the work zone. Upon an individual's conviction of a violation of this section while in a highway work zone, the clerk of court shall report that the vehicle was in a work zone at the time of the violation, the vehicle speed, and the speed limit of the work zone to the Division of Motor Vehicles.

(j3) A person is guilty of a Class 2 misdemeanor if the person drives a commercial motor vehicle carrying a load that is subject to the permit requirements of G.S. 20-119 upon a highway or any public vehicular area at a speed in excess of 15 miles per hour above either:

(1) The posted speed; or

(2) The restricted speed, if any, of the permit, or if no permit was obtained, the speed that would be applicable to the load if a permit had been obtained.

(k) Repealed by Session Laws 1995 (Regular Session, 1996), c. 652, s. 1.

(l) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, including municipal charters, any speed limit on any portion of the public highways within the jurisdiction of this State shall be uniformly applicable to all types of motor vehicles using such portion of the highway, if on November 1, 1973, such portion of the highway had a speed limit which was uniformly applicable to all

types of motor vehicles using it. Provided, however, that a lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any load thereon. The requirement for a uniform speed limit hereunder shall not apply to any portion of the highway during such time as the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of the highway.

(m) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

(n) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, the failure of a motorist to stop his vehicle within the radius of its headlights or the range of his vision shall not be held negligence per se or contributory negligence per se. (1937, c. 297, s. 2; c. 407, s. 103; 1939, c. 275; 1941, c. 347; 1947, c. 1067, s. 17; 1949, c. 947, s. 1; 1953, c. 1145; 1955, c. 398; c. 555, ss. 1, 2; c. 1042; 1957, c. 65, s. 11; c. 214; 1959, c. 640; c. 1264, s. 10; 1961, cc. 99, 1147; 1963, cc. 134, 456, 949; 1967, c. 106; 1971, c. 79, ss. 1-3; 1973, c. 507, s. 5; c. 1330, s. 7; 1975, c. 225; 1977, c. 367; c. 464, s. 34; c. 470; 1983, c. 131; 1985, c. 764, ss. 29, 30; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 164; 1991 (Reg. Sess., 1992), c. 818, s. 1; c. 1034, s. 1; 1993, c. 539, ss. 366, 367; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 652, s. 1; 1997-341, s. 1; 1997-443, s. 19.26(b); 1997-488, s. 1; 1999-330, s. 3; 2000-109, s. 7(c).)

[illegible] certain instruments were "securities" under federal securities laws. Securities Act of 1933, §§ 2, 5, 15 U.S.C.A. §§ 77b, 77e, 77o. Securities Exchange Act of 1934, §§ 3, 7, 15 U.S.C.A. §§ 78c, 78g, 78o.—Securities and Exchange Commission v. National Executive Planners, Ltd., 503 F.Supp. 1000.—See Reg 5.11.

LESS DEGREE

N.C. 1966. Misdemeanor of larceny is "less degree" of felony of larceny within statute providing that prisoner may be convicted of crime charged in indictment or of less degree of same crime. G.S. §§ 14-72, 15-170.—State v. Summers, 150 S.E.2d 627, 265 N.C. 515.—Ind & Inf 189(1).

LESSER INCLUDED OFFENSE

C.A.4 (N.C.) 1962. "Lesser included offense" is offense that is necessarily committed when commission of another offense is had. It is impossible to commit greater without also having committed lesser. Fed.Rules Crim.Proc. 31(c), 18 U.S.C.A.—U.S. v. Wilkinson, 302 F.2d 556, cert. denied 83 S.Ct. 1523, 372 U.S. 917, 10 L.Ed.2d 423.—Ind & Inf 189(1).

N.C. 1966. One offense is a "lesser included offense" of a more serious offense for double jeopardy purposes if all the essential elements of the lesser offense are also essential elements of the greater offense and therefore the evidence sufficient to support a conviction of the more serious offense would also support conviction of the lesser offense. Const. Art. 1, § 11; U.S.C.A.Const. Amend. 5.—State v. Reynolds, 147 S.E.2d 379, 265 N.C. 571.—Double J. 1.

N.C.App. 1969. One crime is a "lesser included offense" of another if all the essential elements of the lesser offense are also essential elements of the greater offense; an "essential element" of a crime is a fact that must be proved beyond a reasonable doubt to convict a defendant of that crime. G.S. § 14-62.—State v. Britt, 170 S.E.2d 083.—Ind & Inf 189(1).

N.C.App. 1980. "Lesser included offense" is one in which greater offense contains all essential elements of lesser offense; such determination is made on definitional, not factual basis.—State v. Hudson, 273 S.E.2d 415, 123 N.C.App. 53a, stay allowed 275 S.E.2d 203, 302 N.C. 441, review allowed 277 S.E.2d 48, 302 N.C. 634, reversed 283 S.E.2d 436, 305 N.C. 729.—Ind & Inf 189(1).

N.C.App. 1984. A "lesser included offense" is one that has some, but not all, of the elements of the greater offense and has no element that the greater offense does not have.—State v. Young, 312 S.E.2d 665, 67 N.C.App. 139.—Ind & Inf 191(0.5).

LETTER OF CREDIT

M.D.N.C. 1975. Commercial "letter of credit" is essentially a third-party beneficiary contract by which party wishing to transact business induces bank to issue the letter to a third party; it is a contract between the procuring customer and the issuing bank for the benefit of the [illegible] — Annotation: 30 [illegible] 2d 1. [illegible] 2d 502.—Banks 1.10.

N.C. 1977. [illegible] "letter of credit" is contract between the issuer and a beneficiary [illegible] independent of the dispute in contract between customer and the beneficiary.—Atlantic Trust Co. Bank v. First Union Nat. Bank of North Carolina, 239 S.E.2d 476, 36 N.C.App. 61, review denied 294 S.E.2d 225, 302 N.C. 214.—Banks 1.10.5.

N.C.App. 1983. "Letter of credit" is an engagement by a bank, finance company, or other issuer made at request of its customer to some third person who seeks to secure or assure to the latter person what will, in effect, be money or some thing [illegible] other or in addition to promise of pieces of paper or property by making certain payment or draft or acceptance, or [illegible] times will take place.—Sunset Investment, Inc. v. Sargent, 297 S.E.2d 77, 59 N.C.App. 204, review denied 301 S.E.2d 394, 307 N.C. 264.—Banks 1.10.5.

LEVIED

N.C. 1952. The word "levied" [illegible] with the word "seized" as [illegible]—[illegible] 71 S.E.2d 27, 236 N.C. [illegible]

LEWDLY AND LASCIVIOUSLY

N.C. 1953. In prosecution of man and woman under statute dealing with fornication and adultery and providing that if any man and woman not being married to each other shall lewdly and lasciviously associate, bed, and cohabit together they shall be guilty of a misdemeanor, testimony that one act of sexual intercourse is not sufficient to sustain a conviction and that "lewdly and lasciviously" means simply habitual sexual intercourse in manner of husband and wife, if man and woman are not married to each other.—G.S. § 14-184.—State v. Kleiman, 85 S.E.2d 148, 241 N.C. 277.—Lewd 1.

N.C. 1949. The phrase "lewdly and lasciviously cohabit" as used in statute providing that if a man or woman, not being married to each other, shall "lewdly and lasciviously cohabit" together they shall be guilty of a misdemeanor, plainly implies habitual intercourse, in the manner of hus-

203 S.E.2d 401
(Cite as: 21 N.C.App. 51, 203 S.E.2d 401)

C

Court of Appeals of North Carolina.

STATE of North Carolina
v.
Steve Leon CRAIG.

No. 7425SC202.

March 6, 1974.

Defendant was convicted on plea of guilty in Superior Court, Caldwell County, William Z. Wood, J., of **reckless driving**, and petition for certiorari was granted. The Court of Appeals, Baley, J., held that superior court was without jurisdiction to accept plea of guilty to charge of **reckless driving** when defendant was before court on appeal from conviction in district court for operating a motor vehicle while under the influence of intoxicating liquor inasmuch as Superior Court had no original jurisdiction of misdemeanor of **reckless driving**, and statutes which conferred jurisdiction upon appeal for acceptance of a plea to a **lesser included** or related charge were not complied with.

Judgment arrested.

West Headnotes

Criminal Law ⚿**260.13**
110k260.13 Most Cited Cases

Superior court was without jurisdiction to accept plea of guilty to charge of **reckless driving** when defendant was before court on appeal from conviction in district court for operating a motor vehicle while under the influence of intoxicating liquor inasmuch as superior court had no original jurisdiction of misdemeanor of **reckless driving**, and statutes which conferred jurisdiction upon appeal for acceptance of a plea to a **lesser included** or related charge were not complied with. G.S. §§ 7A-271, 7A-272, 15-140, 20-140, 20-176.

***52** ****402** Defendant was tried in the district court upon a two-count warrant charging him with (1) operating a motor vehicle on a public highway in Caldwell County on the 12th day of April, 1973 while under the influence of intoxicating liquor, and (2) failing to yield right-of-way in obedience to a duly erected stop sign. He was found guilty upon both charges and judgment entered imposing a suspended sentence of imprisonment. From this judgment defendant appealed to the superior court.

When the cases were called for trial in the superior court, the State elected to take a nol pros on the charge of failure to yield right-of-way in obedience to the stop sign and accepted a plea of guilty to **reckless driving**. The court sentenced the defendant to six months imprisonment which was suspended and defendant placed on probation for two years. When defendant did not consent to the terms of probation, the court entered an active sentence. Two days later the defendant agreed to accept the conditions of probation as pronounced by the court in its original judgment, and this judgment was reinstated.

Upon petition by defendant, this Court granted certiorari.

Atty. Gen. Robert Morgan by Associate Atty. James Wallace, Jr., Raleigh, for the State.

Gudger & Sawyer by Wesley F. Talman, Jr., Asheville, for defendant-appellant.

BALEY, Judge.

The sole question here involved is whether the superior court has jurisdiction to accept a plea of guilty to a charge of **reckless driving** when defendant is before the court on appeal from a conviction in the district court for operating a motor vehicle while under the influence of intoxicating liquor. We hold that the superior court does not have such jurisdiction in this case and vacate the judgment imposed.

Reckless driving is a misdemeanor, G.S. s 20--140 , G.S. s 20--176. Except as provided in G.S. s 7A--271, the district court has exclusive original jurisdiction for the trial of misdemeanors. G.S. s 7A--272. State v. Wall, 271 N.C. 675, 157 S.E.2d 363.

***53** There was no charge of **reckless driving** against the defendant in either the district or superior courts. He has appealed his conviction in the district court for the misdemeanor of **driving**

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under the influence of intoxicating liquor and was in the superior court for trial de novo upon that charge. The jurisdiction of the superior court for the trial of defendant was entirely derivative and obtained only with respect to the charge of **driving** under the influence of intoxicating liquor.

"(T)he Superior Court has no jurisdiction to try an accused for A specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for Such misdemeanor in the ****403** inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for Such misdemeanor." State v. Guffey, 283 N.C. 94, 96, 194 S.E.2d 827, 829.

When a conviction for a misdemeanor is appealed from the district court to the superior court for trial de novo, the superior court is permitted to accept a plea of guilty to a **lesser included** offense or related charge as provided in G.S. s 7A--271(a) reading as follows:

'(T)he superior court has jurisdiction to try a misdemeanor:

(5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a **lesser-included** or related charge.'

But the acceptance of a plea of guilty by the superior court to a related charge in misdemeanor appeals from the district court is conditioned upon the requirement that the related charge be contained in a written information. G.S. s 15--140 provides:

'Waiver of indictment in misdemeanor cases--In any criminal action in the superior court where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No ***54** waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel. Pursuant to G.S. 7A--271(a)(5), the superior court is authorized to accept a plea to a related charge in misdemeanors appeals from the district court if the related charge is contained in the written information authorized by this section.' (Emphasis added.)

Reckless driving is not a lesser offense included in the charge of **driving** under the influence of intoxicating liquor. The two offenses are separate and distinct even though they may both arise out of the same transaction. State v. Fields, 221 N.C. 182, 19 S.E.2d 486. Even if **reckless driving** be considered a related charge, there is nothing in the record here to indicate compliance with G.S. s 15--140. While ordinarily no indictment or information for a misdemeanor may be obtained in the superior court, the General Assembly has authorized a written information in the limited instances set out in G.S. s 15--140. The record does not show a written information nor a waiver of indictment or information. In fact, there is no accusation at all of **reckless driving** except as it may be implied by the guilty plea.

As quoted with approval by Chief Justice Parker in McClure v. State, 267 N.C. 212, 215, 148 S.E.2d 15, 17--18:

'There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.'

See also State v. Cassada, 6 N.C.App. 629, 170 S.E.2d 575.

Since the superior court has no original jurisdiction of the misdemeanor of **reckless driving**, and the statutes which conferred jurisdiction upon appeal for the acceptance of a plea to a **lesser included** or related charge were not complied with, it follows that the superior court had no jurisdiction to accept the plea of defendant and impose judgment.

Judgment arrested.

CAMPBELL and HEDRICK, JJ., concur.

END OF DOCUMENT

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VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 20, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Criss Porter	Smith Anderson
Karen Jones	Sentencing Comm
Rob Dasgion	NC State Watch
Tim Crowley	UNC TV
[illegible]	NCICA
[illegible]	Progress Energy

House Judiciary II

Committee

Minutes

March 25, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order.

A proposed committee substitute for **HB 65** (Autopsy Photos Not Public Record) was before the Committee. Rep. Stam moved that it be adopted for consideration and the motion carried.

Committee counsel, Karen Cochrane-Brown was recognized to explain the proposed committee substitute. A copy of the committee substitute bill and the bill analysis are a part of the Minutes as *Attachments I and II* respectively.

When Ms. Cochrane-Brown had concluded her remarks, discussion followed.

Rep. Nesbitt wondered when a Judge or District Attorney would order an autopsy when the Medical examiner didn't think was necessary.

Dr. John Butts, the Chief Medical Examiner was recognized. He said that, ordinarily, the only instances where a judge would order an autopsy is for an exhumation. He said he believed that after the exhumation, then that exhumation report itself would be a public record. It would be an unusual circumstance where a judge or district attorney would have the original photographs. He said these ordinarily are taken by his office, by the pathologist or, by law enforcement agencies. It would be unusual for a Judge or a District attorney to be custodians of those photographs.

Rep. Nesbitt asked if those photographs held by law enforcement or other persons are viewable under current law?

Dr. Butts said he would have to defer to our Committee counsel, but he does know that things held by law enforcement have a different status than what his office would hold. He said a district attorney could have the autopsy records sealed.

Rep. Ray, the sponsor of **HB 65**, was recognized. She said that if the district attorney's office is using autopsy photos for investigative purposes, they would have attained those from a chief medical examiner, a pathologist, or some other source. Dr. Butts agreed.

Dr. Butts said that the majority of autopsies would most likely be ordered by a local medical examiner or the chief medical examiner. Instances where district attorneys or judges order autopsies are rare, maybe one or two times a year. In a case where the district attorney needs photographs from a crime scene, they would most likely get them from law enforcement agencies, not his office.

Rep. Ray said if the district attorney's office is using autopsy photos for investigative purposes, they would not be accessible to the public during the investigation.

Rep. Ray thanked the Committee for its hard work on her bill.

Rep. Ellis said he was prepared to make a motion.

Rep. Stam proposed to amend the bill and his motion passed. A copy of this amendment is attached as *Attachment III.*

Rep. Bonner proposed to amend the bill by changing its effective date to July 1, 2003 rather than "when it becomes law." The motion carried. *(See Attachment IV)*

John Bussian with the North Carolina Press Association was recognized and reiterated that the Association is opposed to this change in the public access law. He said to bear in mind that this law is dealing with photos that have been historically open to the public. The bottom line is that these are records made or received by public official doing a job that is paid for by tax dollars. There are two things unprecedented in this bill. First of all it allows viewing, but not copying. Second, is that as the Chief Medical examiner pointed out, is for the district attorney or the prosecutor to petition the court to seal them. That follows the way public access has generally been in this state. This bill would put the burden and expense on the taxpayer and the press to try to get a copy of something that has historically been public. He said, "all of this to try to fix a problem that doesn't exist, at least, not in North Carolina." These photos are rarely requested, as the Chief Medical Examiner has pointed out, let alone disseminated. He asked the Committee, for reasons that are grounded in issues of public access to records in North Carolina, to vote against the bill.

Rep. Nesbitt said that the subcommittee worked as hard as it possibly could to protect the openness of these records. Legally we could have said that autopsy photographs are no longer public records, but in an effort to keep them accessible as possible, the viewing was the subcommittee's attempt to keep these records open to the public. He said, yes, this is the first time this has been done, "but we didn't used to be this tacky." When the world changes, one must change with it.

Pamela Best with the Administrative Office of the Courts was recognized. She said Clerks of Court are opposed to having this be a special proceeding before them, they would rather the proceeding be before a judge.

Dr. John Butts, Chief Medical Examiner with the State was recognized. He said one concern he wanted to address is the use of utilizing such materials for training purposes. He proposed that the committee add "or instructor in medical legal death investigation, to allow for individuals who are not medical examiners, coroners or physicians, but who provide instruction in medical death investigation to use autopsy photographs, when appropriate to instruct law enforcement officers and other with a genuine concern in this area."

Rep. Stam was recognized. He proposed amending the bill on page 3, line 5, by rewriting the line to read: "*physical recognition, a medical examiner, coroner, physician or their designee who*". His motion passed. *(See Attachment V)*

When there was no more discussion, Rep. Ellis made a motion to incorporate the amendments into a new committee substitute, give the bill a favorable report and the original bill an unfavorable report.

Rep. Ellis praised the efforts put forth on **HB 65**, but Rep. Bordsen felt that limiting access to public records would negatively impact women and minorities. She said the case hasn't been made to limit access and she urged the committee to not pass the bill.

Rep. Ellis moved to vote on **HB 65** after 10 minutes to the hour, and the motion passed. His previous motion was before the committee and the motion passed.

The meeting adjourned at 11:00 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H **D**

HOUSE BILL 65
PROPOSED COMMITTEE SUBSTITUTE H65-CSRO-2 [v.7]

3/24/2003 9:52:52 PM

Short Title: Autopsy Photos Not Public Record. (Public)

Sponsors:

Referred to:

February 24, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT PHOTOGRAPHS AND VIDEO OR AUDIO RECORDINGS MADE PURSUANT TO AN AUTOPSY ARE NOT PUBLIC RECORDS AND TO ALLOW FOR LIMITED ACCESS TO RECORDED IMAGES OF AN AUTOPSY BY THE PUBLIC.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 132 of the General Statutes is amended by adding the following new section to read:

"**§ 132-1.8. Confidentiality of photographs and video or audio recordings made pursuant to autopsy.**

Except as otherwise provided in G.S. 130A-389.1, a photograph or video or audio recording of an official autopsy is not a public record as defined by G.S. 132-1. However, the text of an official autopsy report including any findings and interpretations prepared in accordance with G.S. 130A-389(a) is a public record and fully accessible by the public. For purposes of this section an official autopsy is an autopsy performed pursuant to G.S. 130A-389(a).

SECTION 2. G.S. 130A-389 reads as rewritten:

"**§ 130A-389. Autopsies.**

(a) If, in the opinion of the medical examiner investigating the case or of the Chief Medical Examiner, it is advisable and in the public interest that an autopsy or other study be made; or, if an autopsy or other study is requested by the district attorney of the county or by any superior court judge, an autopsy or other study shall be made by the Chief Medical Examiner or by a competent pathologist designated by the Chief Medical Examiner. A complete autopsy report of findings and interpretations, prepared on forms designated for the purpose, shall be submitted promptly to the Chief Medical Examiner. ~~Copies of the report shall be furnished the authorizing medical examiner, district attorney or superior court judge.~~ ~~A~~ Subject to the limitations of G.S. 130A-389.1 relating to photographs and video or audio recordings of an autopsy, a copy of the report

shall be furnished to ~~other~~ any persons upon request. A fee for the autopsy or other study shall be paid by the State. However, if the deceased is a resident of the county in which the death or fatal injury occurred, that county shall pay the fee. The fee shall be one thousand dollars ($1,000).

(b) In deaths where the Chief Medical Examiner and the medical examiner investigating the case do not deem it advisable and in the public interest that an autopsy be performed, but the next-of-kin of the deceased requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform the autopsy and the cost shall be paid by the next-of-kin.

(c) When the next-of-kin of a decedent whose death does not fall under G.S. 130A-383 or 130A-384 requests that an autopsy be performed, the Chief Medical Examiner or a designated pathologist may perform that autopsy and the cost shall be paid by the next-of-kin.

(d) The report of autopsies performed pursuant to subsections (b) and (c) shall be a part of the decedents' medical records and therefore not public records open to inspection."

SECTION 3. Chapter 130A of the General Statutes is amended by adding the following new section to read:

"**§ 130A-389.1. Photographs and video or audio recordings made pursuant to autopsy.**

(a) Any person may inspect and examine original photographs or video or audio recordings of an autopsy performed pursuant to G.S. 130A-389(a) at reasonable times and under reasonable supervision of the custodian of the photographs or recordings. Except as otherwise provided by this section, no custodian of the original recorded images shall furnish copies of photographs or video or audio recordings of an autopsy to the public.

(b) The following public officials may obtain copies of autopsy photographs or video or audio recordings for official use only. These public officials shall not disclose the photographs or video or audio recordings to the public except as provided by law:

(1) The Chief Medical Examiner or a pathologist designated by the Chief Medical Examiner.
(2) Investigating Medical Examiner.
(3) District attorney.
(4) Superior court judge.
(5) Law enforcement officials conducting an investigation relating to the death.

A public official authorized by this subsection to obtain copies may provide a copy of the photograph or videotape to the media for the sole purpose of aiding in the identification of the deceased through publication of the photograph or videotape.

(c) The following persons may obtain copies of autopsy photographs or video or audio recordings, but may not disclose the photographs or video or audio recordings to the public unless otherwise authorized by law:

(1) The personal representative of the estate of the deceased.

(2) A person authorized by an order issued in a special proceeding pursuant to subsection (d) of this section.

(3) After redacting all information identifying the decedent, including name, address, and Social Security number, and after anonymizing any physical recognition, a medical examiner, coroner or physician who uses such material for:

a. medical or scientific teaching or training purposes;

b. teaching or training of law enforcement personnel;

c. teaching or training of attorneys or others with a bona fide professional need to use or understand forensic science;

d. conferring with medical or scientific experts in the field of forensic science; or

e. publication in a scientific or medical journal or textbook.

A medical examiner, coroner or physician who has in good faith complied with this subsection shall not be subject to any penalty under this section.

Any person who lawfully obtains a copy of a photograph or video or audio recording pursuant to this subsection shall be required to sign a statement acknowledging that they have received notice that any unauthorized disclosure of the photograph or video or audio recording is a Class I felony.

(d) A person who is denied access to copies of photographs or video or audio recordings or who is restricted in the use the person may make of the photographs or video or audio recordings under this section may commence a special proceeding in accordance with Article 33 of Chapter 1 of the General Statutes. Upon a showing of good cause, the clerk may issue an order authorizing the person to copy or disclose a photograph or video or audio recording of an autopsy and may prescribe any restrictions or stipulations that the clerk deems appropriate. In determining good cause the clerk shall consider whether the disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether the disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to, or other handling of a photograph or video or audio recording of an autopsy shall be under the direct supervision of the Chief Medical Examiner or the Chief Medical Examiner's designee. A party aggrieved by an order of the clerk may appeal to the appropriate court in accordance with Article 27A of Chapter 1 of the General Statutes.

(e) The petitioner shall provide reasonable notice of the commencement of a special proceeding as authorized by subsection (d) of this section, and reasonable notice of the opportunity to be present and heard at any hearing on the matter in accordance with Rule 5 of the Rules of Civil Procedure. The notice shall be provided to the personal representative of the estate of the deceased, if any, and to the surviving spouse of the deceased. If there is no surviving spouse, then the notice shall be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased or to the guardian or custodian of a minor child of the deceased.

(f) This section does not apply to the use of autopsy photographs or video or audio recordings in a criminal, civil, or administrative proceeding except that nothing in this section prohibits a court or presiding officer, upon good cause shown, from restricting or otherwise controlling the disclosure of an autopsy, crime scene, or similar photograph or video or audio recordings in the manner provided under this section.

(g) Any person who willfully and knowingly violates this section is guilty of a Class I felony, provided that more than one disclosure of the same item by the same person is not a separate offense.

(h) Any person not authorized by this section to obtain a copy of an autopsy photograph or video or audio recording, who knowingly and willfully removes or copies an autopsy photograph or video or audio recording with intent to steal the same is guilty of a Class H felony.

SECTION 4. This act is effective when it becomes law and applies to offenses committed on or after that date. The act applies to all unauthorized disclosures of autopsy photographs or video or audio recordings that occur on or after the effective date, regardless of whether the autopsy was performed before or after that date.

3-25-03

Attachment II

HOUSE BILL 65:
Autopsy Photos Not Public Record.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Karen Ray
Date:	March 25, 2003	**Summary by:**	Karen Cochrane Brown Committee Counsel
Version:	Proposed Committee Substitute H65-CSRO-2[v.7]		

SUMMARY:

The Proposed Committee Substitute rewrites the bill to provide that although photographs and video and audio recordings of official autopsies are not public records the text of an autopsy report is a public record and fully accessible by the public. Official autopsies are those authorized by a medical examiner or requested by a district attorney or superior court judge. Private autopsies are those requested and paid for by a decedent's next-of-kin and become part of the decedent's medical records and therefore are not public records.

In addition, the PCS does the following:

- Authorizes the custodian to permit any member of the public to view original photographs or recordings at reasonable times and under reasonable supervision but generally prohibits the furnishing of copies.
- The following public officials may obtain copies for official use but may not disclose to the public except for the purpose of identifying the deceased;
  - The Chief Medical Examiner or his designee
  - The investigating medical examiner
  - District attorney
  - Superior court judge
  - Law enforcement officials
- After signing a statement acknowledging that they have received notice that unauthorized disclosure of autopsy recorded images is a crime, the following other persons may obtain copies but may not disclose unless authorized by law;
  - Personal representative
  - A person authorized by court order
  - Another medical examiner or physician for medical, scientific, purposes or for teaching or training purposes.
- Authorizes a person who is denied access to copies to commence a special proceeding under Article 33 of Chapter 1. A special proceeding is a simplified and expedited judicial proceeding heard by the clerk of superior court. Currently, matters such as probate, adoption and guardianship are handled by special proceeding. A person aggrieved by the decision of the clerk may appeal to the superior court for a de novo review. Petitioner must give notice to the decedent's personal representative, if any, and the next-of-kin.

- Provides that these restrictions do not apply to the use of autopsy photographs or video or audio recordings in criminal, civil or administrative proceedings. This provision allows autopsy photographs or video or audio recordings to be used as evidence in a criminal or civil trial or an administrative proceeding. Once these documents become part of a court record they become public records and cannot be exempted without violating the Constitution. However, in a specific case, the court or presiding officer may restrict the use of the recorded images.
- Willful and knowing violation of the section is a Class I felony.
- Willful and knowing removal or copying of the photographs with intent to steal is a Class H felony.
- Effective when the act becomes law and applies to unauthorized disclosures made on or after that date.

Attachment III

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 65

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H65-ARO-2 [v.1]

Date 3-25-03 ,2003

Comm. Sub. [YES]
Amends Title [NO]
H65-CSRO-2[v.7]

Representative Stam

moves to amend the bill on page 3, line 5, by rewriting the line to read:

"physical recognition, a medical examiner, coroner, physician, or their designee who".

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

Attachment IV

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 65 DATE 3/25/03

S. B. No. _____ Amendment No. _____ (to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE CS RO-2

Rep.)
) Stam
Sen.)

1 moves to amend the bill on page 2, line 1

2 ( ) WHICH CHANGES THE TITLE

3 by changing persons to person

4

5 and on page 2 line 38 by

6 deleting "the media" and substituting

7 in lieu thereof "another person"

8

9

10

11

12

13

14

15

16

17

18

19

SIGNED Stam

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT *Attachment V*

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 65 DATE 3-13-03

S. B. No. _____ Amendment No. 2

COMMITTEE SUBSTITUTE ✓ (to be filled in by Principal Clerk)

Rep.) Bonner
)
Sen.)

moves to amend the bill on page 4, line 13

( ) WHICH CHANGES THE TITLE

by rewriting the line to read:

" Section 4. This act becomes effective July 1, 2003, and applies to ".

SIGNED _____

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

March 25 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jon Bennett	NCCFTF
John Burns	NC ACRE
Julie Allen	NC Statewatch
John McHugh	GOV OFFICE
Pamela Best	AOC
	North Carolina Medical Society
Amy Jo Horne	NCMS.
John Bussian	NC Press Assn.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 25 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jack Betts	Charlotte Observer
Donna Liggett	NCWAN
Kendall Byrum	Rep Joe Kiser
Ben Smith	Freedom Newspapers
Scott Mooneyham	AP
Lynn Bonner	N&O
Teri Saylor	NC Press Assoc.
Sherry Dillon	Charlotte Observer
John Phelps	NCLM
Dina DiMeo	NCBA
Devon White	PENC

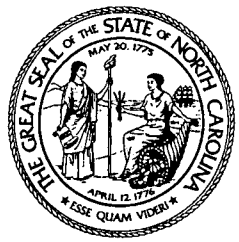
VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 25 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bruce Jenell	NCNN Radio (Press)
Nick Fountain	Young Moore & Henderson



House Judiciary II

Committee

Minutes

March 27, 2003

10:00 a.m.

Minutes compiled from Notes. There was no recording of this meeting.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. All members of the Committee were present.

Rep. Nesbitt called the meeting to order.

Rep. Paul Miller was recognized to explain HB **26** (Camera Defeating License covers).

Considerable discussion followed.

Rep. Stam proposed to amend the bill to make the effective date October 1, 2003. His motion passed.

Rep. Moore was concerned that the language in the bill would make someone with a plastic cover over his plate guilty under this proposed change.

Rep. Nesbitt also offered an amendment and his motion passed.

Rep. Miller was concerned about the word "intent." Rep. Moore pointed out that this was criminal law and that absent "intent" it was not a crime.

Rep. Stam felt that line 8 already covered that issue and was sufficient protection.

Karen Cochrane Brown read an amendment, which she had prepared for Rep. Moore wherein Rep. Moore moved that the amendment be adopted and his motion passed.

Rep. Ellis was concerned that if his tailgate were down, which he does to improve gas mileage on his truck, he would be guilty under this law.

Rep. Walend made a motion to incorporate the bill and amendments into a committee substitute, give the Committee substitute a favorable report and the original bill and unfavorable report. Her motion passed.

Rep. Stam was recognized to explain **HB 393**. He presented a proposed committee substitute to the committee and moved for its adoption. His motion passed.

Rep. Moore moved to amend the bill and his motion passed.

When there was no further discussion, Rep. Stam moved to give the committee substitute a favorable report and the original bill an unfavorable report. His motion passed.

The meeting was adjourned at 10:50 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 26

Short Title:	Camera Defeating License Covers Illegal.	(Public)
Sponsors:	Representatives Miller; and McComas.	
Referred to:	Judiciary II.	

February 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT DEVICES DESIGNED TO COVER REGISTRATION PLATES TO PREVENT THE TAKING OF A CLEAR PHOTOGRAPH BY TRAFFIC CONTROL SYSTEMS USING CAMERAS ARE UNLAWFUL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-63(g) reads as rewritten:

"(g) Alteration, Disguise, or Concealment of Numbers. – Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, including any device designed or used to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1."

SECTION 2. This act is effective when it becomes law.

3-27-03

HOUSE BILL 26:
Camera Defeating License Covers Illegal.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Paul Miller
Date:	March 26, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY:

This bill amends the law relating to alteration, disguise, or concealment of numbers on a motor vehicle registration plate to clarify that devices designed to defeat traffic control systems using cameras are illegal. Any person who willfully uses such a device is guilty of a Class 2 misdemeanor.

CURRENT LAW:

Under current law (G.S. 20-63(g)), it is a Class 2 misdemeanor to willfully alter, disguise, or conceal a motor vehicle license plate. The law prohibits covering a license plate with a "bumper, light, spare tire, tire rack, strap, or other devise".

Conviction of a Class 2 misdemeanor has a presumptive minimum punishment of 1-30 days community punishment, assuming no prior convictions.

BILL ANALYSIS:

This bill clarifies the term "other device" used to cover a license plate in G.S. 20-63(g), by providing that the term includes any device designed or used to prevent or interfere with the taking of a clear photograph by a traffic control system using cameras.

Since 1997, the General Assembly as allowed an increasing number of municipalities to adopt ordinances to enforce traffic violations by the use of traffic control photographic systems. A traffic control photographic system is an electronic system consisting of a photographic, video or electronic camera and a vehicle sensor which works in conjunction with a traffic control device to automatically produce photographs, video or digital images of vehicles violating traffic control laws.

Several devices currently on the market are capable of obscuring images taken by a camera but are transparent otherwise. This bill clarifies that the use of such devices is illegal.

This act would become effective when it becomes law.

H26-SMRO-001

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 26 DATE 3-27-03

S. B. No. _____ Amendment No. 1
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
) Starr
Sen.)

moves to amend the bill on page 1, line 22

( ) WHICH CHANGES THE TITLE

by rewriting as follows

Section 2. This act is effective Oct 1 2003 for acts occurring on or after that date.

SIGNED Starr

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 26 DATE 3-27-03

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

(Rep.) Neshit
Sen.)

moves to amend the bill on page 1, line 10

( ) WHICH CHANGES THE TITLE

by deleting the word "used" on that line

and substituting the word "intended".

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

3-27-03

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 393
PROPOSED COMMITTEE SUBSTITUTE H393-CSSB-2 [v.5]

3/27/2003 8:51:35 AM

Short Title: Modify County Tax Certification Authority. (Public)

Sponsors:

Referred to:

March 11, 2003

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE AUTHORITY OF THE BOARD OF COUNTY COMMISSIONERS IN CERTAIN COUNTIES TO REQUIRE THE REGISTER OF DEEDS IN THE COUNTY NOT TO ACCEPT ANY DEED TRANSFERRING REAL PROPERTY FOR REGISTRATION UNLESS THE COUNTY TAX COLLECTOR CERTIFIES THAT NO DELINQUENT TAXES ARE DUE ON THAT PROPERTY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 161-31 reads as rewritten:

"(a) Tax Certification. – The board of commissioners of a county may, by resolution, require the register of deeds not to accept any deed transferring real property for registration unless the county tax collector has certified that no delinquent ad valorem county taxes, ad valorem municipal taxes, or other taxes with which the collector is charged are a lien on the property described in the deed. The county commissioners may describe the form the certification must take in its resolution.

(a1) Exception to Tax Certification. – If a board of county commissioners adopts a resolution pursuant to subsection (a) of this section, notwithstanding the resolution, the register of deeds shall accept without certification a deed submitted for registration under the supervision of a closing attorney and containing this statement on the deed: 'This instrument prepared by: _____, a licensed North Carolina attorney. Delinquent taxes, if any, to be paid by the closing attorney to the county tax collector upon disbursement of closing proceeds.'.

(b) Applicability. – This section applies only to Alleghany, Anson, Beaufort, Bertie, Cabarrus, Camden, Carteret, Cherokee, Chowan, Clay, Cleveland, Currituck, Davidson, Durham, Forsyth, Gaston, Graham, Granville, Harnett, Haywood, Henderson, Hertford, Iredell, Jackson, Lee, Macon, Madison, Martin, Montgomery, Northampton, Pasquotank, Perquimans, Person, Pitt, Polk, Rockingham, Rowan,

Rutherford, Stanly, Swain, Transylvania, Vance, Warren, Washington, and Yadkin Counties."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 393:
Modify County Tax Certification Authority

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Stam
Date:	March 27, 2003	**Summary by:**	Jeff Hudson
Version:	Proposed Committee Substitute H393-CSSB-2 [v.5]		Committee Counsel

SUMMARY: ***The Proposed Committee Substitute for House Bill 393 provides that a register of deeds, serving in a county where tax collector certification of a deed is normally required prior to registration, must accept an uncertified deed that is submitted for registration under the supervision of a closing attorney and containing the statement, "This instrument prepared by: _____, a licensed North Carolina attorney. Delinquent taxes, if any, to be paid by the closing attorney to the county tax collector upon disbursement of closing proceeds.".***

CURRENT LAW: G.S. 161-31 provides that in certain counties, the board of county commissioners may adopt a resolution to require the register of deeds to refuse to register a deed unless the county tax collector has certified that no delinquent taxes are due on the property. This provision applies to the following 45 counties: Alleghany, Anson, Beaufort, Bertie, Cabarrus, Camden, Carteret, Cherokee, Chowan, Clay, Cleveland, Currituck, Davidson, Durham, Forsyth, Gaston, Graham, Granville, Harnett, Haywood, Henderson, Hertford, Iredell, Jackson, Lee, Macon, Madison, Martin, Montgomery, Northampton, Pasquotank, Perquimans, Person, Pitt, Polk, Rockingham, Rowan, Rutherford, Stanly, Swain, Transylvania, Vance, Warren, Washington, and Yadkin Counties.

In addition to G.S. 161-31, the General Assembly has enacted similar laws that prohibit a register of deeds from registering deeds unless the tax collector has certified that no delinquent taxes are due. These provisions apply to the following local governments: Avery County (1963); Mitchell County (1987); Ashe County (1993); the Towns of Newland, Spruce Pine, and Alleghany County (1997); the Town of Banner Elk (1998); and the Town of Bakersville (1999).

In a county or local government where G.S. 161-31 and other similar State laws do not apply, the register of deeds registers deeds submitted for registration regardless of whether delinquent taxes are due on the property.

BILL ANALYSIS: The Proposed Committee Substitute for House Bill 393 would amend G.S. 161-31 to provide that if a board of county commissioners adopts a resolution to require the register of deeds to refuse to register a deed without the certification of the county tax collector, the register of deeds must still accept an uncertified deed that is submitted for registration under the supervision of a closing attorney and containing the statement, "***This instrument prepared by: _____, a licensed North Carolina attorney. Delinquent taxes, if any, to be paid by the closing attorney to the county tax collector upon disbursement of closing proceeds.***".

EFFECTIVE DATE: This act is effective when it becomes law.

Cindy Avrette, Senate Finance Committee Counsel, contributed to the preparation of this summary.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. H 393 DATE 3-27-03

S. B. No. _____ Amendment No. 3
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

(Rep.) Sen.) Moore

moves to amend the bill on page 1, line 21

( ) WHICH CHANGES THE TITLE

by rewriting line 21 to read

"shall be fined under G.S. 14-3.1. Nothing in this subsection shall prohibit the use of clear covers that are not designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using camera."

SIGNED _____

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

House Pages

1. Name: Ivey Taylor
   County: Pender
   Sponsor: Rep. Justice
2. Name: Alan Teitheman
   County: Union
   Sponsor: Blackwood, Curtis
3. Name:
   County:
   Sponsor:
4. Name:
   County:
   Sponsor:
5. Name:
   County:
   Sponsor:

Sgt-At-Arms

1. Name: Bob Fowler
2. Name: Francis Poole
3. Name: ~~Matt Myers~~ BILL SULLIVAN
4. Name:

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — March 27 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Joe McClees	ACS
Camille Stell	Randy Covington
Michelle Frazier	NC Bar Ass'n
David Baker	DOR
John Bailey	NCDOR
John Phelps	NCLM
Stephanie Simpson	NCAR
Ed Regan	NCACC
Tom Cooley	VNCT
Bruce Forest	NCCW RADIO (press)
Julie Allen	NC Statewatch

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Wednesday, March 27, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bill:**

HB 26 (Camera Defeating License Covers Illegal)
Rep. Paul Miller, Bill Sponsor
HB 393 (Modify County Tax Certification Authority)
Rep. Paul Stam, Bill Sponsor

3. **Adjourn.**

Rep. Paul Stam

From: Chris Burti [chris@statewidetitle.com]
Sent: Thursday, March 27, 2003 8:49 AM
To: 'Rep. Paul Stam'
Cc: roddawa@co.forsyth.nc.us
Subject: RE: Proposed Committee Substitute for House Bill 393 (Modify County Tax Certification Authority)

Rep. Stam,
This is to confirm our telephone discussion. I believe this language will protect the interests of the tax collectors and successfully protect closing attorneys from legal and ethical violations. Thanks for all your efforts in this regard.

Chris Burti
Vice President and Legal Counsel
Statewide Title, Inc.
110 East Arlington Boulevard
Greenville, NC 27858
252-321-0050
Mail to: chris@statewidetitle.com

Rep. Paul Stam

From: roddawa@co.forsyth.nc.us
Sent: Wednesday, March 26, 2003 1:32 PM
To: Rep. Paul Stam
Subject: RE: H 393

Thanks for working with us on this issue. Please do not hesitate to call if you have a need to discuss anything regarding the property tax.

-Pete

W. A. (Pete) Rodda, CAE
Forsyth County Tax Assessor/Collector
P.O. Box 757
Winston-Salem, NC 27102
Work Telephone: (336) 727-2022
Cell Telephone: (336) 978-6947
FAX Telephone: (336) 727-2369

Janette Lee (Rep. Nesbitt)

From: roddawa@co.forsyth.nc.us
Sent: Tuesday, March 18, 2003 8:09 AM
To: Martinn@ncleg.net; Wayneg@ncleg.net; Timm@ncleg.net
Cc: Pauls@ncleg.net; eregan@ncacc.org
Subject: H 393

Good morning -

I am Pete Rodda, the Forsyth County Tax Assessor/Collector. I chair the North Carolina Tax Assessors and Collectors Joint Legislative Committee and I work closely with the Association of County Commissioners regarding legislative issues. Please do not hesitate to contact me if you have any questions or ideas regarding the property tax. The Forsyth County Commissioners fully support my involvement and assistance in legislative matters, so you are welcome to call.

I apologize for not being able to attend todays Judiciary II meeting. But I would like to comment on Rep. Stam's bill so that you will be aware of the reason for the certification process.

I would say that many attorneys practicing in real estate do a good job in making sure that taxes are paid before certifying title to real estate. Unfortunately, there are a number of circumstances in which property is conveyed with no title search, no certification of title or just plain sloppy work at closing. In Forsyth County alone I have well over 1,000 transfers a year in which taxes are NOT paid timely despite the existence of a proration agreement. When contacted, the attorneys involved in these transactions usually make it clear that this is my problem - not theirs - and I should just foreclose on the property. Because the new owners did not own the property on January 1, I cannot proceed with attachment, garnishment or levy on the new owners - foreclosure is all that is left. All of this could be avoided by the attorney simply collecting and paying the prorated taxes.

In Forsyth County we have some 700 parcels with delinquent taxes that were owed at the time of transfer. The most common answer we get is "the buyer was going to pay after closing." The point is, if the buyer or seller doesn't pay, the only remedy the tax collector has is the expensive and time-consuming foreclosure process.

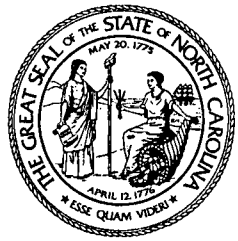
The point of the certification requirement before a deed may be recorded is to put an end to these situations. In my view H 393 would remove the clout from the certification process. There is no provision in H 393 for what happens if taxes are not paid from the proceeds, nor is there any obligation for the attorney to see that the taxes are paid. In short, H 393 would be a return to the problems that got us here.

We are certainly willing to meet with Representative Stam and others to further discuss this matter. But the Tax Assessors and Collectors must oppose this bill in its current form.

Thanks.

-Pete Rodda
A. (Pete) Rodda, CAE
Forsyth County Tax Assessor/Collector
P.O. Box 757
Winston-Salem, NC 27102
Work Telephone: (336) 727-2022

Cell Telephone: (336) 978-6947
FAX Telephone: (336) 727-2369



House Judiciary II

Committee

Minutes

April 1, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order.

HB 108 (Habitual Misd. Larceny/Felony) sponsored by Rep. Moore and **SB 2** (Drivers License Medical Certification) sponsored by Senator R. C. Soles were on the agenda.

Rep. Dewey Hill was recognized to discuss the bill. He said he could not represent Sen. Soles who was the Dean of the Senate, but that he and Sen. Soles both represented Columbus County, which borders South Carolina. Some constituents from that area asked Sen. Soles to help them with a problem they were having in getting a conditional driver's license upon submission of a signed statement from their doctor who practiced just over the North Carolina – South Carolina borders.

Rep. Hill said that there were at least three proposed amendments when the bill was on the House Floor.

SB 2, Edition 2, amends the law that authorizes the Division of Motor Vehicle (DMV) to conditionally issue drivers license to applicants who are afflicted with or suffer from a physical or mental disability or disease that may impair their ability to safely operate a motor vehicle. The statute is amended to allow DMV to issue the license upon the applicant's submission of a signed statement from a physician licensed by this State or by any other jurisdiction. The bill deletes the current restriction that the physician be licensed to practice in North Carolina.

Sharon Matthews representing the Department of Transportation, Division of Motor Vehicles (DMV) was recognized. She said the Division supported the amendment that would allow a physician duly licensed to practice medicine in this state or in any other state of the United States. Rep. Nesbitt wondered why entire United States, rather than bordering counties.

Ms. Matthews deferred to Susan Stewart from the Medical Section at NC DMV.

Rep. Nesbitt explained that the bill came to the committee with "pending amendments." The issue is whether it's going to be adjoining counties, adjoining states, or the whole United States. There was also some talk about how to define "doctor."

Karen Cochrane-Brown was recognized. She said the original Senate bill had "adjoining states" On the Senate floor the bill was amended to delete "in this state". In the House Health Committee an amendment was adopted to put back in "in this state or any state of the US." On the House Floor, that amendment had to be considered again. That is when Rep. Haire's amendment was offered.

Prior to being re-referred to the Judiciary II Committee from the floor, SB 2 was reported from the House Health committee with a favorable report, as amended. The committee did not vote to report the bill as a proposed committee substitute. The amendment adopted by the committee would have limited this change to physicians licensed to practice in the United States.

Rep. Stam was recognized. He said that, without a good reason, he would prefer that it be limited to the United States.

Susan Stewart, Director of the DMV Medical Review Section agreed.

Discussion followed regarding limiting the physician to a Medical Doctor.

Rep. Stam moved to amend the bill just the same as the House Health Committee had amended it, and his motion passed. A copy of this amendment is a part of these Minutes as *Attachment I.*

Rep. Stam then moved to incorporate the amendment and the bill into a proposed committee substitute bill, to give that bill a favorable report, unfavorable to the original bill. His motion passed.

With regard to **HB 108**, Rep. Nesbitt told the committee that there were a number of bills regarding this issue floating around the General Assembly and it was his feeling that the Committee should wait to see what happened with these bills before it considered **HB 108.**

Rep. Nesbitt informed the committee that he would not be able to attend the next meeting due to a trial he was involved with in Asheville. He said Rep. Goodwin would be chairing the committee.

The meeting was adjourned at 10:45 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT *Attachment I*

(Please type or use ballpoint pen)

EDITION No. 2

H. B. No. _____ DATE _____

S. B. No. 2 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.) Stam
Sen.)

1 moves to amend the bill on page 1, line 11
2 ( ) WHICH CHANGES THE TITLE
3 by rewriting the line to read:
4
5 "surgeon duly licensed to practice medicine in this
6 State or in any other state of the United States
7 and wives".
8
9
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12
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18
19

SIGNED Stam

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 2

Health and Human Resources Committee Substitute Adopted 2/26/03

Short Title: Drivers License Medical Certification. (Public)

Sponsors:

Referred to:

February 10, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW CERTAIN APPLICANTS FOR DRIVERS LICENSES TO SUBMIT MEDICAL CERTIFICATES FROM OUT-OF-STATE PHYSICIANS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-9(g)(2) reads as rewritten:

"(g) The Division may issue a driver's license to any applicant covered by subsection (e) of this section under the following conditions:

...

(2) The Division shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine ~~in this State~~ and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle, including, if such is the fact, the examining physician's statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 2:
Drivers License Medical Certification.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. Soles
Date:	April 1, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Second Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 2 amends the law that authorizes the Division of Motor Vehicles (DMV) to conditionally issue drivers license to applicants who are afflicted with or suffer from a physical or mental disability or disease that may impair their ability to safely operate a motor vehicle. The statute is amended to allow the DMV to issue the license upon the applicant's submission of a signed statement from a physician licensed by this State or by any other jurisdiction. The bill deletes the current restriction that the physician be licensed to practice in North Carolina. The act is effective when it becomes law.***

CURRENT LAW: G.S. 20-9 restricts the authority of the Division of Motor Vehicles to issue drivers licenses to certain applicants. G.S. 20-9(e) prohibits DMV from issuing a drivers license to anyone who is afflicted with or suffering from a physical or mental disability or disease that may prevent the person from exercising control over a motor vehicle on the highways or to understand highway warning or direction signs. However, the law provides an exception if DMV is able to determine that the applicant does not pose a safety hazard despite their disability. DMV must make this determination in part on reliance on a signed certificate stating that the applicant's physical or mental disability is controlled by medication and treatment. The statute requires a physician licensed to practice medicine in North Carolina conduct the examination.

Note that in 1999, the General Assembly enacted G.S. 90-18.3 to allow a nurse practitioner or a physician assistant to conduct any physical examination required to be conducted by a physician by a statute or State agency rule. The nurse or PA may also sign the form.

BILL ANALYSIS: The bill will delete the requirement that the certifying physician hold a license to practice in North Carolina to allow DMV to consider certificates signed by physicians licensed to practice any jurisdiction.

North Carolina statutes and rules contain various provisions requiring a physical examination to be conducted by a licensed physician for a variety of purposes. Only a few allow the physician to be licensed in states other than North Carolina. An example of a statute that does is G.S. 97-27(b), which governs workers compensation cases in which there is a question as to the percentage of permanent disability suffered by an employee and the employee is dissatisfied with the examination conducted by the physician designated by the Industrial Commission. Under this subsection, the employee is allowed to have another medical examination, and it may be conducted by a "*duly qualified physician or surgeon licensed and practicing in North Carolina or by a duly qualified physician or surgeon licensed to practice in South Carolina, Georgia, Virginia and Tennessee*" provided that the physician has been approved by the NC Industrial Commission.

BACKGROUND: Prior to being rerefered to this committee from the floor, this bill was reported from the House Health committee with a favorable report as amended. The committee did not vote report the bill as a proposed committee substitute. The amendment adopted by the committee would have limited this change to physicians licensed to practice in the United States.

Linda Attarian, House Health committee counsel, substantially contributed to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 3

SENATE BILL 2

Health and Human Resources Committee Substitute Adopted 2/26/03
House Committee Substitute Favorable 4/2/03

Short Title: Drivers License Medical Certification. (Public)

Sponsors:

Referred to:

February 10, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW CERTAIN APPLICANTS FOR DRIVERS LICENSES TO SUBMIT MEDICAL CERTIFICATES FROM OUT-OF-STATE PHYSICIANS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-9(g)(2) reads as rewritten:

"(g) The Division may issue a driver's license to any applicant covered by subsection (e) of this section under the following conditions:

...

(2) The Division shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine in this State or in any other state of the United States and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle, including, if such is the fact, the examining physician's statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant."

SECTION 2. This act is effective when it becomes law.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 1, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jeff Edwards	NC Dept. of Justice
Susan M. Howard	NC DMV - Medical Section
Sharon Matthews	DOT - DMV
Cindy Ellen	NCRMA
Tash Sr	NCRMA
Rodney E. [illegible]	FAMM
Lee Rubert	CJPC
Steve Keen	NCMS
Mark Benson	Capitol Consp
Kendall Byum	Rep. Kiser
Patrice Roesler	NCAE

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, April 1, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bill:**

HB 108 (Habitual Misd. Larceny/Felony))
Rep. Tim Moore, Bill Sponsor
SB 2 (Drivers License Medical Certification)
Senator R. C. Soles, Bill Sponsor

3. **Adjourn.**

House Judiciary II

Committee

Minutes

April 3, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Wayne Goodwin, Vice Chairman, called the meeting to order.

Rep. Stam was recognized. He moved that a proposed committee substitute for **HB 394** be adopted for discussion and the motion carried. A copy of the committee substitute is attached to these Minutes as *Attachment I.*

He said the proposed committee substitute for **HB 394** (Clarify Legal Filing Law) amends provisions in several sections of the General Statutes, which set deadlines for various acts to be performed. The amendments clarify the law to provide that only legal holidays on which the courthouse is actually closed for transactions will create an extension of time to perform the act.

Rep. Stam said that the Administrative Office of the Courts approves the legislation.

Anne Winner, representing the NC Land Title Association, told the committee that her association also supports this bill.

Rep. Ellis moved to give the proposed committee substitute a favorable report and the original bill an unfavorable report. The motion passed.

Rep. Goodwin said the committee will not be voting on the next bill on the agenda, **HB 564** (Revise Exclusionary Rule), but would hear an explanation of the bill from Rep. Stam who is the bill sponsor.

Rep. Stam was recognized. He acknowledged that the bill would be controversial and would limit the exclusion or suppression of unlawfully obtained evidence in a criminal trial to when exclusion or suppression is required by the United States Constitution. Thus, suppression of evidence would no longer be required if the evidence is obtained in violation of the North Carolina Constitution or as a substantial violation of the Criminal Procedure Act.

He said, "What the bill does not do is deal with admissibility of evidence for trial. Bill does not allow all unlawfully obtained evidence into trial, because most unlawfully obtained evidence is excluded by interpretations of the U. S. Supreme Court under the Constitution of the United States."

His question was, "are we excluding too much or too little?"

Rep. Stam presented the committee with a handout which contained the following: Memorandum from a Staff Attorney, Hal Pell, which discussed *State v. Carter* and the Good Faith Exception; an article written by The Honorable Robert H. Hobgood, Senior Resident Superior Court Judge of the Ninth judicial District of North Carolina. (Judge Hobgood's article appeared in the Campbell Law Review in the spring of 1999); an article from the December 25, 1995 edition of the National Review entitled "Miranda's Hidden Costs", and the official Opinions of the Supreme Court of North Carolina/1988/322 N.C. 709, 370 S.E. 2d *State v. Carter* (S. Ct. 1988) 1988 N. C. Lexis 477, of 356 N.C. 22c 566 S.E. 2d 50 *State vs. Pearson* (S. Ct. 2002) 2002 N.C. Lexis 545, and 324 N. C. 506,379 S.E. 2d 830 *State v. Hyleman* (S. Ct. 1989) 1989 N.C. Lexis 302. A copy of this handout is a part of these Minutes as *Attachment II.*

Rep. Goodwin recognized Paul Pulley, representing the N.C. Academy of Trial Lawyers. Mr. Pulley said that, in anticipation of being joined by the Academy's attorney on Criminal Law, he would yield while others commented on the bill.

Rep. Goodwin then recognized Donna Pygott from the NCVAN who said she felt this bill would be beneficial to many crime victims as it would prevent them from going through second trials.

Patricia Camp from the American Civil Liberties Union was recognized. She said the ACLU opposes the bill. She said a professor from the UNC Law School would like to address the committee on this bill.

After Rep. Stam made closing remarks about why he supported this change to the Exclusionary Rule, the meeting was adjourned at 10:50 a.m.

Rep. Wayne Goodwin
Vice Chairman

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H **D**

HOUSE BILL 394
PROPOSED COMMITTEE SUBSTITUTE H394-PCS60220-RO-5

Short Title: Clarify Legal Filing Law. (Public)

Sponsors:

Referred to:

March 11, 2003

A BILL TO BE ENTITLED

AN ACT CLARIFYING THE LAW PERTAINING TO LEGAL DEADLINES FALLING ON A HOLIDAY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 103-5(a) reads as rewritten:

"(a) Where the day or the last day for doing ~~an~~ any act required or permitted by law to be ~~done~~ performed in a public office or courthouse falls on ~~Sunday or a holiday~~ a Sunday or legal holiday when the public office or courthouse is closed for transactions, the act may be ~~done~~ performed on the next ~~succeeding secular or business~~ day that the public office or courthouse is open for transactions. ~~and where the courthouse in any county is closed on Saturday or any other day by order of the board of county commissioners of said county and the day or the last day required for filing an advance bid or the filing of any pleading or written instrument of any kind with any officer having an office in the courthouse, or the performance of any act required or permitted to be done in said courthouse falls on Saturday or other day during which said courthouse is closed as aforesaid, then said Saturday or other day during which said courthouse is closed as aforesaid shall be deemed a holiday; and said advance bid, pleading or other written instrument may be filed, and any act required or permitted to be done in the courthouse may be done on the next day during which the courthouse is open for business.~~"

SECTION 2. G.S. 1A-1, Rule 6(a) reads as rewritten:

"(a) Computation. – In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal ~~holiday,~~ holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal

~~holiday.~~ holiday when the courthouse is closed for transactions. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday."

SECTION 3. G.S. 45-21.21(e) reads as rewritten:

"(e) A sale may be postponed more than once provided the final postponed sale date is not later than 90 days, exclusive of Sunday and legal ~~holidays,~~ holidays when the courthouse is closed for transactions, after the original date for the sale."

SECTION 4. G.S. 45-21.23 reads as rewritten:

"**§ 45-21.23. Time of sale.**

A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place. The sale shall be held between the hours of 10:00 A.M. and 4:00 P.M. on any day other than Sunday or a legal ~~holiday.~~holiday when the courthouse is closed for transactions."

SECTION 5. G.S. 45-21.24 reads as rewritten:

"**§ 45-21.24. Continuance of uncompleted sale.**

A sale commenced but not completed within the time allowed by G.S. 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday or a legal ~~holiday.~~ holiday when the courthouse is closed for transactions. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued."

SECTION 6. G.S. 45-21.27(a) reads as rewritten:

"(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of the sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid, and if the tenth day shall fall upon a Sunday or legal ~~holiday,~~ holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid filed on the day following when said office is open for the regular dispatch of its business. Subject to the provisions of G.S. 45-21.30, there shall be no resales; rather, there may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid. When an upset bid is not filed following a sale, resale, or

prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed."

SECTION 7. G.S. 1-339.64(a) reads as rewritten:

"(a) An upset bid is an advanced, increased, or raised bid whereby a person offers to purchase real property theretofore sold for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or the last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of sale or the last notice of upset bid was filed, by the close of normal business hours on the tenth day after the filing of the report of sale or the last notice of upset bid and if the tenth day falls upon a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid may be filed on the day following when the office is open for the regular dispatch of its business. Except as provided in G.S. 1-339.66A and G.S. 1-339.69, there shall be no resales; however, there may be successive upset bids, each of which shall be followed by a period of 10 days for a further upset bid. If a timely motion for resale is filed under G.S. 1-339.66A, no upset bids may be filed while the motion is pending."

SECTION 8. G.S. 1-339.25(a) reads as rewritten:

"(a) An upset bid is an advanced, increased, or raised bid in a public sale by auction whereby a person offers to purchase real property theretofore sold for an amount exceeding the reported sale price or the last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of the sale or the last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court with whom the report of sale or the last notice of upset bid was filed, by the close of normal business hours on the tenth day after the filing of the report of sale or the last notice of upset bid, and if the tenth day falls upon a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid may be filed on the day following when the office is open for the regular dispatch of its business. Except as provided in G.S. 1-339.27A and G.S. 1-339.30, there shall be no resales; however, there may be successive upset bids, each of which shall be followed by a period of 10 days for a further upset bid. If a timely

motion for resale is filed under G.S. 1-339.27A, no upset bids may be filed while the motion is pending."

SECTION 9. G.S. 7B-506(e) reads as rewritten:

"(e) If the court orders at the hearing required in subsection (a) of this section that the juvenile remain in custody, a subsequent hearing on continued custody shall be held within seven business days of that hearing, excluding Saturdays, Sundays, and legal ~~holidays,~~ holidays when the courthouse is closed for transactions, and pending a hearing on the merits, hearings thereafter shall be held at intervals of no more than 30 calendar days."

SECTION 10. G.S. 7B-1906(b) reads as rewritten:

"(b) As long as the juvenile remains in secure or nonsecure custody, further hearings to determine the need for continued secure custody shall be held at intervals of no more than 10 calendar days. A subsequent hearing on continued nonsecure custody shall be held within seven business days, excluding Saturdays, Sundays, and legal ~~holidays,~~ holidays when the courthouse is closed for transactions, of the initial hearing required in subsection (a) of this section and hearings thereafter shall be held at intervals of no more than 30 calendar days. In the case of a juvenile alleged to be delinquent, further hearings may be waived only with the consent of the juvenile, through counsel for the juvenile."

SECTION 11. G.S. 105-374(m) reads as rewritten:

"(m) Sale. – The sale shall be by public auction to the highest bidder and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal ~~holiday.~~ holiday when the courthouse is closed for transactions. (In actions brought by a municipality that is not a county seat, the court may, in its discretion, direct that the sale be held at the city or town hall door.) The commissioner conducting the sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty percent (20%) of his bid, which deposit, in the event that the bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting. (However, this provision shall not deprive the commissioner of his right to sue for specific performance of the contract.) No deposit shall be required of a taxing unit that has made the highest bid at the foreclosure sale."

SECTION 12. G.S. 156-105 reads as rewritten:

"**§ 156-105. Assessment lien; collection; sale of land.**

The assessments shall constitute a first and paramount lien, second only to State and county taxes, upon the lands assessed for the payment of the bonds and interest thereon as they become due, and shall be collected in the same manner and by the same officers as the State and county taxes are collected. The assessments shall be due and payable on the first Monday in September each year, and if the same shall not be paid in full by the thirty-first day of December following, it shall be the duty of the sheriff or tax collector to sell the lands so delinquent. The sale of lands for failure to pay such assessments shall be made at the courthouse door of the county in which the lands are situated, between the hours of 10 o'clock in the forenoon and four o'clock in the afternoon of any date except Sunday or another legal ~~holiday,~~ holiday when the courthouse is closed for

transactions, which may be designated by the board of drainage commissioners. After any such sale date has been designated by the board of drainage commissioners, if for any necessary cause the sale cannot be made on that date, the sale may be continued from day to day for not exceeding four days, or the lands may be readvertised and sold on any day which the board of drainage commissioners may or shall designate during the same hours and without any order being obtained therefor during the same calendar year. Nothing in this section shall be construed to require any order from any court for any sale or resale held hereunder. The existing general tax law in force when sales are made for delinquent assessments shall have application in redeeming lands so sold; and in all other respects, except as herein or otherwise modified or amended, the existing law as to the collection of State and county taxes shall apply to the collection of such drainage assessments. No bid at any sale shall be received unless sufficient in amount to discharge all the drainage assessments and other charges due by the delinquent lands or owner thereof, together with all costs and expenses of sale. If no sufficient bid be received, the board of drainage commissioners of the district shall be deemed the purchaser in its corporate capacity at a sum sufficient to pay all assessments which are due and costs as above stated, and shall be entitled to receive a certificate of purchase and deed in the manner provided by law for purchasers at tax sales. The board of drainage commissioners shall only be required to pay to the sheriff the costs and expenses of sale before receiving a certificate of purchase. The board of drainage commissioners of the district in their corporate capacity shall be in like position and have the same rights and be subject to the same duties as the purchaser of lands at any tax sale under the general law. If the board of drainage commissioners shall have been the purchaser of lands so sold, the amount paid in redemption by the owner, or any person having an estate therein or lien thereon, shall include the sum bid therefor plus the penalty. The board of drainage commissioners shall pay to the sheriff or tax collector the amount representing their bid at the sale of said lands before they shall be entitled to receive a deed therefor, which the sheriff shall pay to the treasurer of the drainage district in the same manner as other funds received by him. The board of drainage commissioners, after acquiring a deed for said lands, may hold the same as an asset of the district, and shall be liable for the payment of all drainage assessments and State and county taxes accruing after the sale at which the district was a bidder, and in all respects be deemed the owner of said lands and subject to the same privileges and liabilities as any other landowner, including the right to convey the said lands for a consideration and pay the proceeds of said sale to the treasurer of the district, which may be distributed by the drainage commissioners for the benefit of the district in the same manner as other district funds.

If any sheriff or tax collector failed for any reason to collect drainage assessments upon lands in any drainage districts due in 1917, or any subsequent years, and further failed to make valid sales of the lands so delinquent in the payment of such assessments, then and in such event the existing sheriff or tax collector is hereby authorized and directed to proceed to collect such unpaid drainage assessments, with interest thereon from the dates when such assessments respectively became due, and in default of payment being made he is further authorized to make sales of such lands as may be in

default at any time hereafter, at the times and in the manner authorized by law as amended herein; and the purchaser at said sales shall acquire title to such lands in the manner provided by law. If the sheriff or tax collector in office at the time such assessments were in default has since died or gone out of office, the powers herein given shall be exercised by the existing sheriff or tax collector.

The 1931 amendment to this section shall have the same force and effect from and after April 13, 1931, as if it had been ratified and enacted prior to the first day of January, 1929, and no sale of drainage lands held under the provisions of section 5361 shall be deemed or declared void by reason of the fact that they may not have been held on the day specified in section 5361 of the Consolidated Statutes prior to this amendment."

SECTION 13. This act becomes effective October 1, 2003, and applies to any act required or permitted by law to be done on or after that date.

HOUSE BILL 394:
Clarify Legal Filing Law.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Stam
Date:	April 3, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Proposed Committee Substitute H394-CSRO-5[v.3]		Committee Co-Counsel

SUMMARY: ***The proposed committee substitute for House Bill 394 amends various sections of the General Statutes to clarify the law pertaining to legal deadlines falling on holidays.***

CURRENT LAW:

Current law (G.S. 103-4) lists 18 separate days as legal public holidays. This list includes several days that are not commonly recognized as holidays, such as March 25 (Greek Independence Day), April 12 (Anniversary of signing of the Halifax Resolves), and May 20 (Anniversary of Mecklenburg Declaration of Independence).

Current law also provides that when the day or the last day for doing an act required or permitted by law falls on a Sunday or legal holiday, the act may be done on the next business day.

BILL ANALYSIS:

This bill amends provisions in several sections of the General Statutes, which set deadlines for various acts to be performed. The amendments clarify the law to provide that only legal holidays on which the courthouse is actually closed for transactions will create an extension of time to perform the act.

The laws amended by this bill include provisions relating to:

- Act to be done on Sunday or holidays.
- Rules of Civil Procedure.
- Mortgages and Deeds of Trust.
- Execution Sales.
- Judicial Sales.
- Juvenile Code.
- Foreclosure of Tax lien.
- Assessment lien.

This act would become effective October 1, 2003, and would apply to any act required or permitted by law to be done on or after that date.

Chris Burti Statewide Land Title
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H 394

ISSUES IN REAL PROPERTY

(CONTINUED FROM PAGE 1)

closer examination of the operative facts.

***In re Country Lake Enterprises, INC.*, U.S.B.C., E.D.N.C., Case No. 02-00980-5-ATS**

For many years, we have felt somewhat like Chicken Little in warning real property practitioners about potentially remote problems. The sky appears to have finally fallen on the problem created by the interplay between the time limitations set out in the Article 2A foreclosure procedures of Chapter 45 and the legal holidays set out in NCGS Sec. 103-4. In this Eastern District Bankruptcy case, Judge Small has ruled that where the tenth day of the raised bid/redemption period falls on March 25, it does not expire until the close of business of the next day. As a result, the trustee's deed was voided and the property is part of the bankruptcy estate where the bankruptcy petition was filed at 5:22 P. M. on March 25, 2002. This result arises because NCGS Sec. 45-21.27 "specifically provides that if the tenth day of the upset bid period is a legal holiday, the necessary deposit and notice may be filed on the following day." In this instance, NCGS Sec. 103-4(3)(a) specifies that Greek Independence Day, which falls on March 25, is a legal holiday in North Carolina.

Article 2A provides that a foreclosure sale may not be conducted on a legal holiday as well. G.S. 45-21.23 states that a foreclosure sale shall be held between 10:00 AM and 04:00 PM

"legal holiday." The following is a list of holidays from G.S. 103-4(a):

(1) New Year's Day, January 1.
(1a) Martin Luther King, Jr.'s, Birthday, the third Monday in January.
(2) Robert E. Lee's Birthday, January 19.
(3) Washington's Birthday, the third Monday in February.
(3a) Greek Independence Day, March 25.
(4) Anniversary of signing of Halifax Resolves, April 12.
(5) Confederate Memorial Day, May 10.
(6) Anniversary of Mecklenburg Declaration of Independence, May 20.
(7) Memorial Day, the last Monday in May.
(8) Good Friday.
(9) Independence Day, July 4.
(10) Labor Day, the first Monday in September.
(11) Columbus Day, the second Monday in October.
(11a) Yom Kippur.
(12) Veterans Day, November 11.
(13) Tuesday after the first Monday in November in years in which a general election is to be held.
(14) Thanksgiving Day, the fourth Thursday in November.
(15) Christmas Day, December 25.

Robert E. Lee's Birthday (January 19), Greek Independence Day (March 25), Anniversary of signing of Halifax Resolves (April 12), Confederate Memorial Day (May 10), Anniversary of Mecklenburg Declaration of Independence (May 20), Yom Kippur (the second Monday in October) and Yom Kippur are holidays that are not widely recognized as days on which a foreclosure sale may not be conducted or on which an upset bid will not expire. Many of these legal holidays are not observed with a courthouse closing and therefore some title examiners and foreclosure attorneys are not always alert to the possible title defect caused by failure to observe the requirements of the statutes. The court in this case acknowledged this fact in its refusal to impose sanctions upon the creditors for violation of the stay. In Addition, G.S. 103-4(b) states that whenever a public holiday shall fall upon a Sunday, the following Monday shall be a public holiday. This Sunday extension provision creates a further complication in determining appropriate dates.

IRS Code Section 1031 Deferral May Apply to Peanut Quota Buyout

The Farm Security and Rural Investment Act of 2002 abolishes the peanut quota system and provides for a buyout for quota holders. The payments provided for under the buyout will be taxable as income. IRS Notice 2002–67 provides that if the quota holder used the quota in the trade or business of farming and, on May 13, 2002, the quota holder's holding period for the quota was more than one year, then the transaction may me treated as an installment sale and reported as a section 1231 transaction. Consistent with prior Revenue Rul

"A peanut quota is considered an interest in land." The notice imposes a reporting requirement and notes that the payments "will be reported by USDA on Form 1099–S for 2002 if the amount is $600 or more."

While the notice and prior rulings do not deal with the availability of Section 1031 treatment for the sale of quotas, such treatment would be consistent with other similar interests that have been approved as eligible for deferral of gain or loss. Logically, the buyout payments should be eligible for Section 1033 treatment and the extended three-year replacement period. The notice, however, provides that the buyout of the peanut quotas under the Act is not an involuntary conversion of the quotas. This does not seem correct in that the buyout is mandated by Congress and is not voluntary. As there is no contextual support for this statement, we are inclined to infer that the Service may be planning to not allow Section 1033 treatment. This does not seem to be consistent with prior treatment of similar interests in land.

Chris Burti obtained his B.S. Degree in Management from East Carolina University in 1975, He then received his J.D. from the University of North Carolina School of Law. After practicing law for fifteen years, he

EASEMENTS – ACCESS

In *Bee Tree Missionary Baptist Church v. McNeil*, __N.C.App.__, 570 S.E2d 781 (2002), it was held that a judgment in a prior action upholding the validity of an access easement (to a public road) over the plaintiff—landowner's property collaterally estopped the plaintiff-landowner from challenging the easement and the easement was not void for vagueness. Also, the Court of Appeals cited the case of *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963), where the Court quoted *Shingleton*: "However, 'an easement appurtenant is incident to an estate' and passes with transfer of that estate." The Court continued, "In the absence of evidence to the contrary, an easement that is a 'useful adjunct of land owned by the grantee of the easement, will be declared an 'easement appurtenant,' and not 'in gross,'..."

H 394

PUBLIC HOLIDAYS – AFFECT ON TIME LIMITATIONS

In re County Lake Enterprises, Inc. _____ B.R. _____ (E.D.N.C. 2002), is a reminder about the affect of the last day of a statutory time period falling on a public holiday. The case dealt with a power of sale foreclosure. The tenth day of the upset bid period was March 25, Greek Independence Day, a public holiday specified in G.S. 103-4(a). G.S. 45-21.27(a) provides that if the tenth day shall fall upon a Sunday or legal holiday or upon a day on which the clerk's office is not open for business, the deposit may be made and notice of upset bid filed on the following day. Whether the clerk's office is open or closed on public holidays is irrelevant, the court held. That is because the statute makes it clear that the upset bid period may not end on a legal public holiday. Because March 25 was such a holiday, the upset bid period expired at the normal close of business on March 26, by which time the debtor filed its bankruptcy petition on—you guessed it—March 25, 2002, Greek Independence Day! Therefore, the property was subject to the automatic stay, the debtor still had rights in the property and the property was still part of the bankrupt's estate.

The holidays are set out in G.S. 103-4(a) as follows: (1) New Year's Day, January 1. (1a) Martin Luther King, Jr.'s Birthday, the third Monday in January. (2) Robert E. Lee's Birthday, January 19. (3) Washington's Birthday, the third Monday in February. (3a) Greek Independence Day, March 25. (4) Anniversary of signing of Halifax Resolves, April 12. (5) Confederate Memorial Day, May 10. (6) Anniversary of Mecklenburg Declaration of Independence, May 20. (7) Memorial Day, the last Monday in May. (8) Good Friday. (9) Independence Day, July 4. (10) Labor Day, the first Monday in September. (11) Columbus Day, the second Monday in October. (11a) Yom Kippur. (12) Veterans Day, November 11. (13) Tuesday after the first Monday in November in years in which a general election is to be held. (14) Thanksgiving Day, the fourth Thursday in November. (15) Christmas Day, December 25.

G.S. 103-4(b) provides as follows: "Whenever any public holiday shall fall upon Sunday, the Monday following shall be a public holiday."

Additionally, the following statutes should be kept in mind:

§1-593. How computed.

The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure.

§1-594. Computation in publication.

Except as otherwise expressly provided, the time for publication of legal notices shall be computed in the manner prescribed by Rule 6 of the North Carolina Rules of Civil Procedure. (Emphasis added.)

Note that G.S. 1-593 and G.S. 1-594 do not appear to limit Rule 6 computations to civil actions. Under Rule 6(a), you do *not* count the day of the act, event, default or publication. The last day of the period *is* included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays are excluded in the computation. A half holiday shall not be counted as a holiday. G.S. 1-593 should be kept in mind when computing the 180 day mechanics' lien enforcement period in G.S. 44A-13 which is computed from the date of last furnishing by the claimant.

BILL PITTMAN

Bill Pittman, formerly of Fidelity National, has joined our Raleigh Office as Vice President and Claims Counsel. Bill is a veteran with many years of experience in the title industry. We are delighted to have the benefit of this experience here at The Title Company of North Carolina.

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GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE BILL 564

Short Title:	Revise Exclusionary Rule.	(Public)
Sponsors:	Representative Stam.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT EVIDENCE MAY ONLY BE SUPPRESSED IN A CRIMINAL TRIAL IF ITS EXCLUSION IS REQUIRED BY THE CONSTITUTION OF THE UNITED STATES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-974 reads as rewritten:

"**§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.**

Upon timely motion, evidence ~~must~~ may only be suppressed ~~if:~~ if its exclusion is required by the Constitution of the United States.

~~(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or~~

~~(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:~~

~~a. The importance of the particular interest violated;~~

~~b. The extent of the deviation from lawful conduct;~~

~~c. The extent to which the violation was willful;~~

~~d. The extent to which exclusion will tend to deter future violations of this Chapter.~~"

SECTION 2. This act becomes effective December 1, 2003, and shall apply to all criminal trials pending or commencing on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H

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MEMORANDUM

TO: Rep. Paul Stam
FROM: Hal Pell, Staff Attorney
RE: *State v. Carter* and the Good Faith Exception
DATE: Feb. 25, 2003

A. The federal good faith exception.

The United States Supreme Court, in *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677 (1984), held that the Fourth Amendment of the U.S. Constitution did not require the suppression of evidence that had been obtained by law enforcement officers who had acted in good faith. In *Leon*, law enforcement officers, seeking a search warrant, had provided an affidavit to a state court judge. The judge issued the warrant upon a finding of probable cause to search.

An appellate court later ruled that the information provided to the judge was not, as a matter of law, sufficient to establish probable cause. Consequently, the appellate court ruled that the Fourth amendment's prohibition against unreasonable searches and seizures required the trial court to exclude the evidence that had been obtained by the search warrant.

Upon review, the U.S. Supreme Court discussed the premise behind the exclusionary rule: the deterrence of police misconduct. The Court stated that there was no evidence that neutral and detached magistrates, who rule on the issuance of search warrants, are inclined to ignore or subvert the Fourth Amendment. *Leon*, 468 U.S. at 916. The Court saw no basis for believing that exclusion of evidence seized pursuant to a facially valid warrant would have a significant deterrent effect on the issuing judge or magistrate.

The Court stated that if evidence excluded due to a subsequently invalidated warrant was to have any deterrent effect, it must alter the behavior of individual police officers or the policies of their departments. *Leon*, 468 U.S. at 918. However, the Court noted that "assuming" that the exclusionary rule deters police misconduct and provides incentives for the law enforcement profession to conduct itself in accordance with the Fourth Amendment, "it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."

B. No "good faith exception" in North Carolina.

In *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), the North Carolina Supreme Court considered whether there was a "good faith" exception to Art. I, § 20, of the North Carolina Constitution. Carter, a prisoner on work release, had failed to report back to a prison van after working at a sawmill. He had broken into the seventy-eight year old victim's home and forced her into a field. The defendant then raped the victim, and beat her face until she was unconscious. He was found some thirty yards from the victim, smelling of alcohol and disheveled. The next day, the victim's eyeglasses were found under the defendant's hat in a trailer where the defendant had been taken.

Three days after the assault, an SBI agent made application for a non-testimonial identification order requesting that a blood sample be taken from the defendant. The order was issued, and the sample taken. At the trial, the defendant moved to suppress evidence that blood on his clothes was consistent with the victim's and did not match his own. He relied upon North Carolina case law, which held that drawing blood from an in-custody defendant without first obtaining a search warrant violated the fourth and fourteenth amendments to the U.S. Constitution, and the North Carolina Constitution. The motion to suppress was denied.

The North Carolina Supreme Court held that the trial court had erred in allowing the evidence. The Court discussed the history of the exclusionary rule, and voiced its concerns that exceptions would overcome the rule itself. The Court stated that "[t]he framers of our constitution sought to check the tendency of government to overreach by placing a constitutional mantle around the right to privacy in one's person, home, and effects." The Court believed that the "exclusionary rule [was] indispensable to achieve the purposes for which prohibitions against unreasonable search and seizure were written into the constitutions of the revolutionary era." *Carter*, 322 N.C. at 716.

The Court relied on the fact that North Carolina had been among a handful of states that had adopted an exclusionary rule by statute, rather than by judicial creation. North Carolina passed, in 1937, a law requiring the suppression of evidence obtained under an illegal search warrant. The law was amended in 1951 to apply to unlawful warrantless searches. The

amended statute was repealed in 1969, and replaced in 1975 by N.C.G.S. § 15A-974.

The Court noted that, since 1937, the expressed public policy was to exclude evidence obtained by unreasonable searches and seizures, and that "[t]he clearly mandated public policy of our state is to exclude evidence obtained in violation of our constitution," citing N.C.G.S. § 15A-974(1). The Court went on to hold:

> This policy has existed since 1937. If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy.

Carter, 322 N.C. at 724. Thus, the Court declined to adopt a good faith exception to the exclusionary rule under the state constitution, and ordered a new trial.

C. The *Carter* dissent.

In dissent to the *Carter* decision, Justice Mitchell (joined by Justice Meyer), quoted the United States Supreme Court: "We refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Carter*, 322 N.C. at 724 (Mitchell, J., dissenting), *quoting* Massachusetts v. Sheppard, 468 U.S. 981, 989-90. The dissent notes that the "high-minded quotations relied upon by the majority" warn against permitting courts to be used to assist officers who "*intentionally* break the law to gather evidence against criminals." *Carter*, 322 N.C. at 726 (original emphasis).

The dissent notes that the good faith exception to the exclusionary rule applies *only* in situations where officers have acted under the objectively reasonable belief that their actions were lawful. Consequently, "[a]lthough the majority implies that [the use of exclusionary rule] somehow protects our privacy, the majority completely fails to tell us how exclusion of evidence seized by officer in good faith reliance upon a court order will further [the] noble purpose" of protecting our privacy from invasion. *Id.* The dissent concludes that the failure of the majority "is quite understandable," because the exclusion of evidence is such cases serves no

valid purpose and will greatly harm the innocent public. *Id.*, citing *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677.

The dissent does note that even the undesirable result of preventing criminal prosecutions would be an acceptable price to pay "*if it would have any substantial deterrent effect* on violations of constitutional liberties." *Id.* at 727. However,

> It should be obvious to anyone that excluding this evidence will not deter other officers from making similar mistakes in good faith as to the legal validity of court orders upon which they rely. When following judicial orders in the future, the officers will still not know they are doing anything wrong. Therefore, unlike punishment of intentionally unlawful conduct by officers, which the exclusionary rule arguably deters, punishment of an officer's good faith reliance on a judicial order cannot deter future similar conduct.

Id. Justice Mitchell concluded that the majority had "tilted the scales of justice in favor of criminal defendants for no good or beneficial reason, whatsoever . . . ."

Justice Meyer concurring in the dissent, noted that the Court, in *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986), had recently adopted the *Leon* holding and had extended it to the identical facts in the Carter case. In *Welch*, officers had obtained a blood sample from an in-custody defendant by use of a non-testimonial order. In *Welch*, the Court held that the evidence should not be suppressed because the blood sample was taken in good faith reliance on the order.

The sample in the Carter case had been obtained prior to the *Welch* decision being released. Consequently, Judge Meyer reasoned that the "failure of the majority to give this case the same treatment as *Welch* is the worst sort of judicial arbitrariness." *Carter*, 322 N.C. at 731 (Meyer, J., dissenting).

Justice Meyer was adamant that the Court should not reject, on state constitutional grounds, the good faith exception to the federal exclusionary rule. He noted that Article I, section 20 of the State Constitution had generally been read to be the functional equivalent of the fourth

Amendment, and that the Court had relied on United States Supreme Court decisions on the fourth Amendment as persuasive authority. *Id.* at 732, citing *State v. Arrington*, 311 N.C. 633. He stated that

> The law of search and seizure under the North Carolina Constitution *should be interpreted as being no more restrictive than the fourth amendment* to the United States Constitution.

Id. at 732 (emphasis added), and that

> There is no reason, compelling or otherwise, for this Court to find there to be different exclusionary standards under the North Carolina Constitution than the United States Constitution. A dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the objectives of the fourth amendment or [A]rticle I, section 20 of the North Carolina Constitution.

Id. at 732-733. Justice Meyer concluded that the Court had "grievously erred" in ignoring United States Supreme Court precedent, and creating different rules depending upon whether the state or federal Constitutions were invoked by a defendant making a suppression motion.

D. *State v. Pearson—Carter* considerations.

In a recent North Carolina Court of Appeals decision, the court stated:

> In *State v. Carter*, our Supreme Court held that where the police relied on an NIO [Non-testimonial Identification Order] to take a blood sample from a suspect in custody, there is no good faith exception to the exclusionary rule and the taking of a blood sample necessitates a search warrant.

State v. Pearson, 145 N.C.App. 506, 517-518 (2001), *affirmed,* 356 N.C. 22 (2002), *cert. denied,* 123 S.Ct. 856, 71 USLW 3472 (U.S.N.C. Jan 13, 2003) (NO. 02-7164). In *Pearson*, the defendant had been convicted of multiple rape charges. During the investigation of the crimes, a judge had signed an NIO, and blood, public hair and saliva had been taken while Pearson was in custody. The trial court had granted the motion to suppress the blood

sample obtained pursuant to the NIO, but denied the motion to suppress the hair and saliva samples.

On appeal, Pearson argued that there had been violations of various statutory provisions that are necessary prerequisites to the issuance of an NIO. He also argued that the State substantially violated other procedures required upon the issuance of an NIO. Consequently, he alleged that N.C.G.S. § 15A-974 required the suppression of any evidence obtained by the NIO. Pearson also argued that the taking of his pubic hair and saliva violated his rights under the fourth Amendment and Art. I, section 20 of the North Carolina Constitution.

The N.C. Court of Appeals held that although law enforcement officers may have committed some violations of statutory provisions, the violations were not substantial. It also found that the taking of blood and saliva samples was not as intrusive as a blood sample, and, therefore, declined to extend Carter to such samples. *Id.* at 518. The court held that a later blood test, taken pursuant to a search warrant, was not illegally obtained—as the NIO (upon which the warrant was based) had been properly issued. *Id.* at 520. The court found no error.

There was, however, a dissenting opinion. Judge Biggs found that the NIO was facially inadequate, and that the affidavit in support of the NIO application had false and misleading information. Judge Biggs found that the "State committed numerous statutory violations, the cumulative effect of which was to deprive the defendant of a fair trial." *Pearson*, 145 N.C.App. at 523 (Biggs, J., dissenting). The dissent concluded that the trial court erred in denying the motions to suppress the evidence obtained from the NIO and a later search warrant; that the decision should be reversed; and that a new trial should be ordered.

Upon further review, the North Carolina Supreme Court affirmed. *State v. Pearson*, 356 N.C. 22 (2002). The Court found that the officer making the affidavit for the NIO did not act in reckless disregard of the truth: "Defendant failed to produce evidence that Agent Suttle made his allegations in bad faith such that they were knowingly false or in reckless disregard of the truth. The trial court correctly issued the NIO." *Id.* at 30. The Court also found that there were no substantial statutory violations, such that the evidence should have been suppressed under N.C.G.S. § 15A-974(2).

E. Summary

The *Pearson* case shows a recent application of the *Carter* decision. Blood sample evidence, drawn pursuant to a judicial order, was ruled inadmissible at trial. *Pearson* also shows an attempt to expand the *Carter* ruling to include evidence other than blood samples.

Perhaps the most significant aspect of the *Pearson* case is the appellant's argument that evidence should have been suppressed on statutory grounds. Evidence must be suppressed if it is obtained as a result of a substantial violation of the provisions of Chapter 15A. N.C.G.S. § 15A-974(2). At least one of three appellate court judges hearing the case would have suppressed the evidence based, in part, upon statutory violations.

In summary, under current North Carolina law (1) evidence may be suppressed where officers have acted under the objectively reasonable belief that their actions were lawful, and where the evidence obtained is otherwise admissible under the federal Constitution, and (2) evidence that is otherwise admissible under both the federal and state Constitutions may be held inadmissible due to violations of North Carolina procedural statutory provisions.

I-95 A/K/A THE DRUG TRAFFICKER'S FREEWAY, AND ITS IMPACT ON STATE CONSTITUTIONAL LAW

THE HONORABLE ROBERT H. HOBGOOD*

INTRODUCTION

This article tests the proposition that since July 5, 1984, the date the United States Supreme Court handed down its ruling in *United States. v. Leon*,[1] a criminal defendant in a search and seizure case can expect disparate results in different state trial courts although identical factual situations exist. First, this article hypothetically pits two drug mules against a reasonably well-trained officer with a defective search warrant. It then assumes that a search warrant has been issued erroneously by a magistrate and further that the defendant moves to suppress evidence in six state trial courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

The defect in the search warrant is that the affidavit attached to the search warrant fails to establish probable cause to believe that controlled substances will be found in a particular place due to staleness of the information and insufficient sworn statements concerning the reliability of the confidential informant. One constant in this hypothetical is that a reasonably well-trained officer would not know that the warrant is defective and could reasonably act in objective good faith in searching for and seizing the controlled substances described in the search warrant.

The defective search warrant is challenged in state trial court by a defense motion to suppress the admission into evidence of the seized controlled substances. The state trial judge conducts a pretrial hearing at which evidence, including the search warrant with affidavit attached, is presented. In a written order, the state trial judge makes findings of facts. On the basis of the findings of facts, the state trial judge then makes conclusions of law. Analysis of the law requires the judge to review the Fourth Amendment to the

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1. 468 U.S. 897 (1984).

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II. METHODOLOGY: A HYPOTHETICAL[35]

The moon rises slowly as two men busily transfer contraband drugs from the stash house into the trunk of a late model Cadillac. The Miami drug lord fingers the trigger of his UZI machine gun as he surveys the scene, located somewhere between the Miami International Airport and Hialeah Park Race Track. After receiving their delivery schedule and telephone numbers, the two "mules" drive off to the east until they arrive at Interstate 95, the "Golden Alley." They turn north and set the cruise control. Within twelve hours they will deliver cocaine in six states: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

These foreign nationals have not read the United States Constitution, Bill of Rights, or the constitutions of the six states in which they will make deliveries. They do know, however, that if stopped they are not to speak English except to ask for a lawyer.

This hypothetical assumes that in a city in each of the six states, the following occurs: On that same night a confidential informant of unproven reliability informs an officer of the (insert city) police department that two persons known to him as "Armando" and "Patsy" are selling large quantities of cocaine from their residence at 620 Noveau Riche Drive in downtown (insert name of same city). The informant also indicates that he witnessed a sale of cocaine by Patsy at the residence approximately five months earlier. At that time, he saw a shoe box containing a large amount of cash that belonged to Patsy. He says that Armando and Patsy generally keep only small quantities of drugs at their residence and store the remainder at another location in (insert name of same city). The police put Armando and Patsy under surveillance and determine that the cars parked at the Noveau Riche residence belong to Armando Sanchez, who previously has been arrested for possession of cocaine, and Patsy Stewart, who has no criminal record. That night officers observe a late model Cadillac arrive at the Noveau Riche Drive residence. Two males exit the vehicle and walk into the residence. Each man holds a small package which resembles a fast food restaurant bag. A quick check of the license tag number through the police information network reveals that the Cadillac is owned by Richard Castle, who has been arrested previously for possession of fifty pounds of marijuana. Officers see another automobile arrive. A

35. These facts are designed to resemble the factual situation in *United States v. Leon*, 468 U.S. 897 (1984).

male exits this automobile, rushes inside the residence at 620 Noveau Riche Drive, and shortly thereafter leaves carrying a small paper sack. Activity increases. At two a.m., after all area businesses have closed, three more automobiles arrive. The occupants rush inside the 620 Noveau Riche Drive residence and leave holding paper bags. The police recognize one of those persons as a probationer with prior drug involvement.

While officers continue to keep the residence under surveillance, one officer rushes to a magistrate. The officer presents an affidavit reciting the information obtained from the confidential informant, the officers' personal observations at 620 Noveau Riche Drive, and the record checks obtained. The magistrate issues a search warrant to search the house and vehicles at 629 Noveau Riche Drive, (insert name of city), for controlled substances. The affidavit contains no facts indicating the basis for the informant's statements concerning prior criminal activity and is devoid of information establishing the informant's reliability.

The officer returns to the scene with the search warrant and all officers search the house and the Cadillac. The officers seize two kilos of cocaine in the house at 620 Noveau Riche Drive and eight kilos of cocaine in the trunk of the Cadillac, all wrapped in fast food restaurant bags.

Armando, Patsy and the two "mules" are arrested inside the house and exercise their right to remain silent. Appointed counsel files a motion to suppress the cocaine on the grounds that the search warrant was not supported by probable cause.

How does this hypothetical impact state constitutional law? To answer that question it is necessary to examine the evidence at the suppression hearing through the lens of the state trial judge in each state. The hypothetical assumes that each defendant has standing to object to the admissibility of at least part of the cocaine.

As we trace this hypothetical journey from state to state, we will examine the legal response of state trial court judges based on search and seizure provisions in state constitutions, state statutes and case law. The state trial court judge will look first to the Fourth Amendment of the United States Constitution.

The state trial judge in each case determines that the search warrant is defective under the Fourth Amendment. The magistrate did not have probable cause to issue the search warrant, because there was no proof of the credibility of the informant and his information was stale. However, the trial judge knows that

suppressing the evidence will have no deterrent effect on the police. The police officer who obtained the search warrant was well-trained and relied on the search warrant in objective good faith. The ruling in *United States v. Leon* would indicate that the motion to suppress should be denied.[36]

The trial judge will attempt to determine if the motion to suppress can be allowed on "adequate and independent" state grounds. The method of analysis is analytical and comparative. It is a useful method, because it studies the disparate responses to the issue by six state supreme courts.

This article follows the hypothetical pair northward from Florida to New Jersey, evaluating state constitutional law, state statutory law and state case law, looking for inconsistencies and anomalies. Interestingly, we begin with an anomaly: the search and seizure provision of the Florida Constitution, Article I, Section 12.

III. FLORIDA

Article I, Section 12, of the Florida Constitution, as amended in 1982, effective January 3, 1983, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*[37]

The 1982 amendment to Article I, Section 12, of the Florida Constitution appears in italics type. This 1982 amendment was adopted by vote of the electorate at the November, 1982 general election. The other part of Article I, Section 12 appeared without

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36. *See supra* notes 23-26.

37. FLA. CONST. art. 1, § 12.

cause.[163] At suppression hearings, trial courts may conduct suppression hearings to determine what sworn oral statements a magistrate considered in finding probable cause. Few appellate cases in South Carolina discuss the *Leon* good faith exception to the exclusionary rule.[164] The South Carolina Supreme Court has declined to apply the *Leon* good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause.[165]

South Carolina appellate courts would affirm the state trial judge's order allowing the motion to suppress in our hypothetical. Armando and Patsy would not face trial in South Carolina, or if tried, a motion to dismiss at the close of the State's case would be allowed.

VI. North Carolina

Article I, Section 20 of the North Carolina Constitution provides:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.[166]

The North Carolina Supreme Court has interpreted the search and seizure provision of its state constitution, Article I, Section 20, to provide broader rights than those required by the Fourth Amendment to the United States Constitution. In *State v. Carter*,[167] a 1988 case, the North Carolina Supreme Court refused to adopt the *Leon* good faith exception to the exclusionary rule.[168] The North Carolina Supreme Court's analysis in the Carter case specifically addresses "adequate and independent" state constitutional grounds:

> Because we decide this case on adequate and independent state constitutional grounds, we do not reach or decide the question of whether the challenged search violated defendant's fourth and fourteenth amendment rights under the Federal Constitution.

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163. State v. McKnight, 352 S.E.2d 471, 472 (S.C. 1987).

164. State v. Adolphe, 441 S.E.2d 832, 834 (S.C. Ct. App. 1994).

165. *Austin,* 409 S.E.2d 811 (S.C. Ct. App. 1991); State v. Johnson, 395 S.E.2d 167 (S.C. 1990).

166. N.C. CONST. ART. 1, § 20.

167. State v. Carter 370 S.E.2d 553 (N.C. 1988).

168. *Id.* at 562.

> The federal cases cited or discussed are being used only for the purpose of guidance and they do not compel the result that this Court has reached.[169]

Justice Martin, writing for a four to three majority in *Carter,* recognized that the language in Article I, Section 20 of the North Carolina Constitution differs somewhat from that of the Fourth Amendment to the United States Constitution. To emphasize the court's inherent power to decide the case solely on the state constitution, Justice Martin stated: "Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."[170]

The position of the North Carolina Supreme Court is not surprising. The North Carolina General Assembly enacted a statutory exclusionary rule in 1937, North Carolina General Statute section 15-37, some twenty five years before *Mapp*[171] mandated that the states apply the exclusionary rule under the due process clause of the fourteenth amendment. *Elkins v. U.S.*,[172] the famous "silver platter" decision in 1960, listed North Carolina as one of twenty six states that excluded evidence illegally seized by state officers.[173] Prior to *Elkins*, evidence illegally seized by state officers was admissible in federal trials; thus the evidence was said to be handed over to federal officers by state officers on a "silver platter."

The North Carolina General Assembly amended the statute adopting the exclusionary rule in 1951 to extend the rule to apply to warrantless searches.[174] The amended statute was repealed in 1969 and replaced, effective 1975, by North Carolina General Statute section 15A-974 which provides in part: "[u]pon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina."[175] The General Assembly of

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169. *Id.* at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983); Jackson v. Housing Authority 364 S.E.2d 416 (N.C. 1988)).

170. *Carter,* 370 S.E.2d at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983) *and* State v. Arrington 319 S.E.2d 254, 260 (1984)).

171. Mapp v. Ohio, 367 U.S. 643 (1961).

172. Elkins v. U.S., 364 U.S. 206 (1960).

173. *Id.* at 224 (*citing* State v. Mills 98 S.E.2d 329 (N.C. 1957)).

174. N.C. GEN. STAT. § 15-37 (1957) (repealed 1969).

175. N.C. GEN. STAT. § 15A-974(1) (1973).

North Carolina sets the public policy of the state. Since 1937, the expressed public policy of North Carolina has been to exclude evidence obtained by law enforcement officers in violation of state or federal constitutional rights.

The exclusionary rule continues to be a debated issue in North Carolina, though its legal status is clearly established when the court rules only on the basis of state constitutional law. The *Leon* good faith exception to the exclusionary rule was approved in 1988 in *State v. Welch*[176] and *State v. Witherspoon*,[177] when the court applied federal constitutional law. Unquestionably, *Welch* has been overruled by *Carter*. Both *Welch* and *Carter* involved officers obtaining blood samples from persons in custody using non-testimonial identification orders rather than search warrants.[178]

In *State v. Hyleman*,[179] a 1988 case, the North Carolina Court of Appeals used the *Leon* good faith exception to the exclusionary rule to uphold the trial court's denial of the defendant's motion to suppress. On appeal, the North Carolina Supreme Court, in an opinion written by Justice Martin, reversed the Court of Appeals.[180] The North Carolina Supreme Court did not reach the federal constitutional question. The Court found that the affidavit and application for a search warrant failed to comply with the state search and seizure statute, North Carolina General statute section 15A-244.[181] Justice Martin's opinion reasoned: "[h]aving decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds. . . . It follows that the good faith exception to the exclusionary rule is not applicable. The good faith exception to the exclusionary rule arises upon the exclusion of evidence based upon federal constitutional grounds."[182]

Justice Mitchell's dissent in *Carter*, vigorously attacked the rationale used by the majority in *Carter* and subsequently in *Hyleman*. In his dissent in *Carter* Justice Mitchell stated:

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176. State v. Welch, 342 S.E.2d 789 (N.C. 1986).

177. State v. Witherspoon, 429 S.E.2d 783 (N.C. App. 1993).

178. *Welch,* 342 S.E.2d at 793; *Carter,* 429 S.E.2d at 554.

179. State v. Hyleman, 366 S.E.2d 530 (N.C. App. 1988), *rev'd*, 379 S.E.2d 830 (N.C. 1989).

180. *Hyleman,* 379 S.E.2d 830 (N.C. 1989).

181. *Id.* at 833.

182. *Id.*

> In the context of cases such as this, the majority's doctrinaire application of our exclusionary rule truly becomes a 'mere technicality' applied with a vengeance to block enforcement of the criminal laws for no good reason. Application of the exclusionary rule here will not deter any future misconduct by anyone or lessen the likelihood of future infringements upon anyone's constitutional rights. The only effect of the majority's rejection of a good faith exception to the exclusionary rule in cases such as this is to punish the public by impeding the truth-finding function of its courts. This drastic choice by the majority does not lead to any corresponding societal or constitutional gain for anyone other than criminal defendants lucky enough to have officers make honest errors in their cases. This diminishes the integrity of the judicial branch of government.[183]

Furthermore, Justice Meyer additional dissent in *Carter* contended that there is no reason for the court to find there to be different exclusionary standards under the North Carolina Constitution than the United States Constitution.[184] Justice Meyer wrote that "a dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the objectives of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution."[185]

In conclusion, when North Carolina State Courts evaluate motions to suppress, their rulings depend on whether the courts rely on "adequate and independent" state grounds. Since there is no *Leon* good faith exception to the exclusionary rule in Article I, Section 20 of the North Carolina Constitution, *Carter*. Armando and Patsy's motion to suppress in a North Carolina court would begranted.

VII. VIRGINIA

The Virginia State Constitution provides:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[186]

183. State v. Carter, 370 S.E.2d 553, 565 (N.C. 1988) (Mitchell, J., dissenting).

184. *Id.* at 567(Meyer, J., dissenting).

185. *Id.*

186. VA. CONST. ART. 1, § 10.

IX. Summary & Recommendations

The Florida constitutional amendment which construes state constitutional search and seizure rights "in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court," mandates uniformity of interpretation and application. In fact, it enslaves Article I, section 12 of the Florida Constitution and the Florida State Courts to interpretations of the Fourth Amendment by the United States Supreme Court. The *Leon* good faith exception to the exclusionary rule ensnares Armando and Patsy in Florida. The state trial judge's order allowing the motion to suppress would be reversed by the Florida appellate courts. Armando and Patsy probably would be convicted in Florida.

The Georgia State legislature mandates the exclusionary rule in the OCGA section 17-5-30. The Georgia Supreme Court, in *Gary*, did not apply the *Leon* good faith exception to the exclusionary rule. The judicially created *Leon* good faith exception to the exclusionary rule does not apply in Georgia because Georgia's exclusionary rule is legislatively created. Georgia State courts, using adequate and independent state grounds, OCGA section 17-5-30, resolve search and seizure questions in total reliance on the state statute without considering *Leon*. The state statute, OCGA section 17-5-30, imposes greater requirements upon Georgia law enforcement officers than that required by the Fourth Amendment as interpreted by the United States Supreme Court in *Leon*. The state trial judge in Georgia allows the defense motion to suppress on the basis of OCGA section 17-5-30. Georgia appellate courts would affirm, by also applying the state statute.

The South Carolina Supreme Court declines to apply the *Leon* good faith exception to the exclusionary rule if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause. If a *Johnson* hearing produces no evidence of oral sworn testimony having been presented to the magistrate regarding the informant's reliability, then the South Carolina trial judge's order of suppression would be affirmed by the South Carolina appellate courts. Either Article I, section 10 of the South Carolina Constitution or South Carolina Statute section 17-13-140 provides an adequate and independent state ground for the ruling.

North Carolina State courts interpret search and seizure questions by applying "adequate and independent" state grounds. There is no *Leon* good faith exception to the exclusionary rule in

Article I, section 20 of the North Carolina Constitution. North Carolina appellate courts would affirm the trial court's order allowing the motion to suppress.

Virginia courts embrace the *Leon* good faith exception to the exclusionary rule as "an accepted component of Virginia law."[247] No distinction is drawn between Article I, section 10 of the Virginia Constitution and the Fourth Amendment for purposes of good faith analysis.[248] Virginia appellate courts would reverse the trial court's order allowing the motion to suppress. The evidence would be admissible at trial under the *Leon* good faith exception to the exclusionary rule. Armando and Patsy probably would be convicted in Virginia.

The New Jersey Supreme Court does not recognize a good faith exception to the exclusionary rule as it interprets Article I, paragraph 7 of the New Jersey Constitution.[249] New Jersey appellate courts would affirm the trial judge's order of suppression.

X. CONCLUSION

This thesis proves that a criminal defendant, in a factual situation that resembles *Leon,* can expect disparate results on a motion to suppress in six eastern seaboard state courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey. The state supreme courts in each of these states assess probable cause by use of search and seizure provisions in state constitutions and statutes. State courts that adopt the *Leon* good faith exception to the exclusionary rule would convict the defendants (Florida and Virginia). The defendants would succeed in an appellate review of a suppression hearing in New Jersey, North Carolina, South Carolina and Georgia, if the state supreme court applies "adequate and independent" state grounds to decide the case.

The "adequate and independent" state grounds include the state constitution in New Jersey (Article I, paragraph 7) and in North Carolina (Article I, section 20). Georgia courts apply a legislatively mandated exclusionary rule, OCGA section 17-5-30. Either Article I, section 10 of the South Carolina Constitution or the Code of Laws of South Carolina section 17-13-140 provides an

247. Tart v. Commonwealth, 437 S.E.2d 219, 224 (Va. Ct. App. 1968).
248. Janis v. Commonwealth, 472 S.E.2d 649, 652 (Va. Ct. App. 1996).
249. State v. Novembrino, 519 A.2d 820, 856 (N.J. 1987).

Miranda's Hidden Costs

The Warren Court's creation of a constitutional right not to be questioned has impeded law-enforcement efforts in ways that even the professionals scarcely comprehend.

PAUL CASSELL AND STEPHEN J. MARKMAN

CURIOUSLY absent from the debate within Congress about how to combat historically unprecedented levels of violent crime in the United States has been any serious discussion of the single most damaging legacy of the Supreme Court's criminal-justice revolution of the 1960s: the *Miranda* rule. While intensive debate has focused upon other aspects of the Court's revolution—for example, the exclusionary rule and novel forms of habeas-corpus review—*Miranda* today seems little more than an anachronistic remnant of the era of "Impeach Earl Warren" billboards.



One possible explanation for this development is that the impact of *Miranda*, while extraordinarily detrimental to the criminal-justice system, is largely a hidden one, while the costs of such innovations as the exclusionary rule and habeas corpus are highly visible, in the form of kilos of cocaine being removed from the courtroom and repetitive criminal appeals inundating the justice system. Indeed, the costs of *Miranda* are so obscured that even many law-enforcement officers are only vaguely aware of them. Estimating the costs of *Miranda* requires that we engage in the difficult exercise of comparing the present reality with the reality which might exist "but for" the rule.

For tens of millions of Americans, the *Miranda* warnings have been learned from countless televised police dramas in which arrested suspects have been apprised by conscientious police officers that "You have the right to remain silent; what you say may be used against you; you have a right to an attorney; and you have a right to a free attorney if you cannot afford one." Few of those who have long since memorized these innocuous words have paused to consider how they have eroded the ability of the criminal-justice system to carry out its responsibilities.

In its 1966 decision in *Miranda* v. *Arizona*, the Supreme Court by a 5 to 4 vote determined that the Fifth Amendment's prohibition against a person's being "compelled in any criminal case to be a witness against himself" required what have become known as the *Miranda* warnings whenever a witness in custody is subject to questioning by the police. The decision also required that police obtain a "waiver of rights" from a suspect—that is, an affirmative agreement from the suspect that he would like to talk to police. Also, if at any time the suspect indicated a wish to stop talking or to see a lawyer, police had to stop questioning immediately. Failure to deliver the warnings, obtain the waiver, or cut off questioning when requested automatically bars the use at trial of statements obtained from the suspect.

Underlying *Miranda* was a deep suspicion on the part of the Court majority about any custodial interrogation of criminal suspects. For the 175 years preceding *Miranda*, it had never been thought that the police were violating a suspect's constitutional rights merely by questioning him in the absence of an attorney. No, we are not referring to a police officer's beating the hapless suspect with a rubber hose or policemen working in shifts to keep the suspect from sleep until he finally confesses to a crime. Such tactics were condemned uniformly well before *Miranda*. To satisfy the requirements of the Fifth Amendment, a confession needed to be voluntary, and circumstances which called that voluntariness into doubt served to undermine the admissibility of a confession. Confessions occur for any number of reasons, including the simple desire to cleanse one's soul and the more com-

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 ILLUSTRATION BY DENNIS DITTRICH

plicated desire to explain extenuating circumstances. Under the voluntariness standard, police were not precluded from asking the suspect what knowledge he possessed about the dead body they had discovered buried in his backyard.

This old understanding of the Fifth Amendment's prohibition against coerced self-incrimination was sharply transformed by *Miranda*. The Court acknowledged that "it might not find the defendant's statements to have been involuntary in traditional terms." In other words, the *Miranda* decision was amending the Constitution. In place of the previous understanding, the Court effectively provided a criminal suspect with a right not to be questioned. If he was questioned prior to the warnings, any statements would be suppressed; if he was questioned after the warnings and after he had requested an attorney, any statements that were made prior to the attorney's arrival again would be suppressed. After the attorney's arrival, it was certain that there would be no statements at all.

If the criminal suspect incriminates himself through police methods that do not involve compulsion, that is a good thing.

In dissent, Justice Byron White observed, "In some unknown number of cases the Court's rule will return a killer, a rapist, or other criminal to the streets and to the environment which produced him to repeat his crime whenever it pleases him. As a consequence there will not be a gain, but a loss, in human dignity." Justice White was prescient, although it can hardly be imagined that the majority of Justices in *Miranda* disagreed with his assessment. Such a result was logically certain under *Miranda*.

The insidiousness of *Miranda* is that, by and large, the violent predators placed back on the streets are *not* suspects to whom police have failed to give proper warnings. After nearly three decades, the police not surprisingly have learned *Miranda* by rote and only rarely fail to administer its warnings or follow its waiver and questioning-cutoff rules. Relatively few criminal cases involve the suppression of evidence obtained by police after a failure to comply with *Miranda*. This is what many observers, including some law-enforcement officers themselves, mean when they contend that the system has "learned to live" with *Miranda*.

No, the enormous cost of *Miranda* is entailed not in the lapses of the system but in its successes. It is when the warnings are properly administered and waiver rules are followed that it wreaks its greatest harm. For what it has done is to substantially dry up access to a hugely important category of criminal evidence—confession evidence. It is almost as if the Supreme Court had told law-enforcement officials that, henceforth, they were no longer going to be able to use fingerprint evidence. No one would doubt that in "some unknown number of cases" individuals who would otherwise have been correctly identified as criminals would avoid prosecution.

Principally, *Miranda* has eroded the supply of information available to law enforcement by introducing the criminal's defense attorney to the process at the earliest possible stage. This is done, in a sense, by the suspect asserting his *Miranda* right to have an attorney present at questioning even before formal charges have been filed. The effect of this is to preclude entirely the questioning of many suspects because police recognize that such questioning would be pointless. By effectively insulating the suspect who invokes his rights or asks for a lawyer from any questioning, no matter how restrained or reasonable, *Miranda* has assured that far fewer confessions will be induced by questioning. For the *Miranda* majority, this was cause for celebration, not concern. But this is an odd—not to say dangerous—view of the world. As an earlier Supreme Court said, "the Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will." The principal legacy of *Miranda* is the creation of an environment in which everything possible has been done to avoid such self-inflicted injuries. Given the relatively modest intellectual faculties of many violent criminals, the incidence of such injuries had always been significant.

If the criminal suspect incriminates himself through police methods that do not involve compulsion, that is a good thing. It is a good thing because it results in accurate fact-finding by the criminal-justice system; it avoids the possibility that an innocent person might be charged with a crime he did not commit; and it promotes public confidence that the police have caught the right person. In other words, it is a good thing because it promotes justice through procedures which most Americans would view as fair.

The most compelling evidence of the desirability of confessions, and of the extent to which Justice White's warnings have been borne out, comes from the before-and-after studies done in the immediate wake of the decision in 1966. One leading study, done in Philadelphia, reported that, before *Miranda*, an estimated 45 per cent of all criminal suspects made confessions to police officers; following *Miranda*, that figure dropped to approximately 20 per cent. Another study, done in New York City, found that confession rates fell from 49 per cent to 15 per cent. In Pittsburgh, the confession rate among suspected robbers and murderers fell from 60 per cent to 30 per cent. Adverse effects on confessions were also reported in Chicago, Kansas City, Brooklyn, and New Orleans. The best-estimate consensus among all the studies done on the impact of *Miranda* is that a lost confession occurs in approximately one of every six, or 16 per cent, of all criminal cases in the United States.

THE other leading methodology for such calculations, albeit less exact, is to compare the American confession rate after *Miranda* with confession rates in countries that follow different approaches to regulating police interrogations. Such comparisons fully confirm the conclusions of the before-and-after studies. Since *Miranda*, American police appear to obtain confessions in perhaps 40 per cent of all cases. In other countries, police

are far more successful. In Great Britain in the 1970s and early 1980s, police, following the "Judges' Rules," gave only a very limited advice of rights. Confession rates were estimated to be 61 to 85 per cent, well above reported American rates. In Canada, confession rates also appear to be substantially higher than in the post-*Miranda* United States.

Such declines in confession rates as have occurred in the United States since *Miranda* are extraordinarily harmful to the interests of effective law enforcement. Confession evidence, because it comes from the perpetrator himself, is compelling; but it doesn't stand alone—it is virtually always subject to corroboration by physical or other evidence. According to the available studies, in about one-quarter (24 per cent) of all criminal cases, confessions or other self-incriminating statements by a suspect are indispensable to a criminal conviction; in many more cases, perhaps an equal number, it can be surmised that they make some difference in terms of the severity of the offense for which a defendant is convicted.

A rough calculation, then, can be made as to the real-world cost of the *Miranda* rules. Multiplying the estimated 16-point reduction in the confession rate after *Miranda* by the estimated 24 per cent of cases in which a confession was necessary for conviction produces a figure of 4 per cent of all criminal cases that will be "lost" or never successfully prosecuted because of the rules. That figure may not sound very high, but the cost in absolute numbers of criminal cases is staggering. For FBI-index crimes, each year *Miranda* results in approximately 28,000 "lost" cases for violent crimes (murder, rape, aggravated assault, and robbery) and 79,000 "lost" cases for serious property crimes (burglary, larceny, and car theft). The bare numbers do not begin to convey the human costs in murders that go unpunished, rapists who remain at large, and treasured heirlooms that are never recovered.

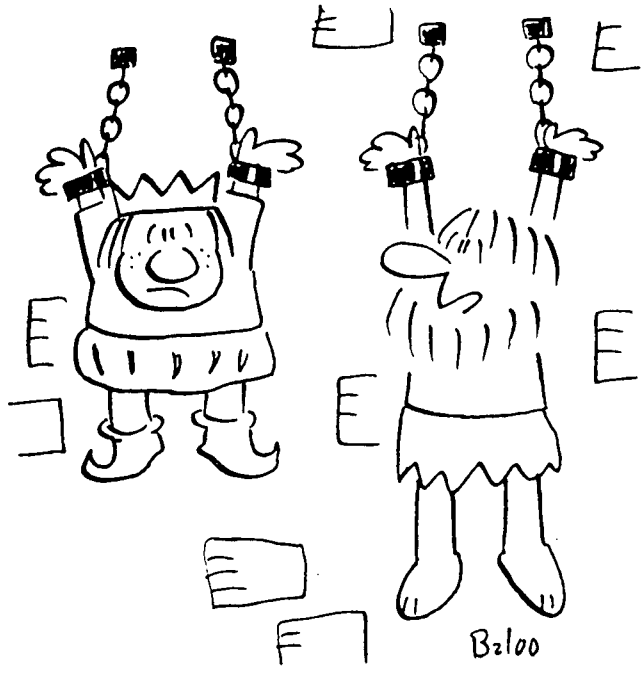
Additionally, the leverage of prosecutors would be reduced in a roughly equal number of cases, resulting in plea bargains more favorable to the defendant and less favorable to the public. Compare these figures with the likely gains expected from other crime-control measures, such as midnight basketball leagues or even long-overdue habeas corpus reform. It seems improbable that any other single needed change in the criminal-justice system would yield anywhere near the number of successful prosecutions that would result from repealing *Miranda*.

Further, all these figures must be weighed in the light of other figures from the Bureau of Justice Statistics indicating that roughly two-thirds of all violent crime in the United States is committed by repeat offenders. *Miranda* does not merely defeat justice in the immediate case, but prematurely returns to the streets individuals in this high-risk category.

IF SUCH a cost in "lost" prosecutions were compelled by the clear language of the Constitution or by the dictates of sound public policy, then society might intelligently choose to suffer the tragic consequences. However, the strictures of *Miranda* are not required by the Constitution—as the Supreme Court recognized in *Miranda* itself—nor are they improvements over alternative methods of achieving fairness and due process in the context of custodial questioning. *Miranda* instead is a "prophylactic" rule (by its own terms) designed to establish protections against violations of the Fifth Amendment. As Chief Justice Warren remarked in his opinion for the court, "[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective [as the *Miranda* rules]." In a later decision, the Court reiterated that the *Miranda* rights "were not themselves rights protected by the Constitution but were instead measures to ensure that the right against compulsory self-incrimination was protected."

Responding to this invitation, Congress in 1968 enacted new legislation concerning police interrogation, adopting the view that such legislation would be "fully as effective" in maintaining the guarantees of the Fifth Amendment. The new law restored the traditional "voluntariness" test and identified the *Miranda* warnings as mere factors to be considered by the courts in deciding whether or not a confession was genuinely voluntary.

Because of the hostility of the incumbent attorney general, Ramsey Clark, who believed that it was unconstitutional, the new congressional enactment quickly fell into desuetude. United States Attorneys were ordered not to defend confessions unless they satisfied the *Miranda* standards. Although later attorneys general, including John Mitchell and Ed Meese, were cognizant of the statute and sensitive to the costs of *Miranda*, no serious efforts were undertaken to reverse the Johnson Administration policy or to secure any determination of the constitutionality of the law. A recommendation by the



"Sibling rivalry, you say?"

Justice Department's Office of Legal Policy in 1987 that an aggressive effort be made to test the law was never adopted as the result of opposition by other agencies within the Department.

THE time has never been better for a test case raising the 1968 law and challenging *Miranda*. Just last year, Justice Scalia wrote a scathing concurrence chastising the Justice Department for its failure to enforce the law. He observed that that failure "may have produced—during an era of intense national concern about the problem of run-away crime—the acquittal and non-prosecution of many dangerous felons, enabling them to continue their depredations upon our citizens." He promised to rule on the statute at the next available opportunity. Congress should make certain that the Justice Department gives him the opportunity by directing it to begin enforcing the statute and reminding the Executive Branch of its constitutional duty to "take care that the laws be faithfully executed." Congress need not enact a new law; it need only ensure that a law already on the books is presented to the Court.

A favorable Court ruling seems quite a realistic prospect. It has long been understood that the Congress has the final say on rules of evidence for federal cases. If the statute admitting voluntary confessions does not confront any constitutional barrier (as the Court has now plainly held), on what possible grounds could the enactment of the people's representatives be struck down? As the Office of Legal Policy observed in recommending that the legitimacy of the *Miranda*-repeal statute be asserted, "There is every reason to believe that an effort to correct this situation would be successful. . . . It is difficult to see how we could fail to make our case."

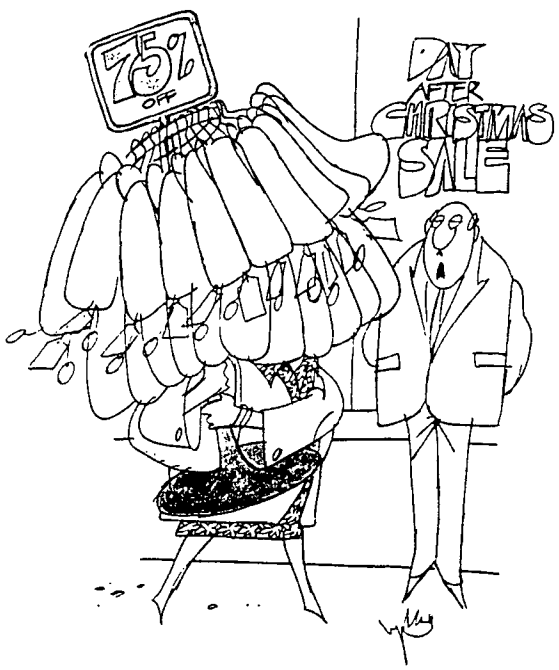
While the statute highlights the problems of *Miranda*'s continuing vitality in federal cases, equally perplexing is its applicability to the far greater number of state criminal prosecutions. The Supreme Court's acknowledgment that the *Miranda* rules are not derived from the Fifth Amendment leads one to ask how the federal judiciary possesses the authority to impose *Miranda* upon the states. It is an extraordinarily novel proposition of constitutional law that the states are limited in their criminal procedures not merely by the dictates of the Constitution but also by superintending or "prophylactic" rules invented by the federal judiciary. That such a proposition has not yet been challenged can be explained only by the states' tendency to rely upon the Justice Department for leadership on constitutional matters of this sort, as well, perhaps, as by an understandable failure even by the law-enforcement community to recognize the full extent of *Miranda*'s hidden costs.

Ironically, there are better means of enforcing the very protections toward which *Miranda* is directed. However, as is the case generally with the exercise of uniform tional policies, *Miranda* petrified efforts by the sta which were widespread in the 1960s, to experiment with their custodial interrogation procedures and search for alternatives that might better protect not only society's interest in apprehending criminals but also suspects' interests in preventing coercive questioning.

Perhaps the most effective replacement for *Miranda* would simply be to videotape or record police interrogations. About one-sixth of all police departments in the country already videotape at least some confessions, and a recent study by the National Institute of Justice concluded that, in addition to providing safeguards for the suspect, videotaping also resulted in the improvement of police interrogation practices, rendered confessions more convincing to judges and juries, and assisted prosecutors in negotiating more favorable plea bargains and guilty pleas. Videotaping would also provide more protection for innocent suspects caught up in the criminal-justice system.

For *Miranda* is not particularly well tailored to protecting a suspect's rights to be free from coercion. Justice Harlan's point in his *Miranda* dissent has never been effectively answered: "The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." It i not clear why police using rubber hoses before *Mira* would have thought it necessary to shelve them afterward. Furthermore, once a valid *Miranda* waiver is obtained, police are relatively free to proceed as they like.

No legacy of the Warren Court has been more devastating to the first civil right of individuals, the right to be protected from attack. Congressional conservatives may choose to place serious procedural reform off-limits. They may do this, in part, because of the burdens of leadership required in order to explain the relationship of procedure to the substantive ability of the justice system to protect society. They may do this because it is easier to deal with public-policy problems whose costs are more visible. However, if effective reform is to be undertaken, unsettling such settled areas of the law as *Miranda* will be required. Until that time, society can do little more than continue to count Justice White's "unknown number" of killers, rapists, and other criminals who go free cause of the criminal-justice i novations of the Warren Court. □



"One to a customer, madam."

Document 1 of 1

Source:
Michie's North Carolina Primary Law/North Carolina Judicial Decisions (Since 1987)/SUPREME COURT OF NORTH CAROLINA/1988/322 N.C. 709, 370 S.E.2d 553 STATE V. CARTER (S. Ct. 1988) 1988 N.C. Lexis 477

322 N.C. 709, 370 S.E.2d 553 STATE V. CARTER (S. Ct. 1988) 1988 N.C. Lexis 477

STATE OF NORTH CAROLINA
vs.
ROBERT LEE CARTER

No. 40A87

SUPREME COURT OF NORTH CAROLINA

322 N.C. 709, 370 S.E.2d 553, 1988 N.C. LEXIS 477

July 28, 1988, Filed

Appeal by defendant from judgments sentencing him to consecutive terms of life for conviction of rape in the first degree and thirty years for conviction of kidnapping in the first degree and to a term of two years, to run concurrently with the sentence for kidnapping, for conviction of misdemeanor assault, said sentences imposed by **Lee, J.,** at the 3 November 1986 session of Superior Court, Orange County.

HEADNOTE

Criminal Law § 84; Searches and Seizures § 4 -- blood sample -- invalid nontestimonial identification order -- no good faith exception to exclusionary rule under N.C. Constitution

There is no good faith exception under Art. I, § 20 of the North Carolina Constitution to the exclusion of evidence obtained by an unreasonable search and seizure. Therefore, Art. I, § 20 required the exclusion of evidence derived from a blood sample obtained by officers from defendant in reliance upon a nontestimonial identification order which was improperly issued because defendant was in custody where no search warrant authorizing the taking of defendant's blood was issued, defendant did not consent, and probable cause and exigent circumstances did not exist to justify a warrantless search.

COUNSEL

Lacy H. Thornburg, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, and John H. Watters, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defendant, by Louis D. Billionis, Assistant Appellate Defender, for defendant.

JUDGES

Martin, Justice. Justice Mitchell dissenting. Justice Meyer and Webb join in this dissenting opinion. Justice Meyer dissenting. Justices Mitchell and Webb join in this dissenting opinion.

AUTHOR: MARTIN

OPINION

{*710} This case presents us with the question of whether there is a good faith exception under article I, section 20 of the North Carolina Constitution to the exclusion of evidence obtained by unreasonable search and seizure. We hold that there is no good faith exception to the requirements of article I, section 20 as applied to the facts of this case and, accordingly, we grant defendant a new trial because evidence that should have been excluded under our state constitution was admitted in the trial of his case.

Defendant was convicted of rape in the first degree, kidnapping in the first degree, and assault inflicting serious bodily injury on the seventy-eight-year-old victim.

Defendant contends on appeal that (1) taking a sample of his blood without a search warrant violated his rights under the federal and state constitutions, and (2) the record is inadequate to permit a conclusion that scientific testimony on blood types based upon the technique called electrophoresis is sufficiently reliable to permit its acceptance in a court of law. Because we hold that article I, section 20 of the North Carolina Constitution requires the exclusion of the scientific evidence derived from the blood sample, we do not find it necessary to reach other issues presented in this case. Nor do we find it necessary to review in detail all of the evidence presented at trial.

The state's evidence at trial showed that on 18 April 1986 defendant entered the home of the victim and forced her to go with him through her backyard and through a plowed field. He then raped her, severely beat her face, and left her unconscious. Defendant, a prisoner at the Orange County Prison Unit, had been working that day at Branson's sawmill, where he had a work-release job. At approximately 4:15 p.m. defendant was seen walking into the woods with a shovel and a roll of toilet paper, it being the practice of the workmen to relieve themselves in the {*711} woods. He did not report to the van at 4:30 p.m. to be taken back to the prison unit as was expected of him. He was found by searchers at approximately 6:15 p.m., some thirty-three yards from where the victim was found unconscious at 11:00 p.m. Defendant smelled of alcohol and was dirty and disheveled. He was taken to a trailer on the sawmill grounds. The following day the victim's eyeglasses were found under defendant's hat in the trailer. A shovel and paper had been found near the unconscious body of the victim.

The victim's eyesight is considerably impaired, but she was able to describe her assailant as wearing a yellow shirt, a brown apron, work pants, and work shoes. This accords with the description of defendant's dress on the date in question given by witnesses with normal vision. The victim testified that her assailant covered his face but appeared to her to be wearing a red wig and to have a red complexion. Defendant was called "Red" by his co-workers at the mill.

On 21 April, State Bureau of Investigation agent William Weis made application for a nontestimonial identification order requesting, inter alia, that a blood sample be taken from defendant. The order was issued and blood was taken from defendant at North Carolina Memorial Hospital. Defendant made a pretrial motion to suppress any evidence obtained pursuant to the order because the resulting search violated the federal and state constitutions and constituted a substantial violation of Chapter 15A of the North Carolina General Statutes. Defendant relied upon the holding in **State v. Welch,** 316 N.C. 578, 342 S.E.2d 789(1986), that drawing blood from an in-custody defendant without first obtaining a search warrant violated his fourth and fourteenth amendment rights under the Federal Constitution. **See also State v. Irick,** 291 N.C. 480, 231 S.E.2d 833 (1977). However, in **Welch** this Court also recognized a good faith exception to the federal constitutional requirement that evidence illegally obtained not be admitted where an officer relied on a nontestimonial identification order to take blood from a defendant in custody. The trial court denied defendant's motion to suppress, ruling that "Officer Weis had acted in good-faith in obtaining the order . . . ."

At trial, SBI serologist Mark S. Nelson testified, over defendant's objection, that a blood smear on underwear seized from defendant {*712} after he was returned to the Orange County Prison Unit on 18 April 1986 was consistent with the victim's blood type but definitely was not defendant's blood type. Defendant's blood type had been determined through analysis of the blood sample obtained on the authority of the contested nontestimonial identification order.

It is settled law in this jurisdiction that a nontestimonial identification order may not properly issue for identification procedures to be performed upon an in-custody suspect. We held in **Irick,** 291 N.C. at 490, 231 S.E.2d at 840, that "Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused." In **Welch,** this Court again held that the statute is not applicable for the issuing of a nontestimonial identification order when the suspect or accused is in custody. Similarly, Article 14 of Chapter 15A did not apply to the taking of the blood sample from defendant, who was in custody in the Orange County Prison Unit. Therefore, the question for resolution is whether the obtaining of the evidence from defendant violated his rights under our state constitution. Defendant argues that his rights under article I, section 20 of the North Carolina Constitution have been violated by the taking of the blood sample and the subsequent introduction at trial of evidence obtained from the sample. Because we decide this case on adequate and independent state constitutional grounds, we do not reach or decide the question of whether the challenged search violated defendant's fourth and fourteenth amendment rights under the Federal Constitution. The federal cases cited or discussed are being used only for the purpose of guidance and they do not compel the result that this Court has reached. **Michigan v. Long,** 463 U.S. 1032, 77 L. Ed. 2d 1201(1983); **Jackson v. Housing Authority,** 321 N.C. 584, 364 S.E.2d 416 (1988).

Our state constitution, like the Federal Constitution, requires the exclusion of evidence obtained by unreasonable search and seizure. **State v. Reams,** 277 N.C. 391, 178 S.E.2d 65 (1970), **cert. denied,** 404 U.S. 840, 30 L. Ed. 2d 74 (1971); **State v. Colson,** 274 N.C. 295, 163 S.E.2d 376(1968), **cert. denied,** 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). In language somewhat different from that of the fourth amendment to the United States Constitution, article I, {*713} section 20 of the North Carolina Constitution forbids unreasonable search and seizure:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision. **Michigan v. Long,** 463 U.S. 1032,77 L. Ed. 2d 1201; **State v. Arrington,** 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984).

Until 1914 neither state nor federal search and seizure law knew an exclusionary rule, with the sole exception of the state of Iowa. In that year, the United States Supreme Court barred from the federal courts the use of evidence obtained by federal officers in an illegal search. **Weeks v. United States,** 232 U.S. 383, 58 L. Ed. 652 (1914). In **Wolf v. Colorado,** 338 U.S. 25, 93 L. Ed. 1782 (1949), the Court held that the fourth amendment is enforceable against the states through the due process clause of the fourteenth amendment, but declined to extend the exclusionary rule to the states. **Wolf** left the states free to experiment with various methods of protecting their citizens' fourth amendment rights. With the exception of the state of Iowa, which held illegally obtained evidence to be inadmissible into its courts

as violative of its state constitution in 1903, **State v. Sheridan,** 121 Iowa 164, 96 N.W. 730,[1] no state supreme court anticipated **Weeks** by holding that its state constitution gave rise to an exclusionary rule. The states followed the common law rule that the admissibility of evidence was not affected by the means used to obtain it. In the landmark case of **Mapp v. Ohio,** 367 U.S. 643, 6 L. Ed. 2d 1081 (1961), the United States Supreme Court held that the fourth amendment forbids the admission of illegally obtained evidence in state courts. Although the states did not anticipate **Weeks,** *{*714}* roughly half of them, including North Carolina, did not wait for **Mapp** but adopted an exclusionary rule under state law before that decision required that state courts exclude illegally obtained evidence under the Federal Constitution.[2] North Carolina repudiated the traditional common law principle in 1937 when the General Assembly enacted a statutory exclusionary rule, N.C.G.S. § 15-27. Thus the exclusionary rule was first received into our law fifty years ago, a quarter of a century before the **Mapp** decision mandated that under the Federal Constitution state courts must exclude illegally obtained evidence.

The withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution. **See Schmerber v. California,** 384 U.S. 757, 16 L. Ed. 2d 908 (1966); **State v. Welch,** 316 N.C. 578, 342 S.E.2d 789. Although **Schmerber** and **Welch** were decided on federal constitutional grounds, an individual's constitutional rights under the Constitution of North Carolina must receive at least the same protection as such rights are accorded under the Federal Constitution. **Pruneyard Shopping Center v. Robins,** 447 U.S. 74, 64 L. Ed. 2d 741(1980). Therefore, under our state constitution, a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search. **Welch,** 316 N.C. 578, 342 S.E.2d 789. Here, there were no exigent circumstances to justify a warrantless search; defendant's blood type would remain constant. No search warrant authorizing the taking of defendant's blood was issued. Therefore, obtaining the sample of defendant's blood violated his rights under article I, section 20 of the North Carolina Constitution to be free from unreasonable searches and seizures. Under our expressed public policy since 1937, the challenged evidence should have been suppressed. N.C.G.S. § 15A-974(1) (1983).

The state, however, urges this Court to adopt a "good faith" exception to our long-standing exclusionary rule. We now turn to address this issue.

Since deciding **Mapp** in 1961, the United States Supreme Court has limited the scope of application of the exclusionary rule *{*715}* in several cases. In each case the Supreme Court has weighed the costs of the more expansive application of the rule -- which it has identified as that of a quantum of deterrence of police misconduct foregone -- against the costs of lost probative evidence. In each case the Court has determined that the costs are too slight to outweigh the benefits of admissibility. Thus, in **Alderman v. United States,** 394 U.S. 165, 22 L. Ed. 2d 176(1969), the Court held that a defendant has no standing to object to the admission of evidence obtained in violation of the fourth amendment rights of another. In **United States v. Calandra,** 414 U.S. 338, 38 L. Ed. 2d 561(1974), the Court declined to apply the rule to grand jury proceedings. **United States v. Janis,** 428 U.S. 433, 49 L. Ed. 2d 1046 (1976), held that evidence illegally obtained by a state criminal law enforcement officer is admissible in a federal civil proceeding. **Stone v. Powell,** 428 U.S. 465, 49 L. Ed. 2d 1067(1976), held that federal habeas corpus relief on the ground that illegally obtained evidence was admitted at trial is unavailable to a state prisoner who has had a full and fair state trial. **United States v. Havens,** 446 U.S. 620, 64 L. Ed. 2d 559 (1980), held that it is constitutionally permissible to admit illegally seized evidence to rebut a defendant's response to a matter first raised by the government during cross-examination.

In **United States v. Leon,** 468 U.S. 897, 82 L. Ed. 2d 677 (1984), the Supreme Court drew upon the analysis developed in these cases to work a more profound curtailment of the federal exclusionary rule. The Court there held that evidence obtained by officers acting in reasonable reliance on a search warrant

issued by a detached and neutral magistrate, although ultimately found to be unsupported by probable cause, may be admitted in the government's case in chief. Justice White, writing for the Court in **Leon,** directs that a case-by-case approach supplant the **Weeks/Mapp** per se rule in suppression cases involving warrants ultimately found to be inadequate. Justice White concludes:

> We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.

468 U.S. at 926, 82 L. Ed. 2d at 700. We must agree with the recent observation of the New Jersey Supreme Court, in its 1987 *(*716)* decision, **State v. Novembrino,** 105 N.J. 95, 519 A. 2d 820, that at least with respect to searches under warrant, the **Leon** good faith exception has swallowed the **Weeks/Mapp** rule:

> According to Justice White's formulation, in suppression cases involving warrants the application of the exclusionary rule will be the exception, and recognition of the good-faith "exception" will be the prevailing standard.

105 N.J. at 139, 519 A. 2d at 846.

From its introduction through the present day, the exclusionary rule has met strong criticism from able judges and commentators and has also evoked forceful support. We shall not here attempt to recount every episode in this well-known history.[3] Chief Justice Weintraub of the New Jersey Supreme Court distilled the essence of the continuing controversy in an opinion written three years before **Mapp** was decided:

> The exclusionary rule rests upon two propositions. The first is that government should not stoop to the "dirty business" of a criminal in order to catch him. The second is that civil and criminal remedies against the offending officer are as a practical matter ineffective, and hence the rule of exclusion is the only available remedy to protect society from the excesses which led to the constitutional right.

Eleuteri v. Richman, 26 N.J. 506, 512, 141 A. 2d 46, 49 (1958). We subscribe to these propositions, both with respect to the exclusionary rule and with respect to a good faith exception to it. To reach this conclusion we draw upon the past fifty years of experience in this state, as well as the experience of other states: The exclusionary rule is indispensable to achieve the purposes for which prohibitions against unreasonable search and seizure were written into the constitutions of the revolutionary era.

Sam J. Ervin, Jr., formerly a justice of this Court, wrote with respect to this question:

> *(*717)* This constitutional guaranty against unreasonable searches and seizures has its roots deeply implanted in the human heart, the common law of England, and tyrannies perpetrated by government on the people of England and the colonies.
>
> The oldest and deepest hunger of the human heart is for a place where one may dwell in peace and security and keep inviolate from public scrutiny one's innermost aspirations and thoughts, one's most intimate associations and communications, and one's most private activities. This truth was documented by Micah, the prophet, 2,700 years ago when he described the

Mountain of the Lord as a place where "they shall sit every man under his own vine and fig tree and none shall make them afraid" (Micah 4:4).

The common law of England originated in the instincts, the habits, and the customs of the people. Hence, it is not surprising that on emerging from the mists of unrecorded history, the English common law embraced as a fundamental principle that every man's home is his castle and the correlative rule that every man may resist to the utmost unidentified persons who seek to enter his home against his will. . . .

. . .

. . . The common-law courts of England . . . authorized searches and seizures only by special warrants, which were based on oaths disclosing the reasons for their issuance and describing the places to be searched and the persons or things to be seized.

The courts of England that were independent of the common law, such as the Court of Star Chamber . . . and the Court of High Commission . . . did not respect the principle of the common law that every man's home is his castle.

They authorized searches and seizures by general warrants, which were based on mere suspicion and commanded searches and seizures for the enforcement of particular laws without specifying the places to be searched or the persons or things to be seized. In so doing, the general warrants delegated to the persons executing them the autocratic *[*718]* power to decide according to their own notions what places should be searched, what persons should be arrested, and what things should be seized. . . .

. . .

. . . Despite honest beliefs of sincere persons to the contrary, the exclusionary rule is an essential ingredient of the Fourth Amendment. Apart from it, the Amendment's guaranty against unreasonable searches and seizures is worse than solemn mockery, and the Amendment might well be expunged from the Constitution as a meaningless expression of a merely pious hope. . . .

If letters and private documents can be thus seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Ervin, **The Exclusionary Rule: An Essential Ingredient of The Fourth Amendment,** The True Bill (N.C. Bar Ass'n), vol. 5, No. 1, at 1-3 (1985). The framers of our constitution sought to check the tendency of government to overreach by placing a constitutional mantle around the right to privacy in one's person, home, and effects. They therefore constitutionalized the probable cause standard and the requirement that the government limit the scope of its invasion of privacy by identifying the persons, places, and items to be searched or seized.

North Carolina was among a handful of states that adopted an exclusionary rule by statute rather than by judicial creation. The 1937 statute requiring the exclusion of evidence obtained under an illegal

search warrant was amended in 1951 to extend the rule to apply to unlawful warrantless searches.[4] The amended {*719} statute was repealed in 1969 and replaced, effective 1975, by N.C.G.S. § 15A-974. Section 15A-974 provides in pertinent part that "[u]pon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina." Since 1937 the expressed public policy of North Carolina has been to exclude evidence obtained in violation of constitutional rights against unreasonable searches and seizures.

The exclusionary sanction is indispensable to give effect to the constitutional principles prohibiting unreasonable search and seizure. We are persuaded that the exclusionary rule is the only effective bulwark against governmental disregard for constitutionally protected privacy rights. Equally of importance in our reasoning, we adhere to the rule for the sake of maintaining the integrity of the judicial branch of government.

The preservation of the right to be protected from unreasonable search and seizure guaranteed by our state constitution demands that the courts of this state not condone violations thereof by admitting the fruits of illegal searches into evidence. This thesis was adumbrated in **Weeks.** There Justice Day wrote:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392, 58 L. Ed. at 655. It was given its classical formulation by Justices Holmes and Brandeis in separate and prescient dissents in the 1928 decision, **Olmstead v. United States,** 277 U.S. 438, 72 L. Ed. 944. In his **Olmstead** dissent, Justice Holmes reasoned that "no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities {*720} to succeed." 277 U.S. at 470, 72 L. Ed. at 953. With more passion but with equal force, Justice Brandeis concluded his dissent with these words:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent. teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

277 U.S. at 485, 72 L. Ed. at 959-60.

Justice Brennan's dissent in **Leon** continues this line of interpretive argument about constitutional protections and the exclusion of illegally obtained evidence. Justice Brennan summarizes the position in these words: "The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures." 468 U.S. at 935, 82 L. Ed. 2d at 706.

One of the great purposes of the exclusionary rule is to impose the template of the constitution on police training and practices. Unavoidably, a few criminals may profit along with the innocent multitude

from this constitutional arrangement. As Justice Traynor noted in his opinion in **People v. Cahan,** 44 Cal. 2d 434, 449, 282 P. 2d 905, 914 (1955):

> He does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught.

{*721} We conclude that the exclusionary rule has been a potent force for achieving its intended deterrent purpose. Warrants today are more carefully prepared and scrutinized before issuance. Likewise, the exclusionary rule is responsible for the systematic, in-depth training of police forces in the law of search and seizure.[5] It can be no part of our constitutional duties to signal a retreat from these salutary advances in constitutional compliance which have guided police practice in this state since 1937.

In our view, logic and history combine to refute those who hope to spare society the costs resulting from the exclusionary rule by adopting alternative remedies. In the period of history between **Weeks** and **Mapp,** when the states were free to experiment with effective alternative remedial devices, none were developed. The **Mapp** Court was forced to conclude that "other remedies have proved worthless and futile." 367 U.S. at 652, 6 L. Ed. 2d at 1088. The damage action, which has inspired the most interest as an alternative to the exclusionary rule, may provide some relief upon occasion to an individual whose rights have been invaded, but offers scant prospect of replacing the exclusionary rule as an institutional deterrent to unconstitutional invasions of privacy. In sifting the prospects of this alternative remedy, commentators have aptly noted that its many defects include the disinclination of juries to doubt the testimony of police witnesses about conduct undertaken to protect the public, the doctrine of sovereign immunity, the judgment-proof character of the working police officer, and the difficulty that the aggrieved plaintiff may encounter in finding and paying counsel to represent him in a damage action.[6] Article I, section 18 of our state constitution directs our courts to provide every person with a remedy for injury. We will not abandon a proven remedy in favor of one which, because its ineffectualness is patent beforehand, mocks this constitutionally mandated guaranty.

{*722} In determining the value of the exclusionary rule, we regard the crucial matter of the integrity of the judiciary and the maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure to be the paramount considerations. We do not discount the implications of the failure to convict the guilty because probative evidence has been excluded in even one grave criminal case. The resulting injuries to victim, family, and society are tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious.

The state, relying upon **Welch,** 316 N.C. 578, 342 S.E.2d 789, argues that this Court should create a good faith exception to the exclusionary rule under our state constitution which would in the case before us permit the admission of evidence obtained by officers in objectively reasonable reliance on a nontestimonial identification order subsequently found to have been improperly issued. In interpreting the Federal Constitution in **Welch,** we adopted the holding of **Leon,** 468 U.S. 897, 82 L. Ed. 2d 677, and extended it to a case not involving a defective search warrant. Except for **Illinois v. Krull,** 480 U.S. , 94 L. Ed. 2d 364 (1987), the United States Supreme Court has applied a good faith exception to the exclusionary rule only in cases involving defective search warrants. **E.g., Massachusetts v. Sheppard,** 468 U.S. 981, 82 L. Ed. 2d 737 (1984).

Here, one of the dissents relies heavily upon **Krull.** The distinctions of the present case and **Krull** are obvious. In **Krull,** the Supreme Court, in a 5 to 4 decision, applied a good faith exception to an unconstitutional search where the officer in good faith relied upon a statute authorizing warrantless

administrative searches, the statute ultimately being found to violate the fourth amendment. **Krull** involved the least intrusive of searches, the search of an automobile wrecking yard to determine if the automobile parts dealer was complying with the Illinois Vehicle Code. The Court reasoned that where the officer in good faith relies upon such statute, the deterrent effect of the exclusionary rule is lost.

We are presently concerned with the **most** intrusive search, the invasion of defendant's body and the withdrawal of defendant's blood. Our constitution, as well as the Federal Constitution, {*723} requires a valid search warrant for this purpose. The United States Supreme Court in **Krull** based its reasoning on the lack of deterrence to avoid the exclusionary rule. North Carolina, however, justifies its exclusionary rule not only on deterrence but upon the preservation of the integrity of the judicial branch of government and its tradition based upon fifty years' experience in following the expressed public policy of the state. Under the judicial integrity theory, our constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others. Although the United States Supreme Court applied a cost-benefit analysis in **Krull,** the basis of our exclusionary rule is not suited to such simplistic resolution of the issue. **See generally** Note, **Illinois v. Krull: Extending the Fourth Amendment Exclusionary Rule's Good Faith Exception to Warrantless Searches Authorized By Statute,** 66 N.C.L. Rev. 781 (1988).

In the present case we are not bound by our holding in **Welch** because here we are construing our state constitution rather than the Federal Constitution.

Counsel for the state argue that we should follow **Leon** and **Welch** because an order pursuant to Article 14 of Chapter 15A of the North Carolina General Statutes is tantamount to a search warrant. This argument must fail because the taking of a blood sample without consent violates our state constitution unless done pursuant to a valid search warrant or upon probable cause and under exigent circumstances. **Leon,** 468 U.S. 897, 82 L. Ed. 2d 677: **Schmerber v. California,** 384 U.S. 757, 16 L. Ed. 2d 908; **State v. Fisher,** 321 N.C. 19, 361 S.E.2d 551 (1987). A nontestimonial identification order will not fulfill this requirement. This is true because a nontestimonial identification order can be issued without a probable cause finding as required for the issuance of a search warrant. N.C.G.S. §§ 15A-273, -242, -245 (1983). Probable cause to **arrest** cannot satisfy this requirement. There must be probable cause to believe that the item to be seized constitutes evidence of an offense or the identity of a person who participated in the crime in order to secure a search warrant. N.C.G.S. § 15A-242(4). A nontestimonial identification order may be issued upon a finding, as to the item to be taken, that it will be of "material aid in determining whether the person named in the affidavit committed the offense." N.C.G.S. § 15A-273(3). Further, the {*724} requirement of N.C.G.S. § 15A-273(2) that there be "reasonable grounds to suspect" that the person named committed the offense fails to rise to the level of the probable cause requirement necessary to obtain a search warrant. **See** Comment. **Criminal Law and Procedure -- Nontestimonial Identification Orders Without Probable Cause,** 12 Wake Forest L. Rev. 387 (1976).

It must be remembered that it is not only the rights of this criminal defendant that are at issue, but the rights of all persons under our state constitution. The clearly mandated public policy of our state is to exclude evidence obtained in violation of our constitution. N.C.G.S. § 15A-974(1). This policy has existed since 1937. If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy.

We are not persuaded on the facts before us that we should engraft a good faith exception to the exclusionary rule under our state constitution.

We reverse the ruling of the court below admitting the blood evidence and grant the defendant a new trial.

New trial.

DISPOSITION

New trial.

DISSENT

Justice Mitchell dissenting.

By refusing to permit the introduction of evidence seized by officers acting in the honest belief that a court order authorizing its seizure was lawful, this Court gives much greater protection to criminal defendants than they have been given by the Supreme Court of the United States. In fact, the Supreme Court has specifically stated in a similar situation, "[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." **Massachusetts v. Sheppard,** 468 U.S. 981, 989-90, 82 L. Ed. 2d 737, 744 (1984). We should take the same position as to the court ordered search in this case.

In its failing effort to strike a proper balance between the guarantee against unreasonable searches and the public safety, the majority has chosen to place such a heavy thumb on the scales of justice that they will always weigh in favor of the criminal /*725/ defendant. The inflexible exclusionary rule the majority has selected for North Carolina will not advance the right to be free from unlawful searches, but it will prevent trial courts from reaching the truth and convicting the guilty in a substantial number of cases. The majority should recognize a good faith exception to our exclusionary rule similar to that applied by the Supreme Court under the Constitution of the United States. To do otherwise serves no valid purpose, substantially interferes with enforcement of the criminal law and diminishes the integrity of the judicial branch of government. Therefore, I dissent.

I recognize that our State Constitution, like the Constitution of the United States, requires the exclusion of evidence obtained by an unreasonable search and seizure. **State v. Reams,** 277 N.C. 391, 178 S.E.2d 65(1970), **cert. denied,** 404 U.S. 840, 30 L. Ed. 2d 74 (1971). I even agree with the majority that in the past the exclusionary rule may have been the only practical remedial device for preventing unreasonable searches and seizures. **But see United States v. Leon,** 468 U.S. 897, 918, 82 L. Ed. 2d 677, 696 (1984). Even the majority seems to recognize, however, that conditions causing the Supreme Court of the United States to first adopt the exclusionary rule have largely ceased to exist.

One need only read any daily newspaper on a regular basis to know that civil judgments against law enforcement officers for violations of constitutional rights are no longer unusual. Indeed, it is now quite possible for evidence unlawfully seized to be excluded in a criminal case against an accused, while the accused receives additional or double relief in the form of a civil judgment for the same violation of rights. The decision of the majority here greatly increases the likelihood of cases in which criminals will be set free while, at the same time, public officials who have made honest mistakes in good faith are required to pay them damages. It is obvious beyond any need for further discussion that such cases will not further the majority's goal of promoting the integrity of the judiciary, but will result, instead, in the judiciary being subjected to well-deserved ridicule by the general public.

The majority has devoted several pages of its opinion to noble and stirring quotations of legal luminaries of the past, such as former Justices Holmes and Brandeis and our own Sam J. Ervin, Jr., former United States Senator and former Justice of this /*726/ Court. Although I agree with almost

everything contained in those quotations from decades past, it appears that their scope and grandeur have blinded the majority to the obvious fact that they have almost no relevance to the present case.

The high-minded quotations relied upon by the majority warn against permitting courts to be used to further the designs of law enforcement officers who **intentionally** break the law to gather evidence against criminals. All courts have taken those warnings to heart, and evidence seized by **intentionally** unlawful methods has been excluded under the Fourth Amendment to the Constitution of the United States for decades. **Mapp v. Ohio,** 367 U.S. 643, 6 L. Ed. 2d 1081 (1961). Further, evidence seized by such intentionally unlawful means is not rendered admissible by the good faith exception to the exclusionary rule. **See United States v. Leon,** 468 U.S. 897, 82 L. Ed. 2d 677 (seizure under defective search warrant); **State v. Welch,** 316 N.C. 578, 342 S.E.2d 789(1986) (under non-testimonial identification order). The majority simply has chased a constitutional rabbit which was caught and skinned long ago.

By definition, the "good faith exception" to the exclusionary rule applies **only** in situations in which law enforcement officers have acted under the objectively reasonable belief that their actions were lawful and correct. Although the majority implies that by choosing a rule which excludes such evidence seized in good faith it somehow protects our privacy from invasion -- by police, not by criminals -- the majority completely fails to tell us how exclusion of evidence seized by officers in good faith reliance upon a court order will further this noble purpose. This failure of the majority is quite understandable, since exclusion of evidence in such cases will serve no valid purpose and will greatly harm the innocent public. **See generally United States v. Leon,** 468 U.S. 897, 82 L. Ed. 2d 677.

Only in recent years have researchers begun to study the effects of the exclusionary rule. At least one study indicates that the rule results in either a failure to prosecute or a failure to convict as much as 2.35% of all those arrested for felonies. **Id.** at 907-09 n.6, 82 L. Ed. 2d at 688-89 n.6 (citing California study). The same study suggests that the exclusionary rule is an even greater impediment to prosecutions for particular crimes such as drug {*727} crimes which are unusually dependent on physical evidence. **Id.** Thus, it has been estimated that the exclusionary rule results in the failure to prosecute or the failure to convict in as much as 7.1% of felony drug charges. **Id.** Additionally,

> the small percentages . . . mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. "[A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official unlawfulness." **Illinois v. Gates,** 462 US at 257-258, 76 L Ed 2d 527, 103 S Ct 2317 (White, J., concurring in judgment).
>
> **Id.**

Even the terribly undersirable result of preventing criminal prosecutions by denying "the jury access to clearly probative and reliable evidence" would be an acceptable price to pay in cases such as this, **if it would have any substantial deterrent effect** on violations of constitutional liberties. Rejection of the good faith exception to the exclusionary rule, however, "can have no substantial deterrent effect in the sorts of situations under consideration in this case . . . [and] cannot pay its way in those situations." **Id.** The majority's calculated choice to reject the good faith exception to the exclusionary rule under our state constitution simply will **not** make our people more secure in their right to be free from unreasonable searches.

In the present case, officers relying in good faith upon a **written judicial order** took a sample of the

defendant's blood for analysis and use as evidence. It should be obvious to anyone that excluding this evidence will not deter other officers from making similar mistakes in good faith as to the legal validity of court orders upon which they rely. When following judicial orders in the future, the officers still will not know they are doing anything wrong. Therefore, unlike punishment of intentionally unlawful conduct by officers, which the exclusionary rule arguably deters, punishment of an officer's good faith reliance on a judicial order cannot deter future similar conduct.

Certainly, a refusal to recognize a good faith exception to the exclusionary rule will have no significant "deterrent" effect on *{*728}* judges and magistrates. As the Supreme Court of the United States has correctly pointed out:

> To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates . . . ., their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.
>
> Third, and most important, we discern no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. . . . And, to the extent that the rule is thought to operate as a "systemic" deterrent on a wider audience, it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessarily meaningful to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

Id. at 916-17, 82 L. Ed. 2d at 694-95 (footnotes omitted). The same common sense reasoning is applicable to cases such as this, in which the search has been conducted pursuant to a nontestimonial identification order. **State v. Welch,** 316 N.C. 578, 342 S.E.2d 789. Further, the reasoning of the Supreme Court is not made any less compelling by virtue of the fact that this issue arises under our State Constitution rather than the Constitution of the United States. The exclusionary rule is identical under both constitutions, and the good faith exception to that rule also should be applied equally under both constitutions.

*{*729}* The Supreme Court of the United States has always restricted application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." **United States v. Calandra,** 414 U.S. 338, 348, 38 L. Ed. 2d 561, 571 (1974). The Supreme Court also:

> has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. . . . [Supreme Court] cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. . . . After all, it is the defendant, and not the constable, who stands trial.

United States v. Payner, 447 U.S. 727, 734,65 L. Ed. 2d 468, 476 (1980) (citations omitted). This

Court should adopt the same common sense reasoning expressed in such statements by the Supreme Court of the United States and apply it here. Regrettably, however, the majority chooses to be more dogmatic and doctrinaire than the Supreme Court of the United States in protecting criminal defendants by excluding evidence uncovered through honest mistakes of officers acting in good faith reliance upon court orders. I recognize that it is within the power of the majority to give criminal defendants greater protections under our State Constitution than those given them by the Constitution of the United States or the decisions of the Supreme Court of the United States; I simply think the majority is wrong to do so in the context of this case.

In the context of cases such as this, the majority's doctrinaire application of our exclusionary rule truly becomes a "mere technicality" applied with a vengeance to block enforcement of the criminal laws for no good reason. Application of the exclusionary rule here will not deter any future misconduct by anyone or lessen the likelihood of future infringements upon anyone's constitutional rights. The only effect of the majority's rejection of a good faith exception to the exclusionary rule in cases such as this is to punish the public by impeding the truth-finding function of its courts. This drastic choice by the majority does not lead to any corresponding societal or constitutional gain for anyone other than criminal defendants lucky enough to have officers make *{*730}* honest errors in their cases. This diminishes the integrity of the judicial branch of government.

As I believe the majority has today dramatically tilted the scales of justice in favor of criminal defendants for no good or beneficial reason whatsoever, I respectfully dissent.

Justice Meyer dissenting.

I join the well-reasoned dissenting opinion of Justice Mitchell, and wish to add the following.

The majority dismisses the very recent United States Supreme Court case, **Illinois v. Krull,** 480 U.S. , 94 L. Ed. 2d 364 (1987), as a 5 to 4 decision which fails to address the "judicial integrity" justification for the exclusionary rule. In my view, this cavalier dismissal is a serious error. As a practical matter, the United States Supreme Court frequently divides rather sharply on hotly debated issues such as this one. **See, e.g., United States v. Leon,** 468 U.S. 897, 82 L. Ed. 2d 677(1984) (6 to 3); **United States v. Havens,** 446 U.S. 620, 64 L. Ed. 2d 559 (1980) (5 to 4); **Michigan v. DeFillipo,** 443 U.S. 31, 61 L. Ed. 2d 343(1979) (6 to 3). It is unwise to ignore the teachings of the majority opinion in such cases.

In my view, the case before the Court today is indistinguishable from **Krull.** There, a detective searched an automobile wrecking yard under authorization of a section of the Illinois Vehicle Code granting police officers wide latitude to make warrantless inspections of the records and premises of automobile parts dealers. The statute was later found to be unconstitutional. Here, the SBI agent and assistant district attorney made application for a nontestimonial identification order requesting that, among other things, a blood sample be taken from defendant. The order was improperly issued, since under **State v. Irick,** 291 N.C. 480, 231 S.E.2d 833 (1977), Article 14 of Chapter 15A of the North Carolina General Statutes does not apply to an in-custody accused. In **Krull,** the United States Supreme Court held that its decision in **United States v. Leon,** 468 U.S. 897, 82 L. Ed. 2d 677, controlled the facts before it. Under **Leon,** the exclusionary rule does not apply to evidence obtained by a police officer who acts in objectively *{*731}* reasonable reliance on a search warrant issued by a neutral magistrate that is later found to be defective. **Id.** at 922, 82 L. Ed. 2d at 698; **see** Note, **Illinois v. Krull: Extending the Fourth Amendment Exclusionary Rule's Good Faith Exception to Warrantless Searches Authorized by Statute,** 66 N.C.L. Rev. 781, 784 (1988). In **Krull,** the Supreme Court encountered no problems in analogizing the situation in which a police officer acts in reasonable reliance on an unconstitutional **warrant** to one in which he acts under the authority of what turns out to be an

unconstitutional **statute.** So it should be in the case before this Court. Here we have a law enforcement officer acting in objectively reasonable reliance upon an order issued by a judge which was later found to have been improperly issued. If this Court followed **Krull,** the evidence deduced from the blood sample drawn from defendant would be properly admissible.

As the majority points out, when interpreting the Federal Constitution, we adopted the **Leon** holding and extended it to a case not involving a defective search warrant in **State v. Welch,** 316 N.C. 578, 342 S.E.2d 789 (1986). In **Welch,** this Court held that the obtaining of a blood sample from an in-custody defendant by use of a nontestimonial order was an unreasonable search and seizure under the United States Constitution, but that since the officers acted in good faith in obtaining the blood through the nontestimonial order, the evidence need not be excluded. **State v. Welch,** 316 N.C. 578, 342 S.E.2d 789. Under the logic of **Welch,** this Court should hold that the evidence derived from the blood drawn in this case should also not be suppressed since the seizure was in good faith. This is especially so since the samples were obtained from the defendant in the case **sub judice** before this Court's decision in **Welch** went down. The failure of the majority to give this case the same treatment as **Welch** is the worst sort of judicial arbitrariness.

The State here, in obtaining a nontestimonial order and in making the minor intrusions required to draw blood or get pubic and head hair samples, was acting in objectively reasonable reliance upon an order issued by a judge pursuant to statutory authority. **See, e.g., State v. Kuplen,**316 N.C. 387, 343 S.E.2d 793 (1986); **State v. Young,** 317 N.C. 396, 346 S.E.2d 626(1986). Logic demands that the good faith exception to the exclusionary rule be *{*732}* properly extended to apply to the facts in the case before us today.

This Court ought not, on the basis of state constitutional law, reject the good faith exception to the federal exclusionary rule enunciated in **United States v. Leon,** 468 U.S. 897, 82 L. Ed. 2d 677, and **Massachusetts v. Sheppard,** 468 U.S. 981, 82 L. Ed. 2d 737 (1984). The law of search and seizure under the North Carolina Constitution should be interpreted as being no more restrictive than the fourth amendment to the United States Constitution. Article I, section 20 of the Constitution of North Carolina has generally been read as being the functional equivalent of the fourth amendment. **See State v. Kornegay,** 313 N.C. 1, 326 S.E.2d 881; **State v. Arrington,** 311 N.C. 633, 319 S.E.2d 254 (1984). In interpreting article I, section 20, this Court has generally relied on United States Supreme Court decisions on the fourth amendment as persuasive authority. **See, e.g., State v. Arrington,** 311 N.C. 633, 319 S.E.2d 254.

As stated in **State v. Vestal,** 278 N.C. 561, 577, 180 S.E.2d 755, 766 (1971), "there is no variance between the law of this State as declared by the decisions of this Court . . . and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States." **See also State v. Kornegay,** 313 N.C. 1, 326 S.E.2d 881 (1985). In **State v. Hendricks,** 43 N.C. App. 245, 258 S.E.2d 872 (1979), **cert. denied,** 299 N.C. 123, 262 S.E.2d 6 (1980), our Court of Appeals stated:

> Though the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States.

Id. at 251-52, 258 S.E.2d at 877.

There is no reason, compelling or otherwise, for this Court to find there to be different exclusionary

standards under the North Carolina Constitution than the United States Constitution. A dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the objectives *{*733}* of the fourth amendment or article I, section 20 of the North Carolina Constitution. As pointed out in another context:

> "[T]he exclusionary rule[] is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'"

New York v. Belton, 453 U.S. 454, 458, 69 L. Ed. 2d 768, 773-74, **reh'g denied,** 453 U.S. 950, 69 L. Ed. 2d 1036 (1981) (quoting LaFave, **"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,** 1974 Sup. Ct. Rev. 127, 141).

Since the search and seizure portions of the North Carolina Constitution have heretofore been interpreted in light of the United States Constitution, I believe that the majority has grievously erred in ignoring the rationale of **Illinois v. Krull,** 480 U.S. , 94 L. Ed. 2d 364, and instead creating different exclusionary rules depending upon whether the state or federal Constitutions are invoked by a defendant making a suppression motion.

OPINION FOOTNOTES

1 **Sheridan** was overruled by **State v. Tonn,** 195 Iowa 94, 191 N.W. 530 (1923).

2 **Elkins v. United States,** 364 U.S. 206, 4 L. Ed. 2d 1669 (1960), contains an appendix presenting in tabular form the law of the states on admissibility of illegally seized evidence to that date.

3 **See, e.g., People v. Defore,** 242 N.Y. 13, 150 N.E. 585 (1926), written by then Judge Cardozo, the best known case in which a state supreme court declined to follow the **Weeks** rule, and Wigmore's biting indictment of the **Weeks** decision, 8 Wigmore, **Evidence** § 2184 (3d ed. 1940).

4 In 1938, **State v. McGee,** 214 N.C. 184, 198 S.E. 616, presented to the Supreme Court the very question of the admissibility of the fruits of illegal searches conducted without a warrant left open by N.C.G.S. § 15-27. The Court upheld the search over the dissent of Justice Devin, joined by Justice Stacy, who argued that the spirit if not the letter of the 1937 statute demanded the exclusion of an illegal warrantless search a fortiori since it forbade the admission of evidence obtained with a formally deficient warrant.

5 **See** Milner, **Supreme Court Effectiveness and Police Organization,** 36 Law & Contemp. Prob., 467, 475 (1971); Kamisar, **Public Safety v. Individual Liberties: Some "Facts" and "Theories",** 53 J. Crim. L.C. & P.S. 171, 179-82 (1962); Sachs, **The Exclusionary Rule: A Prosecutor's Defense,** 1 Crim. J. Ethics 28, 31 (1982).

6 **See** Stewart, **The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,** 83 Colum. L. Rev. 1365, at 1387-88 (1983); 1 W. LaFave, **Search and Seizure** § 1.2(c) (1987); Amsterdam, **Perspectives on the Fourth Amendment,** 58 Minn. L. Rev. 349, 430 n.37 (1974).

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356 N.C. 22, 566 S.E.2d 50 STATE V. PEARSON (S. Ct. 2002) 2002 N.C. Lexis 545

STATE OF NORTH CAROLINA
vs.
MARION EDWARD PEARSON, JR.

No. 541A01

SUPREME COURT OF NORTH CAROLINA

356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545

June 28, 2002, Filed

<CASE SUMMARY>

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 145 N.C. App. 506, 551 S.E.2d 471 (2001), finding no error in judgments entered 11 January 2000 by Boner, J., in Superior Court, Burke County, after the trial court's 21 January 2000 order denying in pertinent part defendant's motions to suppress evidence.

HEADNOTE

1.Search and Seizure-nontestimonial identification order-affidavit-reasonable grounds for suspicion

A rape defendant's motion to suppress evidence gained from a nontestimonial identification order was properly denied where the affidavit sufficiently established reasonable grounds to suspect that defendant had committed the rapes. Defendant was a suspect based on more than a minimal amount of objective justification and more than a particularized hunch.

2.Search and Seizure-nontestimonial identification order-supporting affidavit-reliance on information from another officer

A rape defendant failed to produce evidence that a statement in an affidavit supporting a nontestimonial identification order was made in bad faith such that it was knowingly false or in reckless disregard of the truth where the affidavit alleged that defendant had been seen peeping into an apartment but defendant argued that the report did not show that defendant was actually seen peeping. A police officer making an affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties, and the officer making the affidavit from a report in this case had every reason to conclude that defendant had been secretly peeping.

3.Search and Seizure-nontestimonial identification order-procedures following collection of samples

The trial court properly concluded that violations of statutory nontestimonial identification statutes were not substantial and correctly refused to suppress the seized evidence where a return was not made to the issuing judge within 90 days and defendant was not provided with a copy of the results in a timely manner. N.C.G.S. § 15A-974(2) mandates suppression when the evidence is obtained as a result of the violation, but these violations involved procedures to be followed after the samples are taken and the deviation was a mere unintentional

oversight. The defense interests protected by the statutes are the requirement of an inventory of what was seized and the opportunity to move for the destruction of that evidence, but the defendant in this case was alert during the procedure , knew what was taken, and did not move for destruction of the evidence. Finally, a subsequent search warrant obtained as the result of an SBI agent's tenacity over ten years provided more conclusive DNA and factual evidence, and it is unlikely that defendant would have avoided prosecution if this evidence was destroyed. N.C.G.S. §§ 15A-280, -282.

4.Search and Seizure-nontestimonial identification order-attorney not present

There was no prejudicial error in failing to provide a rape suspect with an attorney during the execution of a nontestimonial identification order where defendant moved to suppress the evidence produced by the order rather than statements made during the procedure, and, although defendant maintained that the lack of an attorney impaired his ability to obtain an order to destroy the evidence, it is clear that defendant would have remained a suspect whether or not this evidence was destroyed.

5.Search and Seizure-nontestimonial identification order-constitutional requirement

There was no constitutional error in the denial of a motion to suppress evidence seized with a nontestimonial identification order where the supporting affidavit provided reasonable grounds to suspect that defendant committed two rapes. Collection procedures such as these require only reasonable suspicion to be constitutionally permissible.

6.Search and Seizure-nontestimonial identification order-not tainted by earlier order

The trial court did not err in a rape prosecution by denying a motion to suppress a second nontestimonial identification order issued in 1998 where defendant argued that the 1998 warrant was tainted by an illegal 1986 nontestimonial identification order, but the evidence obtained in 1986 was properly seized and investigators were led back to defendant in 1998 due to the perseverance of an SBI agent rather than the results of the 1986 order, which had merely concluded that defendant was not excluded as a suspect.

COUNSEL

Roy Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Robert C. Ervin for defendant-appellant.

JUDGES

WAINWRIGHT, Justice.

AUTHOR: WAINWRIGHT

OPINION

/*24/ WAINWRIGHT, Justice.

On 21 September 1998, Marion Edward Pearson (defendant) was indicted for four counts of first-degree rape, two counts of first-degree sexual offense, two counts of first-degree burglary, and one count of robbery with a dangerous weapon. On 12 April 1999, defendant was also indicted for additional counts of first-degree rape, first-degree burglary, and robbery with a dangerous weapon.

On 11 January 2000, defendant tendered an **Alford** plea to two counts of second-degree rape as part of a plea agreement. Defendant reserved the right to appeal from the trial court's denial of his motions to suppress, and the State dismissed the remaining charges. The trial court sentenced defendant to consecutive prison terms of twenty-five years. The Court of Appeals, with one judge dissenting, found

no error. Defendant appeals to this Court from the decision of the Court of Appeals on the basis of the dissent.

Our review of the record reveals the following relevant facts: On 7 March 1985, the Morganton Police Department received a report of a Peeping Tom in the Village Creek Apartments complex. When Lieutenant James Buchanan responded to the call, he saw a black male wearing a light gray or blue windbreaker and blue jeans, squatting beside an air-conditioning unit directly behind an apartment building. The suspect ran when he saw Buchanan. Buchanan lost the suspect and notified other officers to stop two cars that were leaving the complex. Defendant was driving one of the cars and was wearing a light blue windbreaker and blue jeans. When interviewed later about this incident, defendant claimed he was going to a friend's apartment in the complex, but he could not remember the friend's name.

At 1:15 a.m. on 14 July 1985, Kathy Richards reported to the Morganton Police that while she was asleep on her couch a man entered her apartment, held a knife to her throat, and raped her. Richards had been asleep on her couch when she was attacked. The *{*25}* man also took thirty-eight dollars from her wallet. Richards could not see the man but believed he was a twenty-five to thirty-five-year-old white male who was over six feet tall. Police found the screen to Richards' bathroom window had been partially removed, and it appeared someone had crawled through the window. The State Bureau of Investigation (SBI) obtained from the apartment a partial Negroid hair that was not suitable for scientific comparison. A sexual assault examination was completed on Richards at the hospital.

At 1:10 a.m. on 23 November 1985, Arlene Holden called the Morganton Police and reported that a man broke into her apartment at Village Creek Apartments, disabled the lights in her bedroom, hid in her bedroom, and raped her. Before raping Holden, the man struck her in the head, tied her up with pantyhose, and covered her face, using pinking shears to threaten her. The man performed oral sex on Holden and raped her twice. After raping Holden the first time, the man made sure her face was covered, turned on the lights, and looked for money. Holden described the man as having a dark complexion and being five feet eight inches tall, with a lean or medium build. The screen had been removed from an unlocked window in Holden's bedroom. Negroid pubic and body hairs were found in trace evidence examined by the state crime lab. A sexual assault examination was done on Holden at the hospital.

Investigators developed defendant as a suspect in the Holden rape at the Village Creek Apartments based on the Peeping Tom incident in March 1985 at the apartment complex. Investigators interviewed defendant on 26 November 1985. Defendant denied any involvement in the Holden rape and left the interview with a cooperative attitude.

Between 11:30 and 11:40 p.m. on 17 February 1986, Ernestine Kyes was attacked in her bedroom. After showering, Kyes attempted to turn on her bedroom light, but it would not work. Kyes' attacker threatened her with something that felt like a knife, covered her head with a towel, performed oral sex on her, forced her to perform oral sex on him, and then raped her. The attacker took approximately forty dollars from Kyes' purse and then raped her again. The man knew the names of Kyes' children and where they went to school. Defendant's son attended the day care that Kyes directed, and defendant sometimes brought his son to and from the day care. Kyes described her attacker as a black man between five feet eight inches and five feet ten inches tall, with an average build. Evidence found on Kyes' clothing and bed covers included Negroid hairs. A sexual *{*26}* assault examination was completed on Kyes at the hospital. Pubic combings of the victim contained two Negroid hairs.

Both Holden and Kyes described their attacker as someone of medium height. Holden said he was five feet eight inches tall, and Kyes said he was between five feet eight and five feet ten inches tall. Additionally, Holden and Kyes said he was of medium build. Holden said he had a lean, medium build, and Kyes described him as having an average build. Further, both women described their attacker as

dark-skinned. Holden described her attacker as having a dark complexion, and Kyes said her attacker was a black male. At the scenes of both the Holden and Kyes rapes, Negroid hairs were found. Defendant is a black male, slender and muscular, and stands approximately five feet eight inches tall.

After the report of Kyes' rape, investigators intensified the focus of the investigation on defendant. At 1:30 a.m. on 18 February 1986, after learning of the Kyes rape, SBI Agent John Suttle drove directly to defendant's house and noted that the hood of defendant's car was warmer than others in the lot, as if it had been recently driven. Police interviewed defendant again on 18 February 1986. Defendant claimed he did not leave home after 11:00 p.m. on the night of this rape, 17 February 1986.

On 28 March 1986, Agent Suttle completed an application for a nontestimonial identification order (NIO) to get head and pubic hair samples, a blood sample, and a saliva sample from defendant. In his affidavit, Agent Suttle stated:

> During the early hours of 11-23-86, a white female [Holden] age 26, living at Village Creek Apartments was raped twice by a male subject that entered her apartment via an unlocked window. The subject was described by the victim as being approx. 5'8" tall, lean medium build with a dark complexion speaking with a fake accent. On the night of 2-17-86, a white female [Kyes] age 34, living at Woodbridge Apts was raped twice by a male subject that had entered her apartment via an unlocked window. The victim described her assailant as being 5'8" to 5'10", medium build, "not light and not heavy". Two Negroid pubic hairs were found at the scene of the second rape.
>
> . . .
>
> Marion Pearson [defendant] is a black male, slender and muscular, approx. 5'8" tall. Pearson was caught by Lt. James(*27) Buchanan secretly peeping into apartments at Village Creek Apartments on March 7, 1985 around 9:00 pm.

Later that day, Judge Claude Sitton signed an NIO requiring defendant to appear at the Morganton Police Department on 8 April 1986 and submit to the nontestimonial identification procedures. The order was served on defendant on 1 April 1986. At the time the order was served, defendant was "belligerent and antagonistic" and refused to sign and acknowledge his receipt of the order. Defendant testified on **voir dire** at a motions hearing that he went to the office of the Clerk of Superior Court to request appointment of counsel and was told that no attorney could be appointed until he was charged with a crime.

On 8 April 1986, defendant went to the Morganton Police Department. Defendant testified he asked for an attorney again at this time but was not given one. Pursuant to the NIO, head and pubic hair samples, a saliva sample, and a blood sample were taken from defendant. Subsequent testing of the evidence showed that defendant's blood type would not be detectible from the semen left by the rapist. The testing also showed that a pubic hair found on victim Holden's sweater had similarities and dissimilarities to defendant's hairs and that two pubic hairs found on victim Kyes were microscopically consistent with defendant's hairs and could have come from him. Defendant was therefore not excluded as a suspect.

On 15 May 1986, after crawling into an occupied women's rest room stall in Morganton, defendant was arrested and sentenced to two years in prison for secret peeping. Defendant was arrested in June 1991 for a Peeping Tom offense in Maryland. Defendant was subsequently arrested in Maryland five more times for secret peeping offenses.

In March 1998, when DNA technology became available, Agent Suttle submitted to SBI Agent Brenda Bissette the sexual assault kits from victims Holden and Kyes and the samples taken from defendant pursuant to the 1986 NIO. Agent Bissette, a DNA analyst in the Molecular Genetics Section of the SBI, determined that defendant's DNA was present in both the Kyes kit and the Holden kit and concluded that only one African-American in 34 million would have the same DNA match found in the Holden kit. Bissette also said that a new blood sample from defendant could produce more definitive results.

*{*28}* On 23 November 1998, Agent Suttle was granted a search warrant to obtain a new blood sample from defendant. The warrant application was based on all the information concerning the crimes, including Agent Suttle's notation that defendant's car felt warm to the touch immediately after the Kyes rape was reported, defendant's arrest and conviction for entering an occupied rest room on 15 May 1986, the results of the DNA analysis of the samples obtained in 1986, and other information including defendant's multiple arrests for Peeping Tom offenses in Maryland. The search warrant was issued and served on defendant. SBI tests on the new blood revealed more definitive results identifying defendant as the perpetrator. From the new blood sample, Agent Bissette determined that only one African-American in 280 million would have the same DNA match found in both the Holden kit and the Richards kit.

After his indictment, defendant filed three separate motions to suppress on 6 January 2000. Defendant first argues the trial court erred by denying his motion to suppress evidence based on violations of the nontestimonial identification statutes. He argues that Agent Suttle's affidavit submitted in support of the application for the 1986 NIO did not set forth sufficient facts to establish reasonable grounds to suspect that defendant committed the offenses.

N.C.G.S § 15A-273 provides that a nontestimonial identification order

> may issue only on an affidavit . . . sworn to before the judge and establishing the following grounds for the order:
>
> (1) That there is probable cause to believe that a felony offense . . . has been committed;
>
> (2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense; and
>
> (3) That the results . . . will be of material aid in determining whether the person named' in the affidavit committed the offense.

N.C.G.S § 15A-273 (1999).

The reasonable grounds standard is similar to the reasonable suspicion standard applied to brief detentions. **See Terry v. Ohio,** 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, 44 Ohio Op. 2d 383 (1968). The sole requirement is a minimal amount of objective justification, something more than an *{*29}* "unparticularized suspicion or 'hunch.'" **United States v. Sokolow,** 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581 (1989) (quoting **Terry,** 392 U.S at 27, 20 L. Ed. 2d at 909); **accord State v. Watkins,** 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994). The reasonable grounds standard required for an NIO is significantly lower than a probable cause standard. **State v. Grooms,** 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000), **cert. denied,** U.S. , 151 L. Ed. 2d 54, 122 S. Ct. 93 (2001). An NIO "is an investigative tool requiring a lower standard of suspicion that is available for the limited purpose of

identifying the perpetrator of a crime." **Id.**

Here, it was reasonable to infer that defendant was someone who met the physical description of the perpetrator given by two of the rape victims. Further, the following facts provide reasonable suspicion that defendant committed the rapes: a Peeping Tom was reported at the location of one of the rapes; a police officer spotted a man squatting next to an air-conditioning unit directly behind an apartment building wearing a light gray or blue windbreaker and blue jeans; the man ran when he saw the officer; shortly thereafter, defendant was stopped near the location where the Peeping Tom was spotted; and defendant was wearing blue jeans and a light blue windbreaker at the time. Defendant was a suspect based on more than a minimal amount of objective justification and more than an unparticularized hunch. The affidavit sufficiently established reasonable grounds to suspect defendant committed the rapes.

Defendant further argues the second sentence in the paragraph of Agent Suttle's affidavit that contains the facts establishing reasonable grounds is false and was made intentionally or with a reckless disregard for its truth. That sentence reads: "Pearson was caught by Lt. James Buchanan secretly peeping into apartments at Village Creek Apartments on March 7, 1985 around 9:00 pm." Defendant argues the police report of the incident did not show that the suspect was seen peeping into apartments, but rather that he was seen "squatting next to an air conditioner unit."

As with an affidavit to procure a search warrant, evidence obtained from an NIO should be suppressed if it is the product of an affidavit that contains deliberate falsehoods or shows a reckless disregard for the truth. **See Franks v. Delaware,** 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 672, 98 S. Ct. 2674 (1978) (holding that where a defendant shows that a search warrant affidavit includes false statements necessary to the finding of probable cause, the search warrant is void). Because "there is a presumption of validity with respect to [an] affidavit supporting [a] search warrant," **State v. Fernandez,** 346 N.C. 1, 14, 484 *(*30)* S.E.2d 350, 358 (1997), there must also be a presumption of validity with respect to an affidavit supporting an NIO. A defendant contesting an NIO has the burden of presenting evidence to "establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." **Id.**

There is no evidence in the record that Agent Suttle intentionally misstated a fact to deceive anyone. Police had received a report that a Peeping Tom was at an apartment complex, a man was seen squatting next to an air-conditioning unit directly behind an apartment building, and the man ran when approached by a police officer. Police stopped defendant as he was leaving the complex, and defendant matched the description of the man seen behind the apartments. Agent Suttle had every reason to conclude defendant had been secretly peeping. He did not misrepresent the activity seen behind the apartments.

"[A] police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties." **State v. Harvey,** 281 N.C. 1, 8, 187 S.E.2d 706, 711 (1972).

Here, Agent Suttle testified that he did not have personal knowledge of these events but that he had reviewed the report of the investigation and had talked with Lt. Buchanan and other officers who were familiar with the incident. Agent Suttle further testified that "in retrospect, [he] should have worded [the affidavit] to explain in greater length the circumstances." The trial court found that "the affidavit statement that **'Pearson was caught by Lt. James Buchanan secretly peeping into apartments'** is an opinion reasonably drawn from the facts stated in Lt. Buchanan's incident report." Defendant failed to produce evidence that Agent Suttle made his allegations in bad faith such that they were knowingly false or in reckless disregard of the truth. The trial court correctly issued the NIO.

Defendant also argues that N.C.G.S. §§ 15A-280 and -282 were substantially violated as defined by N.C.G.S. § 15A-974(2), which requires that evidence must be suppressed if "it is obtained as a result of a **substantial** violation of the provisions of this Chapter." N.C.G.S. § 15A-280 provides:

> Within 90 days after the nontestimonial identification procedure, a return must be made to the judge who issued the order or to a judge designated in the order setting forth an inventory of *[*31]* the products of the nontestimonial identification procedures obtained from the person named in the affidavit. If, at the time of the return, probable cause does not exist to believe that the person has committed the offense named in the affidavit or any other offense, the person named in the affidavit is entitled to move that the authorized judge issue an order directing that the products and reports of the nontestimonial identification procedures, and all copies thereof, be destroyed. The motion must, except for good cause shown, be granted.

N.C.G.S. § 15A-280 (1999).

N.C.G.S. § 15A-282 provides:

> A person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available.

N.C.G.S. § 15A-282 (1999).

The trial court concluded that "the failure of Agent Suttle to return the non-testimonial identification order to [the trial judge] within ninety days . . . violated the provisions of G.S. 15A-280" and that "the failure of Agent Suttle to provide the defendant a copy of the results of the test performed in 1986 . . . in a timely manner violated the requirements of G.S. 15A-282." The trial court further concluded that both of these violations were not substantial under N.C.G.S § 15A-974(2). We agree.

N.C.G.S. § 15A-974(2) provides that evidence must be suppressed if

> it is obtained as a result of a **substantial** violation of the provisions of this Chapter. In determining whether a violation is substantial, the court 'must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct:
>
> c. The extent to which the violation was willful: d. The extent to which exclusion will tend to deter future violations of this Chapter.

N.C.G.S. § 15A-974(2) (1999) (emphasis added).

*[*32]* When making a motion to suppress evidence upon a ground specified in N.C.G.S. § 15A-974, a "defendant has the burden of establishing that his motion to suppress is timely and proper in form." **State v. Satterfield,** 300 N.C. 621, 624-25, 268 S.E.2d 510, 513-14 (1980). Further, defendant "bears the burden of presenting facts in support of his motion to suppress." **Id.** at 626; 268 S.E.2d at 514.

The statute mandates that evidence must be suppressed if it is obtained as a **result** of a violation, meaning that "a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed." **State v. Richardson,** 295 N.C. 309, 322, 245 S.E.2d 754, 763 (1978). "Evidence will not be suppressed unless it has been obtained **as a consequence** of the officer's unlawful conduct . . . . The evidence must be such that it would not have been obtained **but for** the unlawful conduct of the investigating officer. **Id.** at 323, 245 S.E.2d at 763.

Here, the collection of the evidence obtained from the 1986 NIO was not causally related to the statutory violations of N.C.G.S. §§ 15A-280 and -282 because §§ 15A-280 and -282 focus on policies to be followed **after** samples are taken. These policies are not related to **obtaining** the samples.

Further, examination of the first three statutory circumstances outlined in N.C.G.S. § 15A-974(2) shows the evidence was not obtained in substantial violation of chapter 15A. Regarding the particular interest violated, N.C.G.S. § 15A-280's purposes are twofold: (1) it requires a return to the judge who issued the NIO setting forth a product inventory, and (2) it allows the subject of the NIO the opportunity to make a motion to have the NIO products destroyed. N.C.G.S. § 15A-280. In the case at bar, only insignificant interests were violated by Agent Suttle's failure to provide a return to the judge. Defendant was present at his NIO procedure and was aware of what was taken. Further, defendant had no right to the destruction of the material, but only the right to move for its destruction after the ninety day period if there was not probable cause to believe he committed the offenses. Upon hearing such a motion, the trial court could have denied the request upon a finding of good cause. Defendant failed to move for the destruction of the NIO products. Because defendant failed to move for destruction of the evidence (as discussed below), he cannot now show that the judge would have granted such a motion because he was not excluded as a suspect. Thus, defendant cannot show a significant interest was violated.

*{*33}* Next, the extent of the deviation from lawful conduct here was minimal. Agent Suttle's failure to provide the trial court with an inventory of what products were taken at the NIO procedure was a mere oversight, causing no prejudice to defendant. As noted above, defendant was alert at the procedure and aware of what was taken from him.

Regarding the willfulness of the violation of N.C.G.S. § 15A-280, Agent Suttle testified that he was not aware of the requirement of that subsection. Agent Suttle stated, "if I had any knowledge that a return was to be made, I would have. I've never had a judge or a District Attorney . . . say that -- after ninety days a report and return has to be filed to the issuing judge." Based on our conclusions concerning these first three statutory factors, we find no substantial statutory violation.

Similarly, turning to the violation of N.C.G.S. § 15A-282, which mandates that a copy of any reports of results from NIO procedures be made available to the subject of an NIO, the same analysis given to N.C.G.S. § 15A-280 applies. The interest protected was insignificant because the samples had already been taken and the deviation was an unintentional oversight. Accordingly, N.C.G.S. § 15A-282 was not substantially violated. Further, defendant specifically contends that "the violations of [these statutes] directly affected Pearson's ability to move for destruction of the samples and the test results" and that the "destruction of these test results and the samples would have eliminated the State's identification evidence in this case and ended the potential for prosecution." Based on our thorough review of the record in this case, we conclude that defendant's contentions are without merit because any statutory violation was insignificant and non prejudicial.

Agent Suttle testified that he "called [the supervisor of the DNA section] maybe every year or every two or three years and I even was to the point of putting it on my next year's calendar to call to check to see if they felt like the technology was there" to further test evidence obtained as a result of the NIO and

from the sexual assault kits. Eventually, in 1998, the kits were resubmitted.

In all likelihood, Agent Suttle would have kept defendant as a suspect for over ten years regardless of the maintenance of the NIO products and would have obtained the 1998 search warrant regardless of the 1986 NIO. The products of the 1986 NIO procedures did not affirmatively pinpoint defendant as the perpetrator, nor did they{*34} exclude him as a suspect. The 1998 search warrant provided more conclusive DNA and factual evidence, and this evidence was obtained as a result of Agent Suttle's determination and tenacity.

In sum, while obtaining the evidence violated chapter 15A, the violation was not substantial, and therefore the evidence was not inadmissible under N.C.G.S. § 15A-974(2). Moreover, the statutory violations were not unfairly prejudicial as defendant would have been maintained as a suspect even if the 1986 NIO evidence had been destroyed. Further, there is very little likelihood defendant would not have been prosecuted even if the 1986 NIO evidence had been destroyed. Defendant's argument is without merit.

Next, defendant argues that the failure to provide him an attorney was a substantial violation of N.C.G.S. § 15A-279(d), which provides that a defendant

> is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

N.C.G.S. § 15A-279(d) (1999).

On 26 March 1986, during an interview with police officer Ronnie Hudson, defendant told Hudson that he had been "screwed" by the police enough and that he thought it was time he get an attorney. Defendant testified that after being served with the NIO in April 1986, he

> came down here to the courthouse and went to the front window and told them that I wanted to apply for a court-appointed lawyer and they sent me to a room off to the side. . . . I don't know who it was but that's the -- I went to the office that they sent me to and requested for an attorney and the person behind the desk said basically that if you're -- if this makes it to court, then we can assign you a lawyer and I said, well, you know, it says here I have a right to an attorney and they said, well, yeah, but this office can't issue a lawyer unless you have a trial -- I mean unless you have a case here and so I went to -- I believe it was upstairs to a{*35} judge's chambers and asked and basically the notion I got was that I couldn't get one until I was -- you know, I was arrested on a crime or something.

Defendant further testified that he called the ACLU to request a lawyer and asked his father for help getting a lawyer. Defendant testified that at the NIO procedure, Agent Suttle said defendant would be provided an attorney, but that Agent Suttle later said no attorney was available. Defendant claimed that he then underlined a form where it said that he had a right to an attorney.

Agent Suttle testified that he did not recall defendant requesting an attorney. Agent Suttle said that if defendant had asked for an attorney, "I would have stopped and we [] [would have] made arrangements to get him a lawyer. . . . [we would have] had to call the Clerk's office to get him a lawyer appointed."

Agent Suttle said, "he [defendant] obviously was not saying he wanted a lawyer because, if he had, I would have gotten him one." In addition, after a review of the record, we find no form that contains underlining as defendant claimed. Defendant was not provided an attorney, and the NIO procedures were performed without an attorney present.

The trial court concluded that this was a substantial violation of the statute but that defendant was "not entitled to suppression of the physical evidence seized from him because the evidence was not obtained as a result of the violation. The physical evidence would have been seized from the defendant even if counsel had been present since it was being obtained pursuant to a court order." We agree.

The transcript and records contain conflicting information as to what defendant specifically requested, how and to whom he articulated such requests, and when such requests were made. By calling the ACLU, approaching his father for help to get an attorney, and telling Officer Hudson that he thought it was time he get an attorney, defendant appeared to be getting his own attorney. However, assuming, **arguendo,** that defendant's account of his requests for an attorney is accurate, he fails to demonstrate how the presence of counsel when the evidence was taken would have further protected his rights, and we hold that the failure to provide an attorney, while error, was not prejudicial.

"According to the plain language of section 15A-279(d), the provision protects the defendant from having statements made during *[*36]* the nontestimonial identification procedure used against [him] at trial where counsel was not present during the procedure." **State v. Coplen,** 138 N.C. App. 48, 58, 530 S.E.2d 313, 320, **cert. denied,** 352 N.C. 677, 545 S.E.2d 438 (2000). Here, defendant did not seek to suppress any statements made during the procedure, only to suppress the actual evidence procured.

Defendant also argues that the failure to provide him an attorney impaired his ability to obtain an order for the destruction of the evidence, which meant the SBI could preserve the evidence and later test it with more sophisticated DNA technology. We disagree. Whether defendant had an attorney to advise him to seek to have the evidence destroyed is not determinative. Based on a plethora of evidence other than the products of the 1986 NIO, Agent Suttle and the SBI would have had probable cause to obtain the 1998 search warrant. In the application for the 1998 search warrant, in addition to the details of the three rapes and the investigations, Agent Suttle outlined the following evidence in a seven page affidavit:

> After Pearson was released from the North Carolina Department of Corrections, Investigators did not have any contact or knowledge of Pearson being in the Morganton area. There have not been any other similar reported burglary/rapes reported in the Morganton area since the February rape of Victim Kyes in 1986 and the intense focusing by investigators on Pearson as a suspect.
>
> This affiant in 1993 upon reviewing the serial rapes that occurred in Morganton located through various sources Marion E. Pearson, Jr. in Landham, Maryland. S/A Suttle contacted a Sergeant Paul Evans of the Sex Crimes Unit for Prince Georges County Police in February of 1993 to determine if they were having any burglary/rapes with a similar modus operandi. Evans indicated they had not. A local record check then of Pearson revealed Pearson was arrested on February 28, 1980 for a peeping tom offense and again for the same offense on June 28, 1991 in Maryland. The record also revealed parking citations issued to Pearson in 1991 at the University of Maryland.
>
> Affiant recontacted the Sex Crimes Unit of Prince Georges County Police on October 14, 1997 to review Pearson's status in Maryland. Affiant also had [] been communicating with the

Molecular Genetics Division of the North Carolina Crime Lab for several years with the intentions of waiting for DNA technology {*37} to improve before reinitiating some contact with Marion E. Pearson, Jr.

Affiant talked with Investigator Candice Santos on October 14, 1997 and learned she has two similar unsolved burglary/rapes that she is working on without any suspects. She noted the suspect in both cases did not leave any DNA evidence behind by using a condom and or ejaculating on something that he took from the crime scene with him.

An updated check of Pearson's record in Maryland revealed he had been arrested five times for "peeping tom" related offenses since his record was examined in 1993 by Sergeant Evans and S/A Suttle.

This affiant upon reviewing and examining the three Morganton rape cases notes the following similarities and conclusions:

1. All three Morganton rapes were committed by the same suspect because of the similarities of the three crimes: time, fake accent, Negroid hairs, disabled bedroom lights in the last two cases, moistening of the vagina before first sex act by performing cunninglingus [sic], second rape of second and third victims from behind, taking of money from all three victims, close proximity to town permitting suspect to get away before being caught, use of an edged weapon to gain control of victim.

2. The FBI Behavioral Science Unit review of the cases concluded in all probability that the same suspect committed all three rapes.

3. Marion Pearson's connection to the Village Creek Apartments and his unusual activity there near where the second victim lived.

4. The contact Pearson had with the third victim at the daycare and his ability to surveil victim Kyes and learn her address and facts about her single parent family.

5. Pearson's lack of cooperativeness after the investigation focused on him.

6. Pearson's bizarre behavior such as the bathroom incident at the college which resulted in his getting two years in prison.

{*38} 7. Pearson's continued bizarre nighttime activity in Maryland where he had been charged with peeping tom offenses twice prior to 1993 and his being arrested five times since 1993 in the Maryland area for similar offenses.

8. All three victims were assaulted in the privacy of their own home [sic] and approached from behind by an assailant that entered through unlocked windows. All victims lived in apartments.

9. All three [victims] maintained quiet lifestyles, all were divorced and none of them had promiscuous tendencies or careless attitudes that would classify them at a high risk as a victim of a violent crime.

10. In all three cases the suspect maintained control over the victims by verbalizing

continued threats.

It is this affiant's professional opinion based on years of training and dealing with criminal activity and criminal minds that the so called "peeping tom" activity of Marion Pearson is the proverbial "tip of the iceberg". With the multiple arrests for "peeping" related offenses, common sense would lead a reasonable person to conclude he had to be committing the act many more times than he was caught at. No reasonable person would believe that he was apprehended by police every time he committed the act.

In furtherance of this opinion, this suspect is not out being a "peeping torn" for voyeuristic pleasures but he is stalking his unwitting victims many of whom would never report their rape for fear of the embarrassment and life complications reporting same would involve. If the suspect committing these rapes would beat, injure or maim the external body of the victim's [sic] they would be forced to report these violations. This suspect committing these crimes is smart enough to know if he does not hurt his victims physically they in a high probability might not report the incident. Marion Pearson is a very intelligent individual with collegiate level education and has represented himself in court before. Pearson is also educated to the point of being able to research the "information age" to learn about how DNA is used in forensic labs to identify rapists and how to easily avoid leaving that evidence behind in or on a victim.

This affiant based on many years of experience has the opinion that "peeping tom" activity is not necessarily behavior *{*39}* always consistent with voyeurism. This is a method of selection and evaluation process for a serial rapist to select his victims. In this investigation a suspect in three rapes in a small town in North Carolina is eight years later actively searching and stalking future victims in the State of Maryland.

Although it was error to deny defendant counsel at the NIO procedure, such error was not prejudicial under these circumstances. After a thorough review of the record, it is clear that defendant would have remained a suspect in this case whether the evidence from the 1986 NIO was destroyed or not.

"The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction." **State v. Milby,** 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). In view of the overwhelming evidence that Agent Suttle and investigators accumulated, as well as Agent Suttle's perseverance in maintaining defendant as a suspect until DNA testing evolved, we conclude there is no reasonable possibility that the result here was affected by the failure to provide defendant counsel at the NIO procedure.

In his next argument, defendant contends the trial court committed constitutional error in denying his motion to suppress evidence obtained from the NIO. Specifically, defendant argues the affidavit used to obtain the NIO failed to provide reasonable grounds for suspicion and relied on false and misleading information. We have already addressed these arguments in the statutory setting, and the result is the same under a constitutional analysis. This argument is without merit.

Collection procedures like those involved in the present case require only reasonable suspicion to be constitutionally permissible. **See Hayes v. Florida,** 470 U.S. 811, 817, 84 L. Ed. 2d 705, 711, 105 S. Ct. 1643 (1985) (holding that "there is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act"). As established above, the affidavit in the present case supporting the NIO application established reasonable grounds to suspect that defendant committed the Holden and Kyes rapes. Further, as also discussed above, defendant fails to provide sufficient evidence that the

affidavit relied on false or misleading information.

*{*40}* In his final argument, defendant contends the trial, court erred by denying his motion to suppress a blood sample obtained as a result of the 23 November 1998 search warrant as well as DNA testing of that blood sample. According to defendant, Agent Suttle's decision to seek the search warrant in 1998 was prompted by testing on evidence illegally obtained in 1986. Moreover, results of the tests done on this illegally obtained evidence were presented to the judge who issued the 1998 search warrant. Thus, defendant contends the evidence obtained via the 1998 search warrant was fruit of the poisonous tree because the search warrant was tainted by the illegality of the 1986 NIO.

As previously discussed, it is apparent from the record that Agent Suttle persevered in maintaining defendant as a suspect for over ten years until DNA testing was more advanced. It was this perseverance rather than the results of the 1986 NIO that led investigators back to defendant. In short, because the evidence obtained in 1986 was properly seized, the evidence obtained in 1998 could not be tainted by the 1986 evidence, especially when viewed in light of the abundant evidence obtained prior to the procurement of the 1998 search warrant. Accordingly, defendant's argument is without merit.

In conclusion, we conclude that the trial court committed no prejudicial error, and we therefore affirm the decision of the Court of Appeals.

AFFIRMED.

DISPOSITION

AFFIRMED.

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Document 1 of 1

Source:
Michie's North Carolina Primary Law/North Carolina Judicial Decisions (Since 1987)/SUPREME COURT OF NORTH CAROLINA/1989/324 N.C. 506, 379 S.E.2d 830 STATE V. HYLEMAN (S. Ct. 1989) 1989 N.C. Lexis 302

324 N.C. 506, 379 S.E.2d 830 STATE V. HYLEMAN (S. Ct. 1989) 1989 N.C. Lexis 302

STATE OF NORTH CAROLINA
vs.
KENNETH RAY HYLEMAN

No. 209A88

SUPREME COURT OF NORTH CAROLINA

324 N.C. 506, 379 S.E.2d 830, 1989 N.C. LEXIS 302

June 08, 1989, Filed

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 89 N.C. App. 424, 366 S.E.2d 530 (1988), which found no error in the trial and convictions of defendant before **Ferrell, J.,** at the 23 February 1987 session of Superior Court, Gaston County.

HEADNOTE

1. Searches and Seizures § 26 -- search warrant -- insufficient affidavit -- exclusion of seized evidence

An officer's affidavit was insufficient under N.C.G.S. § 15A-244(3) to establish probable cause for a search warrant, and the trial court erred in denying defendant's motion to suppress evidence seized from defendant's residence pursuant to a search under the warrant, where the affidavit stated that the officer purchased cocaine using bills with specified serial numbers and that, based on information received during the purchase and after the purchase from confidential informants, he had reason to believe that the money and other controlled substances were at defendant's residence, but the affiant failed to state what information he received from the informants during and after the purchase of cocaine, and the affidavit failed to disclose any facts that would lead the affiant or the magistrate reasonably to believe that the identified currency and contraband were at defendant's residence. N.C.G.S. § 15A-947(2) (1988).

2. Criminal Law § 84; Searches and Seizures § 4 -- exclusionary rule -- federal constitutional grounds -- good faith exception

The good faith exception to the exclusionary rule arises only upon the exclusion of evidence based upon federal constitutional grounds.

3. Criminal Law § 89.4 -- denial of prior statement -- testimony of substance of statement improper impeachment

It was improper for the State to impeach a witness who denied making a prior statement to an officer that he had bought cocaine from defendant by the use of the officer's testimony relating the substance of that prior statement.

COUNSEL

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the state.

Gray and Hodnett, by James C. Gray, for the defendant-appellant.

JUDGES

Martin, Justice. Justice Webb dissenting. Justices Meyer and Mitchell join in this dissenting opinion.

AUTHOR: MARTIN

OPINION

*{*507}* Defendant was tried on three counts of trafficking cocaine by possessing, delivering, and selling, and on one count of possession of drug paraphernalia. We hold that defendant is entitled to a new trial because the trial judge erred in denying defendant's motion to suppress.

The state's evidence showed that on 25 July 1986, Detective William Durst of the Gaston County Police Department participated in a cocaine sale organized by a confidential informant. At approximately 7:00 p.m., the informant and Detective Durst met with Gene Orendorff and Jeff Manning. Durst delivered $ 1,650 in previously photocopied currency to Orendorff and Manning. Durst was to make a final payment in the same amount upon receipt of two ounces of cocaine.

Police surveillance units observed Orendorff and Manning driving into a trailer park from which they departed with a third *{*508}* man, Kenneth Wood, at approximately 8:15 p.m. Police then lost track of the three until they were again spotted at 10:25 p.m. At approximately 10:50 p.m. the three men returned to the site of their earlier meeting with Durst and delivered the cocaine to him. At completion of the deal, Durst signaled nearby officers and the three men were arrested.

Later that night, Kenneth Wood identified defendant from a photographic lineup as the person from whom he had acquired the cocaine. Based on this information and on similar statements made by Orendorff to another officer, Detective Durst prepared an affidavit for a warrant to search defendant's residence. The magistrate found probable cause to issue the search warrant based upon the warrant application. The resulting search yielded drug paraphernalia and two hundred and fifty dollars, of which thirty-six bills matched previously-made photocopies.

Defendant was convicted of the sale of cocaine, for which he received a sentence of ten years, and of possession of drug paraphernalia, for which he received a twelve-month sentence. The Court of Appeals found no error in defendant's trial.

Defendant first assigns error to the denial of his motion to suppress evidence. Defendant argues that the affidavit for the search warrant under which the evidence was seized fails to establish probable cause. The affidavit prepared by Detective Durst for the search warrant application reads as follows:

> The applicant (W.C. Durst) is a detective with the Gaston County Police Department, assigned to the Special Investigation Unit (SIU). The applicant has been a police officer for 14 years, 5 years of which, assign to conduct drug investigations.
>
> The applicant states that on July the 25th, 1986 that he purchased two ounces of cocaine, which is included in Schedule II of the N.C. Controlled Substances Act. That the two ounces of cocaine were delivered to the applicant by three persons (Gene Orendorff, Jr., Jeff Manning, Kenny Woods) who arrested at the time of deliver. That the three persons were arrested for trafficking in cocaine and conspiracy to traffick in cocaine.

*{*509}* The applicant states, further, that he paid $ 1650.00 in U.S. currency for the above cocaine. The bills and serial numbers used in the purchase were as follows: . . . .

The applicant states, further, that during the time spent on the purchase, from about 7:15pm 07-25-86 until 10:50pm 07-25-86 that Det. Durst and the suspects were kept under surveillance by other members of the Gaston County Police Dept. S.I.U. and the N.C. S.B.I.

The applicant states, that from the movement of the suspects during, and before the purchase, and information received during the purchase, and information from two confidential sources of information after the purchase that the applicant has reason to believe that the U.S. currency listed above to purchase the two ounces of cocaine, and other controlled substances are at this time located in the above described location and request respectfully that a search warrant be issued.

The validity of this warrant is governed by N.C.G.S. § 15A-244(3):

Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; . .

.

This Court has held that probable cause cannot be shown by conclusory affidavits stating only the belief of the affiant or an informer that probable cause exists to issue the warrant. **State v. Campbell,** 282 N.C. 125, 191 S.E.2d 752 (1972). Recital of some of the circumstances underlying this belief is essential. **Id.** When hearsay information is a part of the foundation of the affiant's belief, such information must be sufficiently detailed in order to form a substantial basis for the magistrate's finding of probable cause. **State v. Arrington,** 311 N.C. 633, 319 S.E.2d 254(1984). Furthermore, the affidavit must implicate the premises to be searched. **Campbell,** 282 N.C. 125, 191 S.E.2d 752.

Here, the application for a search warrant fails to comply with the statute in several respects. The affiant fails to state *{*510}* what information he received from the informants during and after the purchase of cocaine. The affidavit fails to disclose any facts that would lead Durst or a magistrate to reasonably believe that the identified currency and contraband were at the defendant's residence. The inadequacies of the affidavit resulted in the magistrate being confronted with an insufficient, "bare bones" application for a search warrant. Under the totality of circumstances analysis, the affidavit did not comply with N.C.G.S. § 15A-244(3).

The failure of the affidavit to comply with N.C.G.S. § 15A-244(3) constituted a substantial violation. Manifestly, the evidence was seized as a result of the inadequate affidavit upon which the warrant was issued. **See State v. Hunter,** 305 N.C. 106, 286 S.E.2d 535(1982). The interest of a defendant to be free from unlawful searches and seizures is, of course, a fundamental constitutional and statutory right in North Carolina. The "bare bones" conclusory affidavit was totally inadequate to support a finding of probable cause under the totality of circumstances analysis. Additionally, there was evidence of willfulness on the part of the affiant demonstrated by the statement in the affidavit that the suspects were under surveillance by the officers from 7:15 p.m. to 10:50 p.m. The evidence disclosed that the suspects disappeared from the view of the officers from 8:15 p.m. to 10:25 p.m. and that the affiant was aware of this break in the surveillance. The exclusion of illegally seized evidence is the greatest deterrent to similar violations in the future. **See State v. Carter,** 322 N.C. 709, 370 S.E.2d 553(1988). The trial court erred in denying defendant's motion to suppress the evidence seized in the search. Defendant is therefore entitled to a new trial. N.C.G.S. § 15A-974(2) (1988).

Having decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds. **State v. Creason,** 313 N.C. 122, 326 S.E.2d 24(1985); **State v. Blackwell,** 246 N.C. 642, 99 S.E.2d 867 (1957); **State v. Jones,** 242 N.C. 563, 89 S.E.2d 129 (1955). It follows that the good faith exception to the exclusionary rule is not applicable. The good faith exception to the exclusionary rule arises upon the exclusion of evidence based upon federal constitutional grounds. **See, e.g., United States v. Leon,** 468 U.S. 897, 82 L. Ed. 2d 677(1984); **State v. Welch,** 316 N.C. 578, *[*511]* 342 S.E.2d 789 (1986). The Court of Appeals erred in relying upon the federal "good faith" exception doctrine.

We discuss the defendant's second assignment of error because the question it raises may recur at a new trial. This issue involves the state's use of Detective Durst's testimony to impeach the testimony of the state's witness Kenneth Wood. Wood denied making a statement to Detective Durst identifying defendant as the person from whom he obtained the cocaine. The state thereafter recalled Durst, who testified that Wood said he had bought the cocaine from defendant.

This Court recently analyzed this issue in **State v. Hunt,** 324 N.C. 343, 378 S.E.2d 754(1989), holding that it is improper to impeach a witness who has denied making a prior statement by the use of testimony relating the substance of that prior statement.

The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the Superior Court, Gaston County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

DISPOSITION

Reversed and remanded.

DISSENT

Justice Webb dissenting.

I dissent. Conceding for purposes of argument that the search warrant does not comply with N.C.G.S. § 15A-244(3) I do not believe that N.C.G.S. § 15A-974(2) requires that evidence seized during the search should be suppressed. N.C.G.S. § 15A-974 provides in part:

Upon timely motion, evidence must be suppressed if:

. . .

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

(a) The importance of the particular interest violated;

(b) The extent of the deviation from lawful conduct;

(c) The extent to which the violation was willful;

[*512] (d) The extent to which exclusion will tend to deter future violations of this Chapter.

Considering the matters which the statute says we must consider I do not believe the violation was substantial.

Certainly the right to be free from an unlawful search is an important interest. The deviation from lawful conduct, however, was slight. Mr. Durst applied for a search warrant but, according to the majority, he did not comply with all the requirements in the language he used. I would hold this is not a major deviation from lawful conduct. There is no showing at all that the deviation was willful and the exclusion of this evidence will not tend to deter future violations of the chapter. There is no evidence Mr. Durst did not make a good faith effort to prepare a proper affidavit for a search warrant. That is all we can expect from officers in the future. Considering these statutory factors I believe we should hold the violation was not substantial and evidence seized during the search should be admissible.

I realize that in **State v. Carter,** 322 N.C. 709, 370 S.E.2d 553 (1988) we held that there is not a good faith exception under our state Constitution which allows the admission of evidence seized in contravention to our Constitution. This might prevent the admission of the evidence although it should not have been excluded pursuant to N.C.G.S. § 15A-974(2). Suffice it to say I joined in the dissent in **Carter** and I believe **Carter** should be overruled.

I vote to affirm the Court of Appeals.

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HOUSE BILL 564:
Revise Exclusionary Rule.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Stam
Date:	April 3, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: ***The bill would limit the exclusion or suppression of unlawfully obtained evidence in a criminal trial to when exclusion or suppression is required by the United States Constitution. The bill would become effective December 1, 2003, and apply to all criminal trials pending or commencing on or after that date.***

CURRENT LAW: G.S. 15A-974 currently requires suppression of evidence in a criminal trial when (i) required by the U.S. Constitution; (ii) required by the N.C. Constitution; or (iii) the evidence is obtained as the result of a substantial violation of Chapter 15A of the General Statutes (the Criminal Procedure Act). This statute directs the court, when considering whether a violation is substantial, to consider all circumstances, including the importance of the interest that is violated, the extent of the deviation from lawful conduct, the extent to which it was a willful violation, and the extent to which exclusion will deter future violations of the Criminal Procedure Act.

BILL ANALYSIS: House Bill 564 would amend G.S. 15A-974 by authorizing the suppression of evidence only when required by the U.S. Constitution. Thus, suppression of evidence would no longer be required if the evidence is obtained in violation of the N.C. Constitution or as a substantial violation of the Criminal Procedure Act.

BACKGROUND: Under the federal Constitution, there is a "good faith" exception to the exclusionary rule. This exception allows unlawfully obtained evidence to be considered in a criminal trial. This "good faith" exception is not recognized under the State Constitution.

The United States Supreme Court has held that the U.S. Constitution does not require suppression of unlawfully obtained evidence when the evidence was obtained by law enforcement officers who acted in good faith. United States v. Leon, 468 U.S. 897 (1984). In 1988, the North Carolina Supreme Court refused to adopt the "good faith" exception to the exclusionary rule under the N.C. Constitution. State v. Carter, 322 N.C. 709 (1988) (allowing the suppression of a blood sample). Justice Meyer, in a strongly worded dissent, argued, "The law of search and seizure under the North Carolina Constitution should be interpreted as being no more restrictive than the fourth amendment to the United States Constitution."

Consequently, under current North Carolina law (1) unlawfully obtained evidence must be suppressed even when officers have acted under the objectively reasonable belief that their actions were lawful and when the evidence obtained is otherwise admissible under the federal Constitution, and (2) evidence that is otherwise admissible under both the federal and state Constitutions may be held inadmissible due to violations of North Carolina procedural statutory provisions.

H564-SMRH-001: Hal Pell, Staff Attorney, Research Division, contributed to this summary.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 3, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Anne Winn	NCLTA
Donna Pygott	NCWAA
Paul Pulley	NCATL
John McHugh	Gov Office
Patricia Camp	ACLU
Roger Porter	League of Charter Schools
Pamela Reed	AOC

House Judiciary II

Committee

Minutes

April 8, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order.

Rep. Paul Miller was recognized to discuss **HB 26** (Camera Defeating license Covers Illegal), which he had sponsored. A proposed committee substitute was handed out and Rep. Walend moved that it be adopted for consideration. The motion passed.

Rep. Nesbitt told the committee that the proposed committee substitute was prepared by staff at his request to make the penalty for these camera defeating license covers an infraction.

Rep. Ellis asked if there were any driver points for this infraction. He said he believed the bill allows law enforcement officers to go out and assist a private corporation in operating its business.

Rep. Miller said that you could look at it many ways, but that, yes, it would benefit "for profit companies," but at the end of the day, this is about safety.

Rep. Goodwin was in favor of the bill but also had concerns.

Rep. Moore moved to amend the bill to add language that addresses a question raised by Rep. Ellis. This language says that this is not a moving violation that no insurance and license points shall be assessed and also says that no court costs will be assessed when the fine is paid.

Rep. Miller wondered how that would change the bill.

Rep. Stam was concerned that Rep. Moore's amendment would create an inconsistency in the statutes.

Discussion followed. The bill was displaced.

HB 798 (Securities Transfer on Death) sponsored by Rep. Moore was before the committee.

Rep. Moore was recognized. He asked Robin Johnson, Committee Counsel, to explain the bill.

Ms. Johnson's bill analysis is a part of these Minutes as *Attachment I.*

Ms. Johnson also noted that one change that would result from this bill would be a reduction in the collection of probate fees by the clerks of court.

Rep. Moore was recognized and said he did not credit for coming up with this bill, but that Mr. Richard C. Hatch with the AARP had spoken with him about introducing this legislation.

Rep. Nesbitt wondered if this legislation would affect a spouse's share of an estate.

Rep. Stam said he was inclined to vote for the bill, but the downside of this bill is that it would affect what passes outside the estate. Two issues, one is elective share of spouse and that estate planning would be done by stockbrokers. The bill would have "unexpected effect."

Rep. Ellis was concerned that this would create a "two-tier" estate planning.

Mr. Richard Hatch with the AARP was recognized. He said the AARP was in favor of this legislation.

Dick Carlton representing the Securities Industry Corporation also spoke in favor of the bill.

Rep. Walend supported the legislation. Rep. Nesbitt was concerned about the effect this legislation would have on an estate and he suggested that staff should look into this.

The bill was displaced until the committee's next meeting.

Rep. Moore presided while Rep. Nesbitt was recognized to explain his bill, **HB 743** (Nurse Testimonial Privilege).

Committee Counsel, Jeff Hudson explained that **HB 743** provides that nurses shall not be required to disclose information acquired while rendering professional nursing services except in cases where the presiding judge determines that disclosure is necessary for the proper administration of justice and disclosure is not prohibited by other statute or rule.

Rep. Walend, who was also a primary sponsor of the bill, said that she endorsed the bill.

When there was no further discussion, Rep. Goodwin moved to give **HB 743** a favorable report and the motion passed.

The meeting adjourned at 10:50 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

4-8-03
Attachment I

HOUSE BILL 26:
Camera Defeating License Covers Illegal.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Paul Miller
Date:	April 8, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Proposed Committee Substitute H26-CSRO-6[v.1]		Committee Co-Counsel

SUMMARY:

The Proposed Committee Substitute for House Bill 26 provides that a person who willfully covers a registration plate with any devise designed or intended to defeat a traffic control system using cameras commits an infraction.

CURRENT LAW:

Under current law (G.S. 20-63(g)), it is a Class 2 misdemeanor to willfully alter, disguise, or conceal a motor vehicle license plate. The law prohibits covering a license plate with a "bumper, light, spare tire, tire rack, strap, or other devise".

BILL ANALYSIS:

The Proposed Committee Substitute makes it an infraction to cover a license plate with a device designed or intended to prevent the taking of a clear photograph by a traffic control system using cameras. Several devices currently on the market are capable of obscuring images taken by a camera but are transparent otherwise. This bill clarifies that the use of such devices is illegal.

An infraction is a noncriminal violation of law. The sanction for an infraction is a penalty of not more than $100.00. The proceeds of the penalties for infractions are payable to the county in which the infraction occurred for the use of the public schools.

Since 1997, the General Assembly has allowed an increasing number of municipalities to adopt ordinances to enforce traffic violations by the use of traffic control photographic systems. A traffic control photographic system is an electronic system consisting of a photographic, video or electronic camera and a vehicle sensor which works in conjunction with a traffic control device to automatically produce photographs, video or digital images of vehicles violating traffic control laws.

This act would become effective October 1, 2003, and apply to acts committed on or after that date.

H26-SMRO-002

Y-8-03

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H D

HOUSE BILL 26
Committee Substitute Favorable 3/31/03
PROPOSED COMMITTEE SUBSTITUTE H26-CSRO-6 [v.1]

4/7/2003 8:46:50 PM

Short Title: Camera Defeating License Covers Illegal. (Public)

Sponsors:

Referred to:

February 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT DEVICES DESIGNED TO COVER REGISTRATION PLATES TO PREVENT THE TAKING OF A CLEAR PHOTOGRAPH BY TRAFFIC CONTROL SYSTEMS USING CAMERAS ARE UNLAWFUL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-63(g) reads as rewritten:

"(g) Alteration, Disguise, or Concealment of Numbers. – Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall willfully cover or cause to be covered any part or portion of a registration plate or the figures or letters thereon by any device designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras, commits an infraction and shall be fined under G.S. 14-3.1. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1. Nothing in this subsection shall prohibit the use of transparent covers that are not designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras."

SECTION 2. This act becomes effective October 1, 2003, and applies to acts committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 26

Committee Substitute Favorable 3/31/03

Short Title: Camera Defeating License Covers Illegal. (Public)

Sponsors:

Referred to:

February 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT DEVICES DESIGNED TO COVER REGISTRATION PLATES TO PREVENT THE TAKING OF A CLEAR PHOTOGRAPH BY TRAFFIC CONTROL SYSTEMS USING CAMERAS ARE UNLAWFUL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-63(g) reads as rewritten:

"(g) Alteration, Disguise, or Concealment of Numbers. – Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, including any device designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1. Nothing in this subsection shall prohibit the use of clear covers that are not designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras."

SECTION 2. This act becomes effective October 1, 2003, and applies to acts committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 798*

Short Title:	Securities Transfer on Death.	(Public)
Sponsors:	Representatives Moore, Munford (Primary Sponsors); Blust, Gorman, Holmes, Insko, and McHenry.	
Referred to:	Judiciary II.	

March 31, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM TRANSFER ON DEATH (TOD) SECURITY REGISTRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by rewriting the title of Chapter 41 to read "Estates and Interests in Property", and Chapter 41 of the General Statutes is amended by adding a new Article to read:

"Article 4.

"The Uniform Transfer on Death (TOD) Security Registration Act.

"**§ 41-40. Definitions.**

In this Article, unless the context otherwise requires:

(1) 'Beneficiary form' means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) 'Devisee' means any person designated in a will to receive a disposition of real or personal property.

(3) 'Heirs' means those persons, including the surviving spouse, who are entitled under Chapter 29 of the General Statutes or the statutes of intestate succession of other states to take the property of a decedent by intestate succession.

(4) 'Person' means an individual, a corporation, an organization, or other legal entity.

(5) 'Personal representative' includes executor, administrator, collector, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(6) 'Property' includes both real and personal property or any interest in real or personal property and means anything that may be the subject of ownership.

(7) 'Register', including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) 'Registering entity' means a person who originates or transfers a security title by registration and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) 'Security' means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, a security account, and a security entitlement as defined in G.S. 25-8-102.

(10) 'Security account' means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(11) 'State' includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

"**§ 41-41. Registration in beneficiary form; sole or joint tenancy ownership.**

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more individuals with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

"**§ 41-42. Registration in beneficiary form; applicable law.**

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

"**§ 41-43. Origination of registration in beneficiary form.**

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

"**§ 41-44. Form of registration in beneficiary form.**

Registration in beneficiary form may be shown by the words 'transfer on death' or the abbreviation 'TOD', or by the words 'pay on death' or the abbreviation 'POD', after the name of the registered owner or owners and before the name of a beneficiary.

"**§ 41-45. Effect of registration in beneficiary form.**

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership of the security until the owner's death. A registration of a security in beneficiary form may be cancelled or changed at any time by the sole owner or all then-surviving owners, without the consent of the beneficiary.

"**§ 41-46. Ownership on death of owner.**

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

"**§ 41-47. Protection of registering entity.**

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this Article.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this Article.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with G.S. 41-46 and does so in good faith reliance (i) on the registration, (ii) on this Article, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this Article do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this Article.

(d) The protection provided by this Article to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

"**§ 41-48. Nontestamentary transfer on death.**

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Article and is not testamentary.

(b) The interest of a deceased owner when there are one or more surviving owners remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the surviving owner or owners when the decedent's estate is insufficient to satisfy the debts. The interest of a deceased sole owner, or the last to die of several owners, remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the TOD beneficiary when the decedent's estate is insufficient to satisfy the debts.

(c) This Article does not repeal or modify any provision of law relating to estate taxes.

"**§ 41-49. Terms, conditions, and forms for registration.**

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions established may provide for proving death, avoiding or resolving any problems concerning fractional shares, and designating primary or contingent beneficiaries. Forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: 'John S. Brown TOD (or POD) John S. Brown, Jr.'

(2) Multiple owners-sole beneficiary: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr.'

(3) Multiple owners-primary and secondary (substituted) beneficiaries: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr. SUB BENE Peter O. Brown'.

"**§ 41-50. Short title; rules of construction.**

(a) This Article shall be known as and may be cited as the 'Uniform TOD Security Registration Act'.

(b) This Article shall be applied and construed to effectuate its general purposes and to make uniform the laws with respect to the subject of this Article among states enacting it.

(c) This Article does not repeal G.S. 41-2.2. G.S. 41-2.2 applies in determining whether a right of survivorship exists among multiple owners of a security interest in beneficiary form.

"**§ 41-51. Application of Article.**

This Article applies to registrations of securities in beneficiary form made before, on, or after the effective date of this Article, by decedents dying on or after the effective date of this Article."

SECTION 2. G.S. 28A-15-10(a) reads as rewritten:

"(a) When needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

(1) Tentative trusts created by the decedent in savings accounts for other ~~persons;~~ persons.

(2) Gifts causa mortis made by the ~~decedent;~~decedent.

(3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise; and joint tenancies with right of survivorship created by decedent in corporate stocks or other investment securities.

(4) An interest in a security passing to a beneficiary pursuant to the provisions of Article 4 of Chapter 41 of the General Statutes.

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees."

SECTION 3. G.S. 41-2.2 is amended by adding a new subsection to read:

"(e) As used in this section, "securities" has the same meaning as in G.S. 41-40(9) and includes "security account" as that term is defined in G.S. 41-40(10)."

SECTION 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform TOD Security Registration Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 5. This act becomes effective October 1, 2003.

HOUSE BILL 798:
Securities Transfer on Death.

BILL ANALYSIS

Committee: House Judiciary II
Date: April 8, 2003
Version: First

Introduced by: Reps. Moore & Munford
Summary by: Robin Johnson
Committee Counsel

SUMMARY: ***House Bill 798 would amend Chapter 41 - Estates, to allow owners of securities to register their title in transfer-on-death (TOD) form. This would allow the transfer of securities, including stocks, bonds, mutual funds, and security accounts, to a beneficiary upon death based on a prior beneficiary designation by registration. The bill previously came to the General Assembly as a recommendation of the General Statutes Commission and is modeled after the Uniform Transfer on Death (TOD) Securities Registration Act. The Uniform Act has been adopted in 46 states and the District of Columbia.***

CURRENT LAW: Under current law securities can only be passed upon death by probate or by joint tenancy with right of survivorship.

BILL ANALYSIS: The bill would rename Chapter 41 of the General Statutes as "Estates and Interests in Property" and would add a new Article 4 to that Chapter, entitled "The Uniform Transfer on Death (TOD) Security Registration Act". This act would allow the owner of securities to designate a beneficiary of the securities to be received upon the death of the owner. The owner may revoke or modify this designation at any time up until death. Also, this designation does not convey any right or interest in the beneficiary until the time of death. Title to the securities would be transferred as a matter of contract (like life insurance policies or individual retirement accounts), not as a testamentary bequest, and as such would not be part of the probate estate.

Some of the advantages provided by the bill appear to be: 1) provides an alternative to joint ownership with right of survivorship, avoiding the complications and restrictions of dealing with a co-owner but effecting the same transfer upon death; 2) avoids probate and probate fees; and 3) simplifies the process of changing names on securities after death. The bill would does not affect claims creditors, who would still be able to claim these securities if necessary to satisfy claims against the decedent's estate in the same ways as with joint bank accounts with right of survivorship. This form of ownership would not affect estate or inheritance tax collection, and these securities would be counted as part of the taxable estate.

One change that would result from this bill would be a reduction in the collection of probate fees by the clerks of court. Probate fees are collected on all personal property that passes through the probate estate. Because these changes would transfer these securities outside the probate estate, probate fees would not be collected on the value of the securities transferred by this method.

Section 2 of this bill would make a conforming change to the statute governing the rights of creditors to collect estate debts from assets passing outside the estate. This statute is only triggered when other assets of the estate are insufficient to satisfy all claims.

Section 3 would authorize the Revisor of Statutes to include the Official Comments to the Uniform Act from the Uniform Commissioners with the published statutes.

EFFECTIVE DATE: The bill would take effect October 1, 2003, and would apply to persons dying on or after that date who had registered such a designation on their securities at anytime prior to their death. This will ratify the designations made by people before October 1, 2003, including people who may have made such designations under the laws of other states.

BACKGROUND: Similar bills were introduced in the 1997, 1999, and the 2001 Sessions of the General Assembly. In 2001, House Bill 41, which was virtually identical to this bill, passed the House and was given a favorable report by the Senate Commerce Committee.

H798-SMRH-001: Karen Cochrane-Brown, Kory Goldsmith, and Walker Reagan contributed to this summary.

Uniform Law Commissioners
The National Conference of Commissioners on Uniform State Laws

Home

> A Few Facts About The...

TOD SECURITY REGISTRATION ACT

PURPOSE:
This act provides for transfer-on-death (TOD) investment securities stocks, bonds, mutual fund shares, security accounts, and the like. Such securities can be transferred on death to named beneficiaries. The transfers, like pay-on-death deposit accounts, are nontestamentary and do not fall into the probate estate of the deceased holder of these securities. A whole new echelon of property can be kept out of the probate estate, therefore, and estate planning for the purpose of avoiding probate becomes easier.

ORIGIN:
Completed by the Uniform Law Commissioners in 1989.

ENDORSED BY:
American Bar Association
American Association of Retired Persons
Securities Industry Association

STATE ADOPTIONS:

Alabama	Kansas	Ohio
Alaska	Kentucky	Oklahoma
Arizona	Maine	Oregon
Arkansas	Maryland	Pennsylvania
California	Massachusetts	Rhode Island
Colorado	Michigan	South Carolina
Connecticut	Minnesota	South Dakota
Delaware	Mississippi	Tennessee
District of Columbia	Missouri	Utah
Florida	Montana	Vermont
Georgia	Nebraska	Virginia
Hawaii	Nevada	Washington
Idaho	New Hampshire	West Virginia
Illinois	New Jersey	Wisconsin
Indiana	New Mexico	Wyoming
Iowa	North Dakota	

2003 INTRODUCTIONS:

For any further information regarding the TOD Security Registration Act, please contact Michelle Clayton, John McCabe or Katie Robinson at 312-915-0195.

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> Why States Should Adopt the ...

UNIFORM TOD SECURITY REGISTRATION ACT

The highlights of the Uniform TOD Security Registration Act are:

- Permits issuers of securities (stocks, bonds, mutual fund shares, security accounts) to offer customer/owners the ability to name death beneficiaries, to whom the securities transfer upon the death of a customer/owner.
- Allows owners of investment securities to designate death beneficiaries when the issuers provide such a service to their customers.
- Permits issuers of securities to set the standards for allowing TOD registrations and for transferring securities when a customer/owner dies, including standards for proof of death.
- Frees issuers of any liability for a good faith transfer to any beneficiaries.
- Preserves the rights of a deceased owner's creditors in securities that are transferred to any beneficiaries.
- Preserves a customer/owner's control over the securities, including the power to revoke any beneficiary designation, during the life of that customer/owner.
- Provides that TOD transfers are nontestamentary transfers.
- Provides a simple method for registering a death beneficiary, using the acronym TOD (Transfer on Death).
- Corrects the deficiencies of the popular, but flawed, joint tenancy with right of survivorship.
- Does for investment securities what POD (Pay on Death) statutes have done for cash accounts in almost every state.

> Summary

THE UNIFORM TOD SECURITY REGISTRATION ACT

The Uniform TOD Security Registration Act is a late-1989 product of the National Conference of Commissioners on Uniform State Laws. The proposed statute is wholly enabling; it forces nothing on anyone. It is addressed to financial intermediaries, such as mutual funds, banks and brokers maintaining securities accounts for customers, and other organizations responsible for registries showing investment ownerships. The statute encourages and protects intermediaries who decide to offer a security or account registration form showing the owner's name and another designated as the owner's choice to become owner at the owner's death. A registration under the act might say: "owner; John Q. Investor; TOD beneficiary, Martha G. Investor" or more simply, just "John Q. Investor TOD Martha G. Investor." The letters T.O.D. stand for "transfer on death" signaling that the investment or account is to be re-registered on request after the owner's death in the name of the beneficiary.

Control of an investment registered in TOD beneficiary form, including the right to change or cancel the death beneficiary, lies solely with the owner and may be exercised via use of the intermediary's standard procedures for new registrations.

As is so with securities registered in two names with right of survivorship, the transfer of ownership at an owner's death to a survivor designated in the title form results from the registration form and occurs outside the probate process and without reference to any will. Proof of death and survivorship necessary to effect a re-registration or liquidation after the owner's death will be handled as survivorship claims of surviving joint tenants are handled today; i.e., by submission of a death certificate and an application for liquidation or re-registration in the beneficiary's name.

The statute proposes nothing that is novel or untested. Beneficiary form registrations of U.S. Savings Bonds have been available under federal law for more than half a century. Bank accounts and c.d.'s in an owner's sole name and payable on death to a named beneficiary are available in a number of states under p.o.d. account rules found in many banking codes. Life insurance and retirement benefit accounts by-pass probate en route to death beneficiaries designated in controlling paperwork. Mutual funds have occasionally offered a trust form registration that, like bank accounts in the name of one as trustee for another, achieve the results of a TOD registration by use of language that is much less understandable as to its purpose.

The statute enables avoidance of probate without the risk of problems caused by joint and survivor security titles that are especially hard on the elderly. A person, typically elderly and worried about the impact of high probate costs on family survivors, decides to add the name of a child to her own to create a joint tenancy with right of

survivorship on a security or account title. The sole purpose is probate avoidance. The elderly originator of the joint holding probably does not realize that the one named co-owner now appears to own half of the asset meaning that the investment can't be cashed out or re-registered without the consent of both owners. The bad news may come when a child's creditors or divorcing spouse lays claim to the child's half. In short, to get the benefit of probate avoidance through co-ownership and survivorship, an elderly owner has to subject money set aside for future needs to the whims and claims of others, including possible strangers to the family. TOD security registration merely permits realization of the probate avoidance benefits of a joint registration but avoids the loss of sole control for the owner. In time, the TOD registration form should replace joint and survivor titling of investments.

This simple bill is very important for it responds directly and efficiently to serious problems having a unique impact on the elderly that attend joint and survivor titling of investments. It also sanctions a title form that would enable probate-avoiding transfers at death in favor of any death beneficiary, possibly including recognized charitable organizations or a trust company that could not be listed as a co-owner with survivorship under conventional joint tenancy rules. It entails no unwanted costs for anyone, meets a strong need of the elderly, and is without downside risks to any but those very few who continue to feed on assets passing through probate.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 743

Short Title:	Nurse Testimonial Privilege.	(Public)
Sponsors:	Representatives Nesbitt, Walend (Primary Sponsors); and Glazier.	
Referred to:	Judiciary II.	

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH A NURSE TESTIMONIAL PRIVILEGE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 7 of Chapter 8 of the General Statutes is amended by adding a new section to read:

"**§ 8-53.13. Nurse privilege.**

No person licensed pursuant to Article 9A of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional nursing services, and which information was necessary to enable that person to render professional nursing services, except that the presiding judge of a superior or district court may compel disclosure if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 743:
Nurse Testimonial Privilege

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representatives Nesbitt and Walend
Date:	April 8, 2003		
Version:	First Edition	**Summary by:**	Jeff Hudson Committee Counsel

SUMMARY: ***House Bill 743 provides that nurses shall not be required to disclose information acquired while rendering professional nursing services except in cases where the presiding judge determines that disclosure is necessary for the proper administration of justice and disclosure is not prohibited by other statute or rule.***

CURRENT LAW: Under the current law of evidence, there are a number of statutes that treat information acquired in the course of rendering services as privileged and not generally admissible into evidence at trial. These statutes include G.S. 8-53 (Communications between physician and patient), G.S. 8-53.3 (Communications between psychologist and client or patient), G.S. 8-53.4 (School counselor privilege), G.S. 8-53.5 (Communications between marital and family therapist and client(s)), G.S. 8-53.7 (Social worker privilege), G.S. 8-53.8 (Counselor privilege), and G.S. 8-53.9 (Optometrist/patient privilege). All of these statutes are qualified in that they provide the privilege given to information acquired while rendering services is limited to the extent that a judge may compel disclosure of information if the judge determines that disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule.

BILL ANALYSIS: House Bill 743 amends Chapter 8 of the General Statutes (Evidence) to provide that no person licensed pursuant to Article 9A of Chapter 90 of the General Statutes (Nursing Practice Act) shall be required to disclose information acquired in rendering professional nursing services and necessary to enable the person to render professional nursing services. The Nursing Practice Act governs the licensing of both registered nurses and licensed practical nurses. House Bill 743 also provides that the privilege given to information acquired while rendering professional nursing services is qualified to the extent that the presiding judge may compel disclosure if the judge determines that disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule.

EFFECTIVE DATE: This act is effective when it becomes law.

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, April 8, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

   HB 26 Camera defeating License Covers Illegal
   – *Rep. Miller, Bill Sponsor*

   HB 743 Nurse Testimonial Privilege – *Rep. Nesbitt, Bill Sponsor*

   HB 798 Securities Transfer on Death – *Rep. Moore, Bill Sponsor*

3. **Adjourn.**

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 8, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kendall Byrum	Rep. Kiser
Betty Turner	Bank of America
Helen Savage	AARP
Bill Scoggin	KCLH
Paul Stock	NC Bankers Assn.
Erin Culbreath	SHA
Larry Beasley	SIA
Dirk Carthon	SIA
Mike Causey	NC Farm Bureau
WP Pully	NCATL
Jennifer Mullinax	NASW, NC

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

April 8, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Julie Allen	NC Statewatch
Dana Sham	Rep. Sham
Richard C Hatch	AARP

House Judiciary II

Committee

Minutes

April 10, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and announced that the meeting would be cut short due to Session convening at 10:30 a.m.

He said that due to this limitation of time and that there is a speaker from out of town, the committee would only take up **HB 564** (Revise Exclusion Rules) sponsored by Rep. Stam.

Rep. Stam was recognized. He handed out a proposed committee substitute and Rep. Ellis moved that it be adopted for discussion. The motion passed.

Rep. Stam said that the committee substitute narrows the bill quite a bit and focuses on the issue of the "good faith exception."

Rep. Nesbitt recognized Louis D. Bilionis, Professor of Constitutional Law, School of Law, UNC Chapel Hill.

The following are comments made by Professor Bilionis:

Mr. Bilionis said he has taught constitutional law at UNC for about fifteen years. He said he would direct his comments to the proposed committee substitute. He said he was quite sure that this was unintended, but even as the bill is drafted he felt it was unconstitutional under the United States Constitution. "The bill forbids a Superior Court Justice from North Carolina from excluding evidence when the officer believes he was acting legally

in good faith. That misconstrues the good faith exception of the federal exclusionary rule. In point of fact, it goes nowhere near that far. Under the US Supreme Court Decision, a police officer acting in good faith must rely upon a warrant. He must rely alternately upon a explicit statute which directly speaks to the point or he must be relying upon the assertions of a clerk of court, for example. The mere fact that an officer believes he is acting legally does not create a good faith exclusionary rule under the federal constitution. More over the federal constitution requires that the good faith exception, as narrow as it is under the federal constitution, also only applies if the officer's beliefs are reasonable. He said the bill provides none of those limitations and, thus, would be unconstitutional under the United States Constitution.

He said he believes the intention of the bill appears to be an attempt to overrule the *State v. Carter.*

When a Supreme Court interprets the Constitution, the basic principles of law suggest that its interpretation is authoritative until it changes its mind or the people, through a Constitutional Amendment, overrule that decision. It is not the place for the Legislature to overrule the State's Supreme Court's constitutional decisions.

He said Rep. Stam is correct that there is curious language in the Carter case that seems to suggest otherwise. He said he is prepared to explain the language. In the late 1960s through the 1980s persons who attacked the exclusionary rule suggested that it might be something of a constitutional uncertainty, neither "fish nor fowl," it was a rule that judges interpreted, that wasn't explicitly provided in the Constitution, and perhaps Legislatures and court together might share responsibility in defining its metes and bounds. He introduced this in his Brief as a possibility. The United States Supreme Court has rejected this theory since then. Chief Justice Rehnquist based with that theory in a case where Congress had tried to tinker with the Exclusionary Rule under the Miranda Case, looked at that theory and said that it defied principled notions of judicial authority to interpret a constitution.

The United State Supreme Court has rejected that theory and Professor Bilionis suggested that it was quite risky to adopt it today. Justice Martin' language in 1988 may have held some support in constitutional thinking, but today it is, in his opinion, untenable.

There are plenty policy reasons, as well for not adopting the good faith exception as proposed in the bill. Suffice it to note that the good faith exception to the Exclusionary Rule is essential to ensure that a police climate of respect for, and obedience to constitutional rights is maintained. Any withdrawal away from that Exclusionary Rule invites a culture of excuse where police officers would be less concerned about abiding by rights and more concerned about whether they have a defendable position for what they do. In the end, "this leads to an erosion of privacy to the rights of all of us."

Rep. Stam asked Profession Bilionis if he would consider rewriting his bill so that we would be adopting for North Carolina the same good faith exception that is applicable under federal constitutional law.

Professor Bilionis said whether the bill could be changed to better parallel the federal constitution is something he has thought about, but would be difficult because federal decison law is constantly changing and you run the risk of putting in a law a rule that forbids a Superior Court Judge from doing something that subsequent judicial law on the 4th Circuit and the District Court and the U. S. Supreme Court has required. So it is going to be very, very difficult to write a bill that will predict the future.

Rep. Ellis asked Professor Bilionis if there was doubt in his mind about the Legislature's authority to pass the legislation. The Professor said, yes, there is. He doubts that the Legislature has the authority to do this.

Rep. Nesbitt asked him to go back over the Federal Exclusionary Rule.

Professor Bilionis said there were basically three Supreme Court Decisions that speak to the issue. In the *United States v. Leon* in the 1980s, the Supreme Court held that if an officer relies upon a search warrant that turns out to be an invalid warrant, the officer, having been given an authorization by a judge, believing the judge to be correct, may rely upon that warrant. If it turns out to be bad, the evidence might none-the-less be admissible because the office has done all he could do. In a case entitled *Illinois v. Crawl,* the Court extended that exception to cases where the officer relied upon a specific statute that authorized his activity. In that case it was a specific statute, which allowed him to rummage through an automobile junkyard. In a third case, *Arizona v. Evans*, the officers relied upon notice from a clerk of court who had mistakenly thought that a warrant had been issued for someone's arrest.

In all three situations the officer wasn't making his own independent legal judgment about what was lawful or not, he wasn't relying upon the advice of lawyers in the Attorney General's Office, he was relying upon specific authorization from judges, specific authorization from the Legislature, or specific authorization from court personnel. That is as far as the United State Supreme Court has taken an officer's ability to rely upon other legal interpretation. It has never given officers the authority to interpret the law themselves; it has never given them the authority to have their evidence admitted when they were not relying upon any such material.

Rep. Nesbitt asked whether the Courts needed legislative authority to exclude or not to exclude? Is that something they do based upon what they think the constitutional law is? Professor Bilionis said it was indeed and even in *State v. Carter*, the Court saw itself following earlier Supreme Court Decisions in this State that mandated an Exclusionary Rule by implication in the Constitution.

Rep. Nesbitt asked if the Courts have the ability "not to exclude?"

Professor Bilionis said that they did and that over the years modulated the Exclusionary Rules as they have seen the needs of society change. That, in his opinion, suggests one

more reason to "not carve in stone today" something that may very much limit the Court's necessary authority in the future.

Rep. Nesbitt asked what had been done at the federal level legislatively there.

Professor Bilionis said, not recently. It does seem that much of this has reached a certain level of satisfaction nationally. He said that the one thing that did happen was that Congress tried to repeal the Exclusionary Rule under the Miranda decision and the Supreme Court said that however interesting that possibility would have been in the 60s, 70s, and 80s that it is no longer a tenable theory, that judges ultimately bare the final authority in interpreting the reaches of the federal Constitution and he feels the same would hold here in the North Carolina Constitution.

Rep. Ellis asked what was the appropriate authority to do this.

Professor Bilionis said that he felt that ultimately the question would be resolved in litigation. If you were to take this invitation, it will precipitate certain litigation. There would be tremendous opposition by lawyers to any bill that tends to take away the Supreme Court's authority to rule on the Constitution.

Rep. Ellis was prepared to go forward to

Rep. Stam asked Professor Bilionis if he would agree that the Exclusionary Rule interpretation in North Carolina law is more liberal, in the sense of allowing more relevant material evidence to be excluded, than is required under the federal Constitution?

Professor Bilionis responded that the *Carter* case reached a result contrary to what the Supreme Court would have required under the federal Constitution. The *Carter* case is still good law. So to that limited extinct, he said Rep. Stam was correct. It is a gross exaggeration, however, to suggest that the Exclusionary Rule in North Carolina has been administered in any appreciably significant different fashion from the federal. The North Carolina Superior Courts and the North Carolina Supreme Court is not running amok with the Exclusionary Rule. It has tailored it very narrowly. The Court in the *Carter* case reached the correct result because the search there was deeply intrusive. They drew blood from a man without constitutional authority to do so. In limited circumstances the Supreme Court of North Carolina reached a different conclusion from the federal Supreme Court. But you would be hard-pressed to cite many cases that depart from the federal. So in practice, the North Carolina courts have this well under control, reserve the authority to part company from the federal for good and sound reasons that are not using it in any radical fashion.

Rep. Nesbitt made the observation that the reason the *Carter* case differs from the federal constitution is because it was based on the North Carolina Constitution, which is different from the United States Constitution. So it was still founded in constitutional principles, just a different constitution.

Mr. Staples Hughes, Appellate Defender for the State of North Carolina, was recognized. He said he felt that the bill was unconstitutional under the North Carolina Constitution, Article 4, Section 13.2, which deals with the power to make procedural rules in the appellate division and the trial division. That article reads as follows:

> "The Supreme Court is allowed the exclusive authority to make rules of procedure in practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights."

He said this bill, even the proposed committee substitute, takes out of the area of the Exclusionary Rule, substantive violations of Chapter 15.a. Therefore, he said the bill was unconstitutional and he didn't understand why one would want to take away from trial judges, at least the option of their discretion to suppress evidence in the face of a substantial violation of a rule.

Rep. Ellis didn't see any violations of rights in any of the examples given to the committee by Rep. Stam. Rep. Ellis felt that it was just a technical problem about how the blood was taken and this would not have changed the outcome of the trial at all. How were those a substantial violation of the defendant's right?

The meeting was adjourned at 10:30 a.m.

Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, April 10, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

HB 26 Camera Defeating License Covers Illegal – *Rep. Miller, Bill Sponsor*

HB 327 Increase Penalties/Bomb Offenses – *Rep. Goodwin, Bill Sponsor*

HB 357 No Credit Card Number on Receipts – *Rep. Barnhart, Bill Sponsor*

HB 564 Revise Exclusionary Rule – *Rep. Stam, Bill Sponsor*

HB 798 Securities transfer on Death – *Rep. Moore, Bill Sponsor*

3. **Adjourn.**

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 564
PROPOSED COMMITTEE SUBSTITUTE H564-PCS80229-RK-21

Short Title: Revise Exclusionary Rule. (Public)

Sponsors:

Referred to:

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-974 reads as rewritten:

"**§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.**

Upon timely motion, evidence ~~must~~ may be suppressed ~~if~~ only if its exclusion is required by the United States Constitution or the North Carolina Constitution. Notwithstanding the provisions of this section, evidence shall not be suppressed for any constitutional violation if the official who committed the violation was acting in the good faith belief that the violative conduct was legal.

~~(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or~~

~~(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:~~

~~a. The importance of the particular interest violated;~~

~~b. The extent of the deviation from lawful conduct;~~

~~c. The extent to which the violation was willful;~~

~~d. The extent to which exclusion will tend to deter future violations of this Chapter.~~"

SECTION 2. This act becomes effective December 1, 2003, and applies to all criminal trials pending or commencing on or after that date.

HOUSE BILL 564:
Revise Exclusionary Rule.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Stam
Date:	April 9, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS to First Edition H564-CSRK-21 [v.4]		Committee Staff

*SUMMARY: **The bill would limit the exclusion or suppression of unlawfully obtained evidence in a criminal trial to when exclusion or suppression is required by the United States Constitution. The bill would become effective December 1, 2003, and apply to all criminal trials pending or commencing on or after that date.***

The PCS differs from the original bill by authorizing the suppression of evidence only when required by the U.S. Constitution or the N.C. State Constitution. It also provides for a good faith exception to the exclusionary rule by providing that evidence cannot be suppressed for a constitutional violation if the violation was committed with the good faith belief that the action was legal.

CURRENT LAW: G.S. 15A-974 currently requires suppression of evidence in a criminal trial when (i) required by the U.S. Constitution; (ii) required by the N.C. Constitution; or (iii) the evidence is obtained as the result of a substantial violation of Chapter 15A of the General Statutes (the Criminal Procedure Act). This statute directs the court, when considering whether a violation is substantial, to consider all circumstances, including the importance of the interest that is violated, the extent of the deviation from lawful conduct, the extent to which it was a willful violation, and the extent to which exclusion will deter future violations of the Criminal Procedure Act.

BILL ANALYSIS: House Bill 564 would amend G.S. 15A-974 by authorizing the suppression of evidence only when required by the U.S. Constitution. Thus, suppression of evidence would no longer be required if the evidence is obtained in violation of the N.C. Constitution or as a substantial violation of the Criminal Procedure Act.

The PCS would add back the requirement that the evidence has to be suppressed if it was obtained in violation of the N.C. Constitution. It also provides that evidence shall not be suppressed even though there was a constitutional violation in obtaining it if the official that committed the constitutional violation was acting with the good faith belief that the violative conduct was legal.

BACKGROUND: Under the federal Constitution, there is a "good faith" exception to the exclusionary rule. This exception allows unlawfully obtained evidence to be considered in a criminal trial. This "good faith" exception is not recognized under the State Constitution.

The United States Supreme Court has held that the U.S. Constitution does not require suppression of unlawfully obtained evidence when the evidence was obtained by law enforcement officers who acted in good faith. United States v. Leon, 468 U.S. 897 (1984). In 1988, the North Carolina Supreme Court refused to adopt the "good faith" exception to the exclusionary rule under the N.C. Constitution. State v. Carter, 322 N.C. 709 (1988) (allowing the suppression of a blood sample). Justice Meyer, in a strongly worded dissent, argued, "The law of search and seizure under the North Carolina Constitution should be interpreted as being no more restrictive than the fourth amendment to the United States Constitution."

Consequently, under current North Carolina law (1) unlawfully obtained evidence must be suppressed even when officers have acted under the objectively reasonable belief that their actions were lawful and when the evidence obtained is otherwise admissible under the federal Constitution, and (2) evidence that is otherwise admissible under both the federal and state Constitutions may be held inadmissible due to violations of North Carolina procedural statutory provisions.

H564-SMRQ-002: Hal Pell and Robin Johnson Staff Attorneys. Research Division contributed significantly to this summary.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 10, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sandra Artis	North Carolina News Network
Mark Benson	Capitol Group
Keat Wiles	NCATL
BRAD BANNON	Cheshire Parker Schneider Bryan & Vitale
Paul Pulley	NCATL
Staples Hughes	Appellate Defender
John McHugh	GOLDRING
Camille Stell	KCLH
Mel Chilton	NCVAN
JOHN WITHROW	NC STATEWATCH
John Phelps	NCLM

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 10, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Elizabeth Ouzts	NCPIC
Patricia Camp	ACLU
Lorin Mueller	NC Coalition of Police
[illegible]	DP
Mary Ann Talley	NCATL
Bill Wilson	NC Academy of Trial Lawyers

House Pages

1. Name: Margaret Armstrong
   County: Nash
   Sponsor: Rep. Joe Tolson
2. Name: Danielle Lucas
   County: Cumberland
   Sponsor: Rep. M. Lucas
3. Name: _____
   County: _____
   Sponsor: _____
4. Name: _____
   County: _____
   Sponsor: _____
5. Name: _____
   County: _____
   Sponsor: _____

Sgt-At-Arms

1. Name: Jackson Stancil
2. Name: James Worth
3. Name: _____
4. Name: _____

House Judiciary II

Committee

Minutes

April 15, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Vice Chairman, Rep. Goodwin, called the meeting to order.

Rep. Goodwin recognized Rep. Paul Miller to explain **HB 26** (Camera Defeating License Covers Illegal).

Karen Cochrane Brown, Committee Counsel said that the proposed committee substitute for **HB 26** adopted at the committee's April 7th meeting was properly before the committee. She explained that that proposed committee substitute changes the penalty for this kind of a cover on a license plate to an infraction rather than a Class 2 Misdemeanor, as other coverings are currently penalized. At the end of the April 7th meeting, an amendment had been discussed to change this to an infraction that would not require any insurance points or court costs. She said that in the law that these infractions don't increase a insurance points, so that was already covered. Court costs, however, would be a part of this and would be the same as they are for a criminal case, or about $140.00.

Rep. Goodwin wondered if this was unusual as compared to other infractions, to not include court costs.

Ms. Cochrane Brown said that last year, there was a change with regard to seat-belt violations. That change limited the amount of court costs for seat-belt violations to $50.00.

When there was no further discussion, Rep. Stam moved to give the proposed committee substitute a favorable report and an unfavorable report to the original bill. The motion carried.

Rep. Barnhart, bill sponsor for **HB 357** (No credit Card Number on Receipts) was recognized to explain his bill.

He presented a proposed committee substitute to the committee and Rep. Bonner moved that it be adopted for discussion. The motion carried.

Rep. Barnhart said he would define why he was before the committee and what the problem is that he is trying to address. According to the Federal Trade Commission, in 2002 there were 162,000 complaints about identify theft. Forty-two percent of those involved credit card fraud.. According to the NC Attorney General's Office, an estimated 20,000 individuals have their identity stolen each year. The credit card number, debit card number and expiration date is often all the person needs to make a purchase, whether over the Internet or telephone and yet these numbers are presented on many of the receipts we receive today. He just throws his in the trash. Yet, that is where a lot of people who get into these schemes get their information. The average victim spends over $1000 in expense to try to fix this problem once it happens. According to the NC Public Interest Research Group, the average total fraudulent charges in a case are around $18,000.00. The average time spent by one who is unfortunate to have this happen to him is about 175 hours of time. With this bill, he is trying to lower those numbers.

He said **HB 357** would prohibit a person that accepts credit cards for the transaction of business from printing more than five digits of a credit card number or an expiration date on a sales receipt. Hand-written receipts and impact printers were exempted for obvious reasons. The bill does establish a penalty of $500 per violation.

HB 357 would also prohibit a person from selling a cash register or other machine that prints receipts for credit card transactions that cannot be operated to produce a receipt with five or fewer digits of the credit card account number and no expiration date.

Rep. Barnhart said that all involved parties supported the bill in its present form.

Rep. Goodwin recognized Kiki Duncan with NC PIRG who said that she felt bill would go a long way in protecting consumers from identity theft.

Rep. Goodwin recognized Josh Stein, Assistant Attorney General, Consumer Protection Division. He told the committee that both he and Attorney General Roy Cooper support Rep. Barnhart's bill.

Rep. Goodwin then recognized Andy Ellen with the North Carolina Retail Merchants' Association who also commended Rep. Barnhart for his bill. He felt that a good compromise has been reached in the proposed committee substitute.

Rep. Goodwin recognized Paul Stocks with the Banker's Association who also commended Rep. Barnhart for his bill.

Rep. Moore said there was inconsistency in the law in that the NC Statute requires certain legal papers to have social security numbers.

When there was no further discussion, Rep. Walend moved to give the proposed committee substitute a favorable report and the original bill an unfavorable report. The motion passed.

HB 798 (Securities Transfer on Death) sponsored by Rep. Moore was properly before the committee, having been displaced in the April 8th meeting of the committee. He recognized Committee Counsel Drupti Chauhan who was assigned to the Committee to replace Robin Johnson. She said she understood that, at the previous meeting, concerns had been raised about the elective share issue and how this security transfer upon death would affect the elective share. Having spoken to several people, one of whom is Grant Holding, with the planning section of the NC Bar Association, it was her understanding that elective share is apart of the total estate and the Transfer on Death (TOD) would not change the ability of a surviving spouse to get to the elective share.

Rep. Moore acknowledged that this was Rep. Nesbitt's concern. He moved for a favorable report.

Rep. Stem was concerned about Section (5) "This act becomes effective October 1, 2003" but after hearing from Staff, he decided not to send forth an amendment.

Mr. Richard Hatch with AARP said many folks thought they could do this now.

Rep. Moore moved for a favorable report and the motion passed.

Rep. Stam was recognized. He passed out a letter from Judge Robert H. Hobgood regarding his **HB 564** (Revise Exclusionary Rule). A copy of that handout is a part of these Minutes as *Attachment I.*

There being no further business, the committee adjourned at 10:45.

Rep. Wayne Goodwin
Vice Chairman

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 26

Committee Substitute Favorable 3/31/03

PROPOSED COMMITTEE SUBSTITUTE H26-CSRO-6 [v.1]

4/7/2003 8:46:50 PM

Short Title: Camera Defeating License Covers Illegal. (Public)

Sponsors:

Referred to:

February 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT DEVICES DESIGNED TO COVER REGISTRATION PLATES TO PREVENT THE TAKING OF A CLEAR PHOTOGRAPH BY TRAFFIC CONTROL SYSTEMS USING CAMERAS ARE UNLAWFUL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-63(g) reads as rewritten:

"(g) Alteration, Disguise, or Concealment of Numbers. – Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall willfully cover or cause to be covered any part or portion of a registration plate or the figures or letters thereon by any device designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras, commits an infraction and shall be fined under G.S. 14-3.1. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1. Nothing in this subsection shall prohibit the use of transparent covers that are not designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras."

SECTION 2. This act becomes effective October 1, 2003, and applies to acts committed on or after that date.

HOUSE BILL 26:
Camera Defeating License Covers Illegal.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Paul Miller
Date:	April 8, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Proposed Committee Substitute H26-CSRO-6[v.1]		Committee Co-Counsel

SUMMARY:

The Proposed Committee Substitute for House Bill 26 provides that a person who willfully covers a registration plate with any devise designed or intended to defeat a traffic control system using cameras commits an infraction.

CURRENT LAW:

Under current law (G.S. 20-63(g)), it is a Class 2 misdemeanor to willfully alter, disguise, or conceal a motor vehicle license plate. The law prohibits covering a license plate with a "bumper, light, spare tire, tire rack, strap, or other devise".

BILL ANALYSIS:

The Proposed Committee Substitute makes it an infraction to cover a license plate with a device designed or intended to prevent the taking of a clear photograph by a traffic control system using cameras. Several devices currently on the market are capable of obscuring images taken by a camera but are transparent otherwise. This bill clarifies that the use of such devices is illegal.

An infraction is a noncriminal violation of law. The sanction for an infraction is a penalty of not more than $100.00. The proceeds of the penalties for infractions are payable to the county in which the infraction occurred for the use of the public schools.

Since 1997, the General Assembly has allowed an increasing number of municipalities to adopt ordinances to enforce traffic violations by the use of traffic control photographic systems. A traffic control photographic system is an electronic system consisting of a photographic, video or electronic camera and a vehicle sensor which works in conjunction with a traffic control device to automatically produce photographs, video or digital images of vehicles violating traffic control laws.

This act would become effective October 1, 2003, and apply to acts committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 357
PROPOSED COMMITTEE SUBSTITUTE H357-CSSB-4 [v.9]

4/10/2003 9:47:27 AM

Short Title: No Credit Card Number on Receipts. (Public)

Sponsors:

Referred to:

March 10, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT A PERSON THAT ACCEPTS CREDIT, CHARGE, OR DEBIT CARDS FOR THE TRANSACTION OF BUSINESS FROM PRINTING MORE THAN FIVE DIGITS OF A CREDIT, CHARGE, OR DEBIT CARD ACCOUNT NUMBER OR AN EXPIRATION DATE ON A SALES RECEIPT AND TO PROHIBIT A PERSON FROM SELLING A CASH REGISTER OR OTHER MACHINE OR DEVICE THAT ELECTRONICALLY PRINTS RECEIPTS OF CREDIT, CHARGE, OR DEBIT CARD TRANSACTIONS THAT CANNOT BE PROGRAMMED OR OPERATED TO PRODUCE A RECEIPT WITH FIVE OR FEWER DIGITS OF THE CREDIT, CHARGE, OR DEBIT CARD ACCOUNT NUMBER AND NO EXPIRATION DATE PRINTED ON THE RECEIPT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 19C of Chapter 14 of the General Statutes is amended by adding two new sections to read:

"**§ 14-113.24. Credit, charge, or debit card numbers on receipts.**

(a) For purposes of this section, the word 'person' means the person that owns or leases the cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions.

(b) Except as provided in this section, no person that accepts credit, charge, or debit cards for the transaction of business shall print more than five digits of the credit, charge, or debit card account number or the expiration date upon any receipt with the intent to provide the receipt to the cardholder at the point of sale. This section applies to a person who employs a cash register or other machine or device that electronically prints receipts for credit, charge, or debit card transactions that is first used on or after March 1, 2004. This section does not apply to a person whose sole means of recording a credit, charge, or debit card number for the transaction of business is by handwriting or by an imprint or copy of the credit, charge, or debit card.

(c) A person who violates this section commits an infraction as defined in G.S. 14-3.1 and is subject to a penalty of up to five hundred dollars ($500) per violation, not to exceed five hundred dollars ($500) in any calendar month or two thousand dollars ($2,000) in any calendar year. A person who receives a citation for violation of this section is not subject to the penalty provided in this subsection if the person establishes in court that the person came into compliance with this section within 30 days of the issuance of the citation and the person has remained in compliance with this section.

"**§ 14-113.25. Sale of certain cash registers and other receipt printing machines.**

(a) No person shall sell or offer to sell a cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions that cannot be programmed or operated to produce a receipt with five or fewer digits of the credit, charge, or debit card account number and no expiration date printed on the receipt.

(b) A person who violates this section commits an infraction as defined in G.S. 14-3.1 and is subject to a penalty of up to $500 per violation. For purposes of assessing penalties pursuant to this subsection, the sale or offer for sale of each individual cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions in violation of this section is treated as a separate violation."

SECTION 2. G.S. 14-113.24(b) reads as rewritten:

"(b) Except as provided in this section, no person that accepts credit, charge, or debit cards for the transaction of business shall print more than five digits of the credit, charge, or debit card account number or the expiration date upon any receipt with the intent to provide the receipt to the cardholder at the point of sale. This section applies to a person who employs a cash register or other machine or device that electronically prints receipts for credit, charge, or debit card ~~transactions that is first used on or after March 1, 2004.~~transactions. This section does not apply to a person whose sole means of recording a credit, charge, or debit card number for the transaction of business is by handwriting or by an imprint or copy of the credit, charge, or debit card."

SECTION 3. G.S. 14-113.22(b) reads as rewritten:

"(b) Notwithstanding subsection (a), (a1), or (a2) of this section, any person who commits an act made unlawful by ~~this Article~~G.S. 14-113.20 or G.S. 14-113.20A may also be liable for damages under G.S. 1-539.2C."

SECTION 4. Sections 1, 3 and 4 of this act become effective March 1, 2004. Section 2 of this act becomes effective July 1, 2005.

HOUSE BILL 357:
No Credit Card Number on Receipts.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Barnhart
Date:	April 15, 2003	**Summary by:**	Jeff Hudson, Committee Counsel
Version:	Proposed Committee Substitute H357-CSSB-4 [v.9]		

SUMMARY: ***The Proposed Committee Substitute for House Bill 357 would prohibit a person that accepts credit cards for the transaction of business from printing more than five digits of a credit card number or an expiration date on a sales receipt and would prohibit a person from selling a cash register or other machine that prints receipts for credit card transactions that cannot be operated to produce a receipt with five or fewer digits of the credit card account number and no expiration date.***

BILL ANALYSIS:

Sections 1 and 2 of the Proposed Committee Substitute would create two new statutes in the Financial Identity Fraud Article of Chapter 14 of the General Statutes.

New G.S. 14-113.24 (Credit, charge, or debit card numbers on receipts) would prohibit a person that accepts credit, charge, or debit cards for the transaction of business from printing more than five digits of the card account number or the expiration date on a sales receipt. This prohibition applies to the person that owns or leases the cash register or other machine or device that electronically prints the receipts. This prohibition does not apply to a person that only records credit, charge, or debit card transactions by handwriting or an imprint or copy of the card.

Penalty: A person who violates this prohibition commits an infraction and is subject to a penalty of up to $500 per violation, not to exceed $500 in any calendar month or $2,000 in any calendar year. A person may avoid penalties assessed for a violation of this prohibition if the person comes into compliance with the new statute within 30 days of receiving a citation and remains in compliance.

Phase-in: Effective March 1, 2004, this prohibition applies to the use of receipt printing devices that are first put into use on or after March 1, 2004. Effective July 1, 2005, this prohibition applies to the use of all receipt printing devices regardless of when they were first put into use.

New G.S. 14-113.25 (Sale of certain cash registers and other receipt printing machines) would prohibit a person from selling a cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions that cannot be operated to produce a receipt with five or fewer digits of the card account number and no expiration date printed on the receipt.

Penalty: A person who violates this prohibition commits an infraction and is subject to a penalty of up to $500 per violation. For purposes of determining the amount of the penalty, the sale of each individual cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions in violation of this statute is treated as a separate violation.

Section 3 of the Proposed Committee Substitute would make a conforming change to the punishment and liability statute of the Financial Identity Fraud Article to prevent certain general remedies in the Article from applying to violations of the new credit card receipt and sale of cash registers statutes. Section 3 would become effective March 1, 2004.

H357-SMSB-001

NCPIRG
North Carolina Public Interest Research Group

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April 7, 2003

Dear Chairman Nesbitt,

On behalf of the members of the North Carolina Public Interest Research Group (NCPIRG), I urge you to protect the rights of all North Carolina consumers by swiftly considering and passing House Bill 357 through the Judiciary II Committee. H 357 would help to protect consumers from the threat of identity theft by removing the expiration date and all but the last five digits of a credit, charge, or debit card number from electronic sales receipts.

Identity theft occurs when someone takes pieces of another person's identifying information as his or her own and ruins the victim's financial reputation. Victims of this crime face extreme difficulties attempting to clear the damaged credit, or even criminal record, caused by the thief. According to research by the State PIRGs, identity theft victims are burdened with the following:

- The average amount of time it took victims to resolve their cases was nearly 2 years.
- The average total fraudulent charges on new and existing accounts was $18,000.
- Victims spent an average of 175 hours and $808 in out-of-pocket costs (not including lawyer's fees) trying to fix their problem.

In addition to swift passage of H 357 out of committee, NCPIRG also recommends that the General Assembly consider the following measures to protect consumers from identity theft:

- Upon request, give consumers free credit reports at least once annually, as six states already do (CO, GA, MA, MD, NJ, VT).
- Provide consumers with the right to block access to their credit reports.
- Improve change of address verification, a common indicator of fraud.

Thank you for your time and consideration. Please feel free to contact me regarding this or other consumer issues.

Sincerely,

Kiki Dunton
Staff Attorney

printed on recycled paper

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 798*

Short Title:	Securities Transfer on Death.	(Public)
Sponsors:	Representatives Moore, Munford (Primary Sponsors); Blust, Gorman, Holmes, Insko, and McHenry.	
Referred to:	Judiciary II.	

March 31, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM TRANSFER ON DEATH (TOD) SECURITY REGISTRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by rewriting the title of Chapter 41 to read "Estates and Interests in Property", and Chapter 41 of the General Statutes is amended by adding a new Article to read:

"Article 4.

"The Uniform Transfer on Death (TOD) Security Registration Act.

"**§ 41-40. Definitions.**

In this Article, unless the context otherwise requires:

(1) 'Beneficiary form' means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) 'Devisee' means any person designated in a will to receive a disposition of real or personal property.

(3) 'Heirs' means those persons, including the surviving spouse, who are entitled under Chapter 29 of the General Statutes or the statutes of intestate succession of other states to take the property of a decedent by intestate succession.

(4) 'Person' means an individual, a corporation, an organization, or other legal entity.

(5) 'Personal representative' includes executor, administrator, collector, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(6) 'Property' includes both real and personal property or any interest in real or personal property and means anything that may be the subject of ownership.

(7) 'Register', including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) 'Registering entity' means a person who originates or transfers a security title by registration and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) 'Security' means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, a security account, and a security entitlement as defined in G.S. 25-8-102.

(10) 'Security account' means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(11) 'State' includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

"**§ 41-41. Registration in beneficiary form; sole or joint tenancy ownership.**

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more individuals with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

"**§ 41-42. Registration in beneficiary form; applicable law.**

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

"**§ 41-43. Origination of registration in beneficiary form.**

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

"**§ 41-44. Form of registration in beneficiary form.**

Registration in beneficiary form may be shown by the words 'transfer on death' or the abbreviation 'TOD', or by the words 'pay on death' or the abbreviation 'POD', after the name of the registered owner or owners and before the name of a beneficiary.

"**§ 41-45. Effect of registration in beneficiary form.**

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership of the security until the owner's death. A registration of a security in beneficiary form may be cancelled or changed at any time by the sole owner or all then-surviving owners, without the consent of the beneficiary.

"**§ 41-46. Ownership on death of owner.**

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

"**§ 41-47. Protection of registering entity.**

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this Article.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this Article.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with G.S. 41-46 and does so in good faith reliance (i) on the registration, (ii) on this Article, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this Article do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this Article.

(d) The protection provided by this Article to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

"**§ 41-48. Nontestamentary transfer on death.**

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Article and is not testamentary.

(b) The interest of a deceased owner when there are one or more surviving owners remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the surviving owner or owners when the decedent's estate is insufficient to satisfy the debts. The interest of a deceased sole owner, or the last to die of several owners, remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the TOD beneficiary when the decedent's estate is insufficient to satisfy the debts.

(c) This Article does not repeal or modify any provision of law relating to estate taxes.

"**§ 41-49. Terms, conditions, and forms for registration.**

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions established may provide for proving death, avoiding or resolving any problems concerning fractional shares, and designating primary or contingent beneficiaries. Forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: 'John S. Brown TOD (or POD) John S. Brown, Jr.'

(2) Multiple owners-sole beneficiary: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr.'

(3) Multiple owners-primary and secondary (substituted) beneficiaries: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr. SUB BENE Peter O. Brown'.

"**§ 41-50. Short title; rules of construction.**

(a) This Article shall be known as and may be cited as the 'Uniform TOD Security Registration Act'.

(b) This Article shall be applied and construed to effectuate its general purposes and to make uniform the laws with respect to the subject of this Article among states enacting it.

(c) This Article does not repeal G.S. 41-2.2. G.S. 41-2.2 applies in determining whether a right of survivorship exists among multiple owners of a security interest in beneficiary form.

"**§ 41-51. Application of Article.**

This Article applies to registrations of securities in beneficiary form made before, on, or after the effective date of this Article, by decedents dying on or after the effective date of this Article."

SECTION 2. G.S. 28A-15-10(a) reads as rewritten:

"(a) When needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

(1) Tentative trusts created by the decedent in savings accounts for other ~~persons;~~ persons.

(2) Gifts causa mortis made by the ~~decedent;~~decedent.

(3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise; and joint tenancies with right of survivorship created by decedent in corporate stocks or other investment securities.

(4) An interest in a security passing to a beneficiary pursuant to the provisions of Article 4 of Chapter 41 of the General Statutes.

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees."

SECTION 3. G.S. 41-2.2 is amended by adding a new subsection to read:

"(e) As used in this section, "securities" has the same meaning as in G.S. 41-40(9) and includes "security account" as that term is defined in G.S. 41-40(10)."

SECTION 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform TOD Security Registration Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 5. This act becomes effective October 1, 2003.

HOUSE BILL 798:
Securities Transfer on Death.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Reps. Moore & Munford
Date:	April 8, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: ***House Bill 798 would amend Chapter 41 - Estates, to allow owners of securities to register their title in transfer-on-death (TOD) form. This would allow the transfer of securities, including stocks, bonds, mutual funds, and security accounts, to a beneficiary upon death based on a prior beneficiary designation by registration. The bill previously came to the General Assembly as a recommendation of the General Statutes Commission and is modeled after the Uniform Transfer on Death (TOD) Securities Registration Act. The Uniform Act has been adopted in 46 states and the District of Columbia.***

CURRENT LAW: Under current law securities can only be passed upon death by probate or by joint tenancy with right of survivorship.

BILL ANALYSIS: The bill would rename Chapter 41 of the General Statutes as "Estates and Interests in Property" and would add a new Article 4 to that Chapter, entitled "The Uniform Transfer on Death (TOD) Security Registration Act". This act would allow the owner of securities to designate a beneficiary of the securities to be received upon the death of the owner. The owner may revoke or modify this designation at any time up until death. Also, this designation does not convey any right or interest in the beneficiary until the time of death. Title to the securities would be transferred as a matter of contract (like life insurance policies or individual retirement accounts), not as a testamentary bequest, and as such would not be part of the probate estate.

Some of the advantages provided by the bill appear to be: 1) provides an alternative to joint ownership with right of survivorship, avoiding the complications and restrictions of dealing with a co-owner but effecting the same transfer upon death; 2) avoids probate and probate fees; and 3) simplifies the process of changing names on securities after death. The bill would does not affect claims creditors, who would still be able to claim these securities if necessary to satisfy claims against the decedent's estate in the same ways as with joint bank accounts with right of survivorship. This form of ownership would not affect estate or inheritance tax collection, and these securities would be counted as part of the taxable estate.

One change that would result from this bill would be a reduction in the collection of probate fees by the clerks of court. Probate fees are collected on all personal property that passes through the probate estate. Because these changes would transfer these securities outside the probate estate, probate fees would not be collected on the value of the securities transferred by this method.

Section 2 of this bill would make a conforming change to the statute governing the rights of creditors to collect estate debts from assets passing outside the estate. This statute is only triggered when other assets of the estate are insufficient to satisfy all claims.

Section 3 would authorize the Revisor of Statutes to include the Official Comments to the Uniform Act from the Uniform Commissioners with the published statutes.

EFFECTIVE DATE: The bill would take effect October 1, 2003, and would apply to persons dying on or after that date who had registered such a designation on their securities at anytime prior to their death. This will ratify the designations made by people before October 1, 2003, including people who may have made such designations under the laws of other states.

BACKGROUND: Similar bills were introduced in the 1997, 1999, and the 2001 Sessions of the General Assembly. In 2001, House Bill 41, which was virtually identical to this bill, passed the House and was given a favorable report by the Senate Commerce Committee.

H798-SMRH-001: Karen Cochrane-Brown, Kory Goldsmith, and Walker Reagan contributed to this summary.

Section 1: definition of "Security entitlement"
See (a)(17)

§ 25-8-102. Definitions.

(a) In this Article:

(1) "Adverse claim" means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) "Bearer form", as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) "Certificated security" means a security that is represented by a certificate.

(5) "Clearing corporation" means:

(i) A person that is registered as a "clearing agency" under the federal securities laws;

(ii) A federal reserve bank; or

(iii) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) "Communicate" means to:

(i) Send a signed writing; or

(ii) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) "Entitlement holder" means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of G.S. 25-8-501(b)(2) or (3), that person is the entitlement holder.

(8) "Entitlement order" means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9) "Financial asset", except as otherwise provided in G.S. 25-8-103, means:

(i) A security;

(ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.

As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) "Good faith", for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this Article, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(11) "Indorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.

(12) "Instruction" means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) "Registered form", as applied to a certificated security, means a form in which:

(i) The security certificate specifies a person entitled to the security; and

(ii) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) "Securities intermediary" means:

(i) A clearing corporation; or

(ii) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) "Security", except as otherwise provided in G.S. 25-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) Which:

(A) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) Is a medium for investment and by its terms expressly provides that it is a security governed by this Article.

(16) "Security certificate" means a certificate representing a security.

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 of this Article.

(18) "Uncertificated security" means a security that is not represented by a certificate.

(b) Other definitions applying to this Article and the sections in which they appear are:

"Appropriate person"	G.S. 25-8-107.
"Control"	G.S. 25-8-106.
"Delivery"	G.S. 25-8-301.
"Investment company security"	G.S. 25-8-103.
"Issuer"	G.S. 25-8-201.
"Overissue"	G.S. 25-8-210.
"Protected purchaser"	G.S. 25-8-303.
"Securities account"	G.S. 25-8-501.

(c) In addition, Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article.

(d) The characterization of a person, business, or transaction for purposes of this Article does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule. (1965, c. 700, s. 1; 1973, c. 497, s. 3; 1989, c. 588, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 9(a); 1997-181, s. 1.)

Section 2

§ 28A-15-10. Assets of decedent's estate for limited purposes.

(a) When needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

(1) Tentative trusts created by the decedent in savings accounts for other persons;

(2) Gifts causa mortis made by the decedent;

(3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise; and joint tenancies with right of survivorship created by decedent in corporate stocks or other investment securities.

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees.

(b) Where there are not sufficient personal and real assets of the decedent to satisfy all the debts and other claims against his estate, the personal representative shall have the right to sue for and recover any and all personal property or real property, or interest therein, which the decedent may in any manner have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any personal property or real property, or interest therein, so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts and other claims against the estate of the decedent. But if the alienee has sold the personal property or real property, or interest therein, so fraudulently acquired by him from the decedent to a bona fide purchaser for value without notice of the fraud, then such personal property or real property, or interest therein, may not be recovered from such bona fide purchaser but the fraudulent alienee shall be liable to the personal representative for the value of the personal property or real property, or interest therein, so acquired and disposed of to a bona fide purchaser. If the whole recovery from the fraudulent alienee shall not be necessary for the payment of the debts and other claims against the estate of the decedent, the surplus shall be returned to such fraudulent alienee or his assigns.

(c) Where there has been a recovery in an action for wrongful death, the same shall not be applied to the payment of debts and other claims against the estate of decedent or devises, except as to the payment of reasonable burial and funeral expenses and reasonable hospital and medical expenses incident to the injury resulting in death and as limited and provided in G.S. 28-18-2 [G.S. 28A-18-2]. (1973, c. 1329, s. 3.)

§ 41-2.2. Joint ownership of corporate stock and investment securities.

(a) In addition to other forms of ownership, shares of corporate stock or investment securities may be owned by any parties as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.

(b)(1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either party the interest of the decedent shall pass to the surviving party.

(2) Such a joint tenancy may also exist when a broker or custodian holds the shares or securities for the joint tenants and by book entry or otherwise indicates (i) that the shares or securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either party, the interest of the decedent shall pass to the surviving party. Money in the hands of such broker or custodian derived from the sale of, or held for the purpose of, such shares or securities shall be treated in the same manner as such shares or securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) This section does not repeal or modify any provisions of the law relating to estate or inheritance taxes. (1967, c. 864, s. 1; 1969, c. 1115, s. 2; 1989 (Reg. Sess., 1990), c. 891, s. 2; 1998-69, s. 12; 1999-337, s. 10.)

Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

Home

> A Few Facts About The...

TOD SECURITY REGISTRATION ACT

PURPOSE:
This act provides for transfer-on-death (TOD) investment securities stocks, bonds, mutual fund shares, security accounts, and the like. Such securities can be transferred on death to named beneficiaries. The transfers, like pay-on-death deposit accounts, are nontestamentary and do not fall into the probate estate of the deceased holder of these securities. A whole new echelon of property can be kept out of the probate estate, therefore, and estate planning for the purpose of avoiding probate becomes easier.

ORIGIN:
Completed by the Uniform Law Commissioners in 1989.

ENDORSED BY:
American Bar Association
American Association of Retired Persons
Securities Industry Association

STATE ADOPTIONS:

Alabama	Kansas	Ohio
Alaska	Kentucky	Oklahoma
Arizona	Maine	Oregon
Arkansas	Maryland	Pennsylvania
California	Massachusetts	Rhode Island
Colorado	Michigan	South Carolina
Connecticut	Minnesota	South Dakota
Delaware	Mississippi	Tennessee
District of Columbia	Missouri	Utah
Florida	Montana	Vermont
Georgia	Nebraska	Virginia
Hawaii	Nevada	Washington
Idaho	New Hampshire	West Virginia
Illinois	New Jersey	Wisconsin
Indiana	New Mexico	Wyoming
Iowa	North Dakota	

2003 INTRODUCTIONS:

For any further information regarding the TOD Security Registration Act, please contact Michelle Clayton, John McCabe or Katie Robinson at 312-915-0195.

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> Why States Should Adopt the ...

UNIFORM TOD SECURITY REGISTRATION ACT

The highlights of the Uniform TOD Security Registration Act are:

- Permits issuers of securities (stocks, bonds, mutual fund shares, security accounts) to offer customer/owners the ability to name death beneficiaries, to whom the securities transfer upon the death of a customer/owner.
- Allows owners of investment securities to designate death beneficiaries when the issuers provide such a service to their customers.
- Permits issuers of securities to set the standards for allowing TOD registrations and for transferring securities when a customer/owner dies, including standards for proof of death.
- Frees issuers of any liability for a good faith transfer to any beneficiaries.
- Preserves the rights of a deceased owner's creditors in securities that are transferred to any beneficiaries.
- Preserves a customer/owner's control over the securities, including the power to revoke any beneficiary designation, during the life of that customer/owner.
- Provides that TOD transfers are nontestamentary transfers.
- Provides a simple method for registering a death beneficiary, using the acronym TOD (Transfer on Death).
- Corrects the deficiencies of the popular, but flawed, joint tenancy with right of survivorship.
- Does for investment securities what POD (Pay on Death) statutes have done for cash accounts in almost every state.

> Summary

THE UNIFORM TOD SECURITY REGISTRATION ACT

The Uniform TOD Security Registration Act is a late-1989 product of the National Conference of Commissioners on Uniform State Laws. The proposed statute is wholly enabling; it forces nothing on anyone. It is addressed to financial intermediaries, such as mutual funds, banks and brokers maintaining securities accounts for customers, and other organizations responsible for registries showing investment ownerships. The statute encourages and protects intermediaries who decide to offer a security or account registration form showing the owner's name and another designated as the owner's choice to become owner at the owner's death. A registration under the act might say: "owner; John Q. Investor; TOD beneficiary, Martha G. Investor" or more simply, just "John Q. Investor TOD Martha G. Investor." The letters T.O.D. stand for "transfer on death" signaling that the investment or account is to be re-registered on request after the owner's death in the name of the beneficiary.

Control of an investment registered in TOD beneficiary form, including the right to change or cancel the death beneficiary, lies solely with the owner and may be exercised via use of the intermediary's standard procedures for new registrations.

As is so with securities registered in two names with right of survivorship, the transfer of ownership at an owner's death to a survivor designated in the title form results from the registration form and occurs outside the probate process and without reference to any will. Proof of death and survivorship necessary to effect a re-registration or liquidation after the owner's death will be handled as survivorship claims of surviving joint tenants are handled today; i.e., by submission of a death certificate and an application for liquidation or re-registration in the beneficiary's name.

The statute proposes nothing that is novel or untested. Beneficiary form registrations of U.S. Savings Bonds have been available under federal law for more than half a century. Bank accounts and c.d.'s in an owner's sole name and payable on death to a named beneficiary are available in a number of states under p.o.d. account rules found in many banking codes. Life insurance and retirement benefit accounts by-pass probate en route to death beneficiaries designated in controlling paperwork. Mutual funds have occasionally offered a trust form registration that, like bank accounts in the name of one as trustee for another, achieve the results of a TOD registration by use of language that is much less understandable as to its purpose.

The statute enables avoidance of probate without the risk of problems caused by joint and survivor security titles that are especially hard on the elderly. A person, typically elderly and worried about the impact of high probate costs on family survivors, decides to add the name of a child to her own to create a joint tenancy with right of

survivorship on a security or account title. The sole purpose is probate avoidance. The elderly originator of the joint holding probably does not realize that the one named co-owner now appears to own half of the asset meaning that the investment can't be cashed out or re-registered without the consent of both owners. The bad news may come when a child's creditors or divorcing spouse lays claim to the child's half. In short, to get the benefit of probate avoidance through co-ownership and survivorship, an elderly owner has to subject money set aside for future needs to the whims and claims of others, including possible strangers to the family. TOD security registration merely permits realization of the probate avoidance benefits of a joint registration but avoids the loss of sole control for the owner. In time, the TOD registration form should replace joint and survivor titling of investments.

This simple bill is very important for it responds directly and efficiently to serious problems having a unique impact on the elderly that attend joint and survivor titling of investments. It also sanctions a title form that would enable probate-avoiding transfers at death in favor of any death beneficiary, possibly including recognized charitable organizations or a trust company that could not be listed as a co-owner with survivorship under conventional joint tenancy rules. It entails no unwanted costs for anyone, meets a strong need of the elderly, and is without downside risks to any but those very few who continue to feed on assets passing through probate.

Attachment I

North Carolina General Assembly
House of Representatives
State Legislative Building
Raleigh 27601-1096

REPRESENTATIVE PAUL STAM
37TH DISTRICT

April 15, 2003

The Honorable Martin Nesbitt
Chair, House Judiciary 2
Members of the Committee

RE: HB 564 Revise Exclusionary Rule

Dear Mr. Chairman,

I enclose the attached letter from Judge Robert Hobgood. This letter came as a surprise to me but it says it all. Please support this bill.

Sincerely yours,

Rep. Paul Stam

CC: Judge Robert Hobgood

State of North Carolina
General Court of Justice
Superior Court District 9

ROBERT H. HOBGOOD
SENIOR RESIDENT SUPERIOR COURT JUDGE

HENRY W. HIGHT, JR.
RESIDENT SUPERIOR COURT JUDGE

April 11, 2003

Mr. Paul Stam
Stam, Fordham & Danchi, PA
P.O. Box 1600
Apex, NC 27502-3600

Re: Good Faith Exception to the Exclusionary Rule

Dear Paul:

I understand from the newspaper that you have introduced a bill to allow the good faith exception to the exclusionary rule to apply in North Carolina. You will find enclosed a law review article* which I wrote on that subject. It points out the disparate results in Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey state courts on the same facts in a drug case.

I cannot vouch for any changes in the out-of-state law since the Spring of 1999. However, I always thought it odd that the North Carolina Supreme Court in 1988 in the case of State v. Carter refused to adopt the U. S. v. Leon good faith exception to the exclusionary rule. I had to ask myself at that time why would a justice who had taken an oath to uphold the United States Constitution take such a liberal approach in interpreting the State Constitution in reaching contrary results from the United States Supreme Court. In fairness to the individual justices, it was a 4-3 decision. I recall that Justice (later Chief Justice) Mitchell's dissent in Carter vigorously attacked the rationale used by the majority.

"Justice Mitchell dissenting.
By refusing to permit the introduction of evidence seized by officers acting in the honest belief that a court order authorizing its seizure was lawful, this Court gives much greater protection to criminal defendants than they have been given by the Supreme Court of the United States. In fact, the Supreme Court has specifically stated in a similar situation, "[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."

* 21 Campbell Law Review 237 (1999)

Massachusetts v. Sheppard, 468 U.S. 981, 989-90, 82 L. Ed. 2d 737, 744 (1984). We should take the same position as to the court ordered search in this case. In its failing effort to strike a proper balance between the guarantee against unreasonable searches and the public safety, the majority has chosen to place such a heavy thumb on the scales of justice that they will always weigh in favor of the criminal {*725} defendant. The inflexible exclusionary rule the majority has selected for North Carolina will not advance the right to be free from unlawful searches, but it will prevent trial courts from reaching the truth and convicting the guilty in a substantial number of cases. The majority should recognize a good faith exception to our exclusionary rule similar to that applied by the Supreme Court under the Constitution of the United States. To do otherwise serves no valid purpose, substantially interferes with enforcement of the criminal law and diminishes the integrity of the judicial branch of government. Therefore, I dissent."

Whether the North Carolina Supreme Court of 2003 would favor former Chief Justice Burley Mitchell's dissent in Carter is unknown. Obviously, Supreme Courts in many other states have had no problem in that regard.

Finally, I treasure our state constitution. However, I agree with Judge Cardozo. It appears that we are willing to let the criminal go free because the constable has blundered.

Feel free to share this letter and my law review article with members of your legislative committee and any member of the legislature.

SINCERELY,

Robert H. Hobgood

ROBERT H. HOBGOOD

I-95 A/K/A THE DRUG TRAFFICKER'S FREEWAY, AND ITS IMPACT ON STATE CONSTITUTIONAL LAW

THE HONORABLE ROBERT H. HOBGOOD*

INTRODUCTION

This article tests the proposition that since July 5, 1984, the date the United States Supreme Court handed down its ruling in *United States. v. Leon*,[1] a criminal defendant in a search and seizure case can expect disparate results in different state trial courts although identical factual situations exist. First, this article hypothetically pits two drug mules against a reasonably well-trained officer with a defective search warrant. It then assumes that a search warrant has been issued erroneously by a magistrate and further that the defendant moves to suppress evidence in six state trial courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

The defect in the search warrant is that the affidavit attached to the search warrant fails to establish probable cause to believe that controlled substances will be found in a particular place due to staleness of the information and insufficient sworn statements concerning the reliability of the confidential informant. One constant in this hypothetical is that a reasonably well-trained officer would not know that the warrant is defective and could reasonably act in objective good faith in searching for and seizing the controlled substances described in the search warrant.

The defective search warrant is challenged in state trial court by a defense motion to suppress the admission into evidence of the seized controlled substances. The state trial judge conducts a pre-trial hearing at which evidence, including the search warrant with affidavit attached, is presented. In a written order, the state trial judge makes findings of facts. On the basis of the findings of facts, the state trial judge then makes conclusions of law. Analysis of the law requires the judge to review the Fourth Amendment to the

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* Judge Hobgood is currently the Senior Resident Superior Court Judge of the Ninth Judicial District of North Carolina. He received both his A.B. and J.D. degrees from the University of North Carolina at Chapel Hill.

1. 468 U.S. 897 (1984).

21 Campbell LR 237 (1999)

United States Constitution; search and seizure provisions in that state's constitution; state statutes concerning: criminal procedure, search and seizure and the exclusionary rule; and state and federal case law.

The state trial judge then allows or denies the defendant's motion to suppress. If the motion is allowed, then the seized controlled substances are inadmissible at trial. Conversely, if the motion is denied, the seized controlled substances are admissible at trial. Either ruling is appealable to a state appellate court. However, a denial ruling is appealable only after a conviction at trial, or after a plea of guilty by the defendant reserving the right to appeal the suppression issue.

This hypothetical assumes that the state trial judge indeed allows the motion to suppress the evidence, and that the state district attorney, or commonwealth attorney, appeals the ruling to the appropriate appellate court. The state district attorney urges that the trial judge erred in failing to apply the good faith exception to the exclusionary rule as set forth in the United States Supreme Court case of *United States v. Leon*.

Section I presents and traces the history of discussion on this issue. Significant federal cases and relevant state cases are cited, and law review articles provide scholarly comment. Section II traces the hypothetical journey of the two "mules" transporting controlled substances on Interstate 95 from Miami International Airport to Newark, New Jersey and their arrest in six states: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey. Analysis will begin in Section III with Florida and progress northward to Georgia in Section IV, South Carolina in Section V, North Carolina in Section VI, Virginia in Section VII, and New Jersey in Section VIII.

This article argues that a criminal in a search and seizure case can expect disparate results in different state trial courts although identical factual situations exist. The good faith exception to the exclusionary rule adopted by the United States Supreme Court in *United States v. Leon* has not been applied with uniformity in state courts. Furthermore, this article finds that some state courts, relying on "adequate and independent" state grounds, have afforded criminal defendants greater protection under state constitutions and statutes than they would receive in other state courts or federal district courts. Finally, this article argues that state appellate courts must write their opinions with clarity.

I. Literature Review

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

Unquestionably, probable cause is the constitutionally imposed standard for determining whether a search and seizure is lawful. Most state constitutions contain search and seizure provisions with a probable cause standard.

Weeks v. United States,[3] created the exclusionary rule in federal court.[4] The exclusionary rule bars the use of evidence secured through an illegal search and seizure.[5] "Convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . ."[6] *Mapp v. Ohio*[7] applied the exclusionary rule to all state courts pursuant to the due process clause in the Fourteenth Amendment, thereby creating a national standard for police conduct and a meaningful national system of individual rights in the field of search and seizure.[8]

Until 1983, courts could rely on the *Aguilar-Spinelli* test in determining probable cause. In *Aguilar v. Texas*,[9] the United States Supreme Court created standards that required magistrates to examine and verify the basis of an informant's information and the credibility of an informant.[10] *Aguilar* established a two-pronged test: knowledge and veracity.[11] The basis of the knowledge prong requires the police to reveal the informant's source of information.[12] The veracity prong requires the police to show the magistrate proof of the informant's credibility.[13] In

2. U.S. CONST. amend IV.
3. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
4. *Id.*
5. *Id.* at 392, 398.
6. *Id.* at 392.
7. 367 U.S. 643 (1961).
8. *Id.* at 655-57.
9. 378 U.S. 108 (1964).
10. *Id.* at 114.
11. *Id.*
12. *Id.*
13. *Id.*

Spinelli v. U.S.,[14] the Supreme Court held that the knowledge prong could be satisfied if the information provided was sufficiently detailed.[15] Furthermore, the veracity prong could be satisfied if the information provided was enhanced by corroborative information produced by the police.[16]

In 1983, the Supreme Court replaced the two pronged test of *Aguilar-Spinelli* with a "totality of the circumstances" test.[17] Under this test, the magistrate considers all of the circumstances, including the credibility of the informant and the basis of his knowledge, in determining probable cause.[18]

The exclusionary rule does not appear in the United States Constitution, but rather is a judicially created remedy for Fourth Amendment violations.[19] It may be classified as a constitutionally required judicial rule. The exclusionary rule has been controversial over the years. Its sharpest critic was Judge Cardozo, who stated that "the criminal is to go free because the constable has blundered."[20] Justice Brandeis, dissenting in *Olmstead v. United States*,[21] argued in favor of the exclusionary rule stating, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[22]

United States v. Leon created a "good faith" exception to the exclusionary rule.[23] Under this exception, the exclusionary rule cannot be applied to bar evidence in the state's case in chief, although the search warrant subsequently is ruled invalid.[24] The rationale behind the exception is that police officers who reasonably rely in good faith on search warrants issued by neutral and detached magistrates do not intentionally violate the Fourth

14. 393 U.S. 410 (1969).
15. *Id.* at 415.
16. *Id.*
17. Illinois v. Gates, 462 U.S. 213 (1983).
18. *Id.* at 214.
19. United States v. Calandra, 414 U.S. 338 (1974).
20. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
21. 277 U.S. 438 (1928).
22. *Id.* at 468 (Brandeis, J., dissenting).
23. Leon, 468 U.S. 897, 913 (1984).
24. *Id.* at 897.

Amendment. Therefore, the purpose of the exclusionary rule, to deter police misconduct,[25] should not apply to them.[26]

State constitutions contain search and seizure provisions which are interpreted by state supreme courts independent of the United States Supreme Court. At the time of the *Mapp* decision in 1961, twenty-four state courts and the territories of Alaska and Hawaii already excluded evidence illegally seized on the basis of case law or statutes. Thus, a body of state law on the exclusionary rule existed in each of those states and territories before 1961. That state law was not modified by *Leon*.

By contrast, however, some states, such as New Hampshire, had no statutory exclusionary rule prior to *Mapp*. New Hampshire, like a majority of jurisdictions, subscribed to the strict common law rule that a court must admit all competent and probative evidence regardless of its source.[27] Subsequent to *Mapp*, all state trial courts and federal district courts applied the exclusionary rule to enforce a national standard for police conduct in search and seizure cases.

The rights of defendants in search and seizure law reached apogee during the era of Chief Justice Earl Warren.[28] When Warren Burger was sworn in as Chief Justice of the United Supreme Court in 1969, many court observers anticipated a conservative, law and order shift in the decisions of the United States Supreme Court. However, *stare decisis* requires courts to follow established precedents, unless previous case holdings are reversed. Thus, *stare decisis* slows change. Furthermore, a presidential appointee to the Supreme Court does not initiate change in case law until he or she is part of a majority on the court.

In 1977, Justice William J. Brennan, Jr., signaled a method to defense lawyers for retaining individual rights expanded by the Warren Court, but under retrenchment by the Burger Court he stated:

> Of late, . . more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely

25. *Id.* at 916.

26. *Id.* at 919-20 (citing United States v. Peltier, 422 U.S. 531, 542 (1975)).

27. State v. Mara, 78 A. 2d 922, 924 (N.H. 1951).

28. *The Warren Court, A Retrospective* (Bernard Schwartz ed., Oxford University Press 1996).

an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.[29]

In 1982, the United States Supreme Court in *Michigan v. Long*,[30] set forth how state supreme court justices should write their opinions when they are based on "bona fide separate, adequate, and independent [state] grounds."[31]

Beginning in 1983, New Hampshire, and other state supreme courts, "in reaction to federal decisions narrowing the scope and content of fourth amendment rights, . . . repeatedly emphasized the importance of undertaking independent interpretation of our State constitutional guarantees."[32] These courts held that the good faith exception is inconsistent with state constitutional requirements of probable cause.[33]

State appellate courts must clearly state on the face of the opinion the adequacy and independence of any possible state law ground.

When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'[34]

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29. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

30. 463 U.S. 1032 (1982).

31. *Id.* at 1040-41.

32. State v. Canelo, 653 A.2d 1097, 1104 (N.H. 1995) (citing State v. Ball, 471 A.2d 347, 350-52 (N.H. 1983); State v. Bradberry, 522 A.2d 1380, 1982 (N.H. 1986); State v. Koppel, 499 A.2d 977, 979-80 (N.H. 1985); State v. Sidebothem, 474 A.2d 1377, 1379-80 (N.H. 1984); State v. Settle, 447 A.2d 1284, 1285-86 (N.H. 1982) (plurality opinion)) (holding that a good faith exception is incompatible with the guarantees contained in part I, article 19 of the New Hampshire Constitution).

33. *See* State v. Marsala, 579 A.2d 58 (Conn. 1990); State v. Gutierrez, 863 P.2d 1052 (1993); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); and Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). *See also,* State v. Guzman, 842 P.2d 660 (Idaho 1992); People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); and State v. Oakes, 598 A.2d 119 (Vt. 1991).

34. Ohio v. Robinette, 519 U.S. 33, 37 (1996) (citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)) (decision clearly relied on federal law rather than Ohio Constitution). *See also* Pennsylvania v. Labron, 518 U.S. 938, 941 (1996) (Pennsylvania Supreme Court decisions rest on an incorrect reading of the Fourth Amendment's warrant requirement, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion).

II. Methodology: A Hypothetical[35]

The moon rises slowly as two men busily transfer contraband drugs from the stash house into the trunk of a late model Cadillac. The Miami drug lord fingers the trigger of his UZI machine gun as he surveys the scene, located somewhere between the Miami International Airport and Hialeah Park Race Track. After receiving their delivery schedule and telephone numbers, the two "mules" drive off to the east until they arrive at Interstate 95, the "Golden Alley." They turn north and set the cruise control. Within twelve hours they will deliver cocaine in six states: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

These foreign nationals have not read the United States Constitution, Bill of Rights, or the constitutions of the six states in which they will make deliveries. They do know, however, that if stopped they are not to speak English except to ask for a lawyer.

This hypothetical assumes that in a city in each of the six states, the following occurs: On that same night a confidential informant of unproven reliability informs an officer of the (insert city) police department that two persons known to him as "Armando" and "Patsy" are selling large quantities of cocaine from their residence at 620 Noveau Riche Drive in downtown (insert name of same city). The informant also indicates that he witnessed a sale of cocaine by Patsy at the residence approximately five months earlier. At that time, he saw a shoe box containing a large amount of cash that belonged to Patsy. He says that Armando and Patsy generally keep only small quantities of drugs at their residence and store the remainder at another location in (insert name of same city). The police put Armando and Patsy under surveillance and determine that the cars parked at the Noveau Riche residence belong to Armando Sanchez, who previously has been arrested for possession of cocaine, and Patsy Stewart, who has no criminal record. That night officers observe a late model Cadillac arrive at the Noveau Riche Drive residence. Two males exit the vehicle and walk into the residence. Each man holds a small package which resembles a fast food restaurant bag. A quick check of the license tag number through the police information network reveals that the Cadillac is owned by Richard Castle, who has been arrested previously for possession of fifty pounds of marijuana. Officers see another automobile arrive. A

35. These facts are designed to resemble the factual situation in *United States v. Leon*, 468 U.S. 897 (1984).

male exits this automobile, rushes inside the residence at 620 Noveau Riche Drive, and shortly thereafter leaves carrying a small paper sack. Activity increases. At two a.m., after all area businesses have closed, three more automobiles arrive. The occupants rush inside the 620 Noveau Riche Drive residence and leave holding paper bags. The police recognize one of those persons as a probationer with prior drug involvement.

While officers continue to keep the residence under surveillance, one officer rushes to a magistrate. The officer presents an affidavit reciting the information obtained from the confidential informant, the officers' personal observations at 620 Noveau Riche Drive, and the record checks obtained. The magistrate issues a search warrant to search the house and vehicles at 629 Noveau Riche Drive, (insert name of city), for controlled substances. The affidavit contains no facts indicating the basis for the informant's statements concerning prior criminal activity and is devoid of information establishing the informant's reliability.

The officer returns to the scene with the search warrant and all officers search the house and the Cadillac. The officers seize two kilos of cocaine in the house at 620 Noveau Riche Drive and eight kilos of cocaine in the trunk of the Cadillac, all wrapped in fast food restaurant bags.

Armando, Patsy and the two "mules" are arrested inside the house and exercise their right to remain silent. Appointed counsel files a motion to suppress the cocaine on the grounds that the search warrant was not supported by probable cause.

How does this hypothetical impact state constitutional law? To answer that question it is necessary to examine the evidence at the suppression hearing through the lens of the state trial judge in each state. The hypothetical assumes that each defendant has standing to object to the admissibility of at least part of the cocaine.

As we trace this hypothetical journey from state to state, we will examine the legal response of state trial court judges based on search and seizure provisions in state constitutions, state statutes and case law. The state trial court judge will look first to the Fourth Amendment of the United States Constitution.

The state trial judge in each case determines that the search warrant is defective under the Fourth Amendment. The magistrate did not have probable cause to issue the search warrant, because there was no proof of the credibility of the informant and his information was stale. However, the trial judge knows that

suppressing the evidence will have no deterrent effect on the police. The police officer who obtained the search warrant was well-trained and relied on the search warrant in objective good faith. The ruling in *United States v. Leon* would indicate that the motion to suppress should be denied.[36]

The trial judge will attempt to determine if the motion to suppress can be allowed on "adequate and independent" state grounds. The method of analysis is analytical and comparative. It is a useful method, because it studies the disparate responses to the issue by six state supreme courts.

This article follows the hypothetical pair northward from Florida to New Jersey, evaluating state constitutional law, state statutory law and state case law, looking for inconsistencies and anomalies. Interestingly, we begin with an anomaly: the search and seizure provision of the Florida Constitution, Article I, Section 12.

III. Florida

Article I, Section 12, of the Florida Constitution, as amended in 1982, effective January 3, 1983, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*[37]

The 1982 amendment to Article I, Section 12, of the Florida Constitution appears in italics type. This 1982 amendment was adopted by vote of the electorate at the November, 1982 general election. The other part of Article I, Section 12 appeared without

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36. *See supra* notes 23-26.
37. FLA. CONST. art. 1, § 12.

substantial difference in all the prior Florida Constitutions.[38] Prior to passage of this amendment, Florida courts "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution."[39]

Section 933.18 of the Florida Statutes governs the issuance of a search warrant for a private home and provides:

> No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:
>
> . . . .
>
> (5) The law relating to narcotics or drug abuse is being violated therein;
>
> . . . No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some credible witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.[40]

State v. Lavazzoli[41] interpreted the 1982 amendment to Article I, Section 12 of the Florida Constitution as linking Florida's exclusionary rule to the federal exclusionary rule.[42] Thus, the good faith exception to the search warrant requirement as set out in *United States v. Leon*[43] and *Massachusetts v. Sheppard*[44] became the law in Florida.

With this amendment, however, we are bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment, and provide no greater protection than those interpretations. Indeed, an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.[45]

The effect of making the exclusionary rule a part of the Florida Constitution in 1968 was to give the existing exclusionary rule

38. FLA. CONST. of 1838, art. I, § 7 (1968); FLA. CONST. of 1861, art. I, § 7 (1968); FLA. CONST. of 1865, art. I, § 7 (1968); FLA. CONST. of 1868, decl. of rights, § 19 (1968).

39. State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983).

40. FLA. STAT. CH. 933.18 (1985).

41. 434 So.2d 321 (Fla. 1983).

42. *Id.* at 323.

43. 468 U.S. 897 (1984).

44. 468 U.S. 981 (1984).

45. State v. Bernie, 524 So.2d 988, 990-91 (Fla. 1988).

constitutional dimension, supposedly immunizing it from possible future retreat from the United States Supreme Court's constitutional holding in *Mapp*.

However, with the *Bernie* decision in 1988, the Florida Supreme Court held that the language of the amended Article I, Section 12 of the Florida Constitution indicated an intention to apply all United States Supreme Court decisions to Florida search and seizure cases regardless of when rendered.[46] In *Bernie*, Emery Air Freight received an envelope addressed to Vickie Bernie.[47] The envelope had broken in transit, revealing a suspicious substance.[48] Emery notified a drug enforcement agent, who tested the substance and identified it as cocaine.[49] Emery then notified the Sarasota County Sheriff's Office.[50] Bruce Bernie came to Emery's Tampa office to check on the whereabouts of the package, and Emery's employees told him that the package would be delivered the next day, October 14, 1983.[51] On October 14, 1983, based on an affidavit setting forth the preceding facts, the police obtained a search warrant for the Bernies' residence.[52] Probable cause was based on the prospective delivery of cocaine under police control.[53] A few minutes after the controlled delivery, police executed the search warrant at the residence, arrested the Bernies, and charged them with possession of cocaine.[54]

The Bernies moved to suppress the cocaine on the grounds that it was the product of an unreasonable search and seizure, relying on the provisions of Section 933.18, Florida Statutes.[55] The Bernies contended that at the time the search warrant was issued there was no violation of any narcotics law in their dwelling.[56]

Nevertheless, the court in *Bernie* held that the anticipatory search warrant issued was valid and did not violate the Fourth Amendment of the United States Constitution, Article I, Section 12 of the Florida Constitution or Section 933.18 of the Florida

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46. *Id.* at 991.
47. *Id.* at 989.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Bernie*, 524 So.2d at 989.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 990.

Statutes.[57] *Bernie* also held that the 1982 amendment to Article I, Section 12, of the Florida Constitution conformed Florida's search and seizure laws with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment. (emphasis added).[58]

In 1989, one year after *Bernie*, a Florida appellate court in *Renckley v. Florida*[59] found an anticipatory search warrant invalid under Section 933.18.[60] The good faith exception argument of the State failed because the affidavit did not provide sufficient evidence for a magistrate to find probable cause to issue a search warrant.[61] Therefore, the officer's search of the dwelling was not in "objectively reasonable reliance" on the warrant.[62]

More recently, the 1995 case of *Pazos v. Florida*[63] applied the good faith exception to the exclusionary rule in an anticipatory search case.[64] Technically, no narcotics or drug abuse law was being violated when the magistrate issued the search warrant.[65] The court found that the officer reasonably relied on the magistrate's finding of probable cause.[66] The informant had bought drugs before from the occupants of the dwelling.[67] "[T]he officers had the informant in sight constantly except while he was inside the dwelling."[68] "[T]here was a firm connection between the contraband and the premises."[69] The affidavit contained no false statements.[70] The motion to suppress under Florida Statutes Section 933.18 (5) was denied.[71]

In Florida, the task of the issuing magistrate is simply to make a practical, common-sense decision; whether given all the circumstances set forth in the affidavit, including the "veracity" and the "basis of knowledge" of persons supplying hearsay infor-

57. *Bernie*, 524 So.2d at 992.
58. *Id.*
59. 538 So.2d 1340 (Fla. 1989).
60. *Id* at 1342.
61. *Id* at 1342-43.
62. *Id.* at 1343.
63. 654 So.2d 1000 (Fla. 1995).
64. *Id.* at 1001.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Pazos*, 654 So.2d at 1001.
70. *Id.*
71. *Id.* at 1000.

mation, there is a fair probability that contraband or evidence of a crime will be found in a particular place. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed" considering the totality of the circumstances.[72]

State v. Wildes[73] applied the good faith exception enunciated in *United States v. Leon* when the information in the affidavit was obtained by a police officer from an unidentified confidential informant.[74] "The affidavit contained no specific facts regarding the reliability of the informant although the facts themselves contained considerable detail indicating the presence of contraband at the residence authorized to be searched."[75] The Court applied the good faith exception, noting that the search warrant was regular on its face.[76] It also noted that "the affidavit upon which [the search warrant] was based was not so lacking in indicia of probable cause that the officer executing the warrant could not with reasonable objectivity rely in good faith on the magistrate's probable cause determination and on the technical sufficiency of the warrant."[77]

Florida v. Kingston[78] applied the *Leon* good faith exception in 1993, even though the judge issued a search warrant, in which he had drawn a diagonal line across a blank space where the description of the place to be searched was omitted.[79] The detective believed the judge had corrected whatever was wrong.[80] A nine page affidavit was stapled to the search warrant.[81] Apparently, when read in a common sense, non-technical way, the search warrant set forth ample facts to establish probable cause and enable the searcher, with reasonable effort, to identify the place to be searched.[82] In Florida, "the test is practical accuracy, not technical nicety."[83]

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72. Illinois v. Gates, 462 U.S. 213, 238 (1983) (citing Jones v. United States, 362 U.S. 257, 271 (1960)).
73. 468 So.2d 550 (Fla. 1985).
74. *Id.* at 550-51.
75. *Id.* at 550
76. *Id.* at 551.
77. *Id. See also* State v. Harris, 629 So.2d 983 (Fla. 1993).
78. 617 So.2d 414 (Fla. 1993).
79. *Id.* at 415.
80. *Id.* at 416.
81. *Id.*
82. *Id.*
83. *Id.* at 415.

In the 1996 case of *Florida v. Howard*,[84] the search warrant stated that facts showing probable cause were set forth in a written affidavit.[85] The search warrant failed to incorporate by reference the facts in the affidavit.[86] However, the court deemed the search warrant valid, because evidence at the suppression hearing suggested the affidavit had been attached to the warrant and had been reviewed by the issuing judge.[87]

Florida courts have refused to follow the good faith exception to the exclusionary rule in some cases. In *State v. Ross*,[88] a search warrant, due to a word processing error, neglected to include a description of specific property for which the search was authorized.[89] The search warrant was facially invalid.[90] The executing officer could not reasonably have presumed the search warrant to have been valid.[91] Therefore, the State could not resort to the good faith exception to the exclusionary rule enunciated in *United States v. Leon*.[92] The next year, the court in *Vasquez v. State*[93] refused to apply the good faith exception, because the affidavit for a search warrant contained no information about the informant's credibility and no independent police corroboration.[94] No officer could in objective good faith rely on the search warrant.[95] In *Delacruz v. Florida*,[96] the affidavit for a search warrant was insufficient to establish probable cause, because it contained no information about the reliability of the confidential informant.[97]

The *Leon* good faith exception to the exclusionary rule does not apply to the exclusionary provisions of the Florida wiretap law set out in chapter 934, Florida Statutes. The statutorily mandated exclusionary rule in "[c]hapter 934, Florida Statutes, pertaining to security of communications, unequivocally expresses

84. 670 So. 2d 1004 (Fla. 1996).
85. *Id.* at 1005.
86. *Id.*
87. *Id.* at 1005-06.
88. 471 So.2d 196 (Fla. 1985).
89. *Id.* at 196.
90. *Id.*
91. *Id.* (citing United States v. Leon, 468 U.S. 897, 926 (1984)).
92. *Id.*
93. 491 So.2d 297 (Fla. 3d DCA), *rev. denied*, 500 So.2d 545 (Fla. 1986).
94. *Id.* at 301.
95. *Id.* at 300.
96. 603 So.2d 707 (Fla. 1992).
97. *Id.* at 707.

the Legislature's desire to suppress evidence obtained in violation of that chapter."[98]

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter.[99]

Florida state courts have adopted the good faith exception to the exclusionary rule in accordance with the 1982 amendment to Article I, Section 12, of the Florida Constitution. Prior to 1983, the exclusionary rule was a state constitutional provision. The good faith exception to the exclusionary rule, as set forth in *Leon*, became state law in Florida by virtue of the language in Article I, Section 12, of the Florida Constitution: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

In the hypothetical discussed in section II of this article, the state trial judge's order allowing the motion to suppress would be reversed by the Florida appellate courts. Thus, Armando and Patsy would likely be convicted in Florida.

IV. Georgia

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.[100]

The Georgia state constitutional provision on search and seizure has not impacted analysis by the Georgia Supreme Court of the *Leon* good faith exception to the exclusionary rule. That is not to say that the *Leon* good faith exception to the exclusionary rule applies in Georgia state courts.

The federal exclusionary rule, applicable only when evidence has been seized pursuant to an unlawful search, operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ."[101] Any

98. *State v. Garcia*, 547 So.2d 628, 630 (Fla. 1989).
99. *Id.* (citing FLA. STAT. CH. 934.06 (1985)).
100. GA. CONST. art. I, § 1.
101. United States v. Calandra, 414 U.S. 338, 348 (1974).

exception to the federal exclusionary rule arises only when evidence has been seized pursuant to an unlawful search. In *Leon*, the Supreme Court of the United States held that the exclusionary rule does not bar the introduction in the State's case in chief of "evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate that ultimately found to be invalid."[102]

The *Leon* "good faith exception" does not apply in Georgia. The Official Code of Georgia Annotated (OCGA) section 17-5-30 is Georgia's exclusionary rule.[103] The Georgia state legislature has mandated the exclusionary rule in OCGA section 17-5-30.[104] "By its terms, OCGA section 17-5-30 authorizes no exception to Georgia's exclusionary rule when evidence has been seized unlawfully. OCGA section 17-5-30 (a)(1) and (2) clearly provides that '[a] defendant aggrieved by an unlawful search and seizure was entitled to suppression of the evidence regardless of whether the unlawful search and seizure was accomplished with or without a warrant.'"[105]

By passage in 1966 of an act "to provide for searches and seizures and for suppression of evidence illegally seized" the State of Georgia has chosen to impose greater requirements upon its law enforcement officers than that required by the U.S. Constitution, as interpreted by the U.S. Supreme Court.[106]

OCGA section 17-5-30(a)(2) applies in situations where it is alleged that a search conducted pursuant to a search warrant was unlawful because the search warrant itself was either insufficient on its face, was issued without probable cause, or was illegally executed.

In determining whether an affidavit sufficiently establishes the probable cause necessary for issuance of a warrant, Georgia courts employ the 'totality of the circumstances' analysis enunciated in *Illinois v. Gates*, and adopted by Georgia in *State v. Stephens*, with the admonition that '[p]rudence counsels that *Gates* be considered as the outer limit of probable cause.' Under that

102. *Leon*, 468 U.S. 897, 897 (1984).

103. *See* State v. Slaughter, 315 S.E.2d 865, 870 (Ga. 1984); and King v. State, 438 S.E.2d 93, 94-95 (Ga. App. 1993).

104. *See* Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992); and Hestley v. State, 455 S.E.2d 333, 340 (Ga. App. 1995).

105. State v. Harvey, 469 S.E.2d 176, 178 (Ga. 1996).

106. *Gary*, 422 S.E.2d at 428 (noting that "[o]ur decision in this case is based on our construction of OCGA § 17-5-30").

analysis, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.[107]

Georgia law does allow a defendant to plead guilty, reserving the right to appeal the trial court's denial of his motion to suppress.[108]

Prior to the Georgia Supreme Court ruling in *Gary* on November 5, 1992, some Georgia appellate cases had approved and utilized the *Leon* good faith exception to the exclusionary rule.[109] Interestingly, in *Adams v. State,*[110] Chief Judge Carley was careful to specify: "[i]t should be pointed out that the State Constitution and state law are not involved."[111] Furthermore, some of the cases[112] mistakenly cite *State v. Stringer.*[113] In *Stringer*, Chief Justice Marshall referred to the *Leon* good faith exception to the exclusionary rule in *dictum*.[114] The holding in *Stringer* did not adopt the *Leon* good faith exception rule.[115]

In conclusion, the United States Supreme Court's decision in *United States v. Leon*,[116] which judicially creates a "good faith" exception the exclusionary rule, does not apply in Georgia, because Georgia's exclusionary rule is legislatively created. The state statute, OCGA section 17-5-30, imposes greater requirements upon Georgia law enforcement officers than that required

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107. *Id.* at 429-30.

108. *See* State v. McCullough, 438 S.E.2d 369 (Ga. App. 1993); Mims v. State, 410 S.E.2d 824 (Ga. App. 1991).

109. Taylor v. State, 419 S.E.2d 56, 58 (Ga. App. 1992); Talley v. State, 408 S.E.2d 463, 465-466 (Ga. App. 1991); State v. Morris, 402 S.E.2d 288, 290 (Ga. App. 1991); Adams v. State, 383 S.E.2d 378, 379-380 (Ga. App. 1989); State v. Evans, 384 S.E.2d 404, 409 (Ga. App. 1989); Debey v. State, 385 S.E.2d 694 (Ga. App. 1989).

110. 383 S.E.2d 378 (Ga. App. 1989).

111. *Id.* at 380.

112. *See supra* note 110.

113. 372 S.E.2d 426 (Ga. 1988).

114. *Id.* at 606.

115. *Id.* at 606-07.

116. 468 U.S. 897 (1984).

by the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Leon*. The *Leon* good faith exception to the exclusionary rule has not been applied in Georgia state courts since the Georgia Supreme Court ruling in *Gary* on November 5, 1992. These state courts, using adequate and independent state grounds, have resolved search and seizure questions in total reliance on the state statute without considering *Leon*.

In the absence of drug evidence in the hypothetical set out in section II of this article, Armando and Patsy would not be tried or the case would be dismissed at the close of the State's evidence.

V. SOUTH CAROLINA

Article I, section 10 of the South Carolina Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

The present version of Article I, section 10 was adopted in 1971. South Carolina Statute section 17-13-140 provides:

> Any magistrate or recorder or city judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize . . . . (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States. . . . A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer above mentioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

The constitutional prohibition against the issuance of a warrant except "upon probable cause supported by oath or affirmation" is not a grant of power. It is part and parcel of the historic

provision securing the people against unreasonable searches and seizures and its only office is to prescribe minimum standards for the issuance of a warrant. The requirement of an affidavit complies with these standards and is a procedural detail. The determination of whether or not there is probable cause must be made by the officer empowered to issue the search warrant, and not by a police officer or other individual who seeks the warrant.[117] A trial court, in reviewing a magistrate's finding of probable cause, may not consider information which was not set forth in the affidavit unless the search warrant specifies that a sworn oral statement was presented to the magistrate.[118] An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding that probable cause existed. If the search warrant affidavit does not show a reliable confidential informant, then the magistrate cannot find probable cause to issue the search warrant.[119]

In determining the existence of probable cause, a non-confidential informant possesses a higher level of credibility because he exposes himself to public view and to possible civil and criminal liability should the information prove to be false.[120]

A 1991 case, *State v. Scott,*[121] held that a search warrant affidavit articulated sufficient probable cause for the magistrate to issue a search warrant to search the defendant's home.[122] In *Scott*, the affidavit stated that investigators saw the defendant leave his residence; stopped the defendant; the defendant possessed more than twenty grams of cocaine; and the investigators maintained visual contact with the defendant from the time he left his residence until the time of the stop.[123]

If a search warrant affidavit alone is insufficient to establish probable cause, it may be supplemented before the magistrate by sworn oral testimony.[124] However, sworn oral testimony, standing alone, does not satisfy South Carolina's search warrant statute.[125] In *State v. McKnight,* a 1987 case, the officers were aware of the statutory requirement that an affidavit support a search warrant,

117. State v. York, 156 S.E.2d 326 (S.C. 1967).
118. State v. Arnold, 460 S.E.2d 403 (S.C. 1995).
119. State v. Philpot, 454 S.E.2d 905 (S.C. 1995).
120. State v.Bellamy, 473 S.E.2d 838 (S.C. 1996).
121. State v. Scott, 400 S.E.2d 784 (S.C. Ct. App. 1991).
122. *Id.* at 786.
123. *Id.* at 785-786.
124. State v. McKnight, 352 S.E.2d 471, 472 (S.C. 1987).
125. S.C. Code Ann. §17-13-140 (Law Co-op. 1985).

but made no effort to comply.[126] Thus, the good faith exception to the exclusionary rule did not apply when the search warrant was adjudged defective under section 17-13-140 of the South Carolina code, rather than on Fourth Amendment grounds.[127] *Leon* did not apply. The South Carolina Supreme Court found that exclusion of the evidence was appropriate.[128]

In *State v. Johnson,*[129] a 1990 case, the affidavit in support of the search warrant was insufficient to support the magistrate's determination of probable cause.[130] In *Johnson,* the confidential informant's allegations were not corroborated and the reliability of the informant was not set forth.[131] This case was remanded to the trial court.[132] The South Carolina Supreme Court felt that the dispositive issue was whether sworn oral testimony about the informant's reliability was presented to the magistrate.[133] If such information was not given, then the *Johnson* court felt that the magistrate in this case would have served only as a "rubber stamp" for the police rather than as a neutral and detached official.[134] Under such circumstances, *Leon* would specifically preclude application of the good faith exception.[135]

The South Carolina Court of Appeals, in the 1994 case, *State v. Adolphe*,[136] reversed the trial judge's ruling that the *Leon* good faith exception to the exclusionary rule applied.[137] The confidential informant, Richard "Tex" Chung, made a controlled buy of crack at a trailer.[138] Michael Donnell, a man unknown to and not assisting the police at that time, went with Chung into the trailer and acted as an intermediary in the buy.[139] After the buy, Chung met with his supervising officer, turned over the crack and gave a detailed description of the man who had sold the crack to him.[140]

126. *McKnight*, 352 S.E.2d at 471.
127. *Id.* at 473.
128. *Id.*
129. State v. Johnson, 395 S.E.2d 167 (S.C. 1990).
130. *Id.* at 169.
131. *Id.*
132. *Id.* at 170.
133. *Id.*
134. *Id.*
135. *Id.*
136. State v. Adolphe, 441 S.E.2d 832 (S.C. Ct. App. 1994).
137. *Id.* at 834.
138. *Id.* at 833.
139. *Id.*
140. *Id.*

Immediately after receiving the crack from Chung, Officer Young obtained a search warrant for the trailer.[141] Police went to the trailer and arrested several people, including Donnell.[142] Donnell offered to help the police, stating that Adolphe had fled to Adolphe's "stash house."[143] Donnell led police to the alleged house, where the police entered with the consent of one of the occupants.[144] The police arrested Adolphe as he was trying to escape out the back door.[145] Adolphe matched the description of the man who had made the sale to Chung, and Donnell identified Adolphe as the person who sold the crack at the trailer.[146] Minutes later, an officer arrived at the stash house with a search warrant.[147] Officer Young had obtained the information for the search warrant from a radio transmission which he and the magistrate monitored via a police radio at the magistrate's office.[148]

The affidavit of Officer Young stated:

> An individual positively identified by a confidential informant as having sold crack cocaine to the confidential informant within the last 48 hours and being observed by drug agents fleeing the location of the previous bust, was located at this location within minutes after fleeing previous location on the night of 1-2, October, 1991. C.I. and others describe this residence as a stash house where money and drugs are stored after sale from previous location is completed.[149]

The trial court found that the search warrant was deficient on its face and conducted a suppression hearing.[150] At the hearing the only witness was the affiant, Officer Young.[151] Young's testimony only established that Donnell was the person who positively identified Adolphe.[152] Although Young's testimony did not cure the deficiencies in the search warrant, the trial court denied the defense's motion to suppress, applying the *Leon* good faith excep-

141. *Adolphe,* 441 S.E.2d at 833.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Adolphe,* 441 S.E.2d at 833.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 834.
151. *Id.*
152. *Id.*

tion to the exclusionary rule.[153] The Court of Appeals reversed the trial court, applying the *Gates*[154] "totality of the circumstances test."[155] The Court of Appeals concluded that the search warrant should not have been issued because the affidavit, coupled with the suppression hearing, failed to supply facts creating probable cause.[156] The *Adolphe* court stated that the "affidavit did not demonstrate the confidential informant's reliability and the informant's allegations were never corroborated by any identifiable individuals."[157] The Court went on to say that "our Supreme Court (South Carolina) declined to apply the good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause."[158]

In *State v Austin,*[159] decided in 1991, the South Carolina Court of Appeals held that marijuana seized pursuant to a defective search warrant was not admissible under the *Leon* good faith exception to the exclusionary rule.[160] Crucial to this case were the facts that the officer testified at the suppression hearing that he actually knew that the affidavit was insufficient and that the affidavit, itself, contained no information about the reliability of the informant.[161] Consequently, the Court held that the officer did not act in reasonable reliance on the search warrant.[162]

In conclusion, South Carolina Constitution Article I, section 10 closely resembles the Fourth Amendment of the U.S. Constitution. Article I, section 10 does contain a specific phrase prohibiting unreasonable invasions of privacy that is not in the Fourth Amendment. The South Carolina Constitution and South Carolina Statute section 17-13-140 governing searches and seizures both require a finding of probable cause by a judicial official for a search warrant to issue. As a matter of state criminal procedure developed by state case law, magistrates may consider sworn oral statements to supplement affidavits in determining probable

153. *Id.*
154. Illinois v. Gates, 462 U.S. 213 (1983).
155. *Adolphe,* 441 S.E.2d at 834.
156. *Id.*
157. *Id.*
158. *Id.* (*quoting* State v. Johnson, 395 S.E.2d 167, 170 (S.C. 1990) and State v. Austin, 409 S.E.2d 811 (S.C. Ct. App. 1991)).
159. *Austin,* 409 S.E.2d 811 (S.C. Ct. App. 1991).
160. *Id.* at 816.
161. *Id.*
162. *Id.*

cause.[163] At suppression hearings, trial courts may conduct suppression hearings to determine what sworn oral statements a magistrate considered in finding probable cause. Few appellate cases in South Carolina discuss the *Leon* good faith exception to the exclusionary rule.[164] The South Carolina Supreme Court has declined to apply the *Leon* good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause.[165]

South Carolina appellate courts would affirm the state trial judge's order allowing the motion to suppress in our hypothetical. Armando and Patsy would not face trial in South Carolina, or if tried, a motion to dismiss at the close of the State's case would be allowed.

VI. North Carolina

Article I, Section 20 of the North Carolina Constitution provides:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.[166]

The North Carolina Supreme Court has interpreted the search and seizure provision of its state constitution, Article I, Section 20, to provide broader rights than those required by the Fourth Amendment to the United States Constitution. In *State v. Carter*,[167] a 1988 case, the North Carolina Supreme Court refused to adopt the *Leon* good faith exception to the exclusionary rule.[168] The North Carolina Supreme Court's analysis in the Carter case specifically addresses "adequate and independent" state constitutional grounds:

> Because we decide this case on adequate and independent state constitutional grounds, we do not reach or decide the question of whether the challenged search violated defendant's fourth and fourteenth amendment rights under the Federal Constitution.

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163. State v. McKnight, 352 S.E.2d 471, 472 (S.C. 1987).

164. State v. Adolphe, 441 S.E.2d 832, 834 (S.C. Ct. App. 1994).

165. *Austin*, 409 S.E.2d 811 (S.C. Ct. App. 1991); State v. Johnson, 395 S.E.2d 167 (S.C. 1990).

166. N.C. CONST. ART. 1, § 20.

167. State v. Carter 370 S.E.2d 553 (N.C. 1988).

168. *Id.* at 562.

> The federal cases cited or discussed are being used only for the purpose of guidance and they do not compel the result that this Court has reached.[169]

Justice Martin, writing for a four to three majority in *Carter,* recognized that the language in Article I, Section 20 of the North Carolina Constitution differs somewhat from that of the Fourth Amendment to the United States Constitution. To emphasize the court's inherent power to decide the case solely on the state constitution, Justice Martin stated: "Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."[170]

The position of the North Carolina Supreme Court is not surprising. The North Carolina General Assembly enacted a statutory exclusionary rule in 1937, North Carolina General Statute section 15-37, some twenty five years before *Mapp*[171] mandated that the states apply the exclusionary rule under the due process clause of the fourteenth amendment. *Elkins v. U.S.*,[172] the famous "silver platter" decision in 1960, listed North Carolina as one of twenty six states that excluded evidence illegally seized by state officers.[173] Prior to *Elkins*, evidence illegally seized by state officers was admissible in federal trials; thus the evidence was said to be handed over to federal officers by state officers on a "silver platter."

The North Carolina General Assembly amended the statute adopting the exclusionary rule in 1951 to extend the rule to apply to warrantless searches.[174] The amended statute was repealed in 1969 and replaced, effective 1975, by North Carolina General Statute section 15A-974 which provides in part: "[u]pon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina."[175] The General Assembly of

169. *Id.* at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983); Jackson v. Housing Authority 364 S.E.2d 416 (N.C. 1988)).

170. *Carter,* 370 S.E.2d at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983) *and* State v. Arrington 319 S.E.2d 254, 260 (1984)).

171. Mapp v. Ohio, 367 U.S. 643 (1961).

172. Elkins v. U.S., 364 U.S. 206 (1960).

173. *Id.* at 224 (*citing* State v. Mills 98 S.E.2d 329 (N.C. 1957)).

174. N.C. GEN. STAT. § 15-37 (1957) (repealed 1969).

175. N.C. GEN. STAT. § 15A-974(1) (1973).

North Carolina sets the public policy of the state. Since 1937, the expressed public policy of North Carolina has been to exclude evidence obtained by law enforcement officers in violation of state or federal constitutional rights.

The exclusionary rule continues to be a debated issue in North Carolina, though its legal status is clearly established when the court rules only on the basis of state constitutional law. The *Leon* good faith exception to the exclusionary rule was approved in 1988 in *State v. Welch*[176] and *State v. Witherspoon*,[177] when the court applied federal constitutional law. Unquestionably, *Welch* has been overruled by *Carter*. Both *Welch* and *Carter* involved officers obtaining blood samples from persons in custody using non-testimonial identification orders rather than search warrants.[178]

In *State v. Hyleman*,[179] a 1988 case, the North Carolina Court of Appeals used the *Leon* good faith exception to the exclusionary rule to uphold the trial court's denial of the defendant's motion to suppress. On appeal, the North Carolina Supreme Court, in an opinion written by Justice Martin, reversed the Court of Appeals.[180] The North Carolina Supreme Court did not reach the federal constitutional question. The Court found that the affidavit and application for a search warrant failed to comply with the state search and seizure statute, North Carolina General statute section 15A-244.[181] Justice Martin's opinion reasoned: "[h]aving decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds. . . . It follows that the good faith exception to the exclusionary rule is not applicable. The good faith exception to the exclusionary rule arises upon the exclusion of evidence based upon federal constitutional grounds."[182]

Justice Mitchell's dissent in *Carter*, vigorously attacked the rationale used by the majority in *Carter* and subsequently in *Hyleman*. In his dissent in *Carter* Justice Mitchell stated:

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176. State v. Welch, 342 S.E.2d 789 (N.C. 1986).

177. State v. Witherspoon, 429 S.E.2d 783 (N.C. App. 1993).

178. *Welch*, 342 S.E.2d at 793; *Carter*, 429 S.E.2d at 554.

179. State v. Hyleman, 366 S.E.2d 530 (N.C. App. 1988), *rev'd*, 379 S.E.2d 830 (N.C. 1989).

180. *Hyleman*, 379 S.E.2d 830 (N.C. 1989).

181. *Id.* at 833.

182. *Id.*

> In the context of cases such as this, the majority's doctrinaire application of our exclusionary rule truly becomes a 'mere technicality' applied with a vengeance to block enforcement of the criminal laws for no good reason. Application of the exclusionary rule here will not deter any future misconduct by anyone or lessen the likelihood of future infringements upon anyone's constitutional rights. The only effect of the majority's rejection of a good faith exception to the exclusionary rule in cases such as this is to punish the public by impeding the truth-finding function of its courts. This drastic choice by the majority does not lead to any corresponding societal or constitutional gain for anyone other than criminal defendants lucky enough to have officers make honest errors in their cases. This diminishes the integrity of the judicial branch of government.[183]

Furthermore, Justice Meyer additional dissent in *Carter* contended that there is no reason for the court to find there to be different exclusionary standards under the North Carolina Constitution than the United States Constitution.[184] Justice Meyer wrote that "a dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the objectives of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution."[185]

In conclusion, when North Carolina State Courts evaluate motions to suppress, their rulings depend on whether the courts rely on "adequate and independent" state grounds. Since there is no *Leon* good faith exception to the exclusionary rule in Article I, Section 20 of the North Carolina Constitution, *Carter*. Armando and Patsy's motion to suppress in a North Carolina court would begranted.

VII. VIRGINIA

The Virginia State Constitution provides:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[186]

183. State v. Carter, 370 S.E.2d 553, 565 (N.C. 1988) (Mitchell, J., dissenting).
184. *Id.* at 567(Meyer, J., dissenting).
185. *Id.*
186. VA. CONST. ART. 1, § 10.

General warrants are proscribed by both the Fourth Amendment[187] and Virginia's statutory law.[188] The purpose of this proscription is to limit the discretion police officers may exercise when engaging in a "fishing expedition" or an "exploratory rummaging in a person's belongings."[189] To protect against this danger, the Fourth Amendment requires "a particular description of the thing to be seized."[190] The Virginia statutes controlling the issuance of search warrants have been interpreted to impose the same search warrant requirements as the Fourth Amendment.[191]

Virginia magistrates have an additional incentive to exercise care in the issuance of search warrants. Section 19.2-55 of Virginia's code provides that "any person having authority to issue criminal warrants who willfully and knowingly issues a general search warrant or a search warrant without the affidavit required by Section 19.2-54 shall be deemed guilty of a malfeasance."[192]

The Fourth Amendment specifically mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[193] Article I, Section 10 of the Virginia Constitution prohibits a general search of "suspected places without evidence of a fact committed."[194] Although the words, "probable cause," do not appear in the search and seizure provision of the Virginia State Constitution, the words "probable cause" in the Fourth Amendment came from a Virginia document. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against the practice of police control taking the place of judicial control.

Virginia Code Section 19.2-45(2) gives magistrates the power to issue search warrants in accord with the provisions of Sections 19.2-52 to 19.2-60.[195] Section 19.2-52 provides that:

> search warrants, based upon complaint on oath supported by an affidavit as required in Section 19.2-54, may be issued by any judge, magistrate or other person having authority to issue criminal warrants, if he be satisfied from such complaint and affidavit

187. Andresen v. Maryland, 421 U.S. 463, 480 (1976).

188. VA. CODE ANN. § 19.2-54 (Michie 1987).

189. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

190. U.S. CONST., AMEND. IV.

191. Kirby v. Commonwealth, 167 S.E.2d 411, 412 (Va. 1969); Morke v. Commonwealth, 419 S.E.2d 410 (Va. Ct. App. 1992).

192. VA. CODE ANN. § 19.2-55 (Michie 1975).

193. U.S. CONST., AMEND. IV.

194. VA. CONST. ART. 1, § 10.

195. VA. CODE ANN. § 19.2-45(2) (Michie 1985).

that there is reasonable and probable cause for the issuance of such search warrant.[196]

Section 19.2-54 of the Virginia Code specifies the essential requirements of the affidavit:

> No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made and that the object, thing or person searched for constitutes evidence of the commission of such offense. . . . No warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued. The term 'affidavit' as used in this section, means statements made under oath or affirmation and presented verbatim.[197]

Virginia courts have applied common sense to the reasonableness requirement of probable cause.[198] Probable cause is a nontechnical concept.[199] Probable cause is based on probabilities, not legal technicalities.[200] The "totality of the circumstances" test set forth in *Gates*[201] should be evaluated by factual and practical considerations of everyday life on which reasonable and prudent men rely.[202] Virginia magistrates and other judicial officials evaluating probable cause for the issuance of search warrants under the Fourth Amendment and state constitutional search and seizure provisions have to apply their best analysis and common sense to an infinite variety of factual situations.[203] Virginia appellate courts have made a policy decision that when an affidavit for a search warrant provides evidence sufficient to create a disagreement among thoughtful and competent judges as to the existence of probable cause, then the officers could have harbored an objec-

196. VA. CODE ANN. § 19.2-55 (Michie 1986).

197. VA. CODE ANN. § 19.2-54 (Michie 1989).

198. Derr v. Commonwealth, 410 S.E. 2d 662, 666 (Va. 1991).

199. *Id.*

200. *Id.*

201. Illinois v. Gates, 462 U.S. at 231.

202. *Derr*, 410 S.E.2d at 666.

203. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

tively reasonable belief in the existence of probable cause to support the search warrant.[204]

Virginia courts have adopted the good faith exception to the search warrant requirement as set forth in *Leon*.[205] If a search warrant was erroneously issued by a magistrate but reasonably relied on by a law enforcement officer, there could be no deterrent value in excluding the evidence seized.[206] The deterrent effect of the exclusionary rule "is absent where an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant."[207] In the 1995 case of *Robinson v. Commonwealth,*[208] the officer swore in an affidavit that he knew the defendant was selling drugs from his motel room and that the officer had consulted with an expert in hotel-motel drug distribution.[209] The magistrate issued a search warrant, and the officer reasonably relied on the search warrant and acted in objective good faith.[210] The Virginia Court of Appeals held that the evidence found during a search of the defendant's motel room was admissible under the good faith exception to the exclusionary rule.[211]

Trial court scrutiny of the sufficiency of an affidavit to establish probable cause for the issuance of a search warrant does not take the form of *de novo* review in Virginia.[212] The magistrate's determination of probable cause is paid great deference by the reviewing court.[213] The United States Supreme Court has held, however, that on appeal, a trial court's determinations as to whether, for purposes of the Fourth Amendment, law enforcement officers had reasonable suspicion to stop persons and probable cause to make a warrantless search, are to be reviewed *de* novo, rather than "deferentially" and "for clear error."[214] When an affidavit contains a detailed description of the nature of the offense, the premises to be searched, the items for which officers are

204. Tart v. Commonwealth, 437 S.E.2d 219, 223 (Va. Ct. App. 1993).
205. *See* McCary v. Commonwealth, 321 S.E.2d 637 (Va. 1984); Derr v. Commonwealth, 410 S.E.2d 662 (Va. 1991).
206. *Tart,* 437 S.E.2d at 222.
207. *Derr*, 410 S.E. 2d at 667.
208. Robinson v. Commonwealth, 453 S.E.2d 916 (Va. Ct. App. 1995).
209. *Id.* at 917.
210. *Id.* at 918-919.
211. *Id.* at 919.
212. Tart v. Commonwealth, 437 S.E.2d 219, 221 (Va. Ct. App. 1993).
213. *Id.*
214. Ornelas v. United States, 517 U.S. 690 (1996).

searching, and the transaction which led the informant to believe drugs would be in the apartment, then the affidavit is sufficient for a reasonably well-trained police officer to believe that probable cause exists. Evidence seized pursuant to a search warrant based on such an affidavit, even if the affidavit is defective, is admissible in Virginia under the good faith exception to the exclusionary rule.[215]

Trial courts should be alert to the staleness of the information in the affidavit. When an affidavit contains information that a confidential informant was in a motel room where drugs were present within the past seventy-two hours, that information is not so stale that a magistrate cannot find probable cause to issue a search warrant.[216] Virginia courts have noticed that the phrase "within the past seventy-two hours" is often used to protect the identity of confidential informants.[217]

Virginia statutes allow a defendant the right to have a pre-trial hearing on a motion to suppress evidence seized pursuant to a search warrant.[218] If the motion to suppress is denied, the defendant can plead guilty and challenge the denial of the motion to suppress on appeal.[219]

In a dissenting opinion in *Tart*, J. Benton argued that "[A] State is free as a matter of its own law to impose greater restrictions on police activity than those the United States Supreme Court holds to be necessary upon federal constitutional standards."[220] "The requirements for the issuance of a search warrant may be determined by the legislature as a matter of state law and may 'impose higher standards on searches and seizures than required' under federal law."[221] Judge Benton contended that the Virginia Code does not allow a search to be made with a search warrant absent probable cause, stating that:

> If a search and seizure are made pursuant to a warrant and in the absence of probable cause, the legislature has provided a statutory right to suppress the seized evidence. See Code Section 19.2-60. Thus, Virginia law provides an adequate and independent ground for excluding the fruits of this search. (Emphasis

215. Atkins v. Commonwealth, 389 S.E.2d 179, 180 (Va. Ct. App. 1990).
216. *See Tart* , 437 S.E.2d at 221-222.
217. *Id.* at 222.
218. VA. CODE ANN. § 19.2-60 (Michie 1970).
219. Cherry v. Commonwealth, 462 S.E.2d 574 (Va. Ct. App. 1995).
220. *Tart,* 437 S.E.2d at 227 (*citing* Oregon v. Hass, 420 U.S. 714, 719 (1975)).
221. *Tart,* 437 S.E.2d at 229 (*citing* Cooper v. California, 386 U.S. 58, 62 (1967)).

added). . . . In addition, federal case law does not control the interpretation or application of the Virginia suppression statute. The Virginia warrant statute does not codify 'good faith' as an exception to the probable cause requirement. In the absence of a legislative expression that 'good faith' is an exception to the statutory command, decisions by the courts in Virginia that infuse the *Leon* good faith exception into the statute constitute judicial legislation. Absent probable cause, the search warrant should not have been issued and the search should not have been conducted. Searches that are conducted in the absence of probable cause are precisely the type of 'unlawful search or seizure' that is contemplated by our statute.[222]

The reasoning and argument of this dissenting opinion in Tart is identical to the majority opinion in Georgia,[223] South Carolina[224] and North Carolina.[225]

The good faith exception is not available in Virginia in four instances:

1. Where the magistrate was misled by information in the affidavit which the affiant knew was false or should have known was false,

2. where the issuing magistrate totally abandoned his judicial role,

3. where the warrant was based on an affidavit 'so lacking in indicia of probable cause' as to render official belief in its existence unreasonable, or

4. where the warrant was so facially deficient that an executing officer could not reasonably have assumed it was valid.[226]

The four instances specified above in *Robinson*, come directly from *Leon*. They apply in any state that has adopted the good faith exception to the exclusionary rule.

In conclusion, Virginia courts have embraced the good faith exception as "accepted component of Virginia law."[227] "No justifi-

222. *Tart*, 437 S.E.2d at 227 (*quoting* Gary v. State, 422 S.E.2d 426 (Ga. 1992); *citing* VA. CODE ANN. § 19.2-60 (Michie 1970); State v. Guzman, 842 P.2d 660 (Id. 1992) (finding no 'good faith' exception in the Idaho Constitution and statutes); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985) (finding no 'good faith' exception in the Massachusetts suppression statute); State v. Carter, 370 S.E.2d 553 (N.C. 1988) (finding no 'good faith' exception in the North Carolina suppression statute)).

223. Gary v. State, 422 S.E.2d 426 (Ga. 1992).

224. State v. McKnight, 352 S.E.2d 471 (S.C. 1987).

225. State v. Carter, 370 S.E.2d 553 (N.C. 1988).

226. Robinson v. Commonwealth, 453 S.E.2d 916, 918 (Va. Ct. App. 1995).

227. *Tart*, 437 S.E.2d. at 224.

cation exists for drawing a distinction between the two constitutional provisions for purposes of good faith analysis."[228]

The Virginia trial judge's order allowing the defendants' motion to suppress would be reversed on appeal. The drugs seized by virtue of the defective search warrants would be admissible at trial under the *Leon* good faith exception to the exclusionary rule. Armando and Patsy probably would be convicted in Virginia.

VIII. NEW JERSEY

Article I, paragraph 7 of the New Jersey Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.[229]

This language tracks the language of the Fourth Amendment to the United States Constitution. The standard by which courts measure the affidavit in support of a search warrant is probable cause. The term "probable cause" appears in both the Fourth Amendment and in Article I, paragraph 7 of the New Jersey Constitution.

New Jersey courts have consistently characterized probable cause as a common-sense, practical standard for determining the validity of a search warrant.[230] The New Jersey Supreme Court has been unwavering in its insistence that affidavits submitted in support of a warrant application allege specific facts so that the issuing judge can determine independently whether or not probable cause has been established.[231]

State constitutions may be a source of individual liberties more expansive than those conferred by the Federal Constitution. In the 1987 case of *State v. Novembrino,*[232] the New Jersey Supreme Court interpreted Article I, paragraph 7 of the New Jersey Constitution to provide more expansive rights to criminal

228. Janis v. Commonwealth, 472 S.E.2d 649, 651 (Va. Ct. App. 1996).

229. N.J. CONST. ART. 1, § 7.

230. State v. Kasabucki, 244 A.2d 101, 104 (N.J. 1968).

231. State v. Macri, 188 A.2d 389, 393 (N.J. 1963), *disapproved of by* State v. Fariello, 366 A.2d 1313 (N.J. 1976); *see also* State v. Novembrino, 519 A.2d 820, 835 (N.J. 1987).

232. State v. Novembrino, 159 A.2d 820 (N.J. 1987).

defendants (and citizens) than the United States Supreme Court found in *Leon* under the Fourth Amendment to the United States Constitution, although the provisions were almost identical.[233]

New Jersey was the third colony to adopt a state constitution.[234] The New Jersey Constitution of 1776 did not include provisions equivalent to the Bill of Rights.[235] The New Jersey Constitution of 1844 incorporated a protection against unreasonable searches and seizures virtually identical to the Fourth Amendment and to Article I, paragraph 7 of the 1947 Constitution.[236] New Jersey did not apply the exclusionary rule.[237] In fact, during the Constitutional Convention of 1947 an amendment to Article I, paragraph 7 was proposed that would have incorporated the exclusionary rule into the Constitution: "Nothing obtained in violation thereof shall be received into evidence."[238] The amendment was defeated by a vote of 46 to 25.[239]

New Jersey first applied the exclusionary rule in *State v. Valentin*,[240] after *Mapp* held the exclusionary rule applicable to the states under the due process clause of the Fourteenth Amendment.[241] The exclusionary rule is now embedded in New Jersey law. "One obvious consequence of the application of the exclusionary rule in New Jersey has been the encouragement of law-enforcement officials to comply with the constitutionally-mandated probable-cause standard in order to avoid the suppression of evidence."[242]

The New Jersey Supreme Court applies a totality of the circumstances test analogous to that set forth in *Illinois v. Gates*[243] to test the validity of search warrants under the probable cause standard set forth in Article I, paragraph 7 of the New Jersey Constitution. In *Novembrino* the New Jersey Supreme Court stated, "the 'totality-of-the-circumstances' test that we endorse and apply in this case is a principle of state constitutional law used to test determinations of probable cause pursuant to Article I, paragraph

233. *Id.* at 857.
234. *Id.* at 850 n.28.
235. *Id.* at 850.
236. *Id.*
237. *Id.*
238. *Novembrino*, 519 A.2d at 851.
239. *Id.*
240. Sate v. Valentin, 174 A.2d 737 (N.J. 1961).
241. *Id.* at 737-738.
242. *Novembrino,* 519 A.2d at 854.
243. Illinois v. Gates, 462 US 213 (1983).

7 of the New Jersey Constitution. We assume that the application of this standard will be substantially consistent with the criteria set forth in Illinois v. Gates."[244]

Novembrino called upon the New Jersey Supreme Court to decide if Article I, paragraph 7 of the New Jersey Constitution, which incorporates almost verbatim the protection against unreasonable searches and seizures set forth in the Fourth Amendment, would tolerate a modification of the exclusionary rule that recognizes the good faith exception established by the United States Supreme Court in *Leon*. The *Novembrino* Court in its discussion of this issue stated:

"Ultimately, we focus on the inevitable tension between the proposed good-faith exception and the guarantee contained in our State Constitution that search warrants shall not issue except upon probable cause. In the twenty-five years during which we have applied the exclusionary rule in New Jersey, we have perceived no dilution of our probable cause standard; rather, efforts to comply with the constitutional mandate have been enhanced. Nor do we perceive that the application of the exclusionary rule has in any significant way impaired the ability of law-enforcement officials to enforce the criminal laws."[245]

The New Jersey Supreme Court does not recognize a good faith exception to the exclusionary rule as it interprets Article I, paragraph 7 of the New Jersey Constitution. In *Novembrino* New Jersey's Supreme Court iterated this by stating:

"Because we believe that the good faith exception to the exclusionary rule adopted in *Leon* would tend to undermine the constitutionally guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our criminal justice system to accommodate that constitutional guarantee without impairing law enforcement, we decline to recognize a good faith exception to the exclusionary rule."[246]

The New Jersey appellate courts would affirm the trial judge's suppression order applying "adequate and independent" state constitutional grounds, under Article I, paragraph 7 of the New Jersey Constitution. Armando and Patsy would not be convicted in New Jersey

244. *Novembrino*, 519 A.2d at 837n.11.
245. *Id.* at 855.
246. *Id.* at 856-857.

IX. Summary & Recommendations

The Florida constitutional amendment which construes state constitutional search and seizure rights "in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court," mandates uniformity of interpretation and application. In fact, it enslaves Article I, section 12 of the Florida Constitution and the Florida State Courts to interpretations of the Fourth Amendment by the United States Supreme Court. The *Leon* good faith exception to the exclusionary rule ensnares Armando and Patsy in Florida. The state trial judge's order allowing the motion to suppress would be reversed by the Florida appellate courts. Armando and Patsy probably would be convicted in Florida.

The Georgia State legislature mandates the exclusionary rule in the OCGA section 17-5-30. The Georgia Supreme Court, in *Gary*, did not apply the *Leon* good faith exception to the exclusionary rule. The judicially created *Leon* good faith exception to the exclusionary rule does not apply in Georgia because Georgia's exclusionary rule is legislatively created. Georgia State courts, using adequate and independent state grounds, OCGA section 17-5-30, resolve search and seizure questions in total reliance on the state statute without considering *Leon*. The state statute, OCGA section 17-5-30, imposes greater requirements upon Georgia law enforcement officers than that required by the Fourth Amendment as interpreted by the United States Supreme Court in *Leon*. The state trial judge in Georgia allows the defense motion to suppress on the basis of OCGA section 17-5-30. Georgia appellate courts would affirm, by also applying the state statute.

The South Carolina Supreme Court declines to apply the *Leon* good faith exception to the exclusionary rule if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause. If a *Johnson* hearing produces no evidence of oral sworn testimony having been presented to the magistrate regarding the informant's reliability, then the South Carolina trial judge's order of suppression would be affirmed by the South Carolina appellate courts. Either Article I, section 10 of the South Carolina Constitution or South Carolina Statute section 17-13-140 provides an adequate and independent state ground for the ruling.

North Carolina State courts interpret search and seizure questions by applying "adequate and independent" state grounds. There is no *Leon* good faith exception to the exclusionary rule in

Article I, section 20 of the North Carolina Constitution. North Carolina appellate courts would affirm the trial court's order allowing the motion to suppress.

Virginia courts embrace the *Leon* good faith exception to the exclusionary rule as "an accepted component of Virginia law."[247] No distinction is drawn between Article I, section 10 of the Virginia Constitution and the Fourth Amendment for purposes of good faith analysis.[248] Virginia appellate courts would reverse the trial court's order allowing the motion to suppress. The evidence would be admissible at trial under the *Leon* good faith exception to the exclusionary rule. Armando and Patsy probably would be convicted in Virginia.

The New Jersey Supreme Court does not recognize a good faith exception to the exclusionary rule as it interprets Article I, paragraph 7 of the New Jersey Constitution.[249] New Jersey appellate courts would affirm the trial judge's order of suppression.

X. CONCLUSION

This thesis proves that a criminal defendant, in a factual situation that resembles *Leon,* can expect disparate results on a motion to suppress in six eastern seaboard state courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey. The state supreme courts in each of these states assess probable cause by use of search and seizure provisions in state constitutions and statutes. State courts that adopt the *Leon* good faith exception to the exclusionary rule would convict the defendants (Florida and Virginia). The defendants would succeed in an appellate review of a suppression hearing in New Jersey, North Carolina, South Carolina and Georgia, if the state supreme court applies "adequate and independent" state grounds to decide the case.

The "adequate and independent" state grounds include the state constitution in New Jersey (Article I, paragraph 7) and in North Carolina (Article I, section 20). Georgia courts apply a legislatively mandated exclusionary rule, OCGA section 17-5-30. Either Article I, section 10 of the South Carolina Constitution or the Code of Laws of South Carolina section 17-13-140 provides an

247. Tart v. Commonwealth, 437 S.E.2d 219, 224 (Va. Ct. App. 1968).
248. Janis v. Commonwealth, 472 S.E.2d 649, 652 (Va. Ct. App. 1996).
249. State v. Novembrino, 519 A.2d 820, 856 (N.J. 1987).

"adequate and independent" state ground for the South Carolina Supreme Court to reject the *Leon* good faith exception to the exclusionary rule, if the underlying affidavit and a "*Johnson*" hearing fail to establish probable cause.

Is it good or bad that disparate outcomes result in various state trial courts faced with the same facts? The six states in this thesis are separate and distinct sovereignties. Each state has its own constitution. Each state supreme court may interpret its own state constitution and statutes without regard to the federal constitution, so long as Federal Constitutional rights are not diminished.

The disparity also exists between some state trial courts and federal district courts. The principle of federalism envisions two separate and independent judicial systems: federal courts, which construe federal law, and state courts, which construe state law. Prior to *Mapp,* the exclusionary rule did not apply to a state unless that state, on its own initiative, adopted an exclusionary rule by statute or case law. Thus, disparate results in search and seizure cases are part of our legal history.

Senator Sam J. Ervin, Jr., of Watergate fame, formerly a Justice of the North Carolina Supreme Court, explained the historical significance of the exclusionary rule.

> This constitutional guaranty against unreasonable searches and seizures has its roots deeply implanted in the human heart, the common law of England, and the tyrannies perpetrated by government on the people of England and the colonies.
>
> The oldest and deepest hunger of the human heart is for a place where one may dwell in peace and security and keep inviolate from public scrutiny one's innermost aspirations and thoughts, one's most intimate associations and communications, and one's most private activities. This truth was documented by Micah, the prophet, 2,700 years ago when he described the Mountain of the Lord as a place where 'they shall sit every man under his own vine and fig tree and none shall make them afraid.
>
> The common law of England originated in the instincts, the habits, and the customs of the people. Hence, it is not surprising that on emerging from the mists of unrecorded history, the English common law embraced as a fundamental principle that every man's home is his castle and the correlative rule that every man may resist to the utmost unidentified persons who seek to enter his home against his will.
>
> The common-law courts of England . . . authorized searches and seizures only by special warrants, which were based on oaths

> disclosing the reasons for their issuance and describing the places to be searched and the persons or things to be seized.
>
> The courts of England that were independent of the common law, such as the Court of Star Chamber . . . and the Court of High Commission . . . did not respect the principle of the common law that every man's home is his castle.
>
> They authorized searches and seizures by general warrants, which were based on mere suspicion and commanded searches and seizures for the enforcement of particular laws without specifying the places to be searched or the persons or things to be seized. In so doing, the general warrants delegated to the persons executing them the autocratic power to decide according to their own notions what places should be searched, what persons should be arrested, and what things should be seized. . . .
>
> Despite honest beliefs of sincere persons to the contrary, the exclusionary rule is an essential ingredient of the Fourth Amendment. Apart from it, the Amendment's guaranty against unreasonable searches and seizures is worse than solemn mockery, and the Amendment might well be expunged from the Constitution as a meaningless expression of a merely pious hope. . . .
>
> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[250]

Should all trial courts, state and federal, determine and apply probable cause with a uniform standard? Justice Meyer's dissent in *Carter*[251] complained about lack of uniformity. His dissent stated "our state courts create different exclusionary rules depending upon whether the state or federal Constitutions are invoked by a defendant making a suppression motion."[252] *Mapp* mandated that the exclusionary rule would apply in all state courts under the due process clause of the Fourteenth Amendment. *Mapp* created a uniform national standard. *Leon* created a good faith exception to the exclusionary rule that has been adopted in some states and rejected in others. The exception threatens to swallow the rule.

Trial judges know that probable cause review is fact-intensive. As Justice Scalia, dissenting in *Ornelas*, pointed out:

250. Sam J. Ervin, Jr. *The Exclusionary Rule: An Essential Ingredient of The Fourth Amendment,* 1983 SUP. CT. REV. 283, 283-284, 287.

251. *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988).

252. *Id.* at 732, 370 S.E.2d at 567 (Meyer, J., dissenting).

"First, a court must identify all of the relevant historical facts known to the officer at the time of the stop or search; and second, it must decide whether, under a standard of objective reasonableness, those facts would give rise to a reasonable suspicion justifying a stop or probable cause to search."[253]

The majority opinion, written by Chief Justice Rehnquist, stated that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal, but that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[254] The majority opinion cites the need to "maintain control of, and to clarify the legal principles," and "to provid[e] law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[255]

State trial judges must follow the law established by their state supreme courts with regard to the exclusionary rule in search and seizure cases. State supreme courts must write clear decisions. Justice Potter Stewart advised all judges:

"The occupation of a judge requires application of its (the Fourth Amendment) sweeping language to cases presenting the infinite variety of factual situations that arise in real life. The art of being a judge, if there is such an art, is in announcing clear rules in the context of these infinitely varied cases, rules that can be understood and observed by conscientious government officials."[256]

If State Legislatures and Judiciaries will follow this eloquent advice, law-enforcement officials and the citizenry as a whole will be the beneficiaries of clarity, uniformity and consistency in the law.

253. Ornelas v. United States, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting).
254. *Id.* at 698.
255. *Id.* at 697-698.
256. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

April 15, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kiki Dunton	NCPIRG
Jeff Barnhart	NC House
Josh Stein	NC AGO
Greg McLeod	DOJ
Betty Turner	Roy Williams Fan Club
Paul Stock	NC Bankers
Camille Stell	Kennedy Covington
Julie Allen	NC Statewatch
John Phelps	NCLM
Dina DiMaggio	NCBA
Erin Gilbert	SIA

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 15, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Cam Cover	BPMHL
Richard C. Hatch	AARP
Tom Sn'	NCRMA
Andy Ellen	NCRAA

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, April 15, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

HB 26 Camera Defeating License Covers Illegal – *Rep. Miller, Bill Sponsor*

HB 357 No Credit Card Number on Receipts – *Rep. Barnhart, Bill Sponsor*

HB 798 Securities transfer on Death – *Rep. Moore, Bill Sponsor*

3. **Adjourn.**

House Judiciary II

Committee

Minutes

April 22, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and turned the meeting over to Rep. Goodwin to chair, while he explained his bill, **HB 1151** (Improve Rule-Making Process).

Rep. Nesbitt told the committee that, in 1995, the General Assembly made substantial revisions to the permanent rulemaking process. The most significant change was the provision that delayed the effective date of all permanent rules until the 31St legislative day of the next regular session of the General Assembly that begins at least 25 days after the RRC approves the rule, unless a legislator introduces a bill to disapprove the rule.

The fact that it can now take as much as 18 months for an uncontested rule to become effective led to a proliferation of temporary rules. The Joint Legislative Administrative procedure Oversight Committee appointed a subcommittee to consider ways to reduce the number of temporary rules and to limit the delayed effective date of permanent rules. Because of the late adjournment of last year's session, the subcommittee did not meet.

Rep. Nesbitt asked that all parties outside the committee express their concerns about the bill.

Rep. Goodwin recognized Dan Oakley, General Counsel for the Department of Environment and Natural Resources. He said he was concerned about the time limits that are in **HB 1151**, specifically the 180 day period that would be necessary to try to get a temporary rule in place following a regulation change through a court order.

Mr. Oakley was also concerned about switching review of the temporary rules from the codifier of the rules to the Rules Review Commission. He said the codifier of the rules is a permanent position and can more quickly address concerns under the rules review process.

Thirdly, he would like to look further at the types of rules that would go through the "speedier" process, the ones called non-controversial. He would like for that category to be expansive as possible.

Lastly, he had concerns for adding more criteria to the rule-review process, again trying to simplify the rule-making process, perhaps in reducing, rather than increasing the level of review.

Rep. Nesbitt asked Mr. Oakley about the Codifier of Rules versus the Rules Review Commission. Mr. Oakley said the Codifier was about to address, on a timelier manner than the Rules Review Commission.

Rep. Goodwin recognized Satana Deberry, general counsel for the Department of Health and Human Services. She said, although she understood the concerns about the proliferation of temporary rules, that sometimes that is the only way to comply with federal regulations or a situation where the public health and welfare would be impacted. She was also concerned about whether the Rules Review Commission had the expertise to determine whether or not a rule is in the public's safety and welfare. Right now there are three criteria for rules: that a rule is clear and unambiguous, has statutory authority, and is reasonable and necessary. Those are fairly clear-cut, however, the substantive part of the rule is important.

Rep. Nesbitt asked if anyone had written proposals for changes to the bill.

Rep. Bonner asked Ms. Deberry if temporary rules don't address her concerns.

She said that her reading of determination of the public's health, safety, and welfare was very narrow and there may be disagreement on what is in the public's health, safety and welfare. For example, her department has promulgated rules to add some vaccines to the list of vaccines that a child may have or to add to their list of diseases that if a person comes into the hospital with, it would have to be reported to the Public Health Department. She said there could be some disagreement on whether or not this vaccine is necessary and reasonable. There may also be some medical concerns about this.

Rep. Goodwin recognized David Knight representing the Sierra Club.

Mr. Knight said he believes this bill is an attempt to start some reform in the APA process, and certainly he is not against that. But he said he felt that this bill is not fair to the environmental community and that he had the same concerns that other had stated before. He said he felt that this legislation would handcuff agencies while at the same time, expanding the power of the Rules Review Commission. He would like to continue to work with the bill sponsor to make some changes to the bill. Mr. Knight said he would like to see the matter go into a study.

Rep. Nesbitt said that rules review had been studied by everyone for the past fifteen years and he would like to move the bill out of committee this week.

Andy Allen with the N. C. Retail Merchants' Association was recognized. He said he and others had met with staff and Rep. Nesbitt had said he wanted to respond to everyone's concern. He though they had done that. He said the Retail Merchants' Association supports the bill and appreciates the effort that Rep. Nesbitt and Rep. Wilson have put into this legislation.

The following persons spoke in favor of the bill: Joe Deluca, Director of the Rules Review Commission; Judge Julian Mann, Director of the Office of Administrative Hearings; Nick Fountain with the North Carolina Bar Association; Leslie Bevacqua with North Carolina Citizens for Business and Industry (NCCBI); Paul Wilms, with the North Carolina Home Builders' Association; Bob Slocum with the Forestry Association; Rick Zechini with the North Carolina Association of Realtors.

David Knight with the Sierra Club was recognized. He told the committee that he was Co-Chair of the Environmental Section of the Bar Association and that the Bar Association would like to study this issue.

Rep. Goodwin asked staff to explain the bill and recognized Committee Counsel Karen Cochrane-Brown. A copy of the Bill Analysis is a part of these Minutes as *Attachment I.*

Rep. Goodwin recognized Rep. Walend who had a question about how HB 1151 would affect the Certificate of Need (CON). How would this bill affect the adoption of the rules to implement the state medical facilities plans?

Rep. Goodwin recognized Bob Fitzgerald, Director of the Division of Facility Services at the Department of Health and Human Services. He said HB 1151 would severely impact the process of putting medical facilities plans in effect.

Rep. Walend said that while she supports **HB 1151**, she was really concerned about how it would impact CON.

Rep. Farmer-Butterfield was also concerned about how the bill would affect the Certificate of Need process.

Rep. Nesbitt did not understand the problem and asked that the Division of Facility Services put those concerns in writing.

HB 1151 was carried over.

The meeting recessed at 11:00 a.m. to reconvene 15 minutes after Session.

HOUSE BILL 1151: Improve Rulemaking Process.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Nesbitt
Date:	April 22, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***House Bill 1151 amends the Administrative Procedure Act (APA) to revise the procedure for adopting permanent rules to reduce the time required make a rule effective in most cases. The bill changes the procedure for adopting temporary rules and makes them subject to review by the Rules Review Commission. It also creates a procedure for adopting emergency rules and clarifies the role of the Rules Review Commission.***

CURRENT LAW: Article 2A of the APA establishes the procedures for an agency to adopt a rule. The APA authorizes the adoption of temporary and permanent rules. A temporary rule can be adopted very quickly if the agency has a statutory basis to adopt it. Temporary rules are not reviewed by the Rules Review Commission (RRC) and may go into effect as soon as they are entered into the Administrative Code.

Permanent rules have a more lengthy process. In order to adopt a permanent rule an agency must first publish a notice of rulemaking proceeding, which is a statement of the subject matter of the rule, in the North Carolina Register for at least 60 days. The agency must also determine whether the rule has a State or local fiscal impact, or a substantial economic impact, and if it does the agency must prepare or obtain from OSBM a fiscal note. The agency must then publish the notice of text of the rule and accept public comment for at least 30 days. In some cases the agency must also hold at least one public hearing on the rule. The agency may then adopt the rule. The rule is then reviewed by the RRC which determines that the agency has statutory authority to adopt the rule, that the rule is clear and unambiguous, and that the rule is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly. Once the rule is approved by the RRC it may not become effective until the 31st legislative day of the next regular session of the General Assembly that occurs not less than 25 days after approval by the RRC. However, if any member of the General Assembly introduces a bill to disapprove the rule within the first 31 legislative days, it cannot go into effect until an unfavorable action is taken on the bill, or adjournment of the session without enacting the bill.

BILL ANALYSIS: House Bill 1151 revises the temporary and permanent rulemaking process and creates a new category of emergency rule.

The bill makes the following changes regarding temporary rules:

1. Defines the term "recent" to mean 180 prior to the submission of the temporary rule. This is the way OAH currently defines it in their rules.
2. Requires that prior to adoption the agency give notice to interested parties, accept written comments, and hold at least one public hearing.

3. Requires that temporary rules be reviewed by the RRC, using the same standards used for permanent rules. The Commission must conduct the review within 15 days of receipt.

The bill creates a new category of rule called emergency rules for cases of serious and unforeseen threat to public health, safety or welfare. These rules can be adopted using the same procedure currently in effect for temporary rules. The rules will be reviewed by the Codifier of rules and are entered into the Administrative Code by the sixth day after approval. When an agency adopts an emergency rule it must simultaneously commence the process for adopting a temporary rule. Emergency rules become effective when they are entered into the Code and expire after 60 days unless a temporary rule adopted to replace it has been submitted to the Commission.

The bill makes the following changes regarding permanent rules:

1. Eliminates the requirement of publishing a notice of rulemaking proceeding to begin the process for adopting a permanent rule.
2. Provides that permanent rules go into effect on the first day of the month following the month they are approved by the RRC, unless the Commission receives written objections from three or more people. If objections are received, the rules are delayed and subject to legislative disapproval, as under current law. If this occurs, the agency may adopt the rule as a temporary rule if the rule would have qualified as a temporary rule when the process began.
3. The threshold to trigger the substantial economic impact fiscal note is reduced from $5,000,000 to $3,000,000.

The bill makes the following changes regarding the RRC:

1. Gives the Commission authority to review temporary rules using the same standard applied to permanent rules.
2. Adds a fourth standard requiring the Commission to determine whether the rule was adopted in accordance with Part 2 of Article 2A of the APA.
3. Expands the standard of reasonable necessity to include consideration of whether the rule is necessary in light of how specific the underlying statute is, and directs the Commission to restrict its review to the statutory standards.

The act would become effective July 1, 2003, and apply to rules adopted on or after that date.

BACKGROUND:

In 1995, The General Assembly made substantial revisions to the permanent rulemaking process. The most significant change was the provision that delayed the effective date of all permanent rules until the 31st legislative day of the next regular session of the General Assembly that begins at least 25 days after the RRC approves the rule, unless a legislator introduces a bill to disapprove the rule.

The fact that it can now take as much as 18 months for an uncontested rule to become effective led to a proliferation of temporary rules. The Joint Legislative Administrative Procedure Oversight Committee appointed a subcommittee to consider ways to reduce the number of temporary rules and to limit the delayed effective date of permanent rules. Because of the late adjournment of last year's session, the subcommittee did not meet.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1151

Short Title: Improve Rule-Making Process. (Public)

Sponsors: Representatives Nesbitt, C. Wilson, and Culpepper (Primary Sponsors).

Referred to: Judiciary II.

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO REVISE THE PROCEDURE FOR ADOPTING PERMANENT AND TEMPORARY RULES, TO CREATE A PROCEDURE FOR THE ADOPTION OF EMERGENCY RULES, AND TO CLARIFY THE ROLE OF THE RULES REVIEW COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-20(c) reads as rewritten:

"(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the ~~notice of rule-making proceedings~~ notice of text it publishes in the North Carolina Register may state that the agency is initiating ~~rule-making proceedings~~ rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes ~~after the notice of rule-making proceedings~~ may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text."

SECTION 2. G.S. 150B-21.1 reads as rewritten:

"**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. – An agency may adopt a temporary rule ~~without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical~~ when it finds that adherence to the notice and hearing requirements of ~~this Part~~G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

~~(1) A serious and unforeseen threat to the public health, safety, or welfare.~~

(2) The effective date of a recent act of the General Assembly or the United States Congress.
(3) A recent change in federal or State budgetary policy.
(4) A recent federal regulation.
(5) A recent court order.
(6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

~~An agency must prepare a written statement of its findings of need for a temporary rule. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the rule.~~

~~(a1) Notwithstanding the provisions of subsection (a) of this section, the Wildlife Resources Commission may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical to protect the public health, safety, or welfare, conserve wildlife resources, or provide for the orderly and efficient operation of game lands by establishing any of the following:~~

(7) The need for the Wildlife Resources Commission to establish any of the following:
~~(1)~~a. No wake zones;
~~(2)~~b. Hunting or fishing seasons;
~~(3)~~c. Hunting or fishing bag limits;
~~(4)~~d. Management of public game lands as defined in G.S. 113-129(8a).

~~When the Wildlife Resources Commission adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules~~

(8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes and to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association for the purpose of promoting uniformity of state securities regulation. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~
~~(2) Accept oral and written comments on the proposed temporary rule; and~~
~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a3) Notwithstanding the provisions of subsection (a) of this section, the Commissioner of Insurance may adopt a temporary rule~~

(9) The need for the Commissioner of Insurance to implement the provisions of ~~G.S. 58-2-205~~ G.S. 58-2-205.~~after prior notice or hearing or upon any abbreviated notice or hearing. When the Commissioner adopts a temporary rule pursuant to this subsection, the Commissioner must submit the reference to this subsection as the Commissioner's statement of need to the Codifier of Rules.~~

~~(a4) Notwithstanding the provisions of subsection (a) of this section, the State Chief Information Officer may adopt temporary rules~~

(10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Officer shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Officer adopts a temporary rule pursuant to this subsection, the Officer must submit a reference to this subsection as the Officer's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Officer in accordance with this subsection.~~

~~(a5) Notwithstanding the provisions of subsection (a) of this section,~~

(11) The need for the State Board of Elections ~~may~~ to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

~~(1)~~a. In accordance with the provisions of G.S. 163-22.2.

~~(2)~~b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.

~~(3)~~c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

~~When the State Board of Elections adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a6) Expiration by Session Laws 2001, ch. 421, s. 5.3, effective June 30, 2002.~~

~~(a7) Notwithstanding the provisions of subdivision (a)(2) of this section,~~

(12) The need for an agency ~~may~~ to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

a. Repealed by Session Laws 2000, ch. 148, s. 5, effective July 1, 2002.

b. **(Repealed effective July 1, 2003)** Article 34B of Chapter 115C of the General Statutes, relating to qualified zone academy bonds.

~~(a8) (Expires on June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(13) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules concerning the permitted height of mobile and modular homes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a9) (Expires June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(14) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules pursuant to G.S. 113A-11(b) to establish a class of minimum criteria projects.

~~After having the proposed temporary rule published in the North Carolina Register, and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall do all of the following:~~

~~(1) Notify persons on its mailing list, maintained pursuant to G.S. 150B-21.2(d), and any other interested parties, of his intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary shall submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a10) (Expires on October 1, 2004) Notwithstanding the provisions of subsection (a) of this section,~~

(15) The need for the Department of Health and Human Services ~~may~~ to adopt temporary rules concerning the placement of individuals in facilities licensed under Article 2 of Chapter 122C of the General Statutes and the enrollment of providers of services to such individuals in the Medicaid program. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Department shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Department adopts a temporary rule pursuant to this subsection, the Department shall submit a reference to this subsection as the Department's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Department in accordance with this subsection.~~

A recent act, change, regulation, or order as used in subdivisions (2) through (5) of this subsection means an act, change, regulation, or order occurring or made effective no more than 180 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 180-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a1) Unless otherwise provided by law, at least 30 business days prior to adopting a temporary rule, the agency shall:

(1) Submit the rule to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule on the Internet to be posted within five business days.

(2) Notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.

(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.

(4) Hold at least one public hearing on the proposed temporary rule.

An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. – When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the ~~Codifier of Rules.~~ Rules Review Commission. ~~Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a) or (a1) of this section.~~ Within 15 business days after receiving the proposed temporary rule, the Commission or its designee must review the agency's written statement of findings of need for the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9. The Commission's designee shall be a member of the Commission or Commission staff who is an attorney licensed to practice law in North Carolina. In reviewing the statement, the ~~Codifier of Rules~~Commission or its designee may consider any information submitted by the agency or another person. If the ~~Codifier of Rules~~ Commission or its designee finds that the statement meets the ~~criteria,~~criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9, the ~~Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.~~Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

If the ~~Codifier of Rules~~Commission or its designee finds that the statement does not meet either the ~~criteria,~~ criteria listed in subsection (a) of this section or the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the ~~Codifier of Rules~~Commission or its designee must review the additional findings or new statement within ~~one business day~~five business days after the agency submits the additional findings or new statement. If the ~~Codifier of Rules~~Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) ~~or (a1)~~ of this ~~section,~~ section or the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the ~~agency.~~agency and return the rule to the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the ~~Codifier of Rules~~ Commission or its designee that the agency's findings of need for a rule do not meet either the required ~~criteria,~~ criteria or the required standards, the agency must notify the ~~Codifier of Rules~~Commission or its

designee of its decision. ~~The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.~~ The Commission or its designee shall then return the rule to the agency. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) ~~or (a1)~~ of this section and whether the rule meets the standards in ~~G.S. 150B-21.9 that apply to review of a permanent rule.~~ G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

(3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.

(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.

(5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. ~~Publication of a temporary rule in the North Carolina Register serves as a notice of rule making proceedings for a permanent rule if the permanent rule is substantially the same as the published temporary rule, unless the agency published a notice of rule making proceedings at least 60 days before it adopted the temporary rule.~~"

SECTION 3. Part 2 of Article 2A of Chapter 150B of the General Statutes is amended by adding a new section to read:

"**§ 150B-21.1A. Adoption of an emergency rule.**

(a) Adoption. – An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be

contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health, safety, or welfare. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a1).

(b) Review. – An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a

copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.

(3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.

(4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register."

SECTION 4. G.S. 150B-21.2 reads as rewritten:

"**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. – Before an agency adopts a permanent rule, it must take the following actions:

(1) Publish a notice of ~~rule-making proceedings~~ text in the North Carolina ~~Register, unless the proposed rule is substantially the same as a temporary rule published in the North Carolina~~ Register.

(2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

~~(3) Publish the text of the proposed rule in the North Carolina Register.~~

(4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.

(5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

~~(b) Notice of Rule-Making Proceedings. – A notice of rule-making proceedings published in the North Carolina Register must include all of the following:~~

~~(1) A statement of the subject matter of the proposed rule making.~~

~~(2) A short explanation of the reason for the proposed action.~~

~~(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.~~

~~(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.~~

~~Publication in the North Carolina Register of an agency's rule-making agenda satisfies the requirements of this subsection if the agenda includes the information required by this subsection.~~

(c) ~~Text After Notice of Rule-Making Proceedings.~~ Notice of Text. – A notice of the proposed text of a rule must include all of the following:

(1) The text of the proposed rule.

(2) A short explanation of the reason for the proposed rule.
(3) A citation to the law that gives the agency the authority to adopt the rule.
(4) The proposed effective date of the rule.
(5) The date, time, and place of any public hearing scheduled on the rule.
(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.
(8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
(9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

~~An agency shall not publish the proposed text of a rule until at least 60 days after the date the notice of rule making proceedings for the proposed rule was published in the North Carolina Register.~~

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of ~~rule making proceedings or the~~ text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice ~~of rule making proceedings~~ on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and ~~all the following apply:~~

~~(1) The notice of text does not schedule a public hearing on the proposed rule.~~
~~(2)~~ ~~The~~ the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.
~~(3) The proposed text is not a changed version of proposed text the agency previously published in the course of rule making proceedings but did not adopt.~~

An agency may hold a public hearing on a proposed rule in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall

publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – ~~An agency must accept comments on a notice of proposed rule making proceedings published in the North Carolina Register until the text of the proposed rule that results from the notice is published.~~ An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register ~~and that requires a fiscal note under G.S. 150B-21.4(b1)~~ for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. ~~An agency must accept comments on the text of any other proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer.~~ An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on ~~either the notice of rule-making proceedings or~~ the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within ~~30~~ 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule."

SECTION 5. G.S. 150B-21.3 reads as rewritten:

"**§ 150B-21.3. Effective date of rules.**

(a) Temporary and Emergency ~~Rule.~~ Rules. – A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. – A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section.

(b1) Delayed Effective Dates.– If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives objections from three or more persons clearly requesting review by the legislature in accordance with instructions contained in the notice pursuant to G.S. 150B-21.2(b)(9) and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.

(c) Executive Order Exception. – The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission ~~and has not become effective under subsection (b)~~ but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule

made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. – Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

(d) Legislative Day and Day of Adjournment. – As used in this section:

(1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.

(2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution for more than 10 days.

(3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. – A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. – A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission."

SECTION 6. G.S. 150B-21.4(b1) reads as rewritten:

"(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule

change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least ~~five million dollars ($5,000,000)~~ three million dollars ($3,000,000) in a 12-month period."

SECTION 7. G.S. 150B-21.5 reads as rewritten:

"**§ 150B-21.5. Circumstances when notice and rule-making hearing not required.**

(a) Amendment. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

(1) Reletter or renumber the rule or subparts of the rule.

(2) Substitute one name for another when an organization or position is renamed.

(3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.

(4) Change information that is readily available to the public, such as an address or a telephone number.

(5) Correct a typographical error in the North Carolina Administrative Code.

(6) Change a rule in response to a request or an objection by the ~~Commission.~~ Commission, unless the Commission determines that the change is substantial.

(b) Repeal. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

(1) The law under which the rule was adopted is repealed.

(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.

(3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. – The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of ~~rule-making proceedings or a~~

~~notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. – The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice ~~of rule-making proceeding~~ in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

(1) A statement of the subject matter of the proposed rule making.

(2) A short explanation of the reason for the proposed action.

(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.

(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice ~~and hearing~~ of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3."

SECTION 8. G.S. 150B-21.8 reads as rewritten:

"**§ 150B-21.8. Review of rule by Commission.**

(a) ~~Temporary~~ Emergency Rule. – The Commission does not review a ~~temporary~~an emergency rule.

(b) Temporary and Permanent ~~Rule.~~ Rules. – An agency must submit a temporary and permanent ~~rule~~ rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a ~~permanent~~ rule.

(c) Scope. – When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment."

SECTION 9. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly, when considered in light of (i) the cumulative

effect of all rules adopted by the agency related to the specific purpose for which the rule is ~~proposed and~~ proposed, (ii) the legislative intent of the General Assembly in delegating the ~~duty.~~duty, and (iii) the specificity of the statute which provides the underlying basis for the rule.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

~~The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article.~~ The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

~~The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article.~~

(b) Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1."

SECTION 10. G.S. 150B-21.17(a) reads as rewritten:

"(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Temporary rules entered in the North Carolina Administrative Code.

(1a) ~~Notices of rule-making proceedings, the~~ The text of proposed ~~rules,~~ rules and the text of permanent rules approved by the Commission. ~~Except with regard to notices of rule-making proceedings, this subdivision does not apply to the North Carolina State Building Code.~~

(1b) Emergency rules entered into the North Carolina Administrative Code.

(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.

(3) Executive orders of the Governor.

(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.

(5) Orders of the Tax Review Board issued under G.S. 105-241.2.

(6) Other information the Codifier determines to be helpful to the public."

SECTION 11. This act becomes effective July 1, 2003, and applies to rules adopted on or after that date.

4-22-03
IV

NCDENR

North Carolina Department of Environment and Natural Resources

Michael F. Easley, Governor

April 22, 2003

William G. Ross Jr., Secretary

To: Representative Martin Nesbitt

From: Dan Oakley DCO

Re: Written Comments on HB 1151

Proposed language changes to HB 1551

1) Page 5, line 31—replace "180" with "270"

Comment—This change allows commissions, which may meet infrequently, more time to get the temporary rule to the Rules Review Commission. Temporary rules will now require a comment and hearing process, which may be difficult to complete in 180 days.

2) Page 8, lines 2-5—delete sentence requiring agency to begin adoption of temporary rule following the adoption of an emergency rule.

Page 9, lines 7, 8, 9—replace "temporary" with "permanent"

Page 9, lines 11-13—delete subparagraph (d)(4)

Page 9, lines 11—add the following language:

"(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the emergency rule.
(5) 270 days from the date of the emergency rule was published in the North Carolina Register, unless the permanent rule adopted to replace the emergency rule has been submitted to the Commission."

Comment—The above changes track the Senate version of this bill, and allow "emergency" rules to be followed by permanent rules. This avoids a three-part process of emergency rule, followed by temporary rule, followed by permanent rule.

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3) Page 9, lines 16-17—add a new subsection (f)

"(f) Rulemaking Authority – Whenever an agency has been granted temporary rulemaking authority other than through this Article, that authority shall continue.

Comment—The addition of this section would clarify that current authority to adopt temporary rules, wherever it exists, would be extended. N/A

4) Page 16, lines 2-5—delete the proposed changes to the existing APA.
Page 16, lines 17-21—delete the overstrike, and leave paragraph as it is now in the APA.

Comment—The addition of a new review criterion to the RRC review is unnecessary, and is potentially inconsistent with the already-existing requirement in G.S. 150B-21.9(a)(1) to review the authority of the agency. In addition, there appears to be no reason to strike the existing last paragraph of G.S. 150B-21.9(a). – new criteria

5) Page 12, lines 32—delete "three or more persons" and replace with "six or more separate persons".

Comment—This would increase the potential for a permanent rule that is not objectionable to become effective more quickly, without Legislative review.

Thank you for the opportunity to provide these comments. Hopefully, they are all consistent with the premise of the bill to improve the APA and tighten up on temporary rule-making.

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, April 22, 2003
10:00 a.m. and 15 minutes after Session
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bill:**

   HB 108 Habitual Misd. Larceny/Felony – *Rep. Moore, Bill Sponsor*
   HB 1102 Record Closed Sessions – *Rep. Grady, Bill Sponsor*
   HB 1151 Improve Rule-Making Process – *Rep. Nesbitt, Bill Sponsor*

3. **Adjourn.**

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 22, 2003 10:00a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John McHugh	Gov office
Jeff Gray	AOC/MCDJ
Julian Mann	OAH
JOE DELUCA	NC RRC
Nick Fountain	NC Bar Assn
Molly Masich	OAH
Camille Winston	OAH
Sandra Hong	Martin Marietta
MG Binker	News + Record
Leslie Berlanga	NCCBI
Kathie Austin	FRD

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 22, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Stan Wall	Conservation Council
Kari Barsness	NCDENR
Robin Smith	NC DENR
Dan Oakley	NC DENR
Steve Hoffman	NCSBA
Molly Diggins	NC Sierra Club
David Knight	"
Doug Cassiter	NCSTA
Chris Nichols	Hunton + Williams
Rob Lamm	HHS
Tatana Debary	HHS

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 22, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Ellen	NCRMA
Nancy Thompson	MCIC
Stephanie Simpson	NCAR
Julie Allen	NC Statewatch
R Rogers	DENR
Pricy Harrison	CRC
Susan Harrison	WCPSS
Hawley Truax	office of the Governor
Andy Romeact	NCLM
Katherine Davis	EC
Ron Aycock	NCACC

J11

4/22/03

House Pages

1. Name: Disheeka Powell

   County: Edgecombe

   Sponsor: Farmer-Butterfield

2. Name: _____

   County: _____

   Sponsor: _____

3. Name: _____

   County: _____

   Sponsor: _____

4. Name: _____

   County: _____

   Sponsor: _____

5. Name: _____

   County: _____

   Sponsor: _____

Sgt-At-Arms

1. Name: JAMES WORTH
2. Name: Bill Sullivan
3. Name: _____
4. Name: _____

The meeting was reconvened at 5:15 p.m.

Rep. Nesbitt called the meeting to order and recognized Rep. Grady to explain **HB 1102** (Record Closed Sessions). A proposed committee substitute was handed out and there was a motion to adopt the proposed committee substitute for discussion and the motion passed.

Rep. Grady said his bill would amend the public meetings law to require a public body that meets in closed session to make both a general written account and a sound or video-and-sound recording of the closed session. This tape would be retained for two years. He said a board may decide to never release Minutes. If someone wants to see the Minutes, they have to go to court and get a judge to decide.

Committee Counsel, Jeff Hudson gave an explanation of the bill. The Bill Analysis is a part of these Minutes as *Attachment I.*

Rep. Ellis moved to give the proposed committee substitute a favorable report and the original bill an unfavorable report. He said he felt this bill would restore confidence in public officials.

Rep. Bordsen said she strongly supports the bill, but Rep. Walend, as a former County Commissioner, said she did not see a need for it. Rep. Farmer Butterfield also supported the bill.

Mr. Elliot Potter, Editor of the *Jacksonville Daily News,* was recognized.
He said he believed a recording would be the best way for the public to get the truth about what has transpired behind closed doors. Minutes are subject to human limitations and the memories of some.

He told the committee of two instances which occurred in Onslow County in which the Board of Education had a closed session to discuss a student transfer. In the course of that session, board members began arguing loudly, not about a student, however, but about a pay raise that they had given themselves retroactively. This pay raise had been put into effect without public knowledge. A disgruntled board member said she objected to the way the raise and the way it had been handled. The School Board chairman denied all of this and after his paper filed a complaint, the State Appeals Court ruled that there had been a violation of the Open Meeting Law. However, this case cost the newspapers several thousands of dollars in legal fees. It also served to greatly undermine the public's confidence in the Board of Education.

What really happened in that meeting was never revealed. A recording would have clarified the content of discussion behind closed doors and it would have stopped this problem before it ever became an issue.

He said there is another example that is slightly different, which involved the Onslow County Hospital Authority. The hospital CEO was eventually fired when, among other things, the Board members accused him of acquiring a piece of property without prior authorization. The CEO claimed that he did have authorization. When they went back

to the Minutes, they were so ambiguous that no one knew what he had been authorized to do. That issue is in a lawsuit that involves Onslow County Hospital and the CEO. Again, he said, this situation could have been avoided if there had been a recording.

Rep. Nesbitt said simply knowing that there is a video tape recording will deter bad behavior.

Andy Romanet with the North Carolina League of Municipalities was recognized. He said that the League opposed **HB 1002**.

Rep. Stam said "Very briefly, I support the bill and will take just a tiny amount of time because it looks like most of us support it."

He said he'd been thinking about archeology some in the last couple of weeks and one thing that occurred to him was that a thousand years from now what will they know about our city councils? "Pretty much everything is going to be discarded except this stuff that nobody wanted them to know about. Good bill."

Opponents of the bill included Hugh Tilson with the North Carolina Hospital Association, Estherine Davis with ElectricCities of North Carolina, Inc., and Leanne Winner on behalf of the School Board Association.

Rep. Ellis' motion to give the proposed committee substitute a favorable report, the orginal bill and unfavorable report was before the committee and subsequently passed.

HB 1151 (Improve Rule-Making Process) sponsor by Rep. Nesbitt, was again before the committee and Rep. Moore presided.

Rep. Nesbitt was recognized to comment on the bill. He said there were a number of ideas presented to him by the persons who had spoken at the committee's morning meeting.

He had a copy of an amendment passed out concerning the State Medical Facilities Plan. A copy of that amendment is a part of these Minutes as *Attachment II.*

He asked for comments from Committee Counsel, Karen Cochrane-Brown, as to what the amendment would do. She said the 4-page amendment relates to and addresses various issues raised about the State Medical Facilities Plan.

Rep. Moore recognized Bob Fitzgerald with the Division of Facilities Services. He suggested that in the language of the amendment, that the "proposed plan" should replace "the plan." Rep. Nesbitt moved to make that change and the motion carried.

Adoption of Rep. Nesbitt's amendment was before the committee and the motion passed.

Rep. Stam moved to amend the bill on page 8, line 2, which deleted the word "welfare" out of the temporary rules. A copy of his amendment is a part of these Minutes as *Attachment III.*

Robin Smith, Assistant Secretary of the North Carolina Department of Environment and Natural Resources, was recognized. She said that the Department would like to see the word "welfare" reinserted in the temporary rulemaking authority so if there were a unforeseen threat to the public welfare, that at least they could do a temporary rule.

Paul Wilms, with the NC Home Builders' Association said the word "welfare" was undefined and provides carte blanc powers to the agency. Rep. Nesbitt said the problem now is that a temporary rule would not be reviewed if someone had a problem with it, but under **HB 1151**, it could be reviewed fairly quickly.

Dan Oakley, General Counsel for NCDENR had a three proposed amendments handed out for **HB 1151**. A copy of his proposed amendments are a part of these minutes as *Attachment IV, V, and VI, respectively.*

Discussion followed about allowing an extension of 90 days to the 180 days that are allowed for the Rules Review Commission to review a rule and for it to be adopted.

Rep. Nesbitt suggested extending the 180 days to 210 days. He said that 60 days is how long an emergency rules can last if an agency has not adopted a temporary rules to replace it.

Paul Wilms said he opposed extension of emergency rule. The 180-day requirement serves to define what is recent.

Rep. Nesbitt said the bill would add a 30-day burden for the agencies.

HB 1151 was carried over and the meeting adjourned at 6:40 p.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

HOUSE BILL 1102: Record Closed Sessions.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Grady
Date:	April 22, 2003	**Summary by:**	Jeff Hudson
Version:	Proposed Committee Substitute H1102-CSSB-13 [v.4]		Committee Counsel

SUMMARY: ***The Proposed Committee Substitute for House Bill 1102 would amend the public meetings law to require a public body that meets in closed session to make both a general written account and a sound or video-and-sound recording of the closed session.***

CURRENT LAW: Under current law, when a public body meets in closed session, it is required to keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what took place at the meeting. The general account of a closed meeting may be written or may be a video or audio recording. The general account of a closed meeting is a public record, but may be withheld from public inspection if disclosure would frustrate the purpose of the closed session.

The definition of "public body" is defined in subsections (b) and (c) of G.S. 143-318.10. (Attached)

The reasons for holding a closed session are set out in G.S. 143-318.11. (Attached)

BILL ANALYSIS: The Proposed Committee Substitute for House Bill 1102 would amend the public meetings law to require a public body that meets in closed session to make both a general written account and a sound or video-and-sound recording of the closed session. The public body must designate a person who is responsible for making and maintaining the written account and sound or video-and-sound recording of the closed session and for certifying that all discussions taking place during the entire closed session are recorded. The public body will maintain the sound or video-and-sound recording of a closed session for at least two years after the recording is disclosed to the public. The Proposed Committee Substitute for House Bill 1102 would also require that the motion to hold a closed session must designate the person who will make and maintain the written account and the sound or video-and-sound recording of the closed session and who will certify that all discussions taking place during the entire closed session are recorded.

EFFECTIVE DATE: The Proposed Committee Substitute for House Bill 1102 becomes effective October 1, 2003.

H1102-SMSB-001

§ 143-318.10. All official meetings of public bodies open to the public.

(a) Except as provided in G.S. 143-318.11, 143-318.14A, 143-318.15, and 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function. In addition, "public body" means the governing board of a "public hospital" as defined in G.S. 159-39 and the governing board of any nonprofit corporation to which a hospital facility has been sold or conveyed pursuant to G.S. 131E-8, any subsidiary of such nonprofit corporation, and any nonprofit corporation owning the corporation to which the hospital facility has been sold or conveyed.

(c) "Public body" does not include (i) a meeting solely among the professional staff of a public body, or (ii) the medical staff of a public hospital or the medical staff of a hospital that has been sold or conveyed pursuant to G.S. 131E-8.

(d) "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.

(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session. (1979, c. 655, s. 1; 1985 (Reg. Sess., 1986), c. 932, s. 4; 1991, c. 694, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 570, s. 1; 1995, c. 509, s. 135.2(p); 1997-290, s. 1; 1997-465, s. 27.)

§ 143-318.11. Closed sessions.

(a) Permitted Purposes. – It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

(1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or not considered a public record within the meaning of Chapter 132 of the General Statutes.

(2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

(4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.

(5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.

(6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance

by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.

(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.

(b) Repealed by Session Laws 1991, c. 694, s. 4.

(c) Calling a Closed Session. – A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

(d) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 570, s. 2. (1979, c. 655, s. 1; 1981, c. 831; 1985 (Reg. Sess., 1986), c. 932, s. 5; 1991, c. 694, ss. 3, 4; 1993 (Reg. Sess., 1994), c. 570, s. 2; 1995, c. 509, s. 84; 1997-222, s. 2; 1997-290, s. 2; 2001-500, s. 2.)

4-22-03
15 min. after Session
Ellis favorable

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1102
PROPOSED COMMITTEE SUBSTITUTE H1102-CSSB-13 [v.4]

4/21/2003 5:17:49 PM

Short Title: Record Closed Sessions. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO IMPLEMENT THE PUBLIC'S RIGHT TO KNOW DETAILS OF CLOSED MEETINGS AFTER THE JUSTIFICATION FOR WITHHOLDING DETAILS HAS PASSED BY ADDING TO THE OPEN MEETINGS LAW A REQUIREMENT TO MAKE AND KEEP RECORDINGS OF ALL CLOSED MEETINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-318.10(e) reads as rewritten:

"(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. ~~Such~~ In an open meeting, the minutes may be in written form or, at the option of the public body, may be in the form of sound or ~~video and sound~~ video-and-sound recordings. When a public body meets in closed session, ~~it shall keep~~the minutes shall be in the form of a general written account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. In addition to keeping a general written account, a public body that meets in closed session shall also make and maintain a sound or video-and-sound recording of the closed session. ~~Such accounts may be a written narrative, or video or audio recordings.~~ The public body shall designate a person or persons to be responsible for making and maintaining the written account and sound or video-and-sound recording of the closed session and for certifying that the entire closed session, including all discussion taking place therein, was duly recorded as required by this subsection. ~~Such minutes and accounts~~ Minutes and sound or video-and-sound recordings made pursuant to this subsection shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that ~~minutes or an account~~ the written account and sound or video-and-sound recording of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed

session. After the sound or video-and-sound recording of a closed session is disclosed to the public, the public body shall maintain the recording for at least two years."

SECTION 2. G.S. 143-318.11(c) reads as rewritten:

"(c) Calling a Closed Session. – A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session. The motion to hold a closed session shall designate a person or persons to make and maintain the written account and sound or video-and-sound recording of the closed session and to certify that the entire closed session, including all discussion taking place therein, was duly recorded as required by G.S. 143-318.10(e)."

SECTION 3. This act becomes effective October 1, 2003.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1151

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H1151-ARO-11 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [YES]
First Edition

Representative Nesbitt

moves to amend the bill on page 1, lines 5-6, by rewriting the lines to read:
"RULES, TO CLARIFY THE ROLE OF THE RULES REVIEW COMMISSION, AND TO EXCLUDE THE STATE MEDICAL FACILITIES PLAN FROM THE DEFINITION OF A RULE.";

and on page 2, lines 6-8, by rewriting the lines to read:
"(6) The need for the rule to ~~become effective the same date as~~ be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.";

and on page 16, lines 26-27, by inserting the following new subsection between the lines:

"(c) The Commission shall review the State Medical Facilities Plan in accordance with the standards set forth in subsection (a) of the section and report its conclusions to the Governor.";

and on page 17, lines 1-2, by inserting the following new sections between the lines:

"SECTION 10.1. G.S. 150B-2(8a) reads as rewritten:
'(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.

The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:
   1. Declaratory rulings under G.S. 150B-4.
   2. Orders of establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.

k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission, and approved by the Governor.';

SECTION 10.2. G.S. 131E-176(25) reads as rewritten:

'(25) "State Medical Facilities Plan" means the plan prepared by the Department of Health and Human Services and the North Carolina State Health Coordinating Council, and approved by the Governor. In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 day prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1151

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H1151-ARO-11 [v.1]

of the Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan.'".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

Attachment III

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1151

AMENDMENT NO. 2
(to be filled in by
Principal Clerk)

H1151-ARO-9 [v.1]

Date 4-22-03 ,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Stam

moves to amend the bill on page 8, line 2, by rewriting the line to read:

"a serious and unforeseen threat to the public health or safety. When an agency".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

Proposed language changes to HB 1151

Page 5, line 31—replace "180" with "270"

Page 9, line 11—replace "sixty" with "ninety"

Comment—These changes allow commissions, which may meet infrequently, more time to complete the new requirements for a temporary rule and to get the temporary rule to the Rules Review Commission. Temporary rules will now require a comment and hearing process, which may be difficult to complete in the times given. Emergency rules will stay in place at least ninety days, where necessary.

Proposed language changes to HB 1151

Page 9, lines 16-17—add a new subsection (f)

"(f) Rulemaking Authority – Whenever an agency has been granted temporary rulemaking authority other than through this Article, that authority shall continue.

Comment—The addition of this section would clarify that current authority to adopt temporary rules, wherever it exists, would be extended.

Oakley Attachment #6

Attachment VI

Proposed language changes to HB 1151

Page 16, lines 2-5—delete the proposed changes to the existing APA.

Page 16, lines 17-21—delete the overstrike, and leave paragraph as it is now in the APA.

> Comment—The addition of a new review criterion to the RRC review is unnecessary, and is potentially inconsistent with the already-existing requirement in G.S. 150B-21.9(a)(1) to review the authority of the agency. In addition, there appears to be no reason to strike the existing last paragraph of G.S. 150B-21.9(a).

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 22, 2003 15 Min. after Session

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
R. Paul Wilms	NCMBA
Rick Zechini	NC Association of Realtors
Bob Stocum	NC Forestry Assn
Mark Binker	News & Record
Elliott Potter	The Daily News, Jacksonville, N.C.
Teri Saylor	NCPA
John Bussian	"
Bradley Bryan	RRC
Joe DeLuca	NC RRC
Leslie Bevacqua	NCCBI
Andy Ellen	NCLMA
Mike Carpenter	NCHSA

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 22, 2003 15 Min. after Session

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Katherine Davis	EC
Molly Diggins	NC Sierra Club
Michelle Frazier	NC Bar Ass'n
Robin Smith	NC DENR
Dan Oakley	NC DENR
Andy Romanet	NCLM
Hugh Tilson	NCHA
Camille Steel	KCCH
Sabra Deberry	NC DHHS
Rob Lawrence	NCDHHS
Bob Fitzgerald	OHHS/DES

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — April 22, 2003 15 Min. after Session

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
David Knight	NC Sierra Club
Leanne Winner	NCSBA
Susan Harrison	WCPSS
Julian Mann	OAH
Jennifer McGinnis	NCGA Research
Stephanie Simpson	NCAR
Molly Masich	OAH
John Mabry	COG Office
Charles Case	Hunton & Williams

VISITOR REGISTRATION SHEET

Name of Committee | Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Dina O'Mara	NCBA
Isabella Bradley	DHHS
Robbie Robbins	NC Fraternal Order of Police
Jeff Gray	" " "
[illegible]	[illegible]
Fred Allen	NC Aggregates Assn.
[illegible]	[illegible]
[illegible]	RRL
[illegible] Tilson	[illegible] NCTA
Lisa Martin	NCHBA
Jerry Hardesty	NC Pork Council
Beth Anne Mumford	NC Pork Council
[illegible]	NC Forestry Assn.
Steve Woodson	NC Farm Bureau
B. Paul Wilmoth	NCMBA
Charles Case	Hunton & Williams
Rick Zechini	NC Assoc. of Realtors

House Judiciary II

Committee

Minutes

April 23, 2003

9:00 a.m. and 15 minutes after Session

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and asked Rep. Goodwin to chair while he continued debate on **HB 1151** (Improve Rule-Making Process) which was carried over from yesterday's meeting.

Karen Cochrane-Brown was asked to explain changes to proposed committee substitute adopted at yesterday's meeting.

She said some language had been added that would preserve temporary rule-making authority. There were concerns raised by the Department of Health and Natural Resources that something in **HB 1151** might limit or restrict the granting of temporary rule-making authority. DEHNR proposed adding a new subsection in the law that specifies that whenever an agency has been granted temporary rule-making authority other than this article, that authority shall continue. The Committee, however felt that this language was too broad and decided to add a new section at the end of the bill on Page 17 – between lines 1 and 2 that reads, "Nothing in this Act shall be construed to limit or repeal any specific grant of temporary rule-making authority to an agency enacted by the General Assembly prior to the effective date of this Act." This language is intended to preserve any temporary rule-making grants that were authorized prior to this Act.

Rep. Nesbitt moved that the amendment reviewed by staff be adopted and the motion passed.

Ms. Cochrane-Brown said the next amendment addresses another concern raised by DEHNR at yesterday's meeting regarding standards that apply to the determination by the Rules Review Commission of what of "reasonably necessary standards", to determine whether or not a rule is necessary.

The amendment proposed by Nesbitt was adopted.

Satana Deberry, legal Counsel with NC DHHS, wanted to amend the bill relating to the conditions of objection to a rule. She would like to see the number of persons required to object to a rule be increased from three to six.

Rep. Nesbitt said he did not want to make it difficult to object to a rule, however, he agreed with Ms. Deberry and moved to amend the bill to increase the number to ten. The motion passed.

The next issue before the Committee was to more clearly indicate what the Rules Review Commission is to do when it considers "reasonably necessary standards." Ms. Cochrane-Brown explained that this redraft relates back to the Administrative Procedures Act's standard language of what a rule is.

Joe Deluca, Director of the Rules Review Commission wanted to make certain that "conditions of objections" included written objections and he was assured that they did.

David Knight with the Sierra Club was recognized and he deferred to Trip Van Noppen, legal counsel with the Southern Environmental Law Center. His proposals to amend **HB 1151** are attached to these Minutes as *Attachment I*.

An extensive discussion followed. Rep. Nesbitt felt that Mr. Van Noppen was fundamentally disapproving of the bill.

Paul Wilms with the Home Builders Association said tht Mr. Van Noppen's proposal would essentially "gut" the bill.

The bill was temporarily displaced.

House **Bill 327** (Increase Penalties/Bomb Offenses.AB) was before the Committee and Rep. Goodwin, the bill sponsor, was recognized to explain his bill.

Rep. Goodwin presented a proposed committee substitute to the Committee and moved for its adoption. The motion passed.

Committee Counsel, Jeff Hudson, was recognized to explain the proposed committee substitute. He said that **HB 327** had been considered by the Committee before. Rep. Goodwin's original bill increased various penalties for bomb offenses to occupied and unoccupied buildings. The proposed Committee Substitute limits the changes in the law to only apply to public buildings.

The new language is on line 17 and is modeled by the language in line 13, which is currently a heightened penalty for damaging a place of worship with an explosive device. The new language applies to various government-owned buildings, which is taken from the current "Arson" statutes relating to public buildings and the penalty in that provision is a Class E felony. Normally that would be a Class G felony, so this raises the penalty to that of a church arson, to a Class E felony.

Rep. Goodwin explained how the bill came to be; that the courthouse in Richmond had been bombed shortly after the terrorists attacks of September 11, 2001.

He moved to give the proposed committee substitute a favorable report, unfavorable to the original bill. The motion passed.

HB 108 (Habitual Misd. Larceny/Felony) was before the Committee for consideration. Rep. Moore, bill sponsor, was recognized to explain his bill.

He said the bill created the offense of "habitual misdemeanor larceny. A person commits this offense if the person is 18 or older, commits misdemeanor larceny and has been convicted of five or more prior misdemeanor larceny convictions. This offense is punishable as a Class H felony. He said the Sentencing Commission supports this change.

Rep. Moore moved to amend the bill and his motion passed. A copy of that Amendment is a part of these Minutes as *Attachment II.*

Rep. Moore moved to combine the bill and the amendment into a proposed committee substitute, that the committee substitute be given a favorable report, the original bill an unfavorable report. The motion passed.

Rep. Goodwin presided as **HB 1151** (Improve Rule-making Process) was again before the Committee.

Mr. Trip Van Noppen, representing the Southern Environmental Law Center, was recognized. He referred to the handout previously before the Committee. He said his proposed amendments would improve and streamline the process. He referred to proposal number 3. He said this wasn't a change to the bill, but was a change to the Administrative Procedures Act itself.

Currently when the Rules Review Commission reviews any amendment to a rule, it can review the entire rule that is being amended, which can be extensive. This creates an obstacle to agencies' improving their rules.

Rep. Nesbitt asked Ms. Cochrane-Brown what, if anything the subcommittee on **HB 1151** had decided to do about review of amendments to rules.

She said the reason that the language was included in 1995 was that in the past, prior to 1995, agencies had the ability to adopt rules over the objections of the Rules Review Commission. So there are a number of rules in the Administrative Code that may have been adopted without statutory authority at all and these are still in place. Unless someone challenges these rules in court, and the court finds them to be invalid, those rules are still being enforced. So this provision would give the Rules Review Commission the strengthened ability to review rules. This would give them the opportunity to review the entire rule so that if it were one of those rules adopted over an objection, it could be fixed.

Mr. Van Noppen said this may be limited to those circumstances, but it is wide-open. Every time there is a change in the makeup of the Commission, its view might change, so the agency will never know whether its rule will be approved or not. It will be constantly reviewed every time there is an amendment.

He said number 5 has to do with "specificity" language. It asks the Commission to look at whether the General Assembly specifically intended for the agency to adopt a rule on the specific purpose of the rule. That goes far beyond what the courts look at in terms of statutory authority; it is far beyond what the General Assembly has previously asked agencies to do. The General Assembly relies on the agency's expertise. He suggested that the Committee eliminate the original bill language that added "specificity."

Mr. Van Noppen's last point had to do with Section 150B-21.9(a)(3). He proposed that the entire section be deleted from the bill.

Rep. Stam wanted to hear from Mr. Deluca about why he felt it was necessary to review the entire rule when an agency proposed an amendment to a rule.

Mr. Deluca said that the laws change over a period of time and there may be something in a rule for which there was originally authority for and was fair and unambiguous but now, in light of further amendments or changes in law are no longer authorized, or now are ambiguous. He said the Commission needs to review the entire rule each time it is appropriately before the Commission.

The meeting recessed at 11:20 a.m. to reconvene 15 minutes as Session.

Attachment I

SOUTHERN ENVIRONMENTAL LAW CENTER

200 WEST FRANKLIN STREET, SUITE 330

CHAPEL HILL, NC 27516

Telephone 919-967-1450
Facsimile 919-929-9421
selcnc@selcnc.org

Charlottesville, VA
Chapel Hill, NC
Atlanta, GA

PROPOSED AMENDMENTS TO H1151

1. **Bill section 2: change the new definition of a recent act in 150B-21.1(a) to read "...no more than 270 days prior to the submission of a proposed temporary rule to the Codifier of Rules, as provided in subsection (a1) of this section. Upon request of the agency, the Codifier may waive the 270-day requirement..."**

This change would set the deadline at the time the agency publishes the proposed rule rather than when the agency submits the proposed rule to the Commission. This would allow the agency to conduct a meaningful public comment process and would afford the agency time to carefully consider the comments received. Without this change, the agency will be forced by the deadline to race through the public comment period, defeating the purpose of adding the comment period to the temporary rulemaking process.

2. **Bill section 2: change the proposed addition to 150B-21.1(b) to remove the 5 references to "and the standards in G. S. 150B-21.9."**

Adding this reference will require the Commission to conduct its full substantive review of temporary rules in the same manner as it will review the substance of the rule when submitted as a permanent rule. The Commission will have an unnecessary duplicate review process. The Commission's substantive review should occur with the permanent rule.

3. **Bill section 8: amend 150-21.8(c) to read: "Scope. When the Commission reviews an amendment to a rule, it may only review the amendment. ~~entire rule that is being amended. The procedure in G. S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment.~~"**

This change would remove an APA provision that unnecessarily subjects entire rules to Commission review any time an agency makes any amendment to the rule. There is no reason that a rule should be repeatedly reviewed every time there is an amendment, especially when previous Commissions have already reviewed the rule. Also, the scope of the existing provision is very unclear – there is no definition of how much of a set of rules are to be reviewed when there is an amendment.

4. **Bill section 9: remove the proposed addition of 150B-21.9(a)(iii), "the specificity of the statute which provides the underlying basis for the rule."**

This criterion is already encompassed by the criterion that the rule must be within the authority delegated to the agency by the General Assembly. The proposed change would cause the Rules Review Commission and the courts to interpret statutory authority much more narrowly than current court decisions provide. The General

Assembly does not always authorize rulemaking is precise and specific language. Instead, the General Assembly often deliberately and properly delegates broad rulemaking authority to agencies.

5. **Bill section 9: delete all of 150B-21.9(a)(3), "~~It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly, when considered in light of the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed and the legislative intent of the General Assembly in delegating the duty.~~"**

This provision in the APA grants the Commission wide-ranging and unlimited authority to make policy judgments, which may be uninformed, about the regulatory choices made by agencies within the agencies' areas of expertise. The Commission's role should be focused on the clarity of the proposed rule and on screening the rule for statutory authority (a function also fulfilled by the courts), not on making policy judgments.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1151

Short Title:	Improve Rule-Making Process.	(Public)
Sponsors:	Representatives Nesbitt, C. Wilson, and Culpepper (Primary Sponsors).	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO REVISE THE PROCEDURE FOR ADOPTING PERMANENT AND TEMPORARY RULES, TO CREATE A PROCEDURE FOR THE ADOPTION OF EMERGENCY RULES, AND TO CLARIFY THE ROLE OF THE RULES REVIEW COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-20(c) reads as rewritten:

"(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the ~~notice of rule-making proceedings~~ notice of text it publishes in the North Carolina Register may state that the agency is initiating ~~rule-making proceedings~~ rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes ~~after the notice of rule-making proceedings~~ may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text."

SECTION 2. G.S. 150B-21.1 reads as rewritten:

"**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. – An agency may adopt a temporary rule ~~without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical~~ when it finds that adherence to the notice and hearing requirements of ~~this Part~~G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

~~(1) A serious and unforeseen threat to the public health, safety, or welfare.~~

(2) The effective date of a recent act of the General Assembly or the United States Congress.
(3) A recent change in federal or State budgetary policy.
(4) A recent federal regulation.
(5) A recent court order.
(6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

~~An agency must prepare a written statement of its findings of need for a temporary rule. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the rule.~~

~~(a1) Notwithstanding the provisions of subsection (a) of this section, the Wildlife Resources Commission may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical to protect the public health, safety, or welfare, conserve wildlife resources, or provide for the orderly and efficient operation of game lands by establishing any of the following:~~

(7) The need for the Wildlife Resources Commission to establish any of the following:
~~(1)~~a. No wake zones;
~~(2)~~b. Hunting or fishing seasons;
~~(3)~~c. Hunting or fishing bag limits;
~~(4)~~d. Management of public game lands as defined in G.S. 113-129(8a).

~~When the Wildlife Resources Commission adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules~~

(8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes and to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association for the purpose of promoting uniformity of state securities regulation. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~
~~(2) Accept oral and written comments on the proposed temporary rule; and~~
~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a3) Notwithstanding the provisions of subsection (a) of this section, the Commissioner of Insurance may adopt a temporary rule~~

(9) The need for the Commissioner of Insurance to implement the provisions of ~~G.S. 58-2-205~~ G.S. 58-2-205.~~after prior notice or hearing or upon any abbreviated notice or hearing. When the Commissioner adopts a temporary rule pursuant to this subsection, the Commissioner must submit the reference to this subsection as the Commissioner's statement of need to the Codifier of Rules.~~

~~(a4) Notwithstanding the provisions of subsection (a) of this section, the State Chief Information Officer may adopt temporary rules~~

(10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Officer shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Officer adopts a temporary rule pursuant to this subsection, the Officer must submit a reference to this subsection as the Officer's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Officer in accordance with this subsection.~~

~~(a5) Notwithstanding the provisions of subsection (a) of this section,~~

(11) The need for the State Board of Elections ~~may~~ to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

~~(1)~~a. In accordance with the provisions of G.S. 163-22.2.

~~(2)~~b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.

~~(3)~~c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

~~When the State Board of Elections adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a6) Expiration by Session Laws 2001, ch. 421, s. 5.3, effective June 30, 2002.~~

~~(a7) Notwithstanding the provisions of subdivision (a)(2) of this section,~~

(12) The need for an agency ~~may~~ to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

a. Repealed by Session Laws 2000, ch. 148, s. 5, effective July 1, 2002.

b. **(Repealed effective July 1, 2003)** Article 34B of Chapter 115C of the General Statutes, relating to qualified zone academy bonds.

~~(a8) (Expires on June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(13) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules concerning the permitted height of mobile and modular homes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a9) (Expires June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(14) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules pursuant to G.S. 113A-11(b) to establish a class of minimum criteria projects.

~~After having the proposed temporary rule published in the North Carolina Register, and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall do all of the following:~~

~~(1) Notify persons on its mailing list, maintained pursuant to G.S. 150B-21.2(d), and any other interested parties, of his intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~
~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary shall submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a10) (Expires on October 1, 2004) Notwithstanding the provisions of subsection (a) of this section,~~

(15) The need for the Department of Health and Human Services ~~may~~ to adopt temporary rules concerning the placement of individuals in facilities licensed under Article 2 of Chapter 122C of the General Statutes and the enrollment of providers of services to such individuals in the Medicaid program. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Department shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Department adopts a temporary rule pursuant to this subsection, the Department shall submit a reference to this subsection as the Department's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Department in accordance with this subsection.~~

A recent act, change, regulation, or order as used in subdivisions (2) through (5) of this subsection means an act, change, regulation, or order occurring or made effective no more than 180 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 180-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a1) Unless otherwise provided by law, at least 30 business days prior to adopting a temporary rule, the agency shall:

(1) Submit the rule to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule on the Internet to be posted within five business days.

(2) Notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.

(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.

(4) Hold at least one public hearing on the proposed temporary rule.

An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. – When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the ~~Codifier of Rules.~~ Rules Review Commission. ~~Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a) or (a1) of this section.~~ Within 15 business days after receiving the proposed temporary rule, the Commission or its designee must review the agency's written statement of findings of need for the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9. The Commission's designee shall be a member of the Commission or Commission staff who is an attorney licensed to practice law in North Carolina. In reviewing the statement, the ~~Codifier of Rules~~Commission or its designee may consider any information submitted by the agency or another person. If the ~~Codifier of Rules~~ Commission or its designee finds that the statement meets the ~~criteria,~~criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9, the ~~Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.~~Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

If the ~~Codifier of Rules~~Commission or its designee finds that the statement does not meet either the ~~criteria,~~ criteria listed in subsection (a) of this section or the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the ~~Codifier of Rules~~Commission or its designee must review the additional findings or new statement within ~~one business day~~five business days after the agency submits the additional findings or new statement. If the ~~Codifier of Rules~~Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) ~~or (a1)~~ of this ~~section,~~ section or the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the ~~agency.~~agency and return the rule to the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the ~~Codifier of Rules~~ Commission or its designee that the agency's findings of need for a rule do not meet either the required ~~criteria,~~ criteria or the required standards, the agency must notify the ~~Codifier of Rules~~Commission or its

designee of its decision. ~~The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.~~ The Commission or its designee shall then return the rule to the agency. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) ~~or (a1)~~ of this section and whether the rule meets the standards in ~~G.S. 150B-21.9 that apply to review of a permanent rule.~~ G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

(3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.

(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.

(5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. ~~Publication of a temporary rule in the North Carolina Register serves as a notice of rule making proceedings for a permanent rule if the permanent rule is substantially the same as the published temporary rule, unless the agency published a notice of rule making proceedings at least 60 days before it adopted the temporary rule.~~"

SECTION 3. Part 2 of Article 2A of Chapter 150B of the General Statutes is amended by adding a new section to read:

"**§ 150B-21.1A. Adoption of an emergency rule.**

(a) Adoption. – An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be

contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health, safety, or welfare. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a1).

(b) Review. – An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a

copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.

(3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.

(4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register."

SECTION 4. G.S. 150B-21.2 reads as rewritten:

"**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. – Before an agency adopts a permanent rule, it must take the following actions:

(1) Publish a notice of ~~rule-making proceedings~~ text in the North Carolina ~~Register, unless the proposed rule is substantially the same as a temporary rule published in the North Carolina~~ Register.

(2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

~~(3) Publish the text of the proposed rule in the North Carolina Register.~~

(4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.

(5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

~~(b) Notice of Rule-Making Proceedings. – A notice of rule-making proceedings published in the North Carolina Register must include all of the following:~~

~~(1) A statement of the subject matter of the proposed rule making.~~

~~(2) A short explanation of the reason for the proposed action.~~

~~(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.~~

~~(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.~~

~~Publication in the North Carolina Register of an agency's rule-making agenda satisfies the requirements of this subsection if the agenda includes the information required by this subsection.~~

(c) ~~Text After Notice of Rule-Making Proceedings.~~ Notice of Text. – A notice of the proposed text of a rule must include all of the following:

(1) The text of the proposed rule.

(2) A short explanation of the reason for the proposed rule.
(3) A citation to the law that gives the agency the authority to adopt the rule.
(4) The proposed effective date of the rule.
(5) The date, time, and place of any public hearing scheduled on the rule.
(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.
(8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
(9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

~~An agency shall not publish the proposed text of a rule until at least 60 days after the date the notice of rule making proceedings for the proposed rule was published in the North Carolina Register.~~

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of ~~rule making proceedings or the~~ text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice ~~of rule making proceedings~~ on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and ~~all the following apply:~~

~~(1) The notice of text does not schedule a public hearing on the proposed rule.~~
~~(2) The~~ the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.
~~(3) The proposed text is not a changed version of proposed text the agency previously published in the course of rule making proceedings but did not adopt.~~

An agency may hold a public hearing on a proposed rule in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall

publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – ~~An agency must accept comments on a notice of proposed rule-making proceedings published in the North Carolina Register until the text of the proposed rule that results from the notice is published.~~ An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register ~~and that requires a fiscal note under G.S. 150B-21.4(b1)~~ for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. ~~An agency must accept comments on the text of any other proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer.~~ An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on ~~either the notice of rule-making proceedings or~~ the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within ~~30~~ 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule."

SECTION 5. G.S. 150B-21.3 reads as rewritten:

"**§ 150B-21.3. Effective date of rules.**

(a) Temporary and Emergency ~~Rule.~~ Rules. – A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. – A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section.

(b1) Delayed Effective Dates.– If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives objections from three or more persons clearly requesting review by the legislature in accordance with ~~instructions~~ contained in the notice pursuant to G.S. 150B-21.2(b)(9) and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.

(c) Executive Order Exception. – The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission ~~and has not become effective under subsection (b)~~ but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule

made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. – Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

(d) Legislative Day and Day of Adjournment. – As used in this section:

(1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.

(2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution for more than 10 days.

(3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. – A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. – A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission."

SECTION 6. G.S. 150B-21.4(b1) reads as rewritten:

"(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule

change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least ~~five million dollars ($5,000,000)~~ three million dollars ($3,000,000) in a 12-month period."

SECTION 7. G.S. 150B-21.5 reads as rewritten:

"**§ 150B-21.5. Circumstances when notice and rule-making hearing not required.**

(a) Amendment. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

(1) Reletter or renumber the rule or subparts of the rule.

(2) Substitute one name for another when an organization or position is renamed.

(3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.

(4) Change information that is readily available to the public, such as an address or a telephone number.

(5) Correct a typographical error in the North Carolina Administrative Code.

(6) Change a rule in response to a request or an objection by the ~~Commission.~~ Commission, unless the Commission determines that the change is substantial.

(b) Repeal. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

(1) The law under which the rule was adopted is repealed.

(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.

(3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. – The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of ~~rule-making proceedings or a~~

~~notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. – The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice ~~of rule-making proceeding~~ in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

(1) A statement of the subject matter of the proposed rule making.

(2) A short explanation of the reason for the proposed action.

(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.

(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice ~~and hearing~~ of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3."

SECTION 8. G.S. 150B-21.8 reads as rewritten:

"**§ 150B-21.8. Review of rule by Commission.**

(a) ~~Temporary~~ Emergency Rule. – The Commission does not review a ~~temporary~~an emergency rule.

(b) Temporary and Permanent ~~Rule.~~ Rules. – An agency must submit a temporary and permanent ~~rule~~ rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a ~~permanent~~ rule.

(c) Scope. – When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment."

SECTION 9. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly, when considered in light of (i) the cumulative

amdmt # 2

effect of all rules adopted by the agency related to the specific purpose for which the rule is ~~proposed and~~ proposed, (ii) the legislative intent of the General Assembly in delegating the ~~duty.~~duty, and (iii) the specificity of the statute which provides the underlying basis for the rule.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

~~The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article.~~ The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

~~The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article.~~

(b) Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1."

SECTION 10. G.S. 150B-21.17(a) reads as rewritten:

"(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Temporary rules entered in the North Carolina Administrative Code.

(1a) ~~Notices of rule-making proceedings, the~~ The text of proposed ~~rules,~~ rules and the text of permanent rules approved by the Commission. ~~Except with regard to notices of rule-making proceedings, this subdivision does not apply to the North Carolina State Building Code.~~

(1b) Emergency rules entered into the North Carolina Administrative Code.

(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.

(3) Executive orders of the Governor.

(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.

(5) Orders of the Tax Review Board issued under G.S. 105-241.2.

(6) Other information the Codifier determines to be helpful to the public."

SECTION 11. This act becomes effective July 1, 2003, and applies to rules adopted on or after that date.

amdmt # 1 Nesbitt

4-23-03

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 327
PROPOSED COMMITTEE SUBSTITUTE H327-CSSB-6 [v.6]

4/22/2003 4:30:45 PM

Short Title: Increase Penalty For Certain Bomb Offenses. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE CRIMINAL PENALTY FOR DAMAGING A PUBLIC BUILDING WITH AN EXPLOSIVE OR INCENDIARY DEVICE OR MATERIAL.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-49 reads as rewritten:

"**§ 14-49. Malicious use of explosive or incendiary; punishment.**

(a) Any person who willfully and maliciously injures another by the use of any explosive or incendiary device or material is guilty of a Class D felony.

(b) Any person who willfully and maliciously damages any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a Class G felony.

(b1) Any person who willfully and maliciously damages, aids, counsels, or procures the damaging of any church, chapel, synagogue, mosque, masjid, or other building of worship by the use of any explosive or incendiary device or material is guilty of a Class E felony.

(b2) Any person who willfully and maliciously damages, aids, counsels, or procures the damaging of the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental entity by the use of any explosive or incendiary device or material is guilty of a Class E felony.

(c) Repealed by Session Laws 1993, c. 539, s. 1149."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

HOUSE BILL 327:
Increase Penalty For Certain Bomb Offenses.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Goodwin
Date:	April 23, 2003	**Summary by:**	Jeff Hudson
Version:	Proposed Committee Substitute H327-CSSB-6 [v.6]		Committee Counsel

SUMMARY: ***The Proposed Committee Substitute for House Bill 327 would increase the criminal penalty for damaging a public building with an explosive or incendiary device or material.***

CURRENT LAW: Under current law, any person who willfully and maliciously damages real property belonging to another by the use of any explosive or incendiary device or material is guilty of a Class G felony (10 to 16 months of intermediate or active punishment). If the property is a building of worship, the penalty is a Class E felony (20 to 39 months of intermediate or active punishment). If the real property is occupied at the time of the damage, the penalty is a Class D felony (51 to 86 months of active punishment).

BILL ANALYSIS: The Proposed Committee Substitute for House Bill 327 (PCS) would provide that any person who willfully and maliciously damages, aids, counsels, or procures the damaging of the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental entity by the use of any explosive or incendiary device or material is guilty of a Class E felony(20 to 39 months of intermediate or active punishment).

EFFECTIVE DATE: This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 108
PROPOSED COMMITTEE SUBSTITUTE H108-CSRO-12 [v.1]

4/21/2003 6:19:48 PM

Short Title: Habitual Misd. Larceny/Felony. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE OFFENSE OF HABITUAL MISDEMEANOR LARCENY.

The General Assembly of North Carolina enacts:

SECTION 1. Article 16 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-86.2. Habitual misdemeanor larceny.**

(a) The following definitions apply in this section:

(1) "Convicted" means the person has been adjudged guilty of or has entered a plea of guilty or no contest to the misdemeanor larceny charge, and judgment has been entered thereon when the action occurred.

(2) "Misdemeanor larceny" includes the following offenses:

a. Misdemeanor larceny pursuant to G.S. 14-72(a).

b. Any repealed or superseded offense substantially equivalent to misdemeanor larceny under G.S. 14-72(a).

c. Any offense committed in another jurisdiction substantially similar to misdemeanor larceny under G.S. 14-72(a).

(b) A person commits the offense of habitual misdemeanor larceny if that person is 18 years of age or older, commits misdemeanor larceny under G.S. 14-72(a), and has been convicted of five or more prior misdemeanor larceny convictions. A person convicted of violating this section is guilty of a Class H felony.

(c) For purposes of this section, if an offender is convicted of more than one offense of misdemeanor larceny in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to establish the offense of habitual misdemeanor larceny.

(d) A violation of this section shall not constitute commission of a felony for purposes of G.S. 14-7.6."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 108

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

H108-ARO-12 [v.1]

Date 4-23-03 ,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Moore

moves to amend the bill on page 2, lines 2-3, by inserting the following between the lines:

"(d) A violation of this section shall not constitute commission of a felony for purposes of G.S. 14-7.6.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

VISITOR REGISTRATION SHEET 6:10pm

House Committee on Judiciary II — APRIL 23, 2003 (After Session)

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Molly Diggins	NC Sierra Club
Trip Van Noppen	So. Env. Law Center
Grady McGuire	N.C. Conservation Network.
Steve Hall	Conservation Council
Satana Deberry	NC DHHS
David Hyde	NC Sierra Club
Beau Mills	NC Metro. Coalition
Robin Smith	NC DENR
Joan Troy	NC WRC
John McHugh	Goldberg
Al Ripley	NC Justice Ctr.
Kari Barsness	NCDENR

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

APRIL 23, 2003 (After Session) — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John McMillan	MFOS
Dick Taylor	NCATL
Susan Valaani	Nationwide
Michelle Frazier	NC Bar Ass'n
Bill Scoggin	KCCH
Julian Mann	OMH
JOE DELUCA	NC RRC
Steve Woodson	NC Farm Bureau
Vanessa Thompson	MCIC
Amy Dobson	NC State Water

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 23, 2003 (After Session)

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Leslie Bowman	NCCBI
Bob Byron	RTRC
R. Neal Wilkins	NCHBA
Andy Ellen	NCRMA
Sandra Long	Martin Marietta
Lori Ann Harris	LAHA
Rick Zechini	NC Assoc. of REALTORS
Molly Masich	OAH

J11

4/23/03

House Pages

1. Name: Brittany Matthews
   County: Harnett
   Sponsor: Lewis
2. Name: Sumner Green
   County: Mecklenburg
   Sponsor: Wilson
3. Name: Casey Best
   County: Wayne
   Sponsor: Pate
4. Name:
   County:
   Sponsor:
5. Name:
   County:
   Sponsor:

Sgt-At-Arms

1. Name: JAMES WORTH
2. Name: Jim Womack
3. Name:
4. Name:

6:15 p.m. The meeting was reconvened.

Rep. Nesbitt called the meeting to order and recognized Rep. Baker to explain **HB 609** (Enhance Elevator & Amusement Device Safety).

Rep. Baker explained that the bill had been requested by the Department of Labor. It is a bill that deals with amusement devices and some issues that the Department felt needed additional legislation.

The bill basically does three things: Section 1. brings under the purview of the inspectors, certain devices that have been excluded in the past. Section 2. Changes the time in which records of maintenance have to be kept. Section 3 increases the length of time in which notification has to be given that notices are going to be posted, to give inspectors more time, Section 4. has to do with amusement device equipment being operated by someone under the influence of alcohol. Section 5. was added in OSHA Committee and deals with fines and penalties. *(See Attachment I. p.m.)*

Rep. Goodwin said that the bill had been before the House Occupational Safety and Health Committee and that committee had a very thorough debate. He said it was a good bill.

Rep. Nesbitt had a question about the penalty under Section 5. Is it common to see a Class 2 misdemeanor carry a maximum penalty of $10,000 on the first offense?

Rep. Stam pointed out that this was federal law, not common.

Barbara Jackson, General Counsel, NC Department of Labor was recognized. She said that language does parallel the Occupational Health and Safety Act. She said, to her knowledge, this has only been used twice.

Rep. Goodwin moved to give **HB 609** a favorable report and the motion carried.

HB 497 (Remove Sunset/Private Correctional Officers) sponsored by Rep. Hunter, was before the Committee for consideration.

Rep. Hunter was recognized. He said HB 497 would remove the sunset on authorizing a private correctional facility or correctional officers to have similar powers as officers in the Department of Correction. DOC must determine that the private company's employment practices meet the minimum standards followed by DOC in hiring its own personnel. The private corporation must maintain liability insurance with a minimum level of $10 million per occurrence, to $25 million aggregate per occurrence. The private corporation must defend, indemnify and hold harmless the State from any claims arising out of the operation of the private facility or granting powers under the act. The corporation must follow certain procedures if an escapee occurs and must reimburse the State and any county or other law enforcement agency, for the full cost of additional

expenses incurred due to an escape. He said Hertford County has asked him to seek authorization to remove this sunset because two years ago Hertford County got a private correctional facility, Water's Training Institution. This bill is just to remove the sunset so that facility can continue to operate.

Rep. Nesbitt wondered if this bill was just limited for the facility in Hertford County and staff confirmed that it was.

Rep. Farmer-Butterfield moved to give the bill a favorable report and the motion carried.

HB 1023 (Underinsured Motorist Coverage) was before the Committee and Rep. Goodwin was recognized to explain his bill.

He handed out a proposed committee Substitute and Rep. Stam moved that it be adopted for consideration. His motion passed.

Rep. Goodwin said there is, to his knowledge, no opposition to the bill. He said it incorporates language that has been shared among all the stakeholders, the insurance industry and the trial lawyers.

Richard Taylor with the Academy of Trial Lawyers was recognized. He referred to a case several years ago where so many persons were hurt in the accident.

The proposed committee substitute for **HB 1023** provides that in a car accident where more than one person is injured, a person injured in the accident may have an underinsured motorist claim if the amount actually paid to the injured person under bodily injury liability insurance is less than the limit of underinsured motorist coverage.

Rep. Stam was concerned about the effective date, but after discussion, he was okay with the language.

Rep. Moore moved to give the PCS a favorable report and the original bill an unfavorable report. The motion passed.

HB 1151 (Improve Rule-Making Process) was again before the Committee.

Rep. Goodwin presided when Rep. Nesbitt made further comments on his bill.

He presented a new proposed committee substitute to the Committee and Rep. Stam moved that it be adopted for consideration. The motion carried. *(See Attachment II)*

Karen Cochrane-Brown was recognized to explain the changes made to the original bill. She said the committee substitute before the Committee included all the changes that the Committee has discussed over the past few days and a few others suggested by the Chairman.

First, the title was changed to exclude the State Medical Facilities Plan from the definition of a rule.

On Page 2, line (1) "health, safety, or welfare," was put back into the bill. Line 8 (6) made clarifying land that rules adopted outside the Plan can be made consistent by a temporary rule.

Then on Page 5, lines 35-37 changes the 180 period to 210 days, taking into account the additional thirty days that are required for notice and comment.

Page 7, Line 10, a new sentence has been added "When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General States." This authorizes the agency to challenge a decision by the Rules Review Commission or have that determination reviewed by a court.

Page 8, Line 11, "welfare" has been deleted. The clarifies that an emergency rule can only be adopted for serious and unforeseen threat to the "public health or safety."

Page 12, Line 34, the number of persons necessary to object to the adoption of a permanent rule is changed from three to ten and it clarifies that it must be a "written" objection.

On Page 16, Line 5, there is new language added that authorizes judicial review when the Rules Review Commission returns a permanent rule to an agency.

One Line 16, "reasonably necessary" removes language "intended by the General Assembly" and basically just refers back to the definition of a rule, incorporating that language into the "reasonably necessary standard" and includes the language that is currently in the law in regard to considering the accumulative effect of all laws adopted by the agency related to that purpose.

On Line 37, "creates a rebuttable presumption" is added.

One Page 17, Section 11 is new and includes the entire definition of a rule. It also excludes the State Medical Facilities Plan from the definition of a rule.

Section 12 amends Chapter 131E-176(25), which deals with CON law and includes the notice and hearing requirements for adoption of the State Medical Facilities Plan.

Section 13 clarifies "Nothing in this act shall be construed to limit or repeal any specific grant of temporary rulemaking authority to an agency enacted by the General Assembly prior to the effective date of this act."

Discussion followed. After considerable discussion about the effective date, Rep. Nesbitt requested a change in the effective date.

Karen Cochrane-Brown said if this bill were enacted, it would seem to be more practical so that agencies could go through the shorter period.

Ultimately, Section 14 on Page 18, Line 42 was changed from "adopted" to "proposed."

Judge Mann felt that for emergency and temporary rules, it should have the effective date of July 1, 2003 so no one could jump on this process and use October 1, 2003 for when process is initiated.

Rep. Goodwin authorized staff to put that language into a new committee substitute.

Rep. Farmer-Butterfield moved to give the proposed committee substitute for HB **1151** a favorable report, unfavorable as to original bill. The motion passed.

There being no further business, the meeting was adjourned at 7:15 p.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Wednesday, April 23, 2003
15 minutes after Session
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

HB 1151 Improve Rule-Making Process – *Rep. Nesbitt, Bill Sponsor*
HB 497 Remove Sunset/Private Correctional Officers – *Rep. Hunter, Bill Sponsor*
HB 609 Enhance Elevator & Amusement Device Safety- *Rep. Baker, Bill Sponsor*
HB 1023 Underinsured Motorist Coverage – *Rep. Goodwin, Bill Sponsor*

Adjourn.

HOUSE BILL 609:
Enhance Amusement Device Safety.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Baker
Date:	April 23, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Second Edition]		Committee Co-Counsel

SUMMARY: ***This bill would remove exemptions for certain devices or attractions from the Amusement Device Safety Act [ADSA], modify provisions relating to notification of use and maintenance of devices, prohibit operation of any device by an impaired operator, and provide penalties for certain provisions. Section 5(i) is effective on December 1, 2003, and applies to offenses committed on or after that date. Section 2 is effective one year after the bill becomes law. The remainder of this act is effective when it becomes law.***

BILL ANALYSIS:

Section 1. The ADSA does not apply to any device that does not normally require the supervision or services of an operator. This section would delete a provision that exempts the following devices and attractions from the ADSA when they are not located in an amusement park or carnival area:

- Hot or cold air inflatable devices
- Bumper boats
- Simulator devices that simulate the movement shown on various video tapes.

Under current law, if any one of the foregoing devices would normally require the supervision or services of an operator, but it is not located in an amusement or carnival area, it is not subject to the provisions of the ADSA. This amendment would make these devices (if they require an operator) subject to the ADSA, regardless of where they are located.

Section 2. This section would require a device owner to maintain, for the previous 12 months, a signed record of required inspection and testing. The current requirement is 30 days.

Section 3. The bill would:

- Require written notice of a planned schedule of operation to be received by the Commissioner of Labor at least 10 days prior to the first planned date of operation or use. This notice is required after initial assembly or reassembly of any device. The current requirement is five days.
- Delete the authorization to give notice of unplanned use by telephone or telegraph to the Commissioner of Labor. Consequently, an owner could not, after initial assembly or reassembly, operate any device for at least 10 days after notifying the Commissioner.

Section 4. This section would amend the law to provide that no operator shall operate amusement device equipment while under the influence of alcohol or any other impairing substance as defined by G.S. 20-4.01(14a) ["alcohol, controlled substance under Chapter 90 . . . any other drug or psychoactive substance capable of impairing a person's physical or mental faculties . . .]. Any person permitting the operation of a device while the operator was under the influence would also be in violation of this provision.

(over)

Section 5. This section would amend the penalty provisions of the act.

- Persons violating the operator requirements under G.S. 95-111.11(a) would be subject to a maximum penalty of $500.
- Persons either operating devices while under the influence, or permitting the operation of a device by an operator who was under the influence, would be subject to a maximum penalty of $1,000.
- Any person who is in willful violation of any provision in the ADSA, and causes the death of any person, would be guilty of a Class 2 misdemeanor and a maximum penalty of $10,000 on a first offense, and a Class 1 misdemeanor with a maximum penalty of $20,000 on a second offense. Prosecution by the State for any offense is not precluded by this section.

Section 6. Section 5(i) is effective on December 1, 2003, and applies to offenses committed on or after that date. Section 2 becomes effective one year after the bill becomes effective. The remainder of this act is effective when it becomes law.

H. Alan Pell, Committee Counsel to the House Occupational Safety and Health Committee, contributed substantially to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 609
Committee Substitute Favorable 4/8/03

Short Title: Enhance Amusement Device Safety. (Public)

Sponsors:

Referred to:

March 24, 2003

A BILL TO BE ENTITLED

AN ACT TO ENHANCE LAWS PERTAINING TO THE AMUSEMENT DEVICE SAFETY ACT OF NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 95-111.2(b) reads as rewritten:

"(b) This Article shall not apply to any device which does not normally require the supervision or services of an operator. ~~Unless they are located in an amusement park or carnival area, the following devices or attractions are exempt from this Article:~~

~~(1) Hot or cold air inflatable devices;~~

~~(2) Bumper boats; and~~

~~(3) Simulator devices that simulate the movement shown on various video tapes.~~"

SECTION 2. G.S. 95-111.5(b) reads as rewritten:

"(b) An owner of a device subject to the provisions of this Article, or his authorized agent, is hereby required to maintain for at least ~~30 days~~ the previous 12 months a signed record of the required pre-opening inspection and test and such other pertinent information as the Commissioner may require by rule or regulation."

SECTION 3. G.S. 95-111.8 reads as rewritten:

"**§ 95-111.8. Location notice.**

No person shall operate for the public or permit the operation for the public any device subject to the provisions of this Article after initial assembly or after reassembly at any location within this State without first notifying the Commissioner of the intention to operate for the public. Written notice of a planned schedule of operation or use shall be received at least ~~five~~ 10 days prior to the first planned date of operation or use. ~~Notice of unscheduled use shall be given immediately to the Commissioner by telephone or telegraph.~~"

SECTION 4. G.S. 95-111.11 reads as rewritten:

"**§ 95-111.11. Operators.**

(a) Any operator of a device subject to the provisions of this Article shall be at least 18 years of age. An operator shall operate no more than one device at any given time. An operator shall be in attendance at all times the device is in operation.

(b) No person shall operate any amusement device equipment while under the influence of alcohol or any other impairing substance as defined by G.S. 20-4.01(14a). It shall be a violation of this subsection to knowingly permit the operation of any amusement device while the operator is under the influence of an impairing substance."

SECTION 5. G.S. 95-111.13 reads as rewritten:

"**§ 95-111.13. Violations; civil penalties; appeal.**

(a) Any person who violates G.S. 95-111.7(a) or (b) (Operation without certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each day each device is so operated or used.

(b) Any person who violates G.S. 95-111.7(c) (Operation after refusal to issue or after revocation of certificate) or G.S. 95-111.10(c) (Reports required) or G.S. 95-111.12 (Liability insurance) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day each device is so operated or used.

(c) Any person who violates G.S. 95-111.8 (Location notice) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) for each day any device is operated or used without the location notice having been provided.

(d) Any person who violates the provisions of G.S. 95-111.10(d) (Reports required) or knowingly permits the operation of an amusement device in violation of G.S. 95-111-11(a) (Operator requirements) shall be subject to a civil penalty not to exceed five hundred dollars ($500.00).

(e) Any person who violates G.S. 95-111.9 (Operation of unsafe device) or G.S. 95-111.11(b) (Operation of an amusement device while impaired) shall be subject to a civil penalty not to exceed one thousand dollars ($1,000).

(f) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person and the record of previous violations.

(g) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail, the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(h) The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, against whom a civil penalty has been ordered, resides, or if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the

same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice.

(i) Any person who willfully violates any provision of this Article, and the violation causes the death of any person, shall be guilty of a Class 2 misdemeanor, which may include a fine of not more than ten thousand dollars ($10,000); except that if the conviction is for a violation committed after a first conviction of such person, the person shall be guilty of a Class 1 misdemeanor which may include a fine of not more than twenty thousand dollars ($20,000). This subsection shall not prevent any prosecuting officer of the State of North Carolina from proceeding against such person on a prosecution charging any degree of willful or culpable homicide."

SECTION 6. Section 5(i) of this act is effective on December 1, 2003, and applies to offenses committed on or after that date. Section 2 of this act becomes effective one year after this bill becomes law. The remainder of this act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 497

Short Title:	Remove Sunset/Private Correctional Officers.	(Public)
Sponsors:	Representative Hunter.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO REMOVE THE SUNSET ON THE AUTHORIZATION FOR CERTAIN PRIVATE CORRECTIONAL OFFICERS TO USE FORCE AND MAKE ARRESTS CONSISTENT WITH NORTH CAROLINA LAW.

The General Assembly of North Carolina enacts:

SECTION 1. Section 7 of S.L. 2001-378 reads as rewritten:

"**SECTION 7.** This act is effective when it becomes ~~law,~~ law and applies to private correctional facilities and the employees of those correctional facilities constructed and contracted to be operated by the effective date of this ~~act, and expires two years after the effective date.~~ act."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1023:
Underinsured Motorist Coverage

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Goodwin
Date:	April 23, 2003	**Summary by:**	Jeff Hudson
Version:	Proposed Committee Substitute H1023-CSSB-17 [v.1]		Committee Counsel

SUMMARY: ***The Proposed Committee Substitute for House Bill 1023 provides that in a car accident where more than one person is injured, an injured person may have an underinsured motorist claim if the total amount actually paid to the injured person under bodily injury liability insurance is less than the limit of underinsured motorist coverage.***

CURRENT LAW: Under current law, an innocent person injured in a car accident does not have an underinsured motorist claim if the liability insurance limit of the person at fault is equal to or greater than the limit of underinsured motorist coverage. This is true even under circumstances where, because there are multiple claims against the liability insurance, the share of the liability insurance proceeds actually paid to the injured person is less than the underinsured motorist limits.

Example 1: There is a car accident caused by Person A that injures Person B. Person A has bodily injury liability insurance with a $300,000 limit. Person B has underinsured motorist insurance with a $300,000 limit. Since Person A's bodily injury liability insurance limit ($300,000) is equal to Person B's underinsured motorist insurance limit ($300,000), Person B does not have an underinsured motorist claim. Person B can still seek to recover up to $300,000 from Person A's bodily injury liability insurance.

Example 2: There is a car accident caused by Person A that causes bodily injury to Person B and three other individuals. Person A has bodily injury liability insurance with a $300,000 limit. Person B has underinsured motorist insurance with a $300,000 limit. Person A's insurance company settles with the three other injured individuals in the amount of $100,000, leaving $200,000 available under Person A's bodily injury liability insurance. Since Person A's bodily injury liability insurance limit ($300,000) is equal to Person B's underinsured motorist insurance limit ($300,000), Person B does not have an underinsured motorist claim. Person B's only recourse is to try to collect from the $200,000 left under Person A's bodily injury liability insurance.

BILL ANALYSIS: The Proposed Committee Substitute for House Bill 1023 provides that in a car accident where more than one person is injured, a person injured in the accident may have an underinsured motorist claim if the total amount actually paid to the injured person under bodily injury liability insurance is less than the limit of underinsured motorist coverage.

This change in the law would not affect the outcome of Example 1 above, but it would affect the outcome of Example 2. Under Example 2, if Person B collected the $200,000 left under Person A's bodily injury liability insurance, this amount would be less than Person B's underinsured motorist insurance limit ($300,000). Person B would therefore have an underinsured motorist claim and could collect up to $100,000 from the underinsured motorist insurance.

EFFECTIVE DATE: This act would become effective October 1, 2003 and apply to accidents occurring on or after that date.

H1023-SMSB-001

HOUSE BILL 1023

Short Title:	Underinsured Motorist Coverage.	(Public)
Sponsors:	Representatives Goodwin; and Hackney.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE DEFINITION OF UNDERINSURED HIGHWAY VEHICLE TO PROVIDE GREATER PROTECTION TO CONSUMERS INJURED IN MOTOR VEHICLE ACCIDENTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-279.21(b)(4) reads as rewritten:

"(4) Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner. An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident and available for payment for bodily injury is insufficient to pay damages for bodily injury of all persons injured at the time of the accident. ~~is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.~~ For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The provisions of subdivision (3) of this

subsection shall apply to the coverage required by this subdivision. Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.

In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount ~~paid~~ available for payment to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy; provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an

underinsured motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election. Assignment or subrogation as provided in this subdivision shall not, absent contrary agreement, operate to defeat the claimant's right to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for damages beyond those paid by the underinsured motorist insurer. The claimant and the underinsured motorist insurer may join their claims in a single suit without requiring that the insurer be named as a party. Any claimant who intends to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for moneys beyond those paid by the underinsured motorist insurer shall before doing so give notice to the insurer and give the insurer, at its expense, the opportunity to participate in the prosecution of the claim. Upon the entry of judgment in a suit upon any such claim in which the underinsured motorist insurer and claimant are joined, payment upon the judgment, unless otherwise agreed to, shall be applied pro rata to the claimant's claim beyond payment by the insurer of the owner, operator or maintainer of the underinsured highway vehicle and the claim of the underinsured motorist insurer.

A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage shall give notice of the initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties; provided that application is made to and approved by a presiding superior court judge, in any such suit, any insurer providing primary liability insurance on the underinsured highway vehicle may upon payment of all of its applicable limits of liability be released from further liability or obligation to participate in the defense of such proceeding. However, before approving any such application, the court shall be persuaded that the owner, operator, or

maintainer of the underinsured highway vehicle against whom a claim has been made has been apprised of the nature of the proceeding and given his right to select counsel of his own choice to appear in the action on his separate behalf. If an underinsured motorist insurer, following the approval of the application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, the insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle and, provided that adequate notice of right of independent representation was given to the owner, operator, or maintainer, a finding of liability or the award of damages shall be res judicata between the underinsured motorist insurer and the owner, operator, or maintainer of underinsured highway vehicle.

As consideration for payment of policy limits by a liability insurer on behalf of the owner, operator, or maintainer of an underinsured motor vehicle, a party injured by an underinsured motor vehicle may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the vehicle any judgment that exceeds the policy limits. A covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing underinsured motorist coverage from pursuing any right of subrogation.

The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. Once the option to reject underinsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless a named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.

Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance."

SECTION 2. This act becomes effective October 1, 2003, and applies to accidents occurring on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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HOUSE BILL 1151
PROPOSED COMMITTEE SUBSTITUTE H1151-CSRO-13 [v.1]

4/23/2003 11:47:38 AM

Short Title: Improve Rule-Making Process. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO REVISE THE PROCEDURE FOR ADOPTING PERMANENT AND TEMPORARY RULES, TO CREATE A PROCEDURE FOR THE ADOPTION OF EMERGENCY RULES, TO CLARIFY THE ROLE OF THE RULES REVIEW COMMISSION AND TO EXCLUDE THE STATE MEDICAL FACILITIES PLAN FROM THE DEFINITION OF A RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-20(c) reads as rewritten:

"(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the ~~notice of rule-making proceedings~~ notice of text it publishes in the North Carolina Register may state that the agency is initiating ~~rule-making proceedings~~ rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes ~~after the notice of rule-making proceedings~~ may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text."

SECTION 2. G.S. 150B-21.1 reads as rewritten:

"**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. – An agency may adopt a temporary rule ~~without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical~~ when it finds that adherence to the notice and hearing requirements of ~~this Part~~G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.
(2) The effective date of a recent act of the General Assembly or the United States Congress.
(3) A recent change in federal or State budgetary policy.
(4) A recent federal regulation.
(5) A recent court order.
(6) The need for the rule to ~~become effective the same date as~~ be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

~~An agency must prepare a written statement of its findings of need for a temporary rule. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the rule.~~

~~(a1) Notwithstanding the provisions of subsection (a) of this section, the Wildlife Resources Commission may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical to protect the public health, safety, or welfare, conserve wildlife resources, or provide for the orderly and efficient operation of game lands by establishing any of the following:~~

(7) The need for the Wildlife Resources Commission to establish any of the following:
~~(1)~~a. No wake zones;
~~(2)~~b. Hunting or fishing seasons;
~~(3)~~c. Hunting or fishing bag limits;
~~(4)~~d. Management of public game lands as defined in G.S. 113-129(8a).

~~When the Wildlife Resources Commission adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules~~

(8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes and to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association for the purpose of promoting uniformity of state securities regulation. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~
~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a3) Notwithstanding the provisions of subsection (a) of this section, the Commissioner of Insurance may adopt a temporary rule~~

(9) The need for the Commissioner of Insurance to implement the provisions of ~~G.S. 58-2-205~~ G.S. 58-2-205.~~after prior notice or hearing or upon any abbreviated notice or hearing. When the Commissioner adopts a temporary rule pursuant to this subsection, the Commissioner must submit the reference to this subsection as the Commissioner's statement of need to the Codifier of Rules.~~

~~(a4) Notwithstanding the provisions of subsection (a) of this section, the State Chief Information Officer may adopt temporary rules~~

(10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Officer shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~
~~When the Officer adopts a temporary rule pursuant to this subsection, the Officer must submit a reference to this subsection as the Officer's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Officer in accordance with this subsection.~~

~~(a5) Notwithstanding the provisions of subsection (a) of this section,~~

(11) The need for the State Board of Elections ~~may~~ to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

~~(1)~~a. In accordance with the provisions of G.S. 163-22.2.

~~(2)~~b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.

~~(3)~~c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

~~When the State Board of Elections adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a6) Expiration by Session Laws 2001, ch. 421, s. 5.3, effective June 30, 2002.~~

~~(a7) Notwithstanding the provisions of subdivision (a)(2) of this section,~~

(12) The need for an agency ~~may~~ to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

a. Repealed by Session Laws 2000, ch. 148, s. 5, effective July 1, 2002.

b. **(Repealed effective July 1, 2003)** Article 34B of Chapter 115C of the General Statutes, relating to qualified zone academy bonds.

~~(a8) (Expires on June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(13) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules concerning the permitted height of mobile and modular homes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a9) (Expires June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(14) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules pursuant to G.S. 113A-11(b) to establish a class of minimum criteria projects.

~~After having the proposed temporary rule published in the North Carolina Register, and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall do all of the following:~~

~~(1) Notify persons on its mailing list, maintained pursuant to G.S. 150B-21.2(d), and any other interested parties, of his intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary shall submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a10) (Expires on October 1, 2004) Notwithstanding the provisions of subsection (a) of this section,~~

(15) The need for the Department of Health and Human Services ~~may~~ to adopt temporary rules concerning the placement of individuals in facilities licensed under Article 2 of Chapter 122C of the General Statutes and the enrollment of providers of services to such individuals in the Medicaid program. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Department shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Department adopts a temporary rule pursuant to this subsection, the Department shall submit a reference to this subsection as the Department's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Department in accordance with this subsection.~~

A recent act, change, regulation, or order as used in subdivisions (2) through (5) of this subsection means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a1) Unless otherwise provided by law, at least 30 business days prior to adopting a temporary rule, the agency shall:

(1) Submit the rule to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule on the Internet to be posted within five business days.
(2) Notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.
(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.
(4) Hold at least one public hearing on the proposed temporary rule.

An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. – When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the ~~Codifier of Rules.~~ Rules Review Commission. ~~Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a) or (a1) of this section.~~ Within 15 business days after receiving the proposed temporary rule, the Commission or its designee must review the agency's written statement of findings of need for the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9. The Commission's designee shall be a member of the Commission or Commission staff who is an attorney licensed to practice law in North Carolina. In reviewing the statement, the ~~Codifier of Rules~~Commission or its designee may consider any information submitted by the agency or another person. If the ~~Codifier of Rules~~ Commission or its designee finds that the statement meets the ~~criteria,~~criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9, the ~~Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.~~Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

If the ~~Codifier of Rules~~Commission or its designee finds that the statement does not meet either the ~~criteria,~~ criteria listed in subsection (a) of this section or the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the ~~Codifier of Rules~~Commission or its designee must review the additional findings or new statement within ~~one business day~~five business days after the agency submits the additional findings or new statement. If the ~~Codifier of Rules~~Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) ~~or (a1)~~ of this ~~section,~~ section or the standards

in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the ~~agency.~~agency and return the rule to the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the ~~Codifier of Rules~~ Commission or its designee that the agency's findings of need for a rule do not meet either the required ~~criteria,~~ criteria or the required standards, the agency must notify the ~~Codifier of Rules~~Commission or its designee of its decision. ~~The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.~~ The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) ~~or (a1)~~ of this section and whether the rule meets the standards in ~~G.S. 150B-21.9 that apply to review of a permanent rule.~~ G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

(3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.

(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.

(5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. ~~Publication of a temporary rule in the North Carolina Register serves as a notice of rule making proceedings for a permanent rule if the permanent rule is~~

~~substantially the same as the published temporary rule, unless the agency published a notice of rule-making proceedings at least 60 days before it adopted the temporary rule.~~"

SECTION 3. Part 2 of Article 2A of Chapter 150B of the General Statutes is amended by adding a new section to read:

"**§ 150B-21.1A. Adoption of an emergency rule.**

(a) Adoption. – An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a1).

(b) Review. – An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.

(3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.

(4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register."

SECTION 4. G.S. 150B-21.2 reads as rewritten:

"**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. – Before an agency adopts a permanent rule, it must take the following actions:

(1) Publish a notice of ~~rule-making proceedings~~ text in the North Carolina ~~Register, unless the proposed rule is substantially the same as a temporary rule published in the North Carolina~~ Register.

(2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

~~(3) Publish the text of the proposed rule in the North Carolina Register.~~

(4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.

(5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

~~(b) Notice of Rule-Making Proceedings. – A notice of rule-making proceedings published in the North Carolina Register must include all of the following:~~

~~(1) A statement of the subject matter of the proposed rule making.~~

~~(2) A short explanation of the reason for the proposed action.~~

~~(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.~~

~~(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.~~

~~Publication in the North Carolina Register of an agency's rule making agenda satisfies the requirements of this subsection if the agenda includes the information required by this subsection.~~

(c) ~~Text After Notice of Rule Making Proceedings.~~ Notice of Text. – A notice of the proposed text of a rule must include all of the following:

(1) The text of the proposed rule.

(2) A short explanation of the reason for the proposed rule.

(3) A citation to the law that gives the agency the authority to adopt the rule.

(4) The proposed effective date of the rule.

(5) The date, time, and place of any public hearing scheduled on the rule.

(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.

(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.

(8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.

(9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

~~An agency shall not publish the proposed text of a rule until at least 60 days after the date the notice of rule making proceedings for the proposed rule was published in the North Carolina Register.~~

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of ~~rule making proceedings or the~~ text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice ~~of rule making proceedings~~ on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and ~~all the following apply:~~

~~(1) The notice of text does not schedule a public hearing on the proposed rule.~~

~~(2)~~ ~~The~~ the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.

~~(3) The proposed text is not a changed version of proposed text the agency previously published in the course of rule-making proceedings but did not adopt.~~

An agency may hold a public hearing on a proposed rule in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – ~~An agency must accept comments on a notice of proposed rule-making proceedings published in the North Carolina Register until the text of the proposed rule that results from the notice is published.~~ An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register ~~and that requires a fiscal note under G.S. 150B-21.4(b1)~~ for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. ~~An agency must accept comments on the text of any other proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer.~~ An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on ~~either the notice of rule-making proceedings or~~ the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within ~~30~~ 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule."

SECTION 5. G.S. 150B-21.3 reads as rewritten:

"**§ 150B-21.3. Effective date of rules.**

(a) Temporary and Emergency ~~Rule.~~ Rules. – A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. – A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section.

(b1) Delayed Effective Dates.– If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from ten or more persons clearly requesting

review by the legislature in accordance with instructions contained in the notice pursuant to G.S. 150B-21.2(b)(9) and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.

(c) Executive Order Exception. – The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission ~~and has not become effective under subsection (b)~~ but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. – Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

(d) Legislative Day and Day of Adjournment. – As used in this section:

(1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.

(2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution for more than 10 days.

(3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. – A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. – A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission."

SECTION 6. G.S. 150B-21.4(b1) reads as rewritten:

"(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least ~~five million dollars ($5,000,000)~~ three million dollars ($3,000,000) in a 12-month period."

SECTION 7. G.S. 150B-21.5 reads as rewritten:

"**§ 150B-21.5. Circumstances when notice and rule-making hearing not required.**

(a) Amendment. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

(1) Reletter or renumber the rule or subparts of the rule.

(2) Substitute one name for another when an organization or position is renamed.

(3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.

(4) Change information that is readily available to the public, such as an address or a telephone number.

(5) Correct a typographical error in the North Carolina Administrative Code.

(6) Change a rule in response to a request or an objection by the ~~Commission.~~ Commission, unless the Commission determines that the change is substantial.

(b) Repeal. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

(1) The law under which the rule was adopted is repealed.

(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.

(3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. – The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. – The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice ~~of rule-making proceeding~~ in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

(1) A statement of the subject matter of the proposed rule making.

(2) A short explanation of the reason for the proposed action.

(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.

(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice ~~and hearing~~ of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3."

SECTION 8. G.S. 150B-21.8 reads as rewritten:

"**§ 150B-21.8. Review of rule by Commission.**

(a) ~~Temporary~~ Emergency Rule. – The Commission does not review a ~~temporary~~an emergency rule.

(b) Temporary and Permanent ~~Rule.~~ Rules. – An agency must submit a temporary and permanent ~~rule~~ rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a ~~permanent~~ rule.

(c) Scope. – When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment.

(d) Judicial Review – When the Commission returns a permanent rule to an agency in accordance with G.S. 150B-21.12(d), the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes."

SECTION 9. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to ~~fulfill a duty delegated to the agency by~~ implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. ~~when considered in light of~~ The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is ~~proposed and the legislative intent of the General Assembly in delegating the duty.~~proposed.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

~~The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article.~~ The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

~~The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency.~~ Entry of a rule in the North Carolina Administrative Code after review by the Commission ~~is conclusive evidence~~ creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1."

SECTION 10. G.S. 150B-21.17(a) reads as rewritten:

"(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Temporary rules entered in the North Carolina Administrative Code.

(1a) ~~Notices of rule-making proceedings, the~~ The text of proposed ~~rules,~~ rules and the text of permanent rules approved by the Commission. ~~Except with regard to notices of rule-making proceedings, this subdivision does not apply to the North Carolina State Building Code.~~

(1b) Emergency rules entered into the North Carolina Administrative Code.

(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.

(3) Executive orders of the Governor.

(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.

(5) Orders of the Tax Review Board issued under G.S. 105-241.2.

(6) Other information the Codifier determines to be helpful to the public."

SECTION 11. G.S. 150B-2(8a) reads as rewritten:

"(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
2. Orders of establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.

(k) The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission, and approved by the Governor."

SECTION 12. G.S. 131E-176(25) reads as rewritten:

"(25) "State Medical Facilities Plan" means the plan prepared by the Department of Health and Human Services and the North Carolina State Health Coordinating Council, and approved by the Governor. In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan."

SECTION 13. Nothing in this act shall be construed to limit or repeal any specific grant of temporary rulemaking authority to an agency enacted by the General Assembly prior to the effective date of this act.

SECTION 14. This act becomes effective July 1, 2003, and applies to rules adopted on or after that date.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 23, 2003 9:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Patrice Ramer	NAACP
John Madler	NC Sentencing Commission
Karen Jones	" "
Jim Blackburn	County Commissioners Association
Andy Ellen	NC Retail Merchants Assoc.
Sandra Long	Martin Marietta
Kim Hibbard	NC League of Municipalities
Anita Watkins	NC League of Municipalities
Joe DeLuca	NC RRC
R. Carl Wilms	NCHBA
Bob Stevens	NC Forestry Assn

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 23, 2003 9:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Patricia Camp	ACLU
Jane Smith	NCDSS
Satana Deberry	NC DHHS
Steve Wall	Conservation Council
Trip Van Noppen	So. Env. Law Center
Barbara Jackson	NCDOL
Clyde Wagnee	NC DOL
Art Britt	NCDOL
Doug Lanter	NCSTA
Molly Masich	OAH
John McKay	GOV OFFICE

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 23, 2003 9:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rick Zechini	NC Assoc. of Realtors
Andy Romanet	NCLM

House Judiciary II

Committee

Minutes

April 24, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order. Discussion followed about various bills in the Committee that were subject to the crossover deadline.

HB 578 (Eliminate Mandatory Retirement for Judges) was before the Committee. Rep. Moore was recognized to explain his bill.

He said that **HB 578** would amend the law to eliminate the requirement that judges and justices of the General Court of Justice must be retired at age 72.

Rep. Moore told the Committee that the bill needed to be amended and Karen Cochrane-Brown, committee counsel, said the amendment was purely technical in nature.

Stanley Moore, Legislative Analyst, with the Legislature was recognized. He said the bill would save a little money. *(See Attachment I)*

Rep. Stam said that in the free market, one knows when it's time to quit. But sometimes in public service a mandatory retirement age is necessary to deal with senility. Judges in retirement still have the option to work as "emergency judges."

Rep. Bonner was concerned that this bill could affect a lot of judges that should be retired.

Rep. Walend said she wasn't ready to support this bill and felt that the issue should be studied.

After some discussion staff was instructed to draft a bill to study the issue.

HB 1017 (Burglary/Delete Nighttime Requirement) was before the Committee. Rep. Moore was recognized to explain his bill.

He said that **HB 1017** would eliminate from the crime of burglary the element that the crime be committed at night. Under current law, the crime of burglary is the breaking and entering of the dwelling of another at night with the intent to commit a felony. If the dwelling is occupied, the burglary is in the first degree and is punishable as a Class D felony (51 to 86 months of active punishment). If the dwelling is unoccupied, the burglary is in the second degree and is punishable as a Class G felony (10 to 16 months of intermediate or active punishment).

Rep. Stam was recognized He said he didn't support the bill. There is a reason for the common law. What Rep. Moore's bill would do would be to raise the penalty for most burglaries He said a burglary is almost always accompanied by another felony unless thwarted in the middle of the crime. Keeping the law the way it is being smart on crime.

Rep. Nesbitt observed that "burglary" includes the "dwelling" and only at night. All of the things are important.

Rep. Walend wanted clarification on the differences in penalty and the differences in the crime.

Rep. Bordsen pointed out that a burglary was much more dangerous at night because neighbors wouldn't be outside.

Rep. Moore said that most burglaries occur in the daytime. The fact that it's a house is more important to him. He understands why the differences in punishment are in place.

Rep. Stam observed that this bill, if enacted, would need an incarceration assessment.

When there was no further discussion, Rep. Gulley moved to give the bill a favorable report. The motion failed. Rep. Moore asked that the bill be held in Committee.

The meeting adjourned at 10:50 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

Attachment I

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE ACTUARIAL NOTE
RETIREMENT

BILL NUMBER: Committee Substitute for House Bill 578

SHORT TITLE: Eliminate Mandatory Retirement for Judges

Sponsor: Representative Moore

SYSTEM OR PROGRAM AFFECTED: Consolidated Judicial Retirement System

FUNDS AFFECTED: General Fund, Highway Fund and Receipt Fund

BILL SUMMARY: Removes the mandatory retirement age of 72 which will allow judges to continue to service.

EFFECTIVE DATE: July 1, 2003

ESTIMATED IMPACT ON STATE:

Both the Systems' actuary, Buck Consultants, and the General Assembly's actuary, Hartman & Associates, expect no financial impact to the System as result of this change.

ASSUMPTIONS AND METHODOLOGY: Consolidated Judicial Retirement System

The cost estimates of the System's Actuary are based on the employee data, actuarial assumptions and actuarial methods used to prepare the December 31, 2001 actuarial valuation of the fund. The data included 487 active members with an annual payroll of $47.8 million and 382 retired members in receipt of annual pensions totaling $16.1 million. Significant actuarial assumptions used include (a) an investment return rate of 7.25%, (b) salary increase rate of 6.25%, (c) the 1979 George B. Buck Mortality Table for deaths after retirement, and (d) rates of separation from active service based on System experience. The actuarial cost method used to determine the liabilities is the projected benefit method; however, the method used to determine the contribution rate is the projected unit credit method with a frozen unfunded liquidation period of nine years. Detailed information concerning these assumptions and methods is shown in the actuary's report, which is available upon request from Stanley Moore.

SOURCES OF DATA: System Actuary - Buck Consultant, Inc.
General Assembly Actuary - Hartman & Associates, LLC

FISCAL RESEARCH DIVISION 733-4910

PREPARED BY: Stanley Moore

APPROVED BY: James D. Johnson, Director, Fiscal Research Division

DATE: April 23, 2003

BUCK CONSULTANTS
A Mellon Financial Company

200 Galleria Parkway, N.W., Suite 1900
Atlanta, Georgia 30339-5945

April 18, 2003

Ms. Pam Deardorff
Director of External Relations
Retirement Systems Divisions
Department of State Treasurer
325 North Salisbury Street
Raleigh, NC 27603-1388

Proposed Committee Substitute for House Bill 578

Dear Ms. Deardorff:

We have received your letter of March 31 regarding Proposed Committee Substitute for House Bill 578, which affects the Consolidated Judicial Retirement System.

House Bill 578 appears to eliminate the mandatory retirement age for judges and justices of the general court of justice, including Justices of the Supreme Court, and judges of the Court of Appeals, District Court and Superior Court under Chapter 7A (which governs the NC Court system). Current law requires judges to retire once they reach 72 years of age. House Bill 578 eliminates the age ceiling, allowing judges to continue on the bench until they chose to retire or were defeated in an election.

The proposed committee substitute will amend G.S. 135-57 by repealing (b) which automatically retires a justice or judge as of the first day of the calendar month coinciding or next following the attainment of his seventy-second birthday.

There would be no impact on the employer contribution rate to the Consolidated Judicial Retirement System for this legislation, since we currently assume retirement rates of 100% at age 70 or older in preparing the valuation.

If we can be of further assistance with regard to this legislation, please do not hesitate to contact us.

Sincerely,

Edward A. Macdonald
Principal, Consulting Actuary

EAM:sr
[illegible]

Buck Consultants, Inc.
770 1955-2488 Fax 770 1933-8336

HARTMAN & ASSOCIATES, LLC
ACTUARIAL CONSULTING

MARK V. HARTMAN, FSA, MAAA, MCA, EA

Phone: (336) 731-4038
Fax: (336) 731-2583

668 Link Road
Lexington, NC 27295

April 22 , 2003

Mr. Stanley Moore
Fiscal Research Division
North Carolina General Assembly
300 N. Salisbury Street
Raleigh, NC 27603-5925

Re: House Bill 578 Committee Substitute: An Act to Eliminate the Mandatory Retirement Age for Judges

Dear Mr. Moore:

The committee substitute for this bill would repeal G.S. 135-57(b), eliminating the mandatory retirement age for a justice or a judge of the General Court of Justice. Currently, these members of the Consolidated Judicial Retirement System (CJRS) are required to retire upon attainment of age 72. This act is effective July 1, 2003.

The impact of eliminating the mandatory retirement age in the CJRS may be a delay of retirement of judges. If this occurs, retirement benefits would be payable at a higher rate, but for a shorter period than under current provisions. This can be expected to produce a cost savings, but the overall financial impact on the CJRS is not expected to be significant.

If you have any questions, let me know.

Sincerely,

Mark Hartman

Mark V. Hartman, FSA, MAAA, MCA, EA
Consulting Actuary

MVH/jj

HOUSE BILL 578:
Eliminate Mandatory Retirement for Judges.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Moore
Date:	April 24, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***House Bill 578 amends the law to eliminate the requirement that judges and justices of the General Court of Justice must be mandatorily retired at age 72. The bill does not repeal the reference to mandatory retirement contained in the Retirement Law and should be amended accordingly.***

CURRENT LAW:

Under current law, (G.S. 7A-4.20) all judges and justices of the General Court of Justice must retire by the last day of the month in which the judge or justice turns 72 years of age. In recognition of this requirement, the law contains several provisions authorizing the appointment of emergency justices and judges and to recall retired justices and judges.

BILL ANALYSIS:

This bill repeals the basic mandatory retirement provision and several other provisions relating to recall of active and emergency judges who have reached mandatory retirement age. In addition, the bill repeals several obsolete provisions relating to the retirement benefits of justices and judges. These provisions were replaced by the Consolidated Judicial Retirement Act, which became effective in 1974.

The bill also amends several provisions in Chapter 7A that include references to judges that reach mandatory retirement age.

The bill does not include any amendment of the Consolidated Judicial Retirement Act, which also contains a reference to mandatory retirement. The bill should be amended to correct this oversight.

The act would become effective July 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 578

Short Title:	Eliminate Mandatory Retirement for Judges.	(Public)
Sponsors:	Representative Moore.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO ELIMINATE THE MANDATORY RETIREMENT AGE FOR JUDGES AND JUSTICES OF THE GENERAL COURT OF JUSTICE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-4.20, 7A-39.2, 7A-39.13, 7A-51, and 7A-57 are repealed.

SECTION 2. G.S. 7A-39.3(a) reads as rewritten:

"(a) Justices of the Supreme Court and judges of the Court of Appeals who ~~have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who~~ have retired under the provisions of former G.S. 7A-39.2, or under the ~~Uniform~~ Consolidated Judicial Retirement Act after having completed 12 years of creditable service, may apply as provided in G.S. 7A-39.6 to become emergency justices or judges and upon being commissioned as an emergency justice or emergency judge shall be subject to temporary recall to active service in place of a justice or judge who is temporarily incapacitated as provided in G.S. 7A-39.5."

SECTION 3. G.S. 7A-39.14(a) reads as rewritten:

"(a) In addition to the authority granted to the Chief Justice under G.S. 7A-39.5 to recall emergency ~~justices and under G.S. 7A-39.13 to recall retired~~ justices, the Chief Justice may recall not more than one retired or emergency justice or retired emergency judge of the Court of ~~Appeals, including an emergency justice or judge whose commission has expired because he has reached the mandatory retirement age,~~ Appeals in the following circumstances:

(1) If a vacancy exists on the Supreme Court, he may recall an emergency or retired justice to serve on that court until the vacancy is filled in accordance with law.

(2) If a vacancy exists on the Court of Appeals, he may recall an emergency or retired justice of the Supreme Court or judge of the Court of Appeals to serve on the Court of Appeals until the vacancy is filled in accordance with law.

(3) With the concurrence of a majority of the Supreme Court, he may recall an emergency or retired justice to serve on the Supreme Court in place of a sitting justice who, as determined by the Chief Justice, is temporarily unable to perform all of the duties of his office.

(4) With the concurrence of a majority of the Supreme Court, he may recall an emergency or retired justice of the Supreme Court or judge of the Court of Appeals to serve on the Court of Appeals in place of a sitting judge who, as determined by the Chief Justice, is temporarily unable to perform all of the duties of his office."

SECTION 4. G.S. 7A-39.15(a) reads as rewritten:

"(a) A retired justice or judge of the Appellate Division of the General Court of Justice is eligible to be appointed as an emergency recall judge of the Court of Appeals under the following circumstances:

(1) The justice or judge has retired under the provisions of the Consolidated Judicial Retirement Act, Article 4 of Chapter 135 of the General Statutes, or is eligible to receive a retirement allowance under that act;

~~(2) The justice or judge has not reached the mandatory retirement age specified in G.S. 7A-4.20;~~

(3) The justice or judge has served a total of at least five years as a judge or justice of the General Court of Justice, provided that at least six months was served in the Appellate Division, whether or not otherwise eligible to serve as an emergency justice or judge of the Appellate Division of the General Court of Justice;

(4) The judicial service of the justice or judge ended within the preceding 15 years; and

(5) The justice or judge has applied to the Governor for appointment as an emergency recall judge of the Court of Appeals in the same manner as is provided for application in G.S. 7A-53. If the Governor is satisfied that the applicant meets the requirements of this section and is physically and mentally able to perform the duties of a judge of the Court of Appeals, the Governor shall issue a commission appointing the applicant as an emergency recall judge of the Court of ~~Appeals until the applicant reaches the mandatory retirement age for judges of the Court of Appeals specified in G.S. 7A-4.20.~~ Appeals.

~~Any former justice or judge of the Appellate Division of the General Court of Justice who otherwise meets the requirements of this section to be appointed an emergency recall judge of the Court of Appeals, but who has already reached the mandatory retirement age for judges of the Court of Appeals set forth in G.S. 7A-4.20, may apply to the Governor to be appointed as an emergency recall judge of the Court of Appeals as provided in this section. If the Governor issues a commission to the applicant, the retired justice or judge is subject to recall as an emergency recall judge of the Court of Appeals as provided in this section.~~"

SECTION 5. G.S. 7A-45.2 reads as rewritten:

"§ 7A-45.2. **Emergency special judges of the superior court; qualifications, appointment, removal, and authority.**

(a) Any justice or judge of the appellate division of the General Court of Justice who:

(1) Retires under the provisions of the Consolidated Judicial Retirement Act, Article 4 of Chapter 135 of the General Statutes, or who is eligible to receive a retirement allowance under that act;

~~(2) Has not reached the mandatory retirement age specified in G.S. 7A-4.20;~~

(3) Has served at least five years as a superior court judge or five years as a justice or judge of the appellate division of the General Court of Justice, or any combination thereof, whether or not eligible to serve as an emergency justice or judge of the appellate division of the General Court of Justice; and

(4) Whose judicial service ended within the preceding 10 years;

may apply to the Governor for appointment as an emergency special superior court judge in the same manner as is provided for application as an emergency superior court judge in G.S. 7A-53. If the Governor is satisfied that the applicant meets the requirements of this section and is physically and mentally able to perform the duties of a superior court judge, the Governor shall issue a commission appointing the applicant as an emergency special superior court ~~judge until the applicant reaches the mandatory retirement age for superior court judges specified in G.S. 7A-4.20.~~ judge.

(b) Any emergency special superior court judge appointed as provided in this section shall:

(1) Have the same powers and duties, when duly assigned to hold court, as provided for an emergency superior court judge by G.S. 7A-48;

(2) Be subject to assignment in the same manner as provided for an emergency superior court judge by G.S. 7A-46;

(3) Receive the same compensation, expenses, and allowances, when assigned to hold court, as an emergency superior court judge as provided by G.S. 7A-52(b);

(4) Be subject to the provisions and requirements of the Canons of Judicial Conduct; and

(5) Not engage in the practice of law during any period for which the emergency special superior court judgeship is commissioned. However, this subdivision shall not be construed to prohibit an emergency special superior court judge appointed pursuant to this section from serving as a referee, arbitrator, or mediator, during service as an emergency special superior court judge when the service does not conflict with or interfere with the emergency special superior court judge's judicial service in emergency status.

~~(c) Upon reaching mandatory retirement age for superior court judges as set forth in G.S. 7A-4.20, any emergency special superior court judge appointed pursuant to this section, whose commission has expired, may be recalled as a recalled emergency~~

~~special superior court judge to preside over any regular or special session of the superior court under the following circumstances:~~

~~(1) The judge shall consent to the recall;~~

~~(2) The Chief Justice may order the recall;~~

~~(3) Prior to ordering recall, the Chief Justice shall be satisfied that the recalled judge is capable of efficiently and promptly discharging the duties of the office to which recalled;~~

~~(4) Jurisdiction of a recalled emergency special superior court judge is as set forth in G.S. 7A-48;~~

~~(5) Orders of recall and assignment shall be in writing and entered upon the minutes of the court to which assigned; and~~

~~(6) Compensation, expenses, and allowances of recalled emergency special superior court judges are the same as for recalled emergency superior court judges under G.S. 7A-52(b).~~

~~(d) Any former justice or judge of the appellate division of the General Court of Justice who otherwise meets the requirements of subsection (a) of this section to be appointed an emergency special superior court judge but has already reached the mandatory retirement age for superior court judges set forth in G.S. 7A-4.20 on retirement may, in lieu of serving as an emergency judge of the court from which he retired, apply to the Governor to be appointed as an emergency special superior court judge as provided in this section. If the Governor issues a commission to the applicant, the retired justice or judge is subject to recall as an emergency special superior court judge as provided in subsection (c) of this section.~~

(e) No justice or judge appointed as an emergency special superior court judge or subject to recall as provided in this section shall, during the period so appointed or subject to recall, contemporaneously serve as an emergency justice or judge of the appellate division of the General Court of Justice."

SECTION 6. G.S. 7A-52(a) reads as rewritten:

"(a) Judges of the district court and judges of the superior court ~~who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but~~ who have retired under the provisions of former G.S. 7A-51, or under the ~~Uniform~~ Consolidated Judicial Retirement Act after having completed five years of creditable service, may apply as provided in G.S. 7A-53 to become emergency judges of the court from which they retired. The Chief Justice of the Supreme Court may order any emergency judge of the district or superior court who, in his opinion, is competent to perform the duties of a judge of the court from which such judge retired, to hold regular or special sessions of such court, as needed. Order of assignment shall be in writing and entered upon the minutes of the court to which such emergency judge is assigned."

SECTION 7. This act becomes effective July 1, 2003.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 578

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

H578-ARO-15 [v.1]

Date 4-24-03 ,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Moore

moves to amend the bill on page 1, line 5, by rewriting the line to read:

"**SECTION 1.** G.S. 7A-4.20, 7A-39.2, 7A-39.13, 7A-51, 7A-57, and 135-57(b) are".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

HOUSE BILL 1017:
Burglary/Delete Nighttime Requirement

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Moore
Date:	April 24, 2003	**Summary by:**	Jeff Hudson
Version:	First Edition		Committee Counsel

SUMMARY: ***House Bill 1017 would eliminate from the crime of burglary the element that the crime be committed at night.***

CURRENT LAW: Under current law, the crime of burglary is the breaking and entering of the dwelling of another at night with the intent to commit a felony. If the dwelling is occupied, the burglary is in the first degree and is punishable as a Class D felony (51 to 86 months of active punishment). If the dwelling is unoccupied, the burglary is in the second degree and is punishable as a Class G felony (10 to 16 months of intermediate or active punishment).

BILL ANALYSIS: House Bill 1017 would eliminate from the crime of burglary the element that the crime be committed at night.

Under current law, the most similar crime to burglary without the nighttime element is felonious breaking and entering. Felonious breaking and entering is the breaking or entering any building with the intent to commit a felony or larceny and is punishable as a Class H felony (5 to 8 months of community, intermediate, or active punishment).

EFFECTIVE DATE: This act would become effective December 1, 2003, and apply to offenses committed on or after that date.

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, April 24, 2003
10:00 a.m. and 15 minutes after Session
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

HB 578 Eliminate Mandatory Retirement for Judges – *Rep. Moore, Bill Sponsor* Study Bill
HB 915 Manufactured Home Leasehold Estate Financing – *Rep. Brubaker, Bill Sponsor* put off
HB 1006 Manufactured Housing – *Rep. Hunter, Bill Sponsor* Put off
HB 1017 Burglary/Delete Nighttime Requirement – *Rep. Moore, Bill Sponsor*
HB 1024 Criminal History Record Checks - *Rep. Goodwin, Bill Sponsor* ~
HB 1091 Penalty For Illegal Indoor Pyro – *Rep. Goodwin, Bill Sponsor* ~
HB 1190 First Offender/Expunge Criminal Record – *Rep. Wright, Bill Sponsor*

3. **Adjourn.**

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 24, 2003 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Tim Minton	NC Home Builders
Lorin Freeman	NC DOJ
[illegible]	[illegible]
Lee Hamm	NCDOR
Kim Hibbard	NCLM
Al Ripley	NC Justice Ctr
Brad Lovin	NC Manufactured Housing Assn.
Roy Williams	~~AOC~~ UNC
Paul Stam	NC Bankers
Frank Gray	N.C. MBI
Betty Tuanca	Bank of America

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 24, 2003 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Patricia A. Yancey	ACLU

House Judiciary II

Committee

Minutes

April 29, 2003

10:00 a.m.

2:00 p.m.

and 6:30 p.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Rep. Hunter to explain **HB 1006** (Manufactured Housing). Rep. Hunter said the bill was a compromise on his bill and another manufactured housing bill, introduced by Rep. Brubaker.

He presented a proposed Committee Substitute to the Committee and Rep. Goodwin moved that it be adopted for consideration. The motion carried.

Rep. Hunter said he has been negotiating with representatives of the manufactured housing industry, the Low Income Housing Coalition and the NC Justice and Community Development Center on the bill and said it might have to be further modified when it gets to the Senate as the various parties continue to work on it.

Addresses financing and consumer protection issues that are the focus of the bill. Advice and input on the bill has been lifted from the NC Bar Association, the North Carolina Insurance Commissioner, Freddie Mac and others.

It accomplishes the following: multi-financing (Sections 1-4). Under the current law a manufactured hum is not considered real property unless it is place on property that is owned by the owner of the manufactured hum and the owner has filed an affidavit with the registrar of deeds that the title to the manufactured home has been surrendered to the

Division of Motor Vehicles. If it is not on property owned by the owner, the manufactured home is considered tangible personal property. An owner of a manufactured home that has been placed on property that is owned by that owner may convey or encumber that real property and manufactured home by a mortgage and the owner may record that declaration of intent to affix the manufactured home to the real property.

The bill amends the definition of when a manufactured home is considered real property to include manufactured homes that are placed on land in which the owner of the manufactured home has a leasehold interest for at least 20 years. If the owner has a leasehold interest for at least 20 years, the owner must indicate that he has the leasehold interest for at least 20 years and is not the owner of the land to which the manufactured home is attached in the affidavit filed with the registrar of deeds. If the owner of the manufactured home is not the owner of the real property the owner must indicate in the declaration of intent that he does not owner the real property on which the manufactured home is affixed but has entered into a lease for 20 years for the real property. Subsection (e) provides that nay person can elect not to have the manufactured home designated as real property by applying for the title from the Division of Motor Vehicles and filing a declaration of intent not to affix the manufactured home to real property. This would result in the manufactured as being considered personal property.

Section 5 helps to make certain that the owner of a manufactured home community must give each resident notice of an intended sale or closure of the community at least 6 months before the residents are required to vacate unless the closure is due to a valid order of a state or local government. Then notice must be given of the closure within 3 days of the date of the order.

Sections 6 and 7 relate to the oversight of the manufacturing industry. This helps insure better balance of the composition of the manufacturing housing board and improved notice of board meetings.

Section 8 requires the buyers be given notice that they may finance their purchase as a real property transaction and designates the closing as a real estate transaction.

Section 9 requires buyers receive a new three-day right to cancel whenever the purchase agreement is materially changed by the dealer.

Rep. Hunter said the Manufactured Housing Institute and consumer groups are working to fine-tune the bill and are in agreement with the Proposed committee Substitute. The Institute and consumer groups agree that the bill needs more work, but ask that the compromise bill before the committee be passed before the crossover deadline.

Rep. Nesbitt observed that recording a deed might require a fee, so perhaps **HB 1006** wouldn't be subject to cross-over, but would instead, need to re-referred to the Finance Committee.

Rep. Ellis suggested that the bill be amended to include certain fees, and so moved. He then made a motion that the amendment be incorporated into a new proposed committee substitute and that the new PCS be re-referred to a subcommittee. The motion passed.

HB 969 (Constit.Amend./Magistrates' Terms) was before the Committee and Rep. Warner was recognized to explain the bill.

He said the bill came at the request of many magistrates across. He said that HB 969 proposes to amend the State Constitution to change the term of office of magistrates from two year to two years for the initial term and four years for subsequent terms. It proposes to submit the change to the voters of the State at the November 2004, general election.

Mr. Lionel Gilbert, on behalf of the Magistrate's Association, spoke in favor of the bill. He said the bill would actually save money.

Rep. Goodwin moved to amend the bill and the motion carried. *(See Attachment I)*

Rep. Moore moved for a favorable report, but the bill sponsor asked that the bill be reported out of the committee "as amended." Rep. Walend moved for a favorable report, as amended, and the motion carried.

HB 564 (Revise Exclusionary Rule) was before the Committee and Rep. Stam was recognized to explain his bill. He called the Committee's attention to a handout that he had presented to the Committee at an earlier meeting, which included an "unsolicited" letter from Superior Court Judge Robert H. Hobgood. *(See Attachment II)* He also pointed out that other judges in favor of revising the Exclusionary Rule included for Justice Burley Mitchell and former Justice Louis Meyers.

Rep. Stam said he felt that the question of the Constitutionality of the bill was unfounded, that the bill, as written, still would have evidence suppressed if it's exclusion is required by the North Carolina Constitution. At trial, any trial judge can refuse to admit evidence. This has to do with suppression before trial that has one judge telling another judge that certain evidence can't be excluded.

Rep. Stam said that by definition whenever the Exclusionary Rule operates it always operates so as to deprive the relevant fact of true relevant evidence.

Rep. Stam moved to adopt a proposed Committee Substitute for consideration and the motion passed.

Jeff Hunt, District Attorney from the 29th Prosecutorial District and President-elect of the Conference of District Attorneys spoke in favor of the bill. He felt that the bill would bring North Carolina in conformance with the federal rule.

Patricia Camp, Director of the American Civil Liberties Union, spoke against the bill. She said this policy has been in effect since 1937 and she sees no reason to change it and

that everyone who support **HB 564**, refer to the dissent in the *Carter* case, but not the Opinion of the North Carolina Supreme Court. The good faith exception is serves as a way to encourage police to behave within the bounds of the law. Without that, you lose the ability to force police to behave the way they should.

In this country we have long had a principle that innocence is the highest standard. There is a line in the Court's Decision that says that the Legislature has the power to change the Exclusionary Rule, but she sees no need to change it. She asked the Committee to seriously consider how important it is to have this protection.

Mr. Staple Speas, the N. C. Appellate Defender, also spoke against the bill. He reminded the members that Professor Louis Bilionis of UNC Law School, an expert on constitutional law, spoke against this bill at a previous meeting.

He said the bill completely strikes out a judge's power to exclude evidence that is a substantial violation of the Criminal Procedures Act and he urged the Committee to reject the bill.

The bill was temporarily displaced.

HB 1041 (APA Rules/Small Bus. Economic Impact) was before the Committee and Rep. Connie Wilson was recognized to explain her bill.

She said it was brought to her attention as a part of national model legislation to address the importance of small business in the U. S. economy. Ninety percent of the businesses in the country are small businesses and they really are the ones generating new jobs.

The bill requires agencies proposing permanent rules to consider the adverse economic impact of the proposed rule on small business and to review existing rules prior to amendment to determine the impact on small business. The bill also provides that agencies may not adopt rules that are more restrictive than applicable federal law governing the subject matter.

Tripp Van Noppen with the Southern Environmental Law Center spoke against the bill. He said the effect of the bill would that small businesses would be exempt from any rules to avoid doing the study that she has put forth in her bill. The bill, as written, outlaws any rule written that is more restrictive than the federal government. All those attempts to find a "North Carolina" solution would be outlawed.

Rep. Ellis was recognized. He said that small business is frustrated with the inability to get around the rules that agencies put in place. He felt it was a reasonable bill.

The meeting recessed at 11:15 a.m. to reconvene at 2:00 p.m.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1006

Short Title:	Manufactured Housing.	(Public)
Sponsors:	Representatives Hunter and Barnhart (Primary Sponsors).	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO GRANT GREATER CONSUMER PROTECTION TO RESIDENTS OF MANUFACTURED HOUSING IN NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 47-20.6(a) reads as rewritten:

"(a) If the owner of ~~real property~~ a manufactured home that is defined as real property in G.S. 105-273(13) has surrendered the title to ~~a~~ the manufactured home ~~that is placed on the real property~~ and the title has been cancelled by the Division of Motor Vehicles under G.S. 20-109.2, the owner, or the secured party having the first security interest in the manufactured home at time of surrender, shall record the affidavit described in G.S. 20-109.2 with the office of the register of deeds of the county where the ~~real property~~ manufactured home is located. Upon recordation, the affidavit shall be indexed on the grantor index in the name of the owner of the manufactured home and on the grantee index in the name of the secured party or lienholder, if any."

SECTION 2. G.S. 47-20.6 is amended by adding a new subsection to read:

"(e) In the event that the owner of a manufactured home described in subsection (a) of this section is not the owner of the real property to which the manufactured home is affixed, the owner or the secured party having the first security interest in the manufactured home at the time of surrender, shall indicate in the affidavit the following:

(1) That the owner of the manufactured home is not the same as the owner of the real property to which the manufactured home is affixed.

(2) That the owner of the manufactured home has entered into a lease for the real property on which the manufactured home is affixed with a primary term of at least 20 years."

SECTION 3. G.S. 47-20.7 reads as rewritten:

"**§ 47-20.7. Declaration of intent to affix manufactured home; transfer of real property with manufactured home attached.**

(a) ~~A~~ Except as provided in subsection (e) of this section, a person who owns ~~real property~~ or is purchasing ~~on which~~ a manufactured home that ~~has been, or will be~~

~~placed, as defined in G.S. 105-273(13), and either where the manufactured home~~ has never been titled by the Division of Motor Vehicles ~~or where the title to the manufactured home has been surrendered and cancelled by the Division, may~~ and that is defined as real property in G.S. 105-273(13) or that will be so defined once it is affixed to real property, shall record in the office of the register of deeds of the county where the ~~real property~~ manufactured home is or will be located a declaration of intent to affix the manufactured home to the real property and ~~may~~ shall convey or encumber the real property, including the manufactured home, only by a deed, deed of trust, or other instrument recorded in the office of the register of deeds. Upon recordation, the declaration of intent shall be indexed on the grantor index in the name of the owner of the manufactured home.

(b) The declaration of intent, deed, deed of trust, or other instrument shall contain a description of the manufactured home, including the name of the manufacturer, the model name, if applicable, the serial number, and a statement of the owner's intention that the manufactured home be treated as real property. In addition, in the event that the owner is not also the owner of the real property to which the manufactured home is or will be affixed, the owner shall indicate in the declaration of intent the following:

(1) That the owner of the manufactured home is not the same as the owner of the real property to which the manufactured home is affixed.

(2) That the owner of the manufactured home has entered into a lease for the real property on which the manufactured home is affixed with a primary term of at least 20 years.

(c) On or after the filing of the instrument with the office of the register of deeds pursuant to subsection (a) of this section, the manufactured home placed, or to be placed, on the real property becomes an improvement to real property. Any lien on the manufactured home shall be perfected and have priority in the manner provided for a lien on real property.

(d) The provisions of this section control over the provisions of G.S. 25-9-334 relating to the priority of a security interest in fixtures, as applied to manufactured homes.

(e) Notwithstanding the provisions of subsection (a) of this section, any person who would otherwise be required to file a declaration of intent may elect not to have the owner's manufactured home classified as real property by applying for the issuance of a title for a manufactured home from the Division of Motor Vehicles and by filing a declaration of intent not to affix the manufactured home to real property with the register of deeds of the county where the manufactured home is or will be located. The declaration of intent not to affix shall contain a description of the manufactured home, including the name of the manufacturer, the model name, if applicable, the serial number, and a statement of the owner's intention that the manufactured home not be treated as real property. In the event that a declaration of intent not to affix is filed, the manufactured home will be considered tangible personal property, except as provided in G.S. 105-273(13)."

SECTION 4. Subdivision (13) of G.S. 105-273 reads as rewritten:

"**§ 105-273. Definitions.**

When used in this Subchapter (unless the context requires a different meaning):

...

(13) "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures on the land, and all rights and privileges belonging or in any way appertaining to the property. These terms also mean a manufactured home as defined in G.S. 143-143.9(6) if it is a residential structure; has the moving hitch, wheels, and axles removed; and is placed upon a permanent foundation either on land owned by the owner of the manufactured ~~home.~~ home or on land which the owner of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least twenty 20 years. A manufactured home as defined in G.S. 143-143.9(6) that does not meet all of these conditions is considered tangible personal property."

SECTION 5. G.S. 42-14 reads as rewritten:

"**§ 42-14. Notice to quit in certain tenancies.**

A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. Provided, however, where the tenancy involves only the rental of a space for a manufactured home as defined in G.S. 143-143.9(6), a notice to quit must be given at least ~~30~~120 days before the end of the current rental period, regardless of the term of the tenancy."

SECTION 6. Chapter 42 of the General Statutes is amended by adding a new section to read:

"**§ 42-14.3. Notice of sale or closure of manufactured home communities.**

(a) In the event that an owner of a manufactured home community (defined as a parcel of land, whether undivided or subdivided, that has been designed to accommodate at least three manufactured homes) intends to sell or close the manufactured home community, the owner shall give each resident notice of the intended sale or closure at least one year before the residents are required to vacate, regardless of the term of the tenancy. Failure to give notice as required by this section is a defense in an action for possession.

(b) Notwithstanding subsection (a) of this section, if a manufactured home community is being closed pursuant to a valid order of any unit of state or local government, the owner of the community shall be required to give notice of the closure of the community to each resident of the community within three business days of the date on which the order is issued."

SECTION 7. G.S. 143-143.10(a) reads as rewritten:

"(a) There is created the North Carolina Manufactured Housing Board within the Department. The Board shall be composed of nine members as follows:

(1) The Commissioner of Insurance or his designee.

(2) A manufactured home manufacturer.

(3) A manufactured home dealer.

(4) A representative of the banking and finance business.
(5) A representative of the insurance industry.
(6) A manufactured home supplier.
(7) A set-up contractor.
(8) Two ~~representatives of the general public.~~individuals then living in manufactured homes, as defined in G.S. 143-143.9(6).

The Commissioner or his designee shall chair the Board. The Governor shall appoint to the Board the manufactured home manufacturer and the manufactured home dealer. The General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 shall appoint the representative of the banking and finance industry and the representative of the insurance industry. The General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121 shall appoint the manufactured home supplier and set-up contractor. The Commissioner shall appoint two ~~representatives of the general public.~~ individuals living in manufactured homes after receiving recommendations from affordable housing advocates. Except for the ~~representatives from the general public~~ individuals living in manufactured homes and the persons appointed by the General Assembly, each member of the Board shall be appointed by the appropriate appointing authority from a list of nominees submitted to the appropriate appointing authority by the Board of Directors of the North Carolina Manufactured Housing Institute. At least three nominations shall be submitted for each position on the Board. The members of the Board shall be residents of the State.

The members of the Board shall serve for terms of three years. In the event of any vacancy of a position appointed by the Governor or Commissioner, the appropriate appointing authority shall appoint a replacement in the same manner as provided for the original appointment to serve the remainder of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. In the event of any vacancy, the appropriate appointing authority shall appoint a replacement to serve the remainder of the unexpired term. Such appointment shall be made in the same manner as provided for the original appointment. No member of the Board shall serve more than two consecutive, three-year terms.

The ~~member~~ two members of the Board ~~representing the general public~~ who live in manufactured homes shall have no beneficial financial interest connected with the manufactured housing industry. No member of the Board shall participate in any proceeding before the Board involving that member's own business.

Each member of the Board, except the Commissioner and any other State employee, shall receive per diem and allowances as provided with respect to occupational licensing boards by G.S. 93B-5. All per diem and travel expenses shall be paid exclusively out of the fees received by the Board as authorized by this Article. In no case shall any salary, expense, or other obligation of the Board be charged against the General Fund of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board for the exclusive purpose of carrying out the provisions of this Article. At the end of the fiscal year, the Board shall retain fifteen percent (15%) of the

unexpended funds collected and received during that year. The remaining eighty–five percent (85%) of these funds shall be credited to the General Fund.

(b) In accordance with the provisions of this Article, the Board shall have the following powers and duties:

(1) To issue licenses to manufacturers, dealers, salespersons, and set-up contractors.

(2) To require that an adequate bond or other security be posted by all licensees, except manufactured housing salespersons.

(3) To receive and resolve complaints from buyers of manufactured homes and from persons in the manufactured housing industry, in connection with the warranty, warranty service, licensing requirements or any other provision under this Article.

(4) To adopt rules in accordance with Chapter 150B of the General Statutes as are necessary to carry out the provisions of this Article.

(5) To file against the bond posted by a licensee for warranty repairs and service on behalf of a buyer."

SECTION 8. G.S. 143-143.10 is amended by adding a new subsection to read:

"(c) The Board shall meet no less than once every three months to conduct administrative hearings, if necessary, and to discharge any other Board business. Minutes of all Board meetings and records of all official actions taken by the Board, including, without limitation, its decisions with respect to any administrative hearing shall be kept in the Board's public records and posted on the Board's Internet website within one month of the adjournment of any Board meeting. Additionally, a current list of the Board's membership and the Board's next scheduled meetings shall be regularly posted on the Board's Internet website."

SECTION 9. Chapter 143 of the General Statutes is amended by adding a new section to read:

"**§ 143-143.20A. Display of pricing on manufactured homes.**

Each manufactured home dealer shall establish, permanently affix, and prominently display pricing for the manufactured homes offered for sale by the dealer. The prices shall be displayed in writing and shall be disclosed in advance of negotiations with any buyer. Each price shall include the cost of the manufactured home and alternative flooring. In addition, each price display shall include a disclosure that the price does not include variable costs, including, without limitation, transportation fees or set-up and installation costs.

SECTION 10. Chapter 143 of the General Statutes is amended by adding a new section to read:

"**§ 143-143.20B. Disclosure of financing options for manufactured housing.**

If a consumer is purchasing a manufactured home that shall be permanently affixed to land owned by the consumer or on land in which the purchaser of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least twenty 20 years, the manufactured housing dealer shall disclose in writing to each consumer the option of having the manufactured home classified as real property pursuant to G.S. 47-

20.7 and the possibility that, pursuant to that classification, the acquisition of the manufactured home may be financed as real property by a lender. If the consumer elects to classify the manufactured home as real property, then the closing of the acquisition of the home shall be classified as a residential real estate transaction."

SECTION 11. G.S. 143-143.21A reads as rewritten:

"**§ 143-143.21A. Purchase agreements; buyer cancellations.**

(a) A purchase agreement for a manufactured home shall include all of the following:

(1) A description of the manufactured home and all accessories included in the purchase.

(2) The purchase price for the home and all accessories.

(3) The amount of deposit or other payment toward or payment of the purchase price of the manufactured home and accessories that is made by the buyer.

(4) The date the retail purchase agreement is signed.

(5) The estimated terms of financing the purchase, if any, including the estimated interest rate, number of years financed, and monthly payment.

(6) The buyer's signature.

(7) The dealer's signature.

(b) The purchase agreement shall contain, in immediate proximity to the space reserved for the signature of the buyer and in at least ten point, all upper-case Gothic type, the following statement:

"I UNDERSTAND THAT I HAVE THE RIGHT TO CANCEL THIS PURCHASE BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE THAT I HAVE SIGNED THIS AGREEMENT. I UNDERSTAND THAT THIS CANCELLATION MUST BE IN WRITING. IF I CANCEL THE PURCHASE AFTER THE THREE-DAY PERIOD, I UNDERSTAND THAT THE DEALER MAY NOT HAVE ANY OBLIGATION TO GIVE ME BACK ALL OF THE MONEY THAT I PAID THE DEALER. I UNDERSTAND ANY CHANGE TO THE TERMS OF THE PURCHASE AGREEMENT BY THE DEALER WILL CANCEL THIS AGREEMENT."

(c) At the time the deposit or other payment toward or payment for the purchase price is received by the dealer, the dealer shall give the buyer a copy of the purchase agreement and a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the purchase agreement, be easily detachable, and explain the buyer's right to cancel the purchase and how that right can be exercised.

(d) The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer if the buyer cancels the purchase before midnight of the third business day after the date the buyer signed the purchase ~~agreement.~~agreement or if any of the material terms of the purchase agreement are changed by the dealer. To make the cancellation effective, the buyer shall give the dealer written notice of the buyer's cancellation of the purchase. The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer within 15 business days

after receipt of the notice of ~~cancellation.~~ cancellation or within three business days of any change by the dealer of the purchase agreement. For purposes of this section, "business day" means any day except Sunday and legal holidays. Each time the dealer gives the buyer a new set of financing terms, the buyer shall be given another three-day cancellation period. The dealer shall not commence setup procedures until after the three-day cancellation period has run.

(e) If the buyer cancels the purchase after the three-day cancellation period, but before the sale is completed, and if:

(1) The manufactured home is in the dealer's inventory, the dealer may retain from the deposit or other payment received from the buyer actual damages up to a maximum of ten percent (10%) of the purchase price; or

(2) The manufactured home is specially ordered from the manufacturer for the buyer, the dealer may retain actual damages up to the full amount of the buyer's deposit or other payment received from the buyer.

(f) A dealer shall maintain in a segregated escrow fund or trust account any funds that come into the dealer's possession, but that are not the dealer's property and that the dealer is not entitled to retain under the circumstances. The escrow fund or trust account shall be held on deposit at a federally insured financial institution.

(g) A dealer may not transfer title to a manufactured home or otherwise sell, assign, or convey a manufactured home to a consumer unless the dealer delivers to the consumer a written document disclosing the total purchase price, as adjusted for any agreed interest rate and any points or fees, and the length of time for any loan repayment."

SECTION 12. This act becomes effective July 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 969

Short Title:	Constit. Amend./Magistrates' Terms.	(Public)
Sponsors:	Representative Warner.	
Referred to:	Judiciary II.	

April 9, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO CHANGE THE TERM OF OFFICE OF MAGISTRATES.

The General Assembly of North Carolina enacts:

SECTION 1. Section 10 of Article IV of the North Carolina Constitution reads as rewritten:

"**Sec. 10. District Courts.**

The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected. For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint ~~for a term of two years,~~ from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years. The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law. Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the ~~office.~~ office, unless otherwise provided by the General Assembly."

SECTION 2. The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at the general election in November 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to provide for the first term of office for magistrates of the General Court of Justice to be two years and for subsequent terms to be four years."

SECTION 3. If a majority of the votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective January 1, 2005.

SECTION 4. G.S. 7A-71 reads as rewritten:

"**§ 7A-171. Numbers; appointment and terms; vacancies.**

(a) The General Assembly shall establish a minimum and a maximum quota of magistrates for each county. In no county shall the minimum quota be less than one. The number of magistrates in a county, within the quota set by the General Assembly, is determined by the Administrative Officer of the Courts, after consultation with the chief district court judge for the district in which the county is located.

(a1) The initial term of appointment for a magistrate is two years and subsequent terms shall be for a period of four years. The term of office begins on the first day of January of the odd-numbered year after appointment. The service of an individual as a magistrate filling a vacancy as provided in subsection (d) of this section does not constitute an initial term. For purposes of this section, any term of office for a magistrate who has served a two-year term is for four years even if the two-year term of appointment was before the effective date of this section, the term is after a break in service, or the term is for appointment in a different county from the county where the two-year term of office was served.

(b) Not earlier than the Tuesday after the first Monday nor later than the third Monday in December of each even-numbered year, the clerk of the superior court shall submit to the senior regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a) in which ~~his~~ the clerk's county is located the names of two (or more, if requested by the judge) nominees for each magisterial office ~~in the minimum quota established~~ for the ~~county.~~ county for which the term of office of the magistrate holding that position shall expire on December 31 of that year. Not later than the fourth Monday in December, the senior regular resident superior court judge shall, from the nominations submitted by the clerk of the superior court, appoint magistrates to fill the ~~minimum quota established~~ positions for each county of ~~his~~ the judge's district or set of districts. ~~The term of a magistrate so appointed shall be two years, commencing on the first day in January of the calendar year next ensuing the calendar year of appointment.~~

(c) ~~After the biennial appointment of the minimum quota of magistrates, additional magistrates in a number not to exceed, in total, the maximum quota established for each county may be appointed in the following manner. The chief district judge for the district court district in which the county is located, with the approval of the Administrative Officer of the Courts, may certify to the clerk of superior court that the minimum quota is insufficient for the efficient administration of justice~~

~~and that a specified additional number, not to exceed the maximum quota established for the county, is required. Within 15 days after the receipt of this certification the clerk of superior court shall submit to the senior regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a) in which his county is located the names of two (or more, if requested by the judge) nominees for each additional magisterial office. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall from the nominations submitted appoint magistrates in the number specified in the certification. A magistrate so appointed shall serve a term commencing immediately and expiring on the same day as the terms of office of magistrates appointed to fill the minimum quota for the county.~~ If an additional magisterial office for a county is approved to commence on January 1 of an odd-numbered year, the new position shall be filled as provided in subsection (b) of this section. If the additional position takes effect at any other time, it is to be filled as provided in subsection (d) of this section.

(d) Within 30 days after a vacancy in the office of magistrate occurs the clerk of superior court shall submit to the senior regular resident superior court judge the names of two (or more, if so requested by the judge) nominees for the office vacated. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and shall serve ~~for the remainder of the unexpired term.~~ until December 31 of the even-numbered year, and thereafter the position shall be filled as provided in subsection (b) of this section."

SECTION 5. Sections 1 through 3 of this act are effective when they become law. Section 4 of this act becomes effective only upon approval by the voters of the constitutional amendment proposed in Section 2 of this act. If the constitutional amendment proposed in that section is approved by the voters, Section 4 of this act becomes effective January 1, 2005, and applies to appointments that take effect after that date.

HOUSE BILL 969:
Constit. Amend./Magistrates' Terms.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Warner
Date:	April 29, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***House Bill 969 proposes to amend the State Constitution to change the term of office of magistrates from two year to two years for the initial term and four years for subsequent terms. The bill proposes to submit the change to the voters of the State at the November 2004, general election.***

CURRENT LAW:

Article IV, Section 10, of the North Carolina Constitution provides in part that the senior resident Superior Court Judge shall appoint one or more magistrates from nominations submitted by the Clerk of Superior Court for each county. The term for magistrates is two years. The magistrates shall be officers of the District Court.

BILL ANALYSIS:

Section 1. Amends Article IV, Section 10 of the State Constitution to provide that the initial term of appointment for a magistrate is two years and subsequent terms are four years.

Section 2. Directs that the constitutional amendment be submitted to the voters at the November 2004, general election.

Section 3. If a majority of the votes cast is in favor of the amendment, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment among the permanent records. The amendment would become effective January 1, 2005.

Section 4. Amends the statutory provision in Chapter 7A relating to the term of office for magistrates to conform to the constitutional amendment.

Section 5. Makes sections 1 through 3 of the bill effective when they become law. Makes section 4 effective only upon approval by the voters of the constitutional amendment, and in that event it becomes effective January 1, 2005, and applies to appointments that take effect after that date.

Article XIII, section 4, of the State Constitution requires that a proposal to amend the Constitution may be initiated by the General Assembly upon a vote of three-fifths of all the members of each house.

Lionel Gilbert
Todd Tilley

House Bill 969

The justification for changing the terms of Magistrate after an initial two-year to a four-year terms there after:

1st The current two year appointments in addition to the educational requirements and the low starting salary fails to create an incentive for qualified candidates to apply for Magistrate openings. Many new Magistrates fail to understand they are taking a job for only two years and a job with little or no security even if doing an admirable job. Individuals having investigated all the negatives (salary, vacations, holidays and sick leave) will not leave a stable job with so much uncertainly. The potential candidate for a magistrate position with a mortgage, automobile payment and other obligations certainly considers the position a questionable one in that the reappointment has no guarantee.

2nd After the initial two year term the next appointment would be a four year appointment offset to the Clerk of Courts election. This offset would allow the Magistrate two of his four years with a new clerk if one were elected. During the two years the Magistrate would have an opportunity to develop a relationship with the new clerk.

3rd The current system lends itself to wholesale change if a new clerk is elected. Each new Magistrate must attend school of which cost to the taxpayer for travel, accommodations and food. Any opportunity to avoid training new magistrates every two years and creating stability for the system will result in cost savings.

Attachment I

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 969

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

H969-ARO-16 [v.1]

Date April 29, 2003 ,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Goodwin

moves to amend the bill on page 2, line 10, by rewriting the line to read:

"**SECTION 4.** G.S. 7A-171 reads as rewritten:".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 564
PROPOSED COMMITTEE SUBSTITUTE H564-PCS80229-RK-21

Short Title: Revise Exclusionary Rule. (Public)

Sponsors:

Referred to:

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-974 reads as rewritten:

"**§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.**

Upon timely motion, evidence ~~must~~ may be suppressed ~~if:~~only if its exclusion is required by the United States Constitution or the North Carolina Constitution. Notwithstanding the provisions of this section, evidence shall not be suppressed for any constitutional violation if the official who committed the violation was acting in the good faith belief that the violative conduct was legal.

~~(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or~~

~~(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:~~

~~a. The importance of the particular interest violated;~~

~~b. The extent of the deviation from lawful conduct;~~

~~c. The extent to which the violation was willful;~~

~~d. The extent to which exclusion will tend to deter future violations of this Chapter.~~"

SECTION 2. This act becomes effective December 1, 2003, and applies to all criminal trials pending or commencing on or after that date.

HOUSE BILL 564:
Revise Exclusionary Rule.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Stam
Date:	April 9, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS to First Edition H564-CSRK-21 [v.4]		Committee Staff

SUMMARY: ***The bill would limit the exclusion or suppression of unlawfully obtained evidence in a criminal trial to when exclusion or suppression is required by the United States Constitution. The bill would become effective December 1, 2003, and apply to all criminal trials pending or commencing on or after that date.***

The PCS differs from the original bill by authorizing the suppression of evidence only when required by the U.S. Constitution or the N.C. State Constitution. It also provides for a good faith exception to the exclusionary rule by providing that evidence cannot be suppressed for a constitutional violation if the violation was committed with the good faith belief that the action was legal.

CURRENT LAW: G.S. 15A-974 currently requires suppression of evidence in a criminal trial when (i) required by the U.S. Constitution; (ii) required by the N.C. Constitution; or (iii) the evidence is obtained as the result of a substantial violation of Chapter 15A of the General Statutes (the Criminal Procedure Act). This statute directs the court, when considering whether a violation is substantial, to consider all circumstances, including the importance of the interest that is violated, the extent of the deviation from lawful conduct, the extent to which it was a willful violation, and the extent to which exclusion will deter future violations of the Criminal Procedure Act.

BILL ANALYSIS: House Bill 564 would amend G.S. 15A-974 by authorizing the suppression of evidence only when required by the U.S. Constitution. Thus, suppression of evidence would no longer be required if the evidence is obtained in violation of the N.C. Constitution or as a substantial violation of the Criminal Procedure Act.

The PCS would add back the requirement that the evidence has to be suppressed if it was obtained in violation of the N.C. Constitution. It also provides that evidence shall not be suppressed even though there was a constitutional violation in obtaining it if the official that committed the constitutional violation was acting with the good faith belief that the violative conduct was legal.

BACKGROUND: Under the federal Constitution, there is a "good faith" exception to the exclusionary rule. This exception allows unlawfully obtained evidence to be considered in a criminal trial. This "good faith" exception is not recognized under the State Constitution.

The United States Supreme Court has held that the U.S. Constitution does not require suppression of unlawfully obtained evidence when the evidence was obtained by law enforcement officers who acted in good faith. United States v. Leon, 468 U.S. 897 (1984). In 1988, the North Carolina Supreme Court refused to adopt the "good faith" exception to the exclusionary rule under the N.C. Constitution. State v. Carter, 322 N.C. 709 (1988) (allowing the suppression of a blood sample). Justice Meyer, in a strongly worded dissent, argued, "The law of search and seizure under the North Carolina Constitution should be interpreted as being no more restrictive than the fourth amendment to the United States Constitution."

Consequently, under current North Carolina law (1) unlawfully obtained evidence must be suppressed even when officers have acted under the objectively reasonable belief that their actions were lawful and when the evidence obtained is otherwise admissible under the federal Constitution, and (2) evidence that is otherwise admissible under both the federal and state Constitutions may be held inadmissible due to violations of North Carolina procedural statutory provisions.

H564-SMRQ-002: Hal Pell and Robin Johnson Staff Attorneys, Research Division contributed significantly to this summary.

Attachment II

State of North Carolina
General Court of Justice
Superior Court District 9

ROBERT H. HOBGOOD
SENIOR RESIDENT SUPERIOR COURT JUDGE

HENRY W. HIGHT, JR.
RESIDENT SUPERIOR COURT JUDGE

April 11, 2003

Mr. Paul Stam
Stam, Fordham & Danchi, PA
P.O. Box 1600
Apex, NC 27502-3600

Re: Good Faith Exception to the Exclusionary Rule

Dear Paul:

I understand from the newspaper that you have introduced a bill to allow the good faith exception to the exclusionary rule to apply in North Carolina. You will find enclosed a law review article* which I wrote on that subject. It points out the disparate results in Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey state courts on the same facts in a drug case.

I cannot vouch for any changes in the out-of-state law since the Spring of 1999. However, I always thought it odd that the North Carolina Supreme Court in 1988 in the case of State v. Carter refused to adopt the U. S. v. Leon good faith exception to the exclusionary rule. I had to ask myself at that time why would a justice who had taken an oath to uphold the United States Constitution take such a liberal approach in interpreting the State Constitution in reaching contrary results from the United States Supreme Court. In fairness to the individual justices, it was a 4-3 decision. I recall that Justice (later Chief Justice) Mitchell's dissent in Carter vigorously attacked the rationale used by the majority.

"Justice Mitchell dissenting.
By refusing to permit the introduction of evidence seized by officers acting in the honest belief that a court order authorizing its seizure was lawful, this Court gives much greater protection to criminal defendants than they have been given by the Supreme Court of the United States. In fact, the Supreme Court has specifically stated in a similar situation, "[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."

* 21 Campbell Law Review 237 (1999)

Massachusetts v. Sheppard, 468 U.S. 981, 989-90, 82 L. Ed. 2d 737, 744 (1984). We should take the same position as to the court ordered search in this case. In its failing effort to strike a proper balance between the guarantee against unreasonable searches and the public safety, the majority has chosen to place such a heavy thumb on the scales of justice that they will always weigh in favor of the criminal {*725} defendant. The inflexible exclusionary rule the majority has selected for North Carolina will not advance the right to be free from unlawful searches, but it will prevent trial courts from reaching the truth and convicting the guilty in a substantial number of cases. The majority should recognize a good faith exception to our exclusionary rule similar to that applied by the Supreme Court under the Constitution of the United States. To do otherwise serves no valid purpose, substantially interferes with enforcement of the criminal law and diminishes the integrity of the judicial branch of government. Therefore, I dissent."

Whether the North Carolina Supreme Court of 2003 would favor former Chief Justice Burley Mitchell's dissent in Carter is unknown. Obviously, Supreme Courts in many other states have had no problem in that regard.

Finally, I treasure our state constitution. However, I agree with Judge Cardozo. It appears that we are willing to let the criminal go free because the constable has blundered.

Feel free to share this letter and my law review article with members of your legislative committee and any member of the legislature.

SINCERELY,

Robert H. Hobgood

ROBERT H. HOBGOOD

I-95 A/K/A THE DRUG TRAFFICKER'S FREEWAY, AND ITS IMPACT ON STATE CONSTITUTIONAL LAW

THE HONORABLE ROBERT H. HOBGOOD*

INTRODUCTION

This article tests the proposition that since July 5, 1984, the date the United States Supreme Court handed down its ruling in *United States. v. Leon*,[1] a criminal defendant in a search and seizure case can expect disparate results in different state trial courts although identical factual situations exist. First, this article hypothetically pits two drug mules against a reasonably well-trained officer with a defective search warrant. It then assumes that a search warrant has been issued erroneously by a magistrate and further that the defendant moves to suppress evidence in six state trial courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

The defect in the search warrant is that the affidavit attached to the search warrant fails to establish probable cause to believe that controlled substances will be found in a particular place due to staleness of the information and insufficient sworn statements concerning the reliability of the confidential informant. One constant in this hypothetical is that a reasonably well-trained officer would not know that the warrant is defective and could reasonably act in objective good faith in searching for and seizing the controlled substances described in the search warrant.

The defective search warrant is challenged in state trial court by a defense motion to suppress the admission into evidence of the seized controlled substances. The state trial judge conducts a pretrial hearing at which evidence, including the search warrant with affidavit attached, is presented. In a written order, the state trial judge makes findings of facts. On the basis of the findings of facts, the state trial judge then makes conclusions of law. Analysis of the law requires the judge to review the Fourth Amendment to the

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* Judge Hobgood is currently the Senior Resident Superior Court Judge of the Ninth Judicial District of North Carolina. He received both his A.B. and J.D. degrees from the University of North Carolina at Chapel Hill.

1. 468 U.S. 897 (1984).

21 Campbell LR 237 (1999)

United States Constitution; search and seizure provisions in that state's constitution; state statutes concerning: criminal procedure, search and seizure and the exclusionary rule; and state and federal case law.

The state trial judge then allows or denies the defendant's motion to suppress. If the motion is allowed, then the seized controlled substances are inadmissible at trial. Conversely, if the motion is denied, the seized controlled substances are admissible at trial. Either ruling is appealable to a state appellate court. However, a denial ruling is appealable only after a conviction at trial, or after a plea of guilty by the defendant reserving the right to appeal the suppression issue.

This hypothetical assumes that the state trial judge indeed allows the motion to suppress the evidence, and that the state district attorney, or commonwealth attorney, appeals the ruling to the appropriate appellate court. The state district attorney urges that the trial judge erred in failing to apply the good faith exception to the exclusionary rule as set forth in the United States Supreme Court case of *United States v. Leon.*

Section I presents and traces the history of discussion on this issue. Significant federal cases and relevant state cases are cited, and law review articles provide scholarly comment. Section II traces the hypothetical journey of the two "mules" transporting controlled substances on Interstate 95 from Miami International Airport to Newark, New Jersey and their arrest in six states: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey. Analysis will begin in Section III with Florida and progress northward to Georgia in Section IV, South Carolina in Section V, North Carolina in Section VI, Virginia in Section VII, and New Jersey in Section VIII.

This article argues that a criminal in a search and seizure case can expect disparate results in different state trial courts although identical factual situations exist. The good faith exception to the exclusionary rule adopted by the United States Supreme Court in *United States v. Leon* has not been applied with uniformity in state courts. Furthermore, this article finds that some state courts, relying on "adequate and independent" state grounds, have afforded criminal defendants greater protection under state constitutions and statutes than they would receive in other state courts or federal district courts. Finally, this article argues that state appellate courts must write their opinions with clarity.

I. Literature Review

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

Unquestionably, probable cause is the constitutionally imposed standard for determining whether a search and seizure is lawful. Most state constitutions contain search and seizure provisions with a probable cause standard.

Weeks v. United States,[3] created the exclusionary rule in federal court.[4] The exclusionary rule bars the use of evidence secured through an illegal search and seizure.[5] "Convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . ."[6] *Mapp v. Ohio*[7] applied the exclusionary rule to all state courts pursuant to the due process clause in the Fourteenth Amendment, thereby creating a national standard for police conduct and a meaningful national system of individual rights in the field of search and seizure.[8]

Until 1983, courts could rely on the *Aguilar-Spinelli* test in determining probable cause. In *Aguilar v. Texas*,[9] the United States Supreme Court created standards that required magistrates to examine and verify the basis of an informant's information and the credibility of an informant.[10] *Aguilar* established a two-pronged test: knowledge and veracity.[11] The basis of the knowledge prong requires the police to reveal the informant's source of information.[12] The veracity prong requires the police to show the magistrate proof of the informant's credibility.[13] In

2. U.S. CONST. amend IV.
3. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
4. *Id.*
5. *Id.* at 392, 398.
6. *Id.* at 392.
7. 367 U.S. 643 (1961).
8. *Id.* at 655-57.
9. 378 U.S. 108 (1964).
10. *Id.* at 114.
11. *Id.*
12. *Id.*
13. *Id.*

Spinelli v. U.S.,[14] the Supreme Court held that the knowledge prong could be satisfied if the information provided was sufficiently detailed.[15] Furthermore, the veracity prong could be satisfied if the information provided was enhanced by corroborative information produced by the police.[16]

In 1983, the Supreme Court replaced the two pronged test of *Aguilar-Spinelli* with a "totality of the circumstances" test.[17] Under this test, the magistrate considers all of the circumstances, including the credibility of the informant and the basis of his knowledge, in determining probable cause.[18]

The exclusionary rule does not appear in the United States Constitution, but rather is a judicially created remedy for Fourth Amendment violations.[19] It may be classified as a constitutionally required judicial rule. The exclusionary rule has been controversial over the years. Its sharpest critic was Judge Cardozo, who stated that "the criminal is to go free because the constable has blundered."[20] Justice Brandeis, dissenting in *Olmstead v. United States*,[21] argued in favor of the exclusionary rule stating, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[22]

United States v. Leon created a "good faith" exception to the exclusionary rule.[23] Under this exception, the exclusionary rule cannot be applied to bar evidence in the state's case in chief, although the search warrant subsequently is ruled invalid.[24] The rationale behind the exception is that police officers who reasonably rely in good faith on search warrants issued by neutral and detached magistrates do not intentionally violate the Fourth

14. 393 U.S. 410 (1969).
15. *Id.* at 415.
16. *Id.*
17. Illinois v. Gates, 462 U.S. 213 (1983).
18. *Id.* at 214.
19. United States v. Calandra, 414 U.S. 338 (1974).
20. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
21. 277 U.S. 438 (1928).
22. *Id.* at 468 (Brandeis, J., dissenting).
23. Leon, 468 U.S. 897, 913 (1984).
24. *Id.* at 897.

Amendment. Therefore, the purpose of the exclusionary rule, to deter police misconduct,[25] should not apply to them.[26]

State constitutions contain search and seizure provisions which are interpreted by state supreme courts independent of the United States Supreme Court. At the time of the *Mapp* decision in 1961, twenty-four state courts and the territories of Alaska and Hawaii already excluded evidence illegally seized on the basis of case law or statutes. Thus, a body of state law on the exclusionary rule existed in each of those states and territories before 1961. That state law was not modified by *Leon*.

By contrast, however, some states, such as New Hampshire, had no statutory exclusionary rule prior to *Mapp*. New Hampshire, like a majority of jurisdictions, subscribed to the strict common law rule that a court must admit all competent and probative evidence regardless of its source.[27] Subsequent to *Mapp*, all state trial courts and federal district courts applied the exclusionary rule to enforce a national standard for police conduct in search and seizure cases.

The rights of defendants in search and seizure law reached apogee during the era of Chief Justice Earl Warren.[28] When Warren Burger was sworn in as Chief Justice of the United Supreme Court in 1969, many court observers anticipated a conservative, law and order shift in the decisions of the United States Supreme Court. However, *stare decisis* requires courts to follow established precedents, unless previous case holdings are reversed. Thus, *stare decisis* slows change. Furthermore, a presidential appointee to the Supreme Court does not initiate change in case law until he or she is part of a majority on the court.

In 1977, Justice William J. Brennan, Jr., signaled a method to defense lawyers for retaining individual rights expanded by the Warren Court, but under retrenchment by the Burger Court he stated:

> Of late, . . more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely

25. *Id.* at 916.

26. *Id.* at 919-20 (citing United States v. Peltier, 422 U.S. 531, 542 (1975)).

27. State v. Mara, 78 A. 2d 922, 924 (N.H. 1951).

28. *The Warren Court, A Retrospective* (Bernard Schwartz ed., Oxford University Press 1996).

an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.[29]

In 1982, the United States Supreme Court in *Michigan v. Long*,[30] set forth how state supreme court justices should write their opinions when they are based on "bona fide separate, adequate, and independent [state] grounds."[31]

Beginning in 1983, New Hampshire, and other state supreme courts, "in reaction to federal decisions narrowing the scope and content of fourth amendment rights, ... repeatedly emphasized the importance of undertaking independent interpretation of our State constitutional guarantees."[32] These courts held that the good faith exception is inconsistent with state constitutional requirements of probable cause.[33]

State appellate courts must clearly state on the face of the opinion the adequacy and independence of any possible state law ground.

When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'[34]

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29. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

30. 463 U.S. 1032 (1982).

31. *Id.* at 1040-41.

32. State v. Canelo, 653 A.2d 1097, 1104 (N.H. 1995) (citing State v. Ball, 471 A.2d 347, 350-52 (N.H. 1983); State v. Bradberry, 522 A.2d 1380, 1982 (N.H. 1986); State v. Koppel, 499 A.2d 977, 979-80 (N.H. 1985); State v. Sidebothem, 474 A.2d 1377, 1379-80 (N.H. 1984); State v. Settle, 447 A.2d 1284, 1285-86 (N.H. 1982) (plurality opinion)) (holding that a good faith exception is incompatible with the guarantees contained in part I, article 19 of the New Hampshire Constitution).

33. *See* State v. Marsala, 579 A.2d 58 (Conn. 1990); State v. Gutierrez, 863 P.2d 1052 (1993); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); and Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). *See also,* State v. Guzman, 842 P.2d 660 (Idaho 1992); People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); and State v. Oakes, 598 A.2d 119 (Vt. 1991).

34. Ohio v. Robinette, 519 U.S. 33, 37 (1996) (citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)) (decision clearly relied on federal law rather than Ohio Constitution). *See also* Pennsylvania v. Labron, 518 U.S. 938, 941 (1996) (Pennsylvania Supreme Court decisions rest on an incorrect reading of the Fourth Amendment's warrant requirement, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion).

II. METHODOLOGY: A HYPOTHETICAL[35]

The moon rises slowly as two men busily transfer contraband drugs from the stash house into the trunk of a late model Cadillac. The Miami drug lord fingers the trigger of his UZI machine gun as he surveys the scene, located somewhere between the Miami International Airport and Hialeah Park Race Track. After receiving their delivery schedule and telephone numbers, the two "mules" drive off to the east until they arrive at Interstate 95, the "Golden Alley." They turn north and set the cruise control. Within twelve hours they will deliver cocaine in six states: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

These foreign nationals have not read the United States Constitution, Bill of Rights, or the constitutions of the six states in which they will make deliveries. They do know, however, that if stopped they are not to speak English except to ask for a lawyer.

This hypothetical assumes that in a city in each of the six states, the following occurs: On that same night a confidential informant of unproven reliability informs an officer of the (insert city) police department that two persons known to him as "Armando" and "Patsy" are selling large quantities of cocaine from their residence at 620 Noveau Riche Drive in downtown (insert name of same city). The informant also indicates that he witnessed a sale of cocaine by Patsy at the residence approximately five months earlier. At that time, he saw a shoe box containing a large amount of cash that belonged to Patsy. He says that Armando and Patsy generally keep only small quantities of drugs at their residence and store the remainder at another location in (insert name of same city). The police put Armando and Patsy under surveillance and determine that the cars parked at the Noveau Riche residence belong to Armando Sanchez, who previously has been arrested for possession of cocaine, and Patsy Stewart, who has no criminal record. That night officers observe a late model Cadillac arrive at the Noveau Riche Drive residence. Two males exit the vehicle and walk into the residence. Each man holds a small package which resembles a fast food restaurant bag. A quick check of the license tag number through the police information network reveals that the Cadillac is owned by Richard Castle, who has been arrested previously for possession of fifty pounds of marijuana. Officers see another automobile arrive. A

35. These facts are designed to resemble the factual situation in *United States v. Leon*, 468 U.S. 897 (1984).

male exits this automobile, rushes inside the residence at 620 Noveau Riche Drive, and shortly thereafter leaves carrying a small paper sack. Activity increases. At two a.m., after all area businesses have closed, three more automobiles arrive. The occupants rush inside the 620 Noveau Riche Drive residence and leave holding paper bags. The police recognize one of those persons as a probationer with prior drug involvement.

While officers continue to keep the residence under surveillance, one officer rushes to a magistrate. The officer presents an affidavit reciting the information obtained from the confidential informant, the officers' personal observations at 620 Noveau Riche Drive, and the record checks obtained. The magistrate issues a search warrant to search the house and vehicles at 629 Noveau Riche Drive, (insert name of city), for controlled substances. The affidavit contains no facts indicating the basis for the informant's statements concerning prior criminal activity and is devoid of information establishing the informant's reliability.

The officer returns to the scene with the search warrant and all officers search the house and the Cadillac. The officers seize two kilos of cocaine in the house at 620 Noveau Riche Drive and eight kilos of cocaine in the trunk of the Cadillac, all wrapped in fast food restaurant bags.

Armando, Patsy and the two "mules" are arrested inside the house and exercise their right to remain silent. Appointed counsel files a motion to suppress the cocaine on the grounds that the search warrant was not supported by probable cause.

How does this hypothetical impact state constitutional law? To answer that question it is necessary to examine the evidence at the suppression hearing through the lens of the state trial judge in each state. The hypothetical assumes that each defendant has standing to object to the admissibility of at least part of the cocaine.

As we trace this hypothetical journey from state to state, we will examine the legal response of state trial court judges based on search and seizure provisions in state constitutions, state statutes and case law. The state trial court judge will look first to the Fourth Amendment of the United States Constitution.

The state trial judge in each case determines that the search warrant is defective under the Fourth Amendment. The magistrate did not have probable cause to issue the search warrant, because there was no proof of the credibility of the informant and his information was stale. However, the trial judge knows that

suppressing the evidence will have no deterrent effect on the police. The police officer who obtained the search warrant was well-trained and relied on the search warrant in objective good faith. The ruling in *United States v. Leon* would indicate that the motion to suppress should be denied.[36]

The trial judge will attempt to determine if the motion to suppress can be allowed on "adequate and independent" state grounds. The method of analysis is analytical and comparative. It is a useful method, because it studies the disparate responses to the issue by six state supreme courts.

This article follows the hypothetical pair northward from Florida to New Jersey, evaluating state constitutional law, state statutory law and state case law, looking for inconsistencies and anomalies. Interestingly, we begin with an anomaly: the search and seizure provision of the Florida Constitution, Article I, Section 12.

III. FLORIDA

Article I, Section 12, of the Florida Constitution, as amended in 1982, effective January 3, 1983, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*[37]

The 1982 amendment to Article I, Section 12, of the Florida Constitution appears in italics type. This 1982 amendment was adopted by vote of the electorate at the November, 1982 general election. The other part of Article I, Section 12 appeared without

36. *See supra* notes 23-26.

37. FLA. CONST. art. 1, § 12.

substantial difference in all the prior Florida Constitutions.[38] Prior to passage of this amendment, Florida courts "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution."[39]

Section 933.18 of the Florida Statutes governs the issuance of a search warrant for a private home and provides:

> No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:
>
> . . . .
>
> (5) The law relating to narcotics or drug abuse is being violated therein;
>
> . . . No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some credible witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.[40]

State v. Lavazzoli[41] interpreted the 1982 amendment to Article I, Section 12 of the Florida Constitution as linking Florida's exclusionary rule to the federal exclusionary rule.[42] Thus, the good faith exception to the search warrant requirement as set out in *United States v. Leon*[43] and *Massachusetts v. Sheppard*[44] became the law in Florida.

With this amendment, however, we are bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment, and provide no greater protection than those interpretations. Indeed, an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.[45]

The effect of making the exclusionary rule a part of the Florida Constitution in 1968 was to give the existing exclusionary rule

38. FLA. CONST. of 1838, art. I, § 7 (1968); FLA. CONST. of 1861, art. I, § 7 (1968); FLA. CONST. of 1865, art. I, § 7 (1968); FLA. CONST. of 1868, decl. of rights, § 19 (1968).

39. State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983).

40. FLA. STAT. CH. 933.18 (1985).

41. 434 So.2d 321 (Fla. 1983).

42. *Id.* at 323.

43. 468 U.S. 897 (1984).

44. 468 U.S. 981 (1984).

45. State v. Bernie, 524 So.2d 988, 990-91 (Fla. 1988).

constitutional dimension, supposedly immunizing it from possible future retreat from the United States Supreme Court's constitutional holding in *Mapp*.

However, with the *Bernie* decision in 1988, the Florida Supreme Court held that the language of the amended Article I, Section 12 of the Florida Constitution indicated an intention to apply all United States Supreme Court decisions to Florida search and seizure cases regardless of when rendered.[46] In *Bernie*, Emery Air Freight received an envelope addressed to Vickie Bernie.[47] The envelope had broken in transit, revealing a suspicious substance.[48] Emery notified a drug enforcement agent, who tested the substance and identified it as cocaine.[49] Emery then notified the Sarasota County Sheriff's Office.[50] Bruce Bernie came to Emery's Tampa office to check on the whereabouts of the package, and Emery's employees told him that the package would be delivered the next day, October 14, 1983.[51] On October 14, 1983, based on an affidavit setting forth the preceding facts, the police obtained a search warrant for the Bernies' residence.[52] Probable cause was based on the prospective delivery of cocaine under police control.[53] A few minutes after the controlled delivery, police executed the search warrant at the residence, arrested the Bernies, and charged them with possession of cocaine.[54]

The Bernies moved to suppress the cocaine on the grounds that it was the product of an unreasonable search and seizure, relying on the provisions of Section 933.18, Florida Statutes.[55] The Bernies contended that at the time the search warrant was issued there was no violation of any narcotics law in their dwelling.[56]

Nevertheless, the court in *Bernie* held that the anticipatory search warrant issued was valid and did not violate the Fourth Amendment of the United States Constitution, Article I, Section 12 of the Florida Constitution or Section 933.18 of the Florida

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46. *Id.* at 991.
47. *Id.* at 989.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Bernie*, 524 So.2d at 989.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 990.

Statutes.[57] *Bernie* also held that the 1982 amendment to Article I, Section 12, of the Florida Constitution conformed Florida's search and seizure laws with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment. (emphasis added).[58]

In 1989, one year after *Bernie*, a Florida appellate court in *Renckley v. Florida*[59] found an anticipatory search warrant invalid under Section 933.18.[60] The good faith exception argument of the State failed because the affidavit did not provide sufficient evidence for a magistrate to find probable cause to issue a search warrant.[61] Therefore, the officer's search of the dwelling was not in "objectively reasonable reliance" on the warrant.[62]

More recently, the 1995 case of *Pazos v. Florida*[63] applied the good faith exception to the exclusionary rule in an anticipatory search case.[64] Technically, no narcotics or drug abuse law was being violated when the magistrate issued the search warrant.[65] The court found that the officer reasonably relied on the magistrate's finding of probable cause.[66] The informant had bought drugs before from the occupants of the dwelling.[67] "[T]he officers had the informant in sight constantly except while he was inside the dwelling."[68] "[T]here was a firm connection between the contraband and the premises."[69] The affidavit contained no false statements.[70] The motion to suppress under Florida Statutes Section 933.18 (5) was denied.[71]

In Florida, the task of the issuing magistrate is simply to make a practical, common-sense decision; whether given all the circumstances set forth in the affidavit, including the "veracity" and the "basis of knowledge" of persons supplying hearsay infor-

57. *Bernie*, 524 So.2d at 992.
58. *Id.*
59. 538 So.2d 1340 (Fla. 1989).
60. *Id* at 1342.
61. *Id* at 1342-43.
62. *Id.* at 1343.
63. 654 So.2d 1000 (Fla. 1995).
64. *Id.* at 1001.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Pazos*, 654 So.2d at 1001.
70. *Id.*
71. *Id.* at 1000.

mation, there is a fair probability that contraband or evidence of a crime will be found in a particular place. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed" considering the totality of the circumstances.[72]

State v. Wildes[73] applied the good faith exception enunciated in *United States v. Leon* when the information in the affidavit was obtained by a police officer from an unidentified confidential informant.[74] "The affidavit contained no specific facts regarding the reliability of the informant although the facts themselves contained considerable detail indicating the presence of contraband at the residence authorized to be searched."[75] The Court applied the good faith exception, noting that the search warrant was regular on its face.[76] It also noted that "the affidavit upon which [the search warrant] was based was not so lacking in indicia of probable cause that the officer executing the warrant could not with reasonable objectivity rely in good faith on the magistrate's probable cause determination and on the technical sufficiency of the warrant."[77]

Florida v. Kingston[78] applied the *Leon* good faith exception in 1993, even though the judge issued a search warrant, in which he had drawn a diagonal line across a blank space where the description of the place to be searched was omitted.[79] The detective believed the judge had corrected whatever was wrong.[80] A nine page affidavit was stapled to the search warrant.[81] Apparently, when read in a common sense, non-technical way, the search warrant set forth ample facts to establish probable cause and enable the searcher, with reasonable effort, to identify the place to be searched.[82] In Florida, "the test is practical accuracy, not technical nicety."[83]

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72. Illinois v. Gates, 462 U.S. 213, 238 (1983) (citing Jones v. United States, 362 U.S. 257, 271 (1960)).
73. 468 So.2d 550 (Fla. 1985).
74. *Id.* at 550-51.
75. *Id.* at 550
76. *Id.* at 551.
77. *Id. See also* State v. Harris, 629 So.2d 983 (Fla. 1993).
78. 617 So.2d 414 (Fla. 1993).
79. *Id.* at 415.
80. *Id.* at 416.
81. *Id.*
82. *Id.*
83. *Id.* at 415.

In the 1996 case of *Florida v. Howard*,[84] the search warrant stated that facts showing probable cause were set forth in a written affidavit.[85] The search warrant failed to incorporate by reference the facts in the affidavit.[86] However, the court deemed the search warrant valid, because evidence at the suppression hearing suggested the affidavit had been attached to the warrant and had been reviewed by the issuing judge.[87]

Florida courts have refused to follow the good faith exception to the exclusionary rule in some cases. In *State v. Ross*,[88] a search warrant, due to a word processing error, neglected to include a description of specific property for which the search was authorized.[89] The search warrant was facially invalid.[90] The executing officer could not reasonably have presumed the search warrant to have been valid.[91] Therefore, the State could not resort to the good faith exception to the exclusionary rule enunciated in *United States v. Leon*.[92] The next year, the court in *Vasquez v. State*[93] refused to apply the good faith exception, because the affidavit for a search warrant contained no information about the informant's credibility and no independent police corroboration.[94] No officer could in objective good faith rely on the search warrant.[95] In *Delacruz v. Florida*,[96] the affidavit for a search warrant was insufficient to establish probable cause, because it contained no information about the reliability of the confidential informant.[97]

The *Leon* good faith exception to the exclusionary rule does not apply to the exclusionary provisions of the Florida wiretap law set out in chapter 934, Florida Statutes. The statutorily mandated exclusionary rule in "[c]hapter 934, Florida Statutes, pertaining to security of communications, unequivocally expresses

84. 670 So. 2d 1004 (Fla. 1996).
85. *Id.* at 1005.
86. *Id.*
87. *Id.* at 1005-06.
88. 471 So.2d 196 (Fla. 1985).
89. *Id.* at 196.
90. *Id.*
91. *Id.* (citing United States v. Leon, 468 U.S. 897, 926 (1984)).
92. *Id.*
93. 491 So.2d 297 (Fla. 3d DCA), *rev. denied*, 500 So.2d 545 (Fla. 1986).
94. *Id.* at 301.
95. *Id.* at 300.
96. 603 So.2d 707 (Fla. 1992).
97. *Id.* at 707.

the Legislature's desire to suppress evidence obtained in violation of that chapter."[98]

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter.[99]

Florida state courts have adopted the good faith exception to the exclusionary rule in accordance with the 1982 amendment to Article I, Section 12, of the Florida Constitution. Prior to 1983, the exclusionary rule was a state constitutional provision. The good faith exception to the exclusionary rule, as set forth in *Leon*, became state law in Florida by virtue of the language in Article I, Section 12, of the Florida Constitution: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

In the hypothetical discussed in section II of this article, the state trial judge's order allowing the motion to suppress would be reversed by the Florida appellate courts. Thus, Armando and Patsy would likely be convicted in Florida.

IV. GEORGIA

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.[100]

The Georgia state constitutional provision on search and seizure has not impacted analysis by the Georgia Supreme Court of the *Leon* good faith exception to the exclusionary rule. That is not to say that the *Leon* good faith exception to the exclusionary rule applies in Georgia state courts.

The federal exclusionary rule, applicable only when evidence has been seized pursuant to an unlawful search, operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ."[101] Any

98. *State v. Garcia*, 547 So.2d 628, 630 (Fla. 1989).
99. *Id.* (citing FLA. STAT. CH. 934.06 (1985)).
100. GA. CONST. art. I, § 1.
101. United States v. Calandra, 414 U.S. 338, 348 (1974).

exception to the federal exclusionary rule arises only when evidence has been seized pursuant to an unlawful search. In *Leon,* the Supreme Court of the United States held that the exclusionary rule does not bar the introduction in the State's case in chief of "evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate that ultimately found to be invalid."[102]

The *Leon* "good faith exception" does not apply in Georgia. The Official Code of Georgia Annotated (OCGA) section 17-5-30 is Georgia's exclusionary rule.[103] The Georgia state legislature has mandated the exclusionary rule in OCGA section 17-5-30.[104] "By its terms, OCGA section 17-5-30 authorizes no exception to Georgia's exclusionary rule when evidence has been seized unlawfully. OCGA section 17-5-30 (a)(1) and (2) clearly provides that '[a] defendant aggrieved by an unlawful search and seizure was entitled to suppression of the evidence regardless of whether the unlawful search and seizure was accomplished with or without a warrant.'"[105]

By passage in 1966 of an act "to provide for searches and seizures and for suppression of evidence illegally seized" the State of Georgia has chosen to impose greater requirements upon its law enforcement officers than that required by the U.S. Constitution, as interpreted by the U.S. Supreme Court.[106]

OCGA section 17-5-30(a)(2) applies in situations where it is alleged that a search conducted pursuant to a search warrant was unlawful because the search warrant itself was either insufficient on its face, was issued without probable cause, or was illegally executed.

In determining whether an affidavit sufficiently establishes the probable cause necessary for issuance of a warrant, Georgia courts employ the 'totality of the circumstances' analysis enunciated in *Illinois v. Gates*, and adopted by Georgia in *State v. Stephens*, with the admonition that '[p]rudence counsels that *Gates* be considered as the outer limit of probable cause.' Under that

102. *Leon*, 468 U.S. 897, 897 (1984).

103. *See* State v. Slaughter, 315 S.E.2d 865, 870 (Ga. 1984); and King v. State, 438 S.E.2d 93, 94-95 (Ga. App. 1993).

104. *See* Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992); and Hestley v. State, 455 S.E.2d 333, 340 (Ga. App. 1995).

105. State v. Harvey, 469 S.E.2d 176, 178 (Ga. 1996).

106. *Gary*, 422 S.E.2d at 428 (noting that "[o]ur decision in this case is based on our construction of OCGA § 17-5-30").

analysis, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.[107]

Georgia law does allow a defendant to plead guilty, reserving the right to appeal the trial court's denial of his motion to suppress.[108]

Prior to the Georgia Supreme Court ruling in *Gary* on November 5, 1992, some Georgia appellate cases had approved and utilized the *Leon* good faith exception to the exclusionary rule.[109] Interestingly, in *Adams v. State,*[110] Chief Judge Carley was careful to specify: "[i]t should be pointed out that the State Constitution and state law are not involved."[111] Furthermore, some of the cases[112] mistakenly cite *State v. Stringer.*[113] In *Stringer*, Chief Justice Marshall referred to the *Leon* good faith exception to the exclusionary rule in *dictum*.[114] The holding in *Stringer* did not adopt the *Leon* good faith exception rule.[115]

In conclusion, the United States Supreme Court's decision in *United States v. Leon*,[116] which judicially creates a "good faith" exception the exclusionary rule, does not apply in Georgia, because Georgia's exclusionary rule is legislatively created. The state statute, OCGA section 17-5-30, imposes greater requirements upon Georgia law enforcement officers than that required

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107. *Id.* at 429-30.

108. *See* State v. McCullough, 438 S.E.2d 369 (Ga. App. 1993); Mims v. State, 410 S.E.2d 824 (Ga. App. 1991).

109. Taylor v. State, 419 S.E.2d 56, 58 (Ga. App. 1992); Talley v. State, 408 S.E.2d 463, 465-466 (Ga. App. 1991); State v. Morris, 402 S.E.2d 288, 290 (Ga. App. 1991); Adams v. State, 383 S.E.2d 378, 379-380 (Ga. App. 1989); State v. Evans, 384 S.E.2d 404, 409 (Ga. App. 1989); Debey v. State, 385 S.E.2d 694 (Ga. App. 1989).

110. 383 S.E.2d 378 (Ga. App. 1989).

111. *Id.* at 380.

112. *See supra* note 110.

113. 372 S.E.2d 426 (Ga. 1988).

114. *Id.* at 606.

115. *Id.* at 606-07.

116. 468 U.S. 897 (1984).

by the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Leon*. The *Leon* good faith exception to the exclusionary rule has not been applied in Georgia state courts since the Georgia Supreme Court ruling in *Gary* on November 5, 1992. These state courts, using adequate and independent state grounds, have resolved search and seizure questions in total reliance on the state statute without considering *Leon*.

In the absence of drug evidence in the hypothetical set out in section II of this article, Armando and Patsy would not be tried or the case would be dismissed at the close of the State's evidence.

V. SOUTH CAROLINA

Article I, section 10 of the South Carolina Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

The present version of Article I, section 10 was adopted in 1971. South Carolina Statute section 17-13-140 provides:

> Any magistrate or recorder or city judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize . . . . (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States. . . . A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer above mentioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

The constitutional prohibition against the issuance of a warrant except "upon probable cause supported by oath or affirmation" is not a grant of power. It is part and parcel of the historic

provision securing the people against unreasonable searches and seizures and its only office is to prescribe minimum standards for the issuance of a warrant. The requirement of an affidavit complies with these standards and is a procedural detail. The determination of whether or not there is probable cause must be made by the officer empowered to issue the search warrant, and not by a police officer or other individual who seeks the warrant.[117] A trial court, in reviewing a magistrate's finding of probable cause, may not consider information which was not set forth in the affidavit unless the search warrant specifies that a sworn oral statement was presented to the magistrate.[118] An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding that probable cause existed. If the search warrant affidavit does not show a reliable confidential informant, then the magistrate cannot find probable cause to issue the search warrant.[119]

In determining the existence of probable cause, a non-confidential informant possesses a higher level of credibility because he exposes himself to public view and to possible civil and criminal liability should the information prove to be false.[120]

A 1991 case, *State v. Scott,*[121] held that a search warrant affidavit articulated sufficient probable cause for the magistrate to issue a search warrant to search the defendant's home.[122] In *Scott*, the affidavit stated that investigators saw the defendant leave his residence; stopped the defendant; the defendant possessed more than twenty grams of cocaine; and the investigators maintained visual contact with the defendant from the time he left his residence until the time of the stop.[123]

If a search warrant affidavit alone is insufficient to establish probable cause, it may be supplemented before the magistrate by sworn oral testimony.[124] However, sworn oral testimony, standing alone, does not satisfy South Carolina's search warrant statute.[125] In *State v. McKnight,* a 1987 case, the officers were aware of the statutory requirement that an affidavit support a search warrant,

117. State v. York, 156 S.E.2d 326 (S.C. 1967).
118. State v. Arnold, 460 S.E.2d 403 (S.C. 1995).
119. State v. Philpot, 454 S.E.2d 905 (S.C. 1995).
120. State v.Bellamy, 473 S.E.2d 838 (S.C. 1996).
121. State v. Scott, 400 S.E.2d 784 (S.C. Ct. App. 1991).
122. *Id.* at 786.
123. *Id.* at 785-786.
124. State v. McKnight, 352 S.E.2d 471, 472 (S.C. 1987).
125. S.C. Code Ann. §17-13-140 (Law Co-op. 1985).

but made no effort to comply.[126] Thus, the good faith exception to the exclusionary rule did not apply when the search warrant was adjudged defective under section 17-13-140 of the South Carolina code, rather than on Fourth Amendment grounds.[127] *Leon* did not apply. The South Carolina Supreme Court found that exclusion of the evidence was appropriate.[128]

In *State v. Johnson,*[129] a 1990 case, the affidavit in support of the search warrant was insufficient to support the magistrate's determination of probable cause.[130] In *Johnson,* the confidential informant's allegations were not corroborated and the reliability of the informant was not set forth.[131] This case was remanded to the trial court.[132] The South Carolina Supreme Court felt that the dispositive issue was whether sworn oral testimony about the informant's reliability was presented to the magistrate.[133] If such information was not given, then the *Johnson* court felt that the magistrate in this case would have served only as a "rubber stamp" for the police rather than as a neutral and detached official.[134] Under such circumstances, *Leon* would specifically preclude application of the good faith exception.[135]

The South Carolina Court of Appeals, in the 1994 case, *State v. Adolphe*,[136] reversed the trial judge's ruling that the *Leon* good faith exception to the exclusionary rule applied.[137] The confidential informant, Richard "Tex" Chung, made a controlled buy of crack at a trailer.[138] Michael Donnell, a man unknown to and not assisting the police at that time, went with Chung into the trailer and acted as an intermediary in the buy.[139] After the buy, Chung met with his supervising officer, turned over the crack and gave a detailed description of the man who had sold the crack to him.[140]

126. *McKnight*, 352 S.E.2d at 471.
127. *Id.* at 473.
128. *Id.*
129. State v. Johnson, 395 S.E.2d 167 (S.C. 1990).
130. *Id.* at 169.
131. *Id.*
132. *Id.* at 170.
133. *Id.*
134. *Id.*
135. *Id.*
136. State v. Adolphe, 441 S.E.2d 832 (S.C. Ct. App. 1994).
137. *Id.* at 834.
138. *Id.* at 833.
139. *Id.*
140. *Id.*

Immediately after receiving the crack from Chung, Officer Young obtained a search warrant for the trailer.[141] Police went to the trailer and arrested several people, including Donnell.[142] Donnell offered to help the police, stating that Adolphe had fled to Adolphe's "stash house."[143] Donnell led police to the alleged house, where the police entered with the consent of one of the occupants.[144] The police arrested Adolphe as he was trying to escape out the back door.[145] Adolphe matched the description of the man who had made the sale to Chung, and Donnell identified Adolphe as the person who sold the crack at the trailer.[146] Minutes later, an officer arrived at the stash house with a search warrant.[147] Officer Young had obtained the information for the search warrant from a radio transmission which he and the magistrate monitored via a police radio at the magistrate's office.[148]

The affidavit of Officer Young stated:

> An individual positively identified by a confidential informant as having sold crack cocaine to the confidential informant within the last 48 hours and being observed by drug agents fleeing the location of the previous bust, was located at this location within minutes after fleeing previous location on the night of 1-2, October, 1991. C.I. and others describe this residence as a stash house where money and drugs are stored after sale from previous location is completed.[149]

The trial court found that the search warrant was deficient on its face and conducted a suppression hearing.[150] At the hearing the only witness was the affiant, Officer Young.[151] Young's testimony only established that Donnell was the person who positively identified Adolphe.[152] Although Young's testimony did not cure the deficiencies in the search warrant, the trial court denied the defense's motion to suppress, applying the *Leon* good faith excep-

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141. *Adolphe,* 441 S.E.2d at 833.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Adolphe,* 441 S.E.2d at 833.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 834.
151. *Id.*
152. *Id.*

tion to the exclusionary rule.[153] The Court of Appeals reversed the trial court, applying the *Gates*[154] "totality of the circumstances test."[155] The Court of Appeals concluded that the search warrant should not have been issued because the affidavit, coupled with the suppression hearing, failed to supply facts creating probable cause.[156] The *Adolphe* court stated that the "affidavit did not demonstrate the confidential informant's reliability and the informant's allegations were never corroborated by any identifiable individuals."[157] The Court went on to say that "our Supreme Court (South Carolina) declined to apply the good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause."[158]

In *State v Austin,*[159] decided in 1991, the South Carolina Court of Appeals held that marijuana seized pursuant to a defective search warrant was not admissible under the *Leon* good faith exception to the exclusionary rule.[160] Crucial to this case were the facts that the officer testified at the suppression hearing that he actually knew that the affidavit was insufficient and that the affidavit, itself, contained no information about the reliability of the informant.[161] Consequently, the Court held that the officer did not act in reasonable reliance on the search warrant.[162]

In conclusion, South Carolina Constitution Article I, section 10 closely resembles the Fourth Amendment of the U.S. Constitution. Article I, section 10 does contain a specific phrase prohibiting unreasonable invasions of privacy that is not in the Fourth Amendment. The South Carolina Constitution and South Carolina Statute section 17-13-140 governing searches and seizures both require a finding of probable cause by a judicial official for a search warrant to issue. As a matter of state criminal procedure developed by state case law, magistrates may consider sworn oral statements to supplement affidavits in determining probable

153. *Id.*

154. Illinois v. Gates, 462 U.S. 213 (1983).

155. *Adolphe,* 441 S.E.2d at 834.

156. *Id.*

157. *Id.*

158. *Id.* (*quoting* State v. Johnson, 395 S.E.2d 167, 170 (S.C. 1990) and State v. Austin, 409 S.E.2d 811 (S.C. Ct. App. 1991)).

159. *Austin,* 409 S.E.2d 811 (S.C. Ct. App. 1991).

160. *Id.* at 816.

161. *Id.*

162. *Id.*

cause.[163] At suppression hearings, trial courts may conduct suppression hearings to determine what sworn oral statements a magistrate considered in finding probable cause. Few appellate cases in South Carolina discuss the *Leon* good faith exception to the exclusionary rule.[164] The South Carolina Supreme Court has declined to apply the *Leon* good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause.[165]

South Carolina appellate courts would affirm the state trial judge's order allowing the motion to suppress in our hypothetical. Armando and Patsy would not face trial in South Carolina, or if tried, a motion to dismiss at the close of the State's case would be allowed.

VI. North Carolina

Article I, Section 20 of the North Carolina Constitution provides:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.[166]

The North Carolina Supreme Court has interpreted the search and seizure provision of its state constitution, Article I, Section 20, to provide broader rights than those required by the Fourth Amendment to the United States Constitution. In *State v. Carter*,[167] a 1988 case, the North Carolina Supreme Court refused to adopt the *Leon* good faith exception to the exclusionary rule.[168] The North Carolina Supreme Court's analysis in the Carter case specifically addresses "adequate and independent" state constitutional grounds:

> Because we decide this case on adequate and independent state constitutional grounds, we do not reach or decide the question of whether the challenged search violated defendant's fourth and fourteenth amendment rights under the Federal Constitution.

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163. State v. McKnight, 352 S.E.2d 471, 472 (S.C. 1987).

164. State v. Adolphe, 441 S.E.2d 832, 834 (S.C. Ct. App. 1994).

165. *Austin*, 409 S.E.2d 811 (S.C. Ct. App. 1991); State v. Johnson, 395 S.E.2d 167 (S.C. 1990).

166. N.C. CONST. ART. 1, § 20.

167. State v. Carter 370 S.E.2d 553 (N.C. 1988).

168. *Id.* at 562.

> The federal cases cited or discussed are being used only for the purpose of guidance and they do not compel the result that this Court has reached.[169]

Justice Martin, writing for a four to three majority in *Carter,* recognized that the language in Article I, Section 20 of the North Carolina Constitution differs somewhat from that of the Fourth Amendment to the United States Constitution. To emphasize the court's inherent power to decide the case solely on the state constitution, Justice Martin stated: "Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."[170]

The position of the North Carolina Supreme Court is not surprising. The North Carolina General Assembly enacted a statutory exclusionary rule in 1937, North Carolina General Statute section 15-37, some twenty five years before *Mapp*[171] mandated that the states apply the exclusionary rule under the due process clause of the fourteenth amendment. *Elkins v. U.S.*,[172] the famous "silver platter" decision in 1960, listed North Carolina as one of twenty six states that excluded evidence illegally seized by state officers.[173] Prior to *Elkins*, evidence illegally seized by state officers was admissible in federal trials; thus the evidence was said to be handed over to federal officers by state officers on a "silver platter."

The North Carolina General Assembly amended the statute adopting the exclusionary rule in 1951 to extend the rule to apply to warrantless searches.[174] The amended statute was repealed in 1969 and replaced, effective 1975, by North Carolina General Statute section 15A-974 which provides in part: "[u]pon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina."[175] The General Assembly of

169. *Id.* at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983); Jackson v. Housing Authority 364 S.E.2d 416 (N.C. 1988)).

170. *Carter,* 370 S.E.2d at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983) *and* State v. Arrington 319 S.E.2d 254, 260 (1984)).

171. Mapp v. Ohio, 367 U.S. 643 (1961).

172. Elkins v. U.S., 364 U.S. 206 (1960).

173. *Id.* at 224 (*citing* State v. Mills 98 S.E.2d 329 (N.C. 1957)).

174. N.C. GEN. STAT. § 15-37 (1957) (repealed 1969).

175. N.C. GEN. STAT. § 15A-974(1) (1973).

North Carolina sets the public policy of the state. Since 1937, the expressed public policy of North Carolina has been to exclude evidence obtained by law enforcement officers in violation of state or federal constitutional rights.

The exclusionary rule continues to be a debated issue in North Carolina, though its legal status is clearly established when the court rules only on the basis of state constitutional law. The *Leon* good faith exception to the exclusionary rule was approved in 1988 in *State v. Welch*[176] and *State v. Witherspoon*,[177] when the court applied federal constitutional law. Unquestionably, *Welch* has been overruled by *Carter*. Both *Welch* and *Carter* involved officers obtaining blood samples from persons in custody using non-testimonial identification orders rather than search warrants.[178]

In *State v. Hyleman*,[179] a 1988 case, the North Carolina Court of Appeals used the *Leon* good faith exception to the exclusionary rule to uphold the trial court's denial of the defendant's motion to suppress. On appeal, the North Carolina Supreme Court, in an opinion written by Justice Martin, reversed the Court of Appeals.[180] The North Carolina Supreme Court did not reach the federal constitutional question. The Court found that the affidavit and application for a search warrant failed to comply with the state search and seizure statute, North Carolina General statute section 15A-244.[181] Justice Martin's opinion reasoned: "[h]aving decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds. . . . It follows that the good faith exception to the exclusionary rule is not applicable. The good faith exception to the exclusionary rule arises upon the exclusion of evidence based upon federal constitutional grounds."[182]

Justice Mitchell's dissent in *Carter*, vigorously attacked the rationale used by the majority in *Carter* and subsequently in *Hyleman*. In his dissent in *Carter* Justice Mitchell stated:

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176. State v. Welch, 342 S.E.2d 789 (N.C. 1986).

177. State v. Witherspoon, 429 S.E.2d 783 (N.C. App. 1993).

178. *Welch,* 342 S.E.2d at 793; *Carter,* 429 S.E.2d at 554.

179. State v. Hyleman, 366 S.E.2d 530 (N.C. App. 1988), *rev'd*, 379 S.E.2d 830 (N.C. 1989).

180. *Hyleman,* 379 S.E.2d 830 (N.C. 1989).

181. *Id.* at 833.

182. *Id.*

> In the context of cases such as this, the majority's doctrinaire application of our exclusionary rule truly becomes a 'mere technicality' applied with a vengeance to block enforcement of the criminal laws for no good reason. Application of the exclusionary rule here will not deter any future misconduct by anyone or lessen the likelihood of future infringements upon anyone's constitutional rights. The only effect of the majority's rejection of a good faith exception to the exclusionary rule in cases such as this is to punish the public by impeding the truth-finding function of its courts. This drastic choice by the majority does not lead to any corresponding societal or constitutional gain for anyone other than criminal defendants lucky enough to have officers make honest errors in their cases. This diminishes the integrity of the judicial branch of government.[183]

Furthermore, Justice Meyer additional dissent in *Carter* contended that there is no reason for the court to find there to be different exclusionary standards under the North Carolina Constitution than the United States Constitution.[184] Justice Meyer wrote that "a dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the objectives of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution."[185]

In conclusion, when North Carolina State Courts evaluate motions to suppress, their rulings depend on whether the courts rely on "adequate and independent" state grounds. Since there is no *Leon* good faith exception to the exclusionary rule in Article I, Section 20 of the North Carolina Constitution, *Carter*. Armando and Patsy's motion to suppress in a North Carolina court would begranted.

VII. VIRGINIA

The Virginia State Constitution provides:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[186]

183. State v. Carter, 370 S.E.2d 553, 565 (N.C. 1988) (Mitchell, J., dissenting).
184. *Id.* at 567(Meyer, J., dissenting).
185. *Id.*
186. VA. CONST. ART. 1, § 10.

General warrants are proscribed by both the Fourth Amendment[187] and Virginia's statutory law.[188] The purpose of this proscription is to limit the discretion police officers may exercise when engaging in a "fishing expedition" or an "exploratory rummaging in a person's belongings."[189] To protect against this danger, the Fourth Amendment requires "a particular description of the thing to be seized."[190] The Virginia statutes controlling the issuance of search warrants have been interpreted to impose the same search warrant requirements as the Fourth Amendment.[191]

Virginia magistrates have an additional incentive to exercise care in the issuance of search warrants. Section 19.2-55 of Virginia's code provides that "any person having authority to issue criminal warrants who willfully and knowingly issues a general search warrant or a search warrant without the affidavit required by Section 19.2-54 shall be deemed guilty of a malfeasance."[192]

The Fourth Amendment specifically mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[193] Article I, Section 10 of the Virginia Constitution prohibits a general search of "suspected places without evidence of a fact committed."[194] Although the words, "probable cause," do not appear in the search and seizure provision of the Virginia State Constitution, the words "probable cause" in the Fourth Amendment came from a Virginia document. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against the practice of police control taking the place of judicial control.

Virginia Code Section 19.2-45(2) gives magistrates the power to issue search warrants in accord with the provisions of Sections 19.2-52 to 19.2-60.[195] Section 19.2-52 provides that:

> search warrants, based upon complaint on oath supported by an affidavit as required in Section 19.2-54, may be issued by any judge, magistrate or other person having authority to issue criminal warrants, if he be satisfied from such complaint and affidavit

187. Andresen v. Maryland, 421 U.S. 463, 480 (1976).
188. VA. CODE ANN. § 19.2-54 (Michie 1987).
189. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).
190. U.S. CONST., AMEND. IV.
191. Kirby v. Commonwealth, 167 S.E.2d 411, 412 (Va. 1969); Morke v. Commonwealth, 419 S.E.2d 410 (Va. Ct. App. 1992).
192. VA. CODE ANN. § 19.2-55 (Michie 1975).
193. U.S. CONST., AMEND. IV.
194. VA. CONST. ART. 1, § 10.
195. VA. CODE ANN. § 19.2-45(2) (Michie 1985).

that there is reasonable and probable cause for the issuance of such search warrant.[196]

Section 19.2-54 of the Virginia Code specifies the essential requirements of the affidavit:

> No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made and that the object, thing or person searched for constitutes evidence of the commission of such offense. . . . No warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued. The term 'affidavit' as used in this section, means statements made under oath or affirmation and presented verbatim.[197]

Virginia courts have applied common sense to the reasonableness requirement of probable cause.[198] Probable cause is a nontechnical concept.[199] Probable cause is based on probabilities, not legal technicalities.[200] The "totality of the circumstances" test set forth in *Gates*[201] should be evaluated by factual and practical considerations of everyday life on which reasonable and prudent men rely.[202] Virginia magistrates and other judicial officials evaluating probable cause for the issuance of search warrants under the Fourth Amendment and state constitutional search and seizure provisions have to apply their best analysis and common sense to an infinite variety of factual situations.[203] Virginia appellate courts have made a policy decision that when an affidavit for a search warrant provides evidence sufficient to create a disagreement among thoughtful and competent judges as to the existence of probable cause, then the officers could have harbored an objec-

196. VA. CODE ANN. § 19.2-55 (Michie 1986).

197. VA. CODE ANN. § 19.2-54 (Michie 1989).

198. Derr v. Commonwealth, 410 S.E. 2d 662, 666 (Va. 1991).

199. *Id.*

200. *Id.*

201. Illinois v. Gates, 462 U.S. at 231.

202. *Derr*, 410 S.E.2d at 666.

203. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

tively reasonable belief in the existence of probable cause to support the search warrant.[204]

Virginia courts have adopted the good faith exception to the search warrant requirement as set forth in *Leon*.[205] If a search warrant was erroneously issued by a magistrate but reasonably relied on by a law enforcement officer, there could be no deterrent value in excluding the evidence seized.[206] The deterrent effect of the exclusionary rule "is absent where an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant."[207] In the 1995 case of *Robinson v. Commonwealth,*[208] the officer swore in an affidavit that he knew the defendant was selling drugs from his motel room and that the officer had consulted with an expert in hotel-motel drug distribution.[209] The magistrate issued a search warrant, and the officer reasonably relied on the search warrant and acted in objective good faith.[210] The Virginia Court of Appeals held that the evidence found during a search of the defendant's motel room was admissible under the good faith exception to the exclusionary rule.[211]

Trial court scrutiny of the sufficiency of an affidavit to establish probable cause for the issuance of a search warrant does not take the form of *de novo* review in Virginia.[212] The magistrate's determination of probable cause is paid great deference by the reviewing court.[213] The United States Supreme Court has held, however, that on appeal, a trial court's determinations as to whether, for purposes of the Fourth Amendment, law enforcement officers had reasonable suspicion to stop persons and probable cause to make a warrantless search, are to be reviewed *de* novo, rather than "deferentially" and "for clear error."[214] When an affidavit contains a detailed description of the nature of the offense, the premises to be searched, the items for which officers are

204. Tart v. Commonwealth, 437 S.E.2d 219, 223 (Va. Ct. App. 1993).
205. *See* McCary v. Commonwealth, 321 S.E.2d 637 (Va. 1984); Derr v. Commonwealth, 410 S.E.2d 662 (Va. 1991).
206. *Tart,* 437 S.E.2d at 222.
207. *Derr*, 410 S.E. 2d at 667.
208. Robinson v. Commonwealth, 453 S.E.2d 916 (Va. Ct. App. 1995).
209. *Id.* at 917.
210. *Id.* at 918-919.
211. *Id.* at 919.
212. Tart v. Commonwealth, 437 S.E.2d 219, 221 (Va. Ct. App. 1993).
213. *Id.*
214. Ornelas v. United States, 517 U.S. 690 (1996).

searching, and the transaction which led the informant to believe drugs would be in the apartment, then the affidavit is sufficient for a reasonably well-trained police officer to believe that probable cause exists. Evidence seized pursuant to a search warrant based on such an affidavit, even if the affidavit is defective, is admissible in Virginia under the good faith exception to the exclusionary rule.[215]

Trial courts should be alert to the staleness of the information in the affidavit. When an affidavit contains information that a confidential informant was in a motel room where drugs were present within the past seventy-two hours, that information is not so stale that a magistrate cannot find probable cause to issue a search warrant.[216] Virginia courts have noticed that the phrase "within the past seventy-two hours" is often used to protect the identity of confidential informants.[217]

Virginia statutes allow a defendant the right to have a pretrial hearing on a motion to suppress evidence seized pursuant to a search warrant.[218] If the motion to suppress is denied, the defendant can plead guilty and challenge the denial of the motion to suppress on appeal.[219]

In a dissenting opinion in *Tart*, J. Benton argued that "[A] State is free as a matter of its own law to impose greater restrictions on police activity than those the United States Supreme Court holds to be necessary upon federal constitutional standards."[220] "The requirements for the issuance of a search warrant may be determined by the legislature as a matter of state law and may 'impose higher standards on searches and seizures than required' under federal law."[221] Judge Benton contended that the Virginia Code does not allow a search to be made with a search warrant absent probable cause, stating that:

> If a search and seizure are made pursuant to a warrant and in the absence of probable cause, the legislature has provided a statutory right to suppress the seized evidence. See Code Section 19.2-60. Thus, Virginia law provides an adequate and independent ground for excluding the fruits of this search. (Emphasis

215. Atkins v. Commonwealth, 389 S.E.2d 179, 180 (Va. Ct. App. 1990).
216. *See Tart* , 437 S.E.2d at 221-222.
217. *Id.* at 222.
218. VA. CODE ANN. § 19.2-60 (Michie 1970).
219. Cherry v. Commonwealth, 462 S.E.2d 574 (Va. Ct. App. 1995).
220. *Tart,* 437 S.E.2d at 227 (*citing* Oregon v. Hass, 420 U.S. 714, 719 (1975)).
221. *Tart,* 437 S.E.2d at 229 (*citing* Cooper v. California, 386 U.S. 58, 62 (1967)).

added). . . . In addition, federal case law does not control the interpretation or application of the Virginia suppression statute. The Virginia warrant statute does not codify 'good faith' as an exception to the probable cause requirement. In the absence of a legislative expression that 'good faith' is an exception to the statutory command, decisions by the courts in Virginia that infuse the *Leon* good faith exception into the statute constitute judicial legislation. Absent probable cause, the search warrant should not have been issued and the search should not have been conducted. Searches that are conducted in the absence of probable cause are precisely the type of 'unlawful search or seizure' that is contemplated by our statute.[222]

The reasoning and argument of this dissenting opinion in Tart is identical to the majority opinion in Georgia,[223] South Carolina[224] and North Carolina.[225]

The good faith exception is not available in Virginia in four instances:

1. Where the magistrate was misled by information in the affidavit which the affiant knew was false or should have known was false,
2. where the issuing magistrate totally abandoned his judicial role,
3. where the warrant was based on an affidavit 'so lacking in indicia of probable cause' as to render official belief in its existence unreasonable, or
4. where the warrant was so facially deficient that an executing officer could not reasonably have assumed it was valid.[226]

The four instances specified above in *Robinson*, come directly from *Leon*. They apply in any state that has adopted the good faith exception to the exclusionary rule.

In conclusion, Virginia courts have embraced the good faith exception as "accepted component of Virginia law."[227] "No justifi-

222. *Tart*, 437 S.E.2d at 227 (*quoting* Gary v. State, 422 S.E.2d 426 (Ga. 1992); *citing* VA. CODE ANN. § 19.2-60 (Michie 1970); State v. Guzman, 842 P.2d 660 (Id. 1992) (finding no 'good faith' exception in the Idaho Constitution and statutes); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985) (finding no 'good faith' exception in the Massachusetts suppression statute); State v. Carter, 370 S.E.2d 553 (N.C. 1988) (finding no 'good faith' exception in the North Carolina suppression statute)).

223. Gary v. State, 422 S.E.2d 426 (Ga. 1992).

224. State v. McKnight, 352 S.E.2d 471 (S.C. 1987).

225. State v. Carter, 370 S.E.2d 553 (N.C. 1988).

226. Robinson v. Commonwealth, 453 S.E.2d 916, 918 (Va. Ct. App. 1995).

227. *Tart*, 437 S.E.2d. at 224.

cation exists for drawing a distinction between the two constitutional provisions for purposes of good faith analysis."[228]

The Virginia trial judge's order allowing the defendants' motion to suppress would be reversed on appeal. The drugs seized by virtue of the defective search warrants would be admissible at trial under the *Leon* good faith exception to the exclusionary rule. Armando and Patsy probably would be convicted in Virginia.

VIII. NEW JERSEY

Article I, paragraph 7 of the New Jersey Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.[229]

This language tracks the language of the Fourth Amendment to the United States Constitution. The standard by which courts measure the affidavit in support of a search warrant is probable cause. The term "probable cause" appears in both the Fourth Amendment and in Article I, paragraph 7 of the New Jersey Constitution.

New Jersey courts have consistently characterized probable cause as a common-sense, practical standard for determining the validity of a search warrant.[230] The New Jersey Supreme Court has been unwavering in its insistence that affidavits submitted in support of a warrant application allege specific facts so that the issuing judge can determine independently whether or not probable cause has been established.[231]

State constitutions may be a source of individual liberties more expansive than those conferred by the Federal Constitution. In the 1987 case of *State v. Novembrino,*[232] the New Jersey Supreme Court interpreted Article I, paragraph 7 of the New Jersey Constitution to provide more expansive rights to criminal

228. Janis v. Commonwealth, 472 S.E.2d 649, 651 (Va. Ct. App. 1996).

229. N.J. CONST. ART. 1, § 7.

230. State v. Kasabucki, 244 A.2d 101, 104 (N.J. 1968).

231. State v. Macri, 188 A.2d 389, 393 (N.J. 1963), *disapproved of by* State v. Fariello, 366 A.2d 1313 (N.J. 1976); *see also* State v. Novembrino, 519 A.2d 820, 835 (N.J. 1987).

232. State v. Novembrino, 159 A.2d 820 (N.J. 1987).

defendants (and citizens) than the United States Supreme Court found in *Leon* under the Fourth Amendment to the United States Constitution, although the provisions were almost identical.[233]

New Jersey was the third colony to adopt a state constitution.[234] The New Jersey Constitution of 1776 did not include provisions equivalent to the Bill of Rights.[235] The New Jersey Constitution of 1844 incorporated a protection against unreasonable searches and seizures virtually identical to the Fourth Amendment and to Article I, paragraph 7 of the 1947 Constitution.[236] New Jersey did not apply the exclusionary rule.[237] In fact, during the Constitutional Convention of 1947 an amendment to Article I, paragraph 7 was proposed that would have incorporated the exclusionary rule into the Constitution: "Nothing obtained in violation thereof shall be received into evidence."[238] The amendment was defeated by a vote of 46 to 25.[239]

New Jersey first applied the exclusionary rule in *State v. Valentin*,[240] after *Mapp* held the exclusionary rule applicable to the states under the due process clause of the Fourteenth Amendment.[241] The exclusionary rule is now embedded in New Jersey law. "One obvious consequence of the application of the exclusionary rule in New Jersey has been the encouragement of law-enforcement officials to comply with the constitutionally-mandated probable-cause standard in order to avoid the suppression of evidence."[242]

The New Jersey Supreme Court applies a totality of the circumstances test analogous to that set forth in *Illinois v. Gates*[243] to test the validity of search warrants under the probable cause standard set forth in Article I, paragraph 7 of the New Jersey Constitution. In *Novembrino* the New Jersey Supreme Court stated, "the 'totality-of-the-circumstances' test that we endorse and apply in this case is a principle of state constitutional law used to test determinations of probable cause pursuant to Article I, paragraph

233. *Id.* at 857.
234. *Id.* at 850 n.28.
235. *Id.* at 850.
236. *Id.*
237. *Id.*
238. *Novembrino*, 519 A.2d at 851.
239. *Id.*
240. Sate v. Valentin, 174 A.2d 737 (N.J. 1961).
241. *Id.* at 737-738.
242. *Novembrino,* 519 A.2d at 854.
243. Illinois v. Gates, 462 US 213 (1983).

7 of the New Jersey Constitution. We assume that the application of this standard will be substantially consistent with the criteria set forth in Illinois v. Gates."[244]

Novembrino called upon the New Jersey Supreme Court to decide if Article I, paragraph 7 of the New Jersey Constitution, which incorporates almost verbatim the protection against unreasonable searches and seizures set forth in the Fourth Amendment, would tolerate a modification of the exclusionary rule that recognizes the good faith exception established by the United States Supreme Court in *Leon*. The *Novembrino* Court in its discussion of this issue stated:

"Ultimately, we focus on the inevitable tension between the proposed good-faith exception and the guarantee contained in our State Constitution that search warrants shall not issue except upon probable cause. In the twenty-five years during which we have applied the exclusionary rule in New Jersey, we have perceived no dilution of our probable cause standard; rather, efforts to comply with the constitutional mandate have been enhanced. Nor do we perceive that the application of the exclusionary rule has in any significant way impaired the ability of law-enforcement officials to enforce the criminal laws."[245]

The New Jersey Supreme Court does not recognize a good faith exception to the exclusionary rule as it interprets Article I, paragraph 7 of the New Jersey Constitution. In *Novembrino* New Jersey's Supreme Court iterated this by stating:

"Because we believe that the good faith exception to the exclusionary rule adopted in *Leon* would tend to undermine the constitutionally guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our criminal justice system to accommodate that constitutional guarantee without impairing law enforcement, we decline to recognize a good faith exception to the exclusionary rule."[246]

The New Jersey appellate courts would affirm the trial judge's suppression order applying "adequate and independent" state constitutional grounds, under Article I, paragraph 7 of the New Jersey Constitution. Armando and Patsy would not be convicted in New Jersey

244. *Novembrino*, 519 A.2d at 837n.11.

245. *Id.* at 855.

246. *Id.* at 856-857.

IX. Summary & Recommendations

The Florida constitutional amendment which construes state constitutional search and seizure rights "in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court," mandates uniformity of interpretation and application. In fact, it enslaves Article I, section 12 of the Florida Constitution and the Florida State Courts to interpretations of the Fourth Amendment by the United States Supreme Court. The *Leon* good faith exception to the exclusionary rule ensnares Armando and Patsy in Florida. The state trial judge's order allowing the motion to suppress would be reversed by the Florida appellate courts. Armando and Patsy probably would be convicted in Florida.

The Georgia State legislature mandates the exclusionary rule in the OCGA section 17-5-30. The Georgia Supreme Court, in *Gary*, did not apply the *Leon* good faith exception to the exclusionary rule. The judicially created *Leon* good faith exception to the exclusionary rule does not apply in Georgia because Georgia's exclusionary rule is legislatively created. Georgia State courts, using adequate and independent state grounds, OCGA section 17-5-30, resolve search and seizure questions in total reliance on the state statute without considering *Leon*. The state statute, OCGA section 17-5-30, imposes greater requirements upon Georgia law enforcement officers than that required by the Fourth Amendment as interpreted by the United States Supreme Court in *Leon*. The state trial judge in Georgia allows the defense motion to suppress on the basis of OCGA section 17-5-30. Georgia appellate courts would affirm, by also applying the state statute.

The South Carolina Supreme Court declines to apply the *Leon* good faith exception to the exclusionary rule if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause. If a *Johnson* hearing produces no evidence of oral sworn testimony having been presented to the magistrate regarding the informant's reliability, then the South Carolina trial judge's order of suppression would be affirmed by the South Carolina appellate courts. Either Article I, section 10 of the South Carolina Constitution or South Carolina Statute section 17-13-140 provides an adequate and independent state ground for the ruling.

North Carolina State courts interpret search and seizure questions by applying "adequate and independent" state grounds. There is no *Leon* good faith exception to the exclusionary rule in

Article I, section 20 of the North Carolina Constitution. North Carolina appellate courts would affirm the trial court's order allowing the motion to suppress.

Virginia courts embrace the *Leon* good faith exception to the exclusionary rule as "an accepted component of Virginia law."[247] No distinction is drawn between Article I, section 10 of the Virginia Constitution and the Fourth Amendment for purposes of good faith analysis.[248] Virginia appellate courts would reverse the trial court's order allowing the motion to suppress. The evidence would be admissible at trial under the *Leon* good faith exception to the exclusionary rule. Armando and Patsy probably would be convicted in Virginia.

The New Jersey Supreme Court does not recognize a good faith exception to the exclusionary rule as it interprets Article I, paragraph 7 of the New Jersey Constitution.[249] New Jersey appellate courts would affirm the trial judge's order of suppression.

X. CONCLUSION

This thesis proves that a criminal defendant, in a factual situation that resembles *Leon,* can expect disparate results on a motion to suppress in six eastern seaboard state courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey. The state supreme courts in each of these states assess probable cause by use of search and seizure provisions in state constitutions and statutes. State courts that adopt the *Leon* good faith exception to the exclusionary rule would convict the defendants (Florida and Virginia). The defendants would succeed in an appellate review of a suppression hearing in New Jersey, North Carolina, South Carolina and Georgia, if the state supreme court applies "adequate and independent" state grounds to decide the case.

The "adequate and independent" state grounds include the state constitution in New Jersey (Article I, paragraph 7) and in North Carolina (Article I, section 20). Georgia courts apply a legislatively mandated exclusionary rule, OCGA section 17-5-30. Either Article I, section 10 of the South Carolina Constitution or the Code of Laws of South Carolina section 17-13-140 provides an

247. Tart v. Commonwealth, 437 S.E.2d 219, 224 (Va. Ct. App. 1968).
248. Janis v. Commonwealth, 472 S.E.2d 649, 652 (Va. Ct. App. 1996).
249. State v. Novembrino, 519 A.2d 820, 856 (N.J. 1987).

"adequate and independent" state ground for the South Carolina Supreme Court to reject the *Leon* good faith exception to the exclusionary rule, if the underlying affidavit and a "*Johnson*" hearing fail to establish probable cause.

Is it good or bad that disparate outcomes result in various state trial courts faced with the same facts? The six states in this thesis are separate and distinct sovereignties. Each state has its own constitution. Each state supreme court may interpret its own state constitution and statutes without regard to the federal constitution, so long as Federal Constitutional rights are not diminished.

The disparity also exists between some state trial courts and federal district courts. The principle of federalism envisions two separate and independent judicial systems: federal courts, which construe federal law, and state courts, which construe state law. Prior to *Mapp,* the exclusionary rule did not apply to a state unless that state, on its own initiative, adopted an exclusionary rule by statute or case law. Thus, disparate results in search and seizure cases are part of our legal history.

Senator Sam J. Ervin, Jr., of Watergate fame, formerly a Justice of the North Carolina Supreme Court, explained the historical significance of the exclusionary rule.

> This constitutional guaranty against unreasonable searches and seizures has its roots deeply implanted in the human heart, the common law of England, and the tyrannies perpetrated by government on the people of England and the colonies.
>
> The oldest and deepest hunger of the human heart is for a place where one may dwell in peace and security and keep inviolate from public scrutiny one's innermost aspirations and thoughts, one's most intimate associations and communications, and one's most private activities. This truth was documented by Micah, the prophet, 2,700 years ago when he described the Mountain of the Lord as a place where 'they shall sit every man under his own vine and fig tree and none shall make them afraid.
>
> The common law of England originated in the instincts, the habits, and the customs of the people. Hence, it is not surprising that on emerging from the mists of unrecorded history, the English common law embraced as a fundamental principle that every man's home is his castle and the correlative rule that every man may resist to the utmost unidentified persons who seek to enter his home against his will.
>
> The common-law courts of England . . . authorized searches and seizures only by special warrants, which were based on oaths

> disclosing the reasons for their issuance and describing the places to be searched and the persons or things to be seized.
>
> The courts of England that were independent of the common law, such as the Court of Star Chamber . . . and the Court of High Commission . . . did not respect the principle of the common law that every man's home is his castle.
>
> They authorized searches and seizures by general warrants, which were based on mere suspicion and commanded searches and seizures for the enforcement of particular laws without specifying the places to be searched or the persons or things to be seized. In so doing, the general warrants delegated to the persons executing them the autocratic power to decide according to their own notions what places should be searched, what persons should be arrested, and what things should be seized. . . .
>
> Despite honest beliefs of sincere persons to the contrary, the exclusionary rule is an essential ingredient of the Fourth Amendment. Apart from it, the Amendment's guaranty against unreasonable searches and seizures is worse than solemn mockery, and the Amendment might well be expunged from the Constitution as a meaningless expression of a merely pious hope. . . .
>
> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[250]

Should all trial courts, state and federal, determine and apply probable cause with a uniform standard? Justice Meyer's dissent in *Carter*[251] complained about lack of uniformity. His dissent stated "our state courts create different exclusionary rules depending upon whether the state or federal Constitutions are invoked by a defendant making a suppression motion."[252] *Mapp* mandated that the exclusionary rule would apply in all state courts under the due process clause of the Fourteenth Amendment. *Mapp* created a uniform national standard. *Leon* created a good faith exception to the exclusionary rule that has been adopted in some states and rejected in others. The exception threatens to swallow the rule.

Trial judges know that probable cause review is fact-intensive. As Justice Scalia, dissenting in *Ornelas*, pointed out:

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250. Sam J. Ervin, Jr. *The Exclusionary Rule: An Essential Ingredient of The Fourth Amendment,* 1983 SUP. CT. REV. 283, 283-284, 287.

251. *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988).

252. *Id.* at 732, 370 S.E.2d at 567 (Meyer, J., dissenting).

"First, a court must identify all of the relevant historical facts known to the officer at the time of the stop or search; and second, it must decide whether, under a standard of objective reasonableness, those facts would give rise to a reasonable suspicion justifying a stop or probable cause to search."[253]

The majority opinion, written by Chief Justice Rehnquist, stated that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal, but that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[254] The majority opinion cites the need to "maintain control of, and to clarify the legal principles," and "to provid[e] law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[255]

State trial judges must follow the law established by their state supreme courts with regard to the exclusionary rule in search and seizure cases. State supreme courts must write clear decisions. Justice Potter Stewart advised all judges:

"The occupation of a judge requires application of its (the Fourth Amendment) sweeping language to cases presenting the infinite variety of factual situations that arise in real life. The art of being a judge, if there is such an art, is in announcing clear rules in the context of these infinitely varied cases, rules that can be understood and observed by conscientious government officials."[256]

If State Legislatures and Judiciaries will follow this eloquent advice, law-enforcement officials and the citizenry as a whole will be the beneficiaries of clarity, uniformity and consistency in the law.

253. Ornelas v. United States, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting).
254. *Id.* at 698.
255. *Id.* at 697-698.
256. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

HOUSE BILL 1041

Short Title:	APA Rules/Small Bus. Economic Impact.	(Public)
Sponsors:	Representatives C. Wilson; McHenry and Moore.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE AGENCIES PROPOSING PERMANENT RULES TO CONSIDER THE ADVERSE ECONOMIC IMPACT OF THE PROPOSED RULE ON SMALL BUSINESS; TO REQUIRE AGENCY REVIEW OF EXISTING RULES PRIOR TO AMENDMENT TO DETERMINE THE IMPACT ON SMALL BUSINESS; AND TO PROVIDE THAT AGENCIES MAY NOT ADOPT RULES THAT ARE MORE RESTRICTIVE THAN APPLICABLE FEDERAL LAW GOVERNING THE SAME SUBJECT MATTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2A of Chapter 150B of the General Statutes is amended by adding the following new Part to read:

"Part 2A. Regulatory Flexibility.

"**§ 150B-21.7A. Rules affecting small businesses.**

(a) As used in this Part, unless the context clearly requires otherwise, the term:

(1) 'Adverse economic impact' means an aggregate financial impact on small businesses affected by the rule of at least six hundred thousand dollars ($600,000) in a 12-month period.

(2) 'Small business' means a business entity, including its affiliates, that is both independently owned and operated and employs fewer than 500 full-time employees or has gross annual sales of less than six million dollars ($6,000,000).

(b) Before an agency publishes in the North Carolina Register the proposed text of a permanent rule that would have an adverse impact on small businesses, the agency shall prepare an economic impact statement that includes the following:

(1) An identification and estimate of the number of small businesses subject to the proposed rule.

(2) The projected reporting, record keeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

(3) A statement of the probable effect on impacted small businesses.
(4) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.

"**§ 150B-21.7B. Review of existing rules.**

In order to minimize the adverse economic impact on small businesses, prior to amending a permanent rule, the agency shall consider the following:

(1) The continued need for the rule.
(2) The nature of complaints or comments received from the public concerning the rule.
(3) The complexity of the rule.
(4) The extent to which the rule overlaps, duplicates, or conflicts with other federal or State rules or local government ordinances.
(5) The length of time since the rule has been evaluated and an estimate on the length of time the rule will continue to be necessary.
(6) The degree to which technology, economic conditions, or other factors have changed in the area affected by the rule."

SECTION 2. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.
(2) It is clear and unambiguous.
(3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly, when considered in light of the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed and the legislative intent of the General Assembly in delegating the duty.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 and Part 2A of this Article. The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 or Part 2A of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 and Part 2A of this Article.

(b) Timetable. – The Commission must review a rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month."

SECTION 3. G.S. 150B-19 reads as rewritten:

"**§ 150B-19. Restrictions on what can be adopted as a rule.**

An agency may not adopt a rule that does one or more of the following:

(1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.

(2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.

(3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.

(4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).

(5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

a. A service to a State, federal, or local governmental unit.

b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.

c. A transcript of a public hearing.

d. A conference, workshop, or course.

e. Data processing services.

(6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

(7) Is more restrictive than applicable federal law or rule governing the same subject matter."

SECTION 4. This act becomes effective October 1, 2003, and applies to proposed permanent rules the text of which is published in the North Carolina Register on and after that date.

2:00 p.m. The Committee reconvened.

Rep. Nesbitt called the meeting to order. He told the Committee that there were some important bills in the Committee and that because of the absence of Rep. Bonner, it may be necessary to bring in a "floater" to balance the Committee.

Two bills relating to manufactured housing were in the Committee. These were: **HB 915** (Manufactured Home Leasehold Estate Financing) sponsored by Rep. Brubaker, and **HB 1006** (Manufactured Housing) sponsored by Rep. Hunter.

Proposed Committee Substitutes were handed out for both bills and were adopted. Rep. Stam made the motion to adopt the proposed Committee Substitute for **HB 915** and Rep. Walend moved to adopt the proposed committee substitute for **HB1006**. These motions passed.

Drupti Chauhan, Committee Counsel, was recognized. She said that two $5 fees had been added to each bill, one for cancellation of a title and another for recordation at the Register of Deeds of a Declaration of Intent.

Rep. Nesbitt told the committee that both bills would be sent to a subcommittee.

HB 1041 (APA Rules/Small Bus. Economic Impact), sponsored by Rep. Connie Wilson, was before the Committee.

Rep. Wilson was recognized to discuss her bill. She had a proposed committee substitute distributed to the Committee and Rep. Ellis moved that it be adopted for consideration. The motion carried.

She explained the changes in the proposed committee substitute. *(See Attachment III "Part 2A". through Page 2 line 20, Page 3 Line 34, Lines 38-49 and Page 4 Lines 17-29, 31-33).*

Rep. Moore asked if the economic impact study had to be done before an agency can adopt the rule. Rep. Wilson said that it was actually during the process. She said the Rules Review Commission is not required to have an impact statement before it adopts a rule.

Rep. Nesbit had a question about Section 3 (c) Errors. Rep. Wilson said that section allows the private sector to contest an erroneous fiscal note, which it currently cannot do.

Rep. Nesbitt said it appeared to impact the rule, that you could challenge the rule if the fiscal note wasn't correct.

Charles Case, attorney with Hunton & Williams, said he believed that section was intended to allow challenges to fiscal notes, that under current law, even if it is known

that the fiscal note is wrong, a rule cannot be challenged. This was intended to allow a challenge to the fiscal note itself and not to the rule.

Rep. Nesbitt asked what good would it do to challenge a fiscal note?

Mr. Case said that challenging the fiscal note could be a means to have the rule reconsidered.

Rep. Moore said it appears that if it is going to be a more restrictive rule, the fiscal note is subject to judicial review under this Chapter.

Rep. Nesbitt wondered which a fiscal note affects whether or not you can adopt the rule. He wondered what good that would do.

Trip Van Noppen with the Southern Environmental Law Center was recognized. He said that clearly, a challenge to a fiscal note is a challenge to the validity of the rule. He said that a fiscal note is almost always based on estimates, that there is no single wrong answer.

Rep. Nesbitt observed that this would allow a rule to be collaterally attacked in a case after the rule has been adopted.

Rep. Ellis said the language they were discussing should say that in the case of an erroneous fiscal note, that you should be able to attack the rule. His reasoning was, if you don't allow that, you would be allowing an exception to the law and that an erroneous fiscal note could be prepared to implement a bad rule that has a negative impact.

Rep. Nesbitt said that an economic impact note is not required to pass a rule. Rep. Wilson is trying to make it a requirement to have one so that the agencies will be forced to look at the consequences of a rule. But, Rep. Nesbitt said this would allow a collateral attack on the rule after it had been approved.

Karen Cochrane-Brown was recognized. She said if the fiscal note is erroneous, but prepared in good faith, it does not affect the validity of a rule, except for a rule governed by subsection (b3) of this section.

Rep. Wilson observed that that puts the burden of proof on the one contesting the rule.

Rep. Nesbitt observed that Rep. Culpepper had joined the meeting.

Rep. Ellis wanted to know how good faith could be determined under these circumstances.

Rep. Nesbitt said that was the problem.

Rep. Moore said that the way this is drafted makes sense. It does have the "good faith" in there and it also has to do with the accuracy of what was done. He said he also agrees with Rep. Ellis on the policy issue. He would trust the judiciary.

Rep. Nesbitt said the title of the bill needs to be amended in that it no longer reflects what the bill does.

Warren Plonk with the Office of the State Budget and Management was recognized. He said he does these fiscal notes and that all of the fiscal notes are "good faith estimates." He said his office doesn't know how much money a business makes. Determining this is difficult, because a lot of this information is proprietary when you are talking about small companies. Most of the time when a rule is affecting a small group of taxpayers, such as the chemical industry and the wood pulp industry, these people, whether they like it or not, are at the table when these rules are drafted and the agencies as well as Mr. Plonk, have to turn to them and ask for their personal help with regard to preparing a fiscal impact statement. If they are not there, he and the agencies are clueless. He does his best to prepare the fiscal note as accurately as possible.

Rep. Nesbitt recognized Satana Deberry from the Department of Health and Human Services (DHHS) who says that she understands that **HB 1041** is mostly directed at the Department of Environment, Health and Natural Resources (DEHNR), but that the law of unintended consequences means that the department most affected by this bill would be the Department of Health and Human Services. Probably a majority of the groups for which DHHS promulgates rules would qualify as small businesses under this legislation. That includes group homes; foster care homes, daycare centers, and adult care homes. All of these are at the table when a rule is drafted and all have a great deal of influence on how the rule is drafted. She asked the committee to keep in mind that they have no way to determine what a small business is and this bill would keep the department from promulgating rules for the State's most vulnerable citizens.

Rep. Nesbitt moved to amend the bill and the motion carried. *(See Attachment IV)*

Rep. Moore moved to amend the bill and the motion carried. *(See AttachmentV)*

The meeting recessed until fifteen minutes after Session.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 915
PROPOSED COMMITTEE SUBSTITUTE H915-CSRQ-17 [v.1]

4/27/2003 4:40:09 PM

Short Title: Manufactured Home Leasehold Estate Financing. (Public)

Sponsors:

Referred to:

April 8, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT MANUFACTURED HOMES SET UP ON LEASED PROPERTY MAY BE FINANCED AS A REAL PROPERTY LEASEHOLD ESTATE TO ALLOW THE OWNERS TO OBTAIN BETTER INTEREST RATES IN FINANCING THE PURCHASES OF THEIR HOMES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2 of Chapter 47 of the General Statutes is amended by adding a new section to read:

"**§ 47-20.8. Affidavit/Declaration for manufactured home in manufactured home park.**

(a) As used in this section:

(1) 'Manufactured home' has the same meaning as in G.S. 143-143.9(6)k.

(2) 'Manufactured home community or park' means any parcel of land that contains three or more manufactured home spaces.

(3) 'Manufactured home space' means a parcel of land for rent that has been designed to accommodate a manufactured home and provide the required water, sewer, and utility connections.

(b) Notwithstanding any other law, a person who owns a manufactured home located on a manufactured home space leased from another person, and who desires that the home and leasehold interest be treated as a real property leasehold interest, may either:

(1) File an affidavit with the register of deeds as provided in G.S. 47-20.6, if a certificate of title has been issued for the home; or

(2) File a declaration of intent as provided in G.S. 47-20.7, if the home has never been titled or if the title has been cancelled or surrendered, if all of the following conditions are met:

a. The manufactured home has been set up on the manufactured home space in compliance with the manufactured home set-up

requirements in G.S. 143-143.15, with its moving hitch, wheels, and axles removed.

b. The owner of the manufactured home has entered into a lease for the manufactured home space for a primary term of at least 20 years.

c. The affidavit under G.S. 47-20.6 or the declaration under G.S. 47-20.7 will state that the owner of the home is not the same as the owner of the land to which the home is affixed, that the parties have entered into a lease, and that the parties intend that the leasehold interest be treated as a real property leasehold interest.

d. Together with filing such affidavit or declaration, a memorandum of lease is recorded that includes the:

1. Names and addresses of the landlord and the tenant.
2. Duration of the primary term of the lease.
3. Lease renewal provisions, if any.
4. The manufacturer and model name, if applicable, the serial number, year and vehicle identification number of the manufactured home.
5. Legal description of the real property on which the manufactured home is located.
6. Acknowledged signatures of both the landlord and the tenant.

(c) For purposes of this section and the legal description required under G.S. 47-20.6 or G.S. 47-20.7, a legal description of the real property is sufficient as follows:

(1) For a manufactured home community or park that has a subdivision plat recorded with the register of deeds which identifies individual lots within the community, the description shall refer to the lot, the name of the community, and the recording information for the recorded plat; or

(2) The owner or the manufactured home community or park may record a leasehold map of the community. Such map shall, at a minimum, set out the boundaries of the community, show the location of all rental spaces in the community, and assign each space a unique identifying number. The map shall identify the community by name and contain a certification by the owner that it accurately depicts the location and dimensions of the spaces in the community. For a community or park that has recorded such a leasehold map, the legal description is sufficient if it refers to the space number as shown on the leasehold map and refers to the recording information for such map.

(d) Upon compliance with the procedures for surrender of title under G.S. 47-20.6 and G.S. 20-109.2, as modified by this section, the Division of Motor Vehicles shall cancel the title to the manufactured home, if a title has been previously issued.

The Division of Motor Vehicles may charge a fee of five dollars ($5.00) for cancellation of a title under this section.

(e) The recording of an affidavit or declaration does not impair the rights of any holder of a perfected security interest in the manufactured home, unless the affidavit or declaration contains the acknowledged consent of the secured party to the termination of the security interest. If a secured party so consents, that security interest terminates when the affidavit or declaration is recorded.

(f) The landlord under the lease who is also the owner of the manufactured home space on which the manufactured home is located may record a notice and affidavit that terminates an affidavit or declaration of a manufactured home on the landlord's real property, if the lease has been terminated before its expiration, provided all holders of recorded liens against the manufactured home and the leasehold interest have approved the lease termination and the termination of the affidavit. In that event, the landlord shall attach to the notice and affidavit one or the following:

(1) An agreement executed by both the landlord and the tenant in which both parties agree to the termination of the lease, and if there are holders of liens against the manufactured home and leasehold interest, by each such lienholder, in which all parties agree to the termination of the lease.

(2) A copy of a judgment that is entered by a court of competent jurisdiction, that upholds the termination of the lease and that awards possession of the real property to the landlord and, if the home remains on the space, a copy of a new lease of the same priority between the landlord and the prior lienholder against the leasehold estate, or other documentation showing that the lien against the leasehold estate and the other rights and benefits given to the lienholder on the leasehold estate have not been disturbed by the termination of the lease; or

(3) An affidavit of the landlord and any lienholder stating that the manufactured home has been removed from the real property.

(g) At any time after the landlord records a notice and affidavit terminating an affidavit or declaration under subsection (f) of this section, the Division of Motor Vehicles shall retitle the manufactured home to the owner of the manufactured home on presentation of a copy of such notice and affidavit, together with a moving permit from the county tax assessor's office, and on satisfaction of other requirements that the Division of Motor Vehicles may impose.

(h) Except as provided in subsection (j) of this section, the manufactured home and the leasehold interest to which it is affixed shall be treated together as a real property leasehold interest. If there is a change in the identity of the owner of the manufactured home during the term of any lease for which an affidavit or declaration has been recorded under this section, the landlord and the new owner of the manufactured home as successor tenant shall execute an amended memorandum of lease that identifies the successor tenant and that refers to the affidavit or declaration by date and recording information. On the recording of the amended memorandum of

lease, the successor tenant succeeds to the rights and obligations of the manufactured homeowner.

(j) A manufactured home and manufactured home space identified in an affidavit or declaration recorded under this section shall, for property tax purposes, be assessed as a real property leasehold interest."

SECTION 2. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

SECTION 3. This act is effective when it becomes law.

HOUSE BILL 915:
Manufactured Home Leasehold Estate Financing

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Brubaker
Date:	April 23, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS to 1st Edition		Committee Co-Counsel

SUMMARY: ***This bill amends laws related to the property definitions of manufactured homes and allows those homes that are set on leased property to be financed as real property.***

The PCS allows the Division of Motor Vehicle to charge $5.00 for the cancellation of a title to a manufactured home.

CURRENT LAW: A manufactured home is not considered real property unless it is placed on property that is owned by the owner of the manufactured home and the owner has filed an affidavit with the registrar of deeds that the title to the manufactured home has been surrendered to the Division of Motor Vehicles. If it is not on property owned by the owner, the manufactured home is considered tangible personal property. An owner of a manufactured home that has been placed on property that is owned by that owner may convey or encumber that real property and manufactured home by a mortgage and the owner may record that declaration of intent to affix the manufactured home to the real property.

BILL ANALYSIS: This bill creates a new section in Article 2 of chapter 47 of the General Statutes. It allows a person who owns a manufactured home which is located on real property leased from another person to file an affidavit with the registrar of deeds if there is a certificate of title for the home or file a declaration of intent if there is no title and the home has been affixed to the property and the owner has a lease for 20 years for the property on which the manufactured home is located. A memorandum of lease must also be recorded that includes a legal description of the real property. A landlord that owns the property that the manufactured home is located on can record a notice and affidavit that terminates the affidavit or declaration of intent of the owner of the manufactured home if the lease of the real property was terminated before the expiration if all of the holder of recorded liens against the manufactured home and the leasehold interest have approved the lease termination and the termination of the affidavit. The Division of Motor Vehicles shall then re-title the manufactured home.

A manufactured home and the leasehold interest to which it is affixes that are identified in an affidavit or declaration of intent shall be considered as a real property leasehold interest and for property tax purposes shall be assessed as a real property leasehold interest.

BACKGROUND: Freddie Mac currently does not give mortgage loans to buyers/owners of manufactured homes that does not also have a leasehold interest in the land that is for as long as the length of the loan. This bill would address that issue by designating manufactured homes that are affixed to land in which the owner of the manufactured home has at least a 20-year leasehold interest as real property, thereby allowing those buyers/owners to obtain financing.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1006
PROPOSED COMMITTEE SUBSTITUTE H1006-CSRQ-16 [v.3]

4/29/2003 1:26:42 PM

Short Title: Manufactured Housing. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO GRANT GREATER CONSUMER PROTECTION TO RESIDENTS OF MANUFACTURED HOUSING IN NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 47-20.6(a) reads as rewritten:

"(a) If the owner of ~~real property~~ a manufactured home that is defined as real property in G.S. 105-273(13) has surrendered the title to ~~a~~ the manufactured home ~~that is placed on the real property~~ and the title has been cancelled by the Division of Motor Vehicles under G.S. 20-109.2, the owner, or the secured party having the first security interest in the manufactured home at time of surrender, shall record the affidavit described in G.S. 20-109.2 with the office of the register of deeds of the county where the ~~real property~~ manufactured home is located. Upon recordation, the affidavit shall be indexed on the grantor index in the name of the owner of the manufactured home and on the grantee index in the name of the secured party or lienholder, if any."

SECTION 2. G.S. 20-109.2(c) reads as rewritten:

"(c) Cancellation. – Upon compliance by the owner with the procedure for surrender of title, the Division shall rescind and cancel the certificate of title. If a security interest has been recorded on the certificate of title, the Division may not cancel the title without written consent from all secured parties. After cancelling the title, the Division shall return the original of the affidavit to the owner, or to the secured party having the first recorded security interest, with the Division's notation or statement that the title has been surrendered and has been cancelled by the Division. The owner or secured party shall file the affidavit returned by the Division with the office of the register of deeds of the county where the real property is located. The Division may charge five dollars ($5.00) for a cancellation of a title under this section."

SECTION 3. G.S. 47-20.6 is amended by adding a new subsection to read:

"(e) In the event that the owner of a manufactured home described in subsection (a) of this section is not the owner of the real property to which the manufactured home

is affixed, the owner or the secured party having the first security interest in the manufactured home at the time of surrender, shall indicate in the affidavit the following:

(1) That the owner of the manufactured home is not the same as the owner of the real property to which the manufactured home is affixed.

(2) That the owner of the manufactured home has entered into a lease for the real property on which the manufactured home is affixed with a primary term of at least 20 years."

SECTION 4. G.S. 47-20.7 reads as rewritten:

"**§ 47-20.7. Declaration of intent to affix manufactured home; transfer of real property with manufactured home attached.**

(a) ~~A~~ Except as provided in subsection (e) of this section, a person who owns ~~real property~~ or is purchasing ~~on which~~ a manufactured home that ~~has been, or will be placed, as defined in G.S. 105-273(13), and either where the manufactured home~~ has never been titled by the Division of Motor Vehicles ~~or where the title to the manufactured home has been surrendered and cancelled by the Division, may~~ and that is defined as real property in G.S. 105-273(13) or that will be so defined once it is affixed to real property, shall record in the office of the register of deeds of the county where the ~~real property~~ manufactured home is or will be located a declaration of intent to affix the manufactured home to the real property and ~~may~~ shall convey or encumber the real property, including the manufactured home, only by a deed, deed of trust, or other instrument recorded in the office of the register of deeds. Upon recordation, the declaration of intent shall be indexed on the grantor index in the name of the owner of the manufactured home.

(b) The declaration of intent, deed, deed of trust, or other instrument shall contain a description of the manufactured home, including the name of the manufacturer, the model name, if applicable, the serial number, and a statement of the owner's intention that the manufactured home be treated as real property. In addition, in the event that the owner is not also the owner of the real property to which the manufactured home is or will be affixed, the owner shall indicate in the declaration of intent the following:

(1) That the owner of the manufactured home is not the same as the owner of the real property to which the manufactured home is affixed.

(2) That the owner of the manufactured home has entered into a lease for the real property on which the manufactured home is affixed with a primary term of at least 20 years.

(c) On or after the filing of the instrument with the office of the register of deeds pursuant to subsection (a) of this section, the manufactured home placed, or to be placed, on the real property becomes an improvement to real property. Any lien on the manufactured home shall be perfected and have priority in the manner provided for a lien on real property.

(d) The provisions of this section control over the provisions of G.S. 25-9-334 relating to the priority of a security interest in fixtures, as applied to manufactured homes.

(e) Notwithstanding the provisions of subsection (a) of this section, any person who would otherwise be required to file a declaration of intent may elect not to have the

owner's manufactured home classified as real property by applying for the issuance of a title for a manufactured home from the Division of Motor Vehicles and by filing a declaration of intent not to affix the manufactured home to real property with the register of deeds of the county where the manufactured home is or will be located. The declaration of intent not to affix shall contain a description of the manufactured home, including the name of the manufacturer, the model name, if applicable, the serial number, and a statement of the owner's intention that the manufactured home not be treated as real property. In the event that a declaration of intent not to affix is filed, the manufactured home will be considered tangible personal property, except as provided in G.S. 105-273(13)."

SECTION 5. G.S. 161-10 reads as rewritten:

""**§ 161-10. Uniform fees of registers of deeds.**

(a) Except as provided in G.S. 161-11.1 or 161-11.2, all fees collected under this section shall be deposited into the county general fund. While performing the duties of the office, the register of deeds shall collect the following fees which shall be uniform throughout the State:

(1) Instruments in General. – For registering or filing any instrument for which no other provision is made by this section, whether written, printed, or typewritten, the fee shall be twelve dollars ($12.00) for the first page plus three dollars ($3.00) for each additional page or fraction thereof.

When a document is presented for registration that consists of multiple instruments, the fee shall be ten dollars ($10.00) for each additional instrument. A document consists of multiple instruments when it contains two or more instruments with different legal consequences or intent, each of which is separately executed and acknowledged and could be recorded alone.

(1a) Deeds of Trust, Mortgages, and Cancellation of Deeds of Trust and Mortgages. – For registering or filing any deed of trust or mortgage, whether written, printed, or typewritten, the fee shall be twelve dollars ($12.00) for the first page plus three dollars ($3.00) for each additional page or fraction thereof.

When a deed of trust or mortgage is presented for registration that contains one or more additional instruments, the fee shall be ten dollars ($10.00) for each additional instrument. A deed of trust or mortgage contains one or more additional instruments if such additional instrument or instruments has or have different legal consequences or intent, each of which is separately executed and acknowledged and could be recorded alone.

For recording records of satisfaction, or the cancellation of record by any other means, of deeds of trust or mortgages, there shall be no fee.

(1b) Declaration of Intent. – For registering or filing a declaration of intent pursuant to G.S. 47-20.7 five dollars ($5.00).

(2) Marriage Licenses. – For issuing a license fifty dollars ($50.00); for issuing a delayed certificate with one certified copy twenty dollars ($20.00); and for a proceeding for correction of an application, license or certificate, with one certified copy ten dollars ($10.00).

(3) Plats. – For each original or revised plat recorded twenty-one dollars ($21.00) per sheet or page; for furnishing a certified copy of a plat five dollars ($5.00).

(4) Right-of-Way Plans. – For each original or amended plan and profile sheet recorded twenty-one dollars ($21.00) for the first page and five dollars ($5.00) per page for each additional page. This fee is to be collected from the Board of Transportation.

(5) Registration of Birth Certificate One Year or More after Birth. – For preparation of necessary papers when birth to be registered in another county ten dollars ($10.00); for registration when necessary papers prepared in another county, with one certified copy ten dollars ($10.00); for preparation of necessary papers and registration in the same county, with one certified copy twenty dollars ($20.00).

(6) Amendment of Birth or Death Record. – For preparation of amendment and affecting correction ten dollars ($10.00).

(7) Legitimations. – For preparation of all documents concerned with legitimations ten dollars ($10.00).

(8) Certified Copies of Birth and Death Certificates and Marriage Licenses. – For furnishing a certified copy of a death or birth certificate or marriage license ten dollars ($10.00). Provided however, a Register of Deeds may issue without charge a certified Birth Certificate to any person over the age of 62 years.

(8a) Vital Records Network. – For obtaining access to the Vital Records Computer Network, two dollars ($2.00).

(9) Certified Copies. – For furnishing a certified copy of an instrument for which no other provision is made by this section five dollars ($5.00) for the first page, plus two dollars ($2.00) for each additional page or fraction thereof.

(10) Comparing Copy for Certification. – For comparing and certifying a copy of any instrument filed for registration, when the copy is furnished by the party filing the instrument for registration and at the time of filing thereof five dollars ($5.00).

(11) Uncertified Copies. – A register of deeds who supplies uncertified copies of instruments, or index pages, as a convenience to the public, may charge fees that the register of deeds determines bear a reasonable relation to the quality of copies supplied and the cost of purchasing and maintaining copying and/or computer equipment. These fees may be changed from time to time, but the amount of these fees shall at all times be uniform and prominently posted in the office of the register of deeds.

(12) Notarial Acts. – For taking an acknowledgment, oath, or affirmation or performing any other notarial act the maximum fee set in G.S. 10A-10. This fee shall not be charged if the act is performed as a part of one of the services for which a fee is provided by this subsection; except that this fee shall be charged in addition to the fees for registering, filing, or recording instruments or plats as provided by subdivisions (1) and (3) of this subsection.

(13) Uniform Commercial Code. – Such fees as are provided for in Chapter 25, Article 9, Part 5, of the General Statutes.

(14) Torrens Registration. – Such fees as are provided in G.S. 43-5.

(15) Master Forms. – Such fees as are provided for instruments in general.

(16) Probate. – For certification of instruments for registration as provided in G.S. 47-14 two dollars ($2.00).

(17) Qualification of Notary Public. – For administering the oaths of office to a notary public and making the appropriate record entries as provided in G.S. 10A-8 ten dollars ($10.00).

(18) Reinstatement of Articles of Incorporation. – For filing reinstatements of Articles of Incorporation prepared pursuant to G.S. 105-232; such fees as provided for instruments in general. The fee shall be paid by the corporation affected.

(18a) Nonstandard Document. – For registering or filing any document not in compliance with the recording standards adopted under G.S. 161-14(b), the fee shall be twenty-five dollars ($25.00) in addition to all other applicable recording fees.

(19) Miscellaneous Services. – For performing miscellaneous services such as faxing documents, providing laminated copies of documents, expedited delivery of documents, and similar services, the cost of the service.

(b) The uniform fees set forth in this section are complete and exclusive and no other fees shall be charged by the register of deeds.

(c) These fees shall be collected in every case prior to filing, registration, recordation, certification or other service rendered by the register of deeds unless by law it is provided that the service shall be rendered without charge."

SECTION 6. Subdivision (13) of G.S. 105-273 reads as rewritten:

"**§ 105-273. Definitions.**

When used in this Subchapter (unless the context requires a different meaning):

...

(13) "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures on the land, and all rights and privileges belonging or in any way appertaining to the property. These terms also mean a manufactured home as defined in G.S. 143-143.9(6) if it is a residential structure; has the moving hitch, wheels, and axles removed; and is placed upon a permanent foundation either on land owned by the owner of the

manufactured ~~home.~~ home or on land which the owner of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least twenty 20 years. A manufactured home as defined in G.S. 143-143.9(6) that does not meet all of these conditions is considered tangible personal property."

SECTION 7. Chapter 42 of the General Statutes is amended by adding a new section to read:

"**§ 42-14.3. Notice of sale or closure of manufactured home communities.**

(a) In the event that an owner of a manufactured home community (defined as a parcel of land, whether undivided or subdivided, that has been designed to accommodate at least three manufactured homes) intends to sell or close the manufactured home community, the owner shall give each resident notice of the intended sale or closure at least 180 days before the residents are required to vacate, regardless of the term of the tenancy. Failure to give notice as required by this section is a defense in an action for possession.

(b) Notwithstanding subsection (a) of this section, if a manufactured home community is being closed pursuant to a valid order of any unit of state or local government, the owner of the community shall be required to give notice of the closure of the community to each resident of the community within three business days of the date on which the order is issued."

SECTION 8. G.S. 143-143.10(a) reads as rewritten:

"(a) There is created the North Carolina Manufactured Housing Board within the Department. The Board shall be composed of nine members as follows:

(1) The Commissioner of Insurance or his designee.
(2) A manufactured home manufacturer.
(3) A manufactured home dealer.
(4) A representative of the banking and finance business.
(5) A representative of the insurance industry.
(6) A manufactured home supplier.
(7) A set-up contractor.
(8) Two ~~representatives of the general public.~~individuals then living in manufactured homes, as defined in G.S. 143-143.9(6).

The Commissioner or his designee shall chair the Board. The Governor shall appoint to the Board the manufactured home manufacturer and the manufactured home dealer. The General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 shall appoint the representative of the banking and finance industry and the representative of the insurance industry. The General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121 shall appoint the manufactured home supplier and set-up contractor. The Commissioner shall appoint two ~~representatives of the general public.~~ individuals living in manufactured homes after receiving recommendations from affordable housing advocates. Except for the ~~representatives from the general public~~ individuals living in manufactured homes and the persons appointed by the General Assembly, each member of the Board shall be appointed by

the appropriate appointing authority from a list of nominees submitted to the appropriate appointing authority by the Board of Directors of the North Carolina Manufactured Housing Institute. At least three nominations shall be submitted for each position on the Board. The members of the Board shall be residents of the State.

The members of the Board shall serve for terms of three years. In the event of any vacancy of a position appointed by the Governor or Commissioner, the appropriate appointing authority shall appoint a replacement in the same manner as provided for the original appointment to serve the remainder of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. In the event of any vacancy, the appropriate appointing authority shall appoint a replacement to serve the remainder of the unexpired term. Such appointment shall be made in the same manner as provided for the original appointment. No member of the Board shall serve more than two consecutive, three-year terms.

The ~~member~~ two members of the Board ~~representing the general public~~ who live in manufactured homes shall have no beneficial financial interest connected with the manufactured housing industry. No member of the Board shall participate in any proceeding before the Board involving that member's own business.

Each member of the Board, except the Commissioner and any other State employee, shall receive per diem and allowances as provided with respect to occupational licensing boards by G.S. 93B-5. All per diem and travel expenses shall be paid exclusively out of the fees received by the Board as authorized by this Article. In no case shall any salary, expense, or other obligation of the Board be charged against the General Fund of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board for the exclusive purpose of carrying out the provisions of this Article. At the end of the fiscal year, the Board shall retain fifteen percent (15%) of the unexpended funds collected and received during that year. The remaining eighty-five percent (85%) of these funds shall be credited to the General Fund.

(b) In accordance with the provisions of this Article, the Board shall have the following powers and duties:

(1) To issue licenses to manufacturers, dealers, salespersons, and set-up contractors.

(2) To require that an adequate bond or other security be posted by all licensees, except manufactured housing salespersons.

(3) To receive and resolve complaints from buyers of manufactured homes and from persons in the manufactured housing industry, in connection with the warranty, warranty service, licensing requirements or any other provision under this Article.

(4) To adopt rules in accordance with Chapter 150B of the General Statutes as are necessary to carry out the provisions of this Article.

(5) To file against the bond posted by a licensee for warranty repairs and service on behalf of a buyer."

SECTION 9. G.S. 143-143.10 is amended by adding a new subsection to read:

"(c) The Board shall meet no less than once every three months to conduct administrative hearings, if necessary, and to discharge any other Board business. Minutes of all Board meetings and records of all official actions taken by the Board, including, without limitation, its decisions with respect to any administrative hearing shall be kept in the Board's public records and posted on the Board's Internet website within one month of the adjournment of any Board meeting. Additionally, a current list of the Board's membership and the Board's next scheduled meetings shall be regularly posted on the Board's Internet website."

SECTION 10. Chapter 143 of the General Statutes is amended by adding a new section to read:

"**§ 143-143.20B. Disclosure of financing options for manufactured housing.**

If a consumer is purchasing a manufactured home that shall be permanently affixed to land owned by the consumer or on land in which the purchaser of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least twenty 20 years, the manufactured housing dealer shall disclose in writing to each consumer the option of having the manufactured home classified as real property pursuant to G.S. 47-20.7 and the possibility that, pursuant to that classification, the acquisition of the manufactured home may be financed as real property by a lender. If the consumer elects to classify the manufactured home as real property, then the closing of the acquisition of the home shall be classified as a residential real estate transaction."

SECTION 11. G.S. 143-143.21A reads as rewritten:

"**§ 143-143.21A. Purchase agreements; buyer cancellations.**

(a) A purchase agreement for a manufactured home shall include all of the following:

(1) A description of the manufactured home and all accessories included in the purchase.
(2) The purchase price for the home and all accessories.
(3) The amount of deposit or other payment toward or payment of the purchase price of the manufactured home and accessories that is made by the buyer.
(4) The date the retail purchase agreement is signed.
(5) The estimated terms of financing the purchase, if any, including the estimated interest rate, number of years financed, and monthly payment.
(6) The buyer's signature.
(7) The dealer's signature.

(b) The purchase agreement shall contain, in immediate proximity to the space reserved for the signature of the buyer and in at least ten point, all upper-case Gothic type, the following statement:

"I UNDERSTAND THAT I HAVE THE RIGHT TO CANCEL THIS PURCHASE BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE THAT I HAVE SIGNED THIS AGREEMENT. I UNDERSTAND THAT THIS CANCELLATION MUST BE IN WRITING. IF I CANCEL THE PURCHASE AFTER THE THREE-DAY PERIOD, I UNDERSTAND THAT THE DEALER MAY

NOT HAVE ANY OBLIGATION TO GIVE ME BACK ALL OF THE MONEY THAT I PAID THE DEALER. I UNDERSTAND ANY CHANGE TO THE TERMS OF THE PURCHASE AGREEMENT BY THE DEALER WILL CANCEL THIS AGREEMENT."

(c) At the time the deposit or other payment toward or payment for the purchase price is received by the dealer, the dealer shall give the buyer a copy of the purchase agreement and a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the purchase agreement, be easily detachable, and explain the buyer's right to cancel the purchase and how that right can be exercised.

(d) The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer if the buyer cancels the purchase before midnight of the third business day after the date the buyer signed the purchase ~~agreement.~~agreement or if any of the material terms of the purchase agreement are changed by the dealer. To make the cancellation effective, the buyer shall give the dealer written notice of the buyer's cancellation of the purchase. The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer within 15 business days after receipt of the notice of ~~cancellation.~~ cancellation or within three business days of any change by the dealer of the purchase agreement. For purposes of this section, "business day" means any day except Sunday and legal holidays. Each time the dealer gives the buyer a new set of financing terms, the buyer shall be given another three-day cancellation period. The dealer shall not commence setup procedures until after the three-day cancellation period has run.

(e) If the buyer cancels the purchase after the three-day cancellation period, but before the sale is completed, and if:

(1) The manufactured home is in the dealer's inventory, the dealer may retain from the deposit or other payment received from the buyer actual damages up to a maximum of ten percent (10%) of the purchase price; or

(2) The manufactured home is specially ordered from the manufacturer for the buyer, the dealer may retain actual damages up to the full amount of the buyer's deposit or other payment received from the buyer.

(f) A dealer may not transfer title to a manufactured home or otherwise sell, assign, or convey a manufactured home to a consumer unless the dealer delivers to the consumer a written document disclosing the total purchase price, as adjusted for any agreed interest rate and any points or fees, and the length of time for any loan repayment."

SECTION 12. This act becomes effective July 1, 2003.

Attachment III

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1041
PROPOSED COMMITTEE SUBSTITUTE H1041-CSSC-4 [v.1]

4/22/2003 1:35:51 PM

Short Title: APA Rules/Small Bus. Economic Impact. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE AGENCIES PROPOSING PERMANENT RULES TO CONSIDER THE ADVERSE ECONOMIC IMPACT OF THE PROPOSED RULE ON SMALL BUSINESS; TO REQUIRE AGENCY REVIEW OF EXISTING RULES PRIOR TO AMENDMENT TO DETERMINE THE IMPACT ON SMALL BUSINESS; AND TO PROVIDE THAT AGENCIES MAY NOT ADOPT RULES THAT ARE MORE RESTRICTIVE THAN APPLICABLE FEDERAL LAW GOVERNING THE SAME SUBJECT MATTER, AND TO PROVIDE ADDITIONAL LIMITATIONS ON RULES ADOPTED BY THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2A of Chapter 150B of the General Statutes is amended by adding the following new Part to read:

"Part 2A. Regulatory Flexibility.

"**§ 150B-21.7A. Rules affecting small businesses.**

(a) As used in this Part, unless the context clearly requires otherwise, the term:

(1) 'Adverse economic impact' means an aggregate financial impact on small businesses affected by the rule of at least two million dollars ($2,000,000) in a 12-month period.

(2) 'Small business' means a business entity, including its affiliates, that is both independently owned and operated and has gross annual sales of less than ten million dollars ($10,000,000).

(b) Before an agency publishes in the North Carolina Register the proposed text of a permanent rule that would have an adverse impact on small businesses, the agency shall prepare an economic impact statement that includes the following:

(1) An identification and estimate of the number of small businesses subject to the proposed rule.

(2) The projected reporting, record keeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.
(3) A statement of the probable effect on impacted small businesses.
(4) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.

"**§ 150B-21.7B. Review of existing rules.**

In order to minimize the adverse economic impact on small businesses, prior to amending a permanent rule, the agency shall consider the following:

(1) The continued need for the rule.
(2) The nature of complaints or comments received from the public concerning the rule.
(3) The complexity of the rule.
(4) The extent to which the rule overlaps, duplicates, or conflicts with other federal or State rules or local government ordinances.
(5) The length of time since the rule has been evaluated and an estimate on the length of time the rule will continue to be necessary.
(6) The degree to which technology, economic conditions, or other factors have changed in the area affected by the rule."

SECTION 2. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.
(2) It is clear and unambiguous.
(3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly, when considered in light of the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed and the legislative intent of the General Assembly in delegating the duty.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 and Part 2A of this Article. The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 or Part 2A of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 and Part 2A of this Article.

(b) Timetable. – The Commission must review a rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month."

SECTION 3. G.S. 150B-21.4 reads as rewritten:

"**§ 150B-21.4. Fiscal notes on rules.**

(a) State Funds. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the Executive Budget Act, Article 1 of Chapter 143, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Director of the Budget and obtain certification from the Director that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Director of the Budget must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(b) Local Funds. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Office of the Governor as provided by G.S. 150B-21.26, the Fiscal Research Division of the General Assembly, the Office of State Budget and Management, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, or if a fiscal note is required for a rule by subsection (b3) of this section, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal ~~note.~~ note, or if the fiscal note is required by subsection (b3) of this section, the agency must prepare the fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve

the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least five million dollars ($5,000,000) in a 12-month period.

(b2) Content. – A fiscal note required by subsection (b1) of this section must contain the following:

(1) A description of the persons who would be affected by the proposed rule change.

(2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.

(3) A description of the purpose and benefits of the proposed rule change.

(4) An explanation of how the estimate of expenditures was computed.

(b3) More Restrictive Rules. – For any rule adopted by the Department of Environment and Natural Resources or any of its constituent agencies pursuant to Article 9 of Chapter 130A or Articles 21, 21A or 21B of Chapter 143 of the General Statutes, where a person indicates that they or their property or activities are or potentially are regulated by any of those rules in a way that will impose costs on the person, and further indicates that the rules are more restrictive than applicable or comparable federal law, regulation, rule or other enforceable standard governing the same subject matter, the agency must prepare a fiscal note for the rule pursuant to subsections (b1) and (b2) of this section and must include in addition to the information required under those subsections, information on the economic costs attributable to the differences between the rule and the comparable federal rule, as well as the justification and benefits attributable to those ~~benefits.~~ differences

(c) Errors. – An erroneous fiscal note prepared in good faith does not affect the validity of a ~~rule.~~ rule, except for a rule governed by subsection (b3) of this section, the fiscal note of which shall be subject to judicial review de novo under Article 4 of this Chapter."

SECTION 4. This act becomes effective October 1, 2003, and applies to proposed permanent rules the text of which is published in the North Carolina Register on and after that date.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT *Attachment I*

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 1041 DATE 4-29-03

S. B. No. _____ Amendment No. _____ (to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE ✓ H1041-CSSC-4 [v. 1]

Rep.) Nesbitt

Sen.)

moves to amend the bill on page 1, lines 6 through 8

(✓ WHICH CHANGES THE TITLE

by rewriting those lines to read:

"BUSINESS; AND TO PROVIDE".

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

Attachment

(Please type or use ballpoint pen)

EDITION No. 1

H. B. No. 1041 DATE 4-29-03

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE ✓ H1041-CSRC-4 [v.1]

Rep.)
) Moore
Sen.)

moves to amend the bill on page 4, line 29

( ) WHICH CHANGES THE TITLE

by deleting the word "benefits." at the end of the line and substituting the word "differences.".

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

6:30 p.m. The Committee reconvened.

Rep. Nesbitt called the meeting back to order and recognized Rep. Goodwin to explain **HB 1024** (Criminal History Record Checks).

Rep. Goodwin said this bill was requested by the Attorney General's Office and the Department of Justice and essentially adopts the National Crime Prevention and Privacy Compact in North Carolina. He said there were 16 states that have already adopted this Compact. (*See bill analysis – Attachment VI).*

Rep. Nesbitt asked staff if there was anything in the bill that invades our ability to protect our records or supercedes any privacy considerations that we might have? Jeff Hudson said, "no, there is language in the bill that directs the State Compact officer to try to assure that our records are protected for both privacy and accuracy purposes. He also noted that on Page 7, Line 18 of the bill authorizes the State Criminal Record Repository or the FBI to charge a fee for handling a fingerprint processing. He doesn't feel this is a new fee and the bill will not have to be re-referred to the Finance Committee.

Rep. Ellis moved to give the bill a favorable report and the motion carried.

HB 1091 (Penalty for Illegal Indoor Pyrotechnics) was before the Committee and Rep. Goodwin was recognized to discuss his bill. He said it was a bipartisan effort and that the recent event in Rhode Island indicated that pyrotechnics were used without a permit.

Rep. Nesbitt observed that on Page 2 (h1) of the bill, it is creating two classes of misdemeanors for something that is basically already against the law such as occupancy limits to buildings and locking exit doors.

Rep. Goodwin gave a lengthy explanation as to why that language was in the bill, that this bill was a bipartisan effort and some felt that it was necessary to include it.

Rep. Ellis wondered where one might get a permit for pyrotechnic display. Jeff Hudson said that under G. S. 14-413, there is a statutory requirement to get a permit through the Board of County Commissioners. He wasn't sure if the permit requirement in the bill on Page 2 Line 14 was a separate permit. Some local governments may require different permits, such as one from the State Fire Marshal.

Rep. Ellis was concerned that everything in the bill was already illegal.

Rep. Goodwin told the Committee that the State Fire Marshal, when asked what should be done to address tragedies such as the one in Rhode Island, he recommended that the penalty be raised from a Class 2 to a Class 1 misdemeanor.

Rep. Ellis moved to amend the bill by deleting Section 2.

Rep. Stam suggested deleting Sections 2 and 3 and putting a period after "indoors," which is on page 2, Line 1.

Rep. Nesbitt recommended that the bill be carried over so that staff could prepare a proposed committee substitute.

The bill was carried over.

HB 1139 (Protect Rape Victims/Unfavorable Please Bargain) was before the Committee and Rep. Ellis was recognized to discuss the bill.

He said what motivated him to file this bill was a situation he had learned of where a woman had been raped, became pregnant, decided to have the baby and give it up for adoption. The adoptive parents were concerned "that the baby have a clear title." The problem was that the accused rapist had confronted the victim and told her that unless she agreed to a lesser charge, he would assert his parental rights over the child and hold up the adoption process.

The bill provides that a defendant who commits a sex offense that causes the victim to become pregnant cannot exploit his parental rights in order to intimidate the victim or negotiate a more favorable plea bargain. The bill also prohibits a defendant from bring improper pressure on a victim of the crime to induce a more favorable plea arrangement.

Rep. Ellis moved to amend the bill and his motion passed. *(See Attachment VII).*

Discussion followed and the bill was carried over.

The meeting adjourned at 8:10 p.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

Attachment VI

HOUSE BILL 1024:
Criminal History Record Checks.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representative Goodwin
Date:	April 29, 2003	**Summary by:**	Jeff Hudson
Version:	First Edition		Committee Counsel

SUMMARY: ***House Bill 1024 enacts into law and enters the State in the National Crime Prevention and Privacy Compact, a system for the interstate and federal-State exchange of criminal history records for noncriminal justice purposes.***

BACKGROUND: Congress enacted legislation in 1998 to authorize and consent to the establishment of the National Crime Prevention and Privacy Compact. As of April 28, 2003, sixteen states had entered into the Compact. (See attached list)

BILL ANALYSIS:

Section 1 reorganizes various Department of Justice statutes.

Section 2 enacts into law and enters the State in the National Crime Prevention and Privacy Compact (Compact).

Article I. Definitions.

Article II. Purposes.

The main stated purpose for the Compact is the establishment of a cooperative federal-state system for the interstate and federal-state exchange of criminal history records for noncriminal justice purposes. Noncriminal justice purposes include employment suitability, licensing determinations, immigration and naturalization matters, and national security clearances. Under current law, the North Carolina Department of Justice is authorized to provide criminal history records for a number of noncriminal justice purposes, including criminal record checks of school personnel, providers of services to children and the elderly, foster care givers, certain employees of the Department of Health and Human Services and the Department of Juvenile Justice and Delinquency Prevention, prospective adoptive parents, and applicants for licensure as nurses.

Article III. Responsibilities of Compact Parties.

The Federal Bureau of Investigation (FBI) will appoint a Compact Officer to administer the Compact for federal agencies, provide to federal agencies and state criminal history record repositories criminal history records for noncriminal justice purposes, and provide and maintain a centralized information sharing system. Each party state will appoint a state Compact Officer to administer the Compact within the state, establish a criminal history record repository, and provide and maintain telecommunications and related equipment necessary to support the services set forth in the Compact.

Article IV. Authorized Record Disclosures.

The FBI will provide criminal history records to state criminal history record repositories for noncriminal justice purposes as allowed by federal or state law. The FBI and state criminal history record repositories will provide criminal history records to other governmental and nongovernmental agencies for noncriminal justice purposes as allowed by federal or state law. Any record obtained under the Compact may be used only for the official purposes for which the record was requested. Each state Compact Officer will establish procedures to protect the accuracy and privacy of criminal history records.

Article V. Record Request Procedures.

A request for a criminal history record check using the national identification index or the national fingerprint file must be submitted through a state's criminal history record repository or through the FBI. A state criminal history record repository or the FBI may charge a fee in accordance with applicable law for handling a fingerprint processing request. G.S. 114-19.1 currently authorizes the State Bureau of Investigation to charge a fee for providing criminal history records.

Article VI. Establishment of Compact Council.

There will be a Compact Council administratively located within the FBI that will adopt rules to administer the system for providing criminal history records for noncriminal justice purposes. The Compact Council will consist of 15 members appointed by the United States Attorney General. Nine of these members will be state compact officers.

Article VII. Ratification of Compact.

Article VIII. Miscellaneous Provisions.

Article IX. Renunciation.

To leave the Compact, the State would have to enact a law to do so within 180 days of notifying the other party states and the federal government of its intent.

Article X. Severability.

Article XI. Adjudication of Disputes.

The Compact Council has initial authority to make determinations regarding any dispute related to the Compact. The FBI or a party state may appeal a decision of the Compact Council to the United States Attorney General and after that may file suit in federal district court.

Section 3 directs the North Carolina Attorney General to report to the General Assembly on or before March 1, 2004 on the State Compact Officer to be appointed, rules or procedures adopted to implement the Compact, and any changes to the General Statutes needed to conform to the Compact.

EFFECTIVE DATE: This act is effective when it becomes law.

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National Crime Prevention and Privacy Compact

Arizona has ratified the National Crime Prevention and Privacy Compact, becoming the 16th state to do so. Arizona Gov. Jane Dee Hull signed legislation ratifying the compact into law on April 29, 2002. The other states to ratify the compact are:

- Montana, which ratified the compact on April 8, 1999, becoming the first state to do so;
- Georgia, upon whose ratification April 28, 1999, the compact became effective;
- Nevada, May 14, 1999;
- Florida, June 8, 1999;
- Colorado, March 10, 2000;
- Iowa, April 7, 2000;
- Connecticut, June 1, 2000;
- South Carolina, June 22, 2000;
- Arkansas, February 21, 2001(An Adobe Acrobat Reader is necessary to view this document);
- Kansas, April 10, 2001;
- (110kb) Alaska, May 7, 2001 (An Adobe Acrobat Reader is necessary to view this document.);
- Oklahoma, May 24, 2001;
- Maine on June 8, 2001;
- New Jersey on January 3, 2002; and
- Minnesota, on March 25, 2002.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE BILL 1024

Short Title:	Criminal History Record Checks.	(Public)
Sponsors:	Representatives Goodwin; Farmer-Butterfield, Goforth, Jones, and Parmon.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT ADOPTING THE NATIONAL CRIME PREVENTION AND PRIVACY COMPACT FOR NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Article 4 of Chapter 114 of the General Statutes is amended by:

(1) Designating G.S. 114-12 through G.S. 114-19 as:
"Part 1. General Powers and Duties of the State Bureau of Investigation.";

(2) Designating G.S. 114-19.1 through G.S. 114-19.11 as:
"Part 2. Criminal History Record Checks.";

(3) Designating G.S. 114-20 through G.S. 114-21 as:
"Part 3. Protection of Public Officials.";

(4) Recodifying G.S. 114-21 as G.S. 114-12.1.

SECTION 2. Part 2 of Article 4 of Chapter 114 of the General Statutes is amended by adding the following new section to read:

"**§ 114-19.20. The National Crime Prevention and Privacy Compact.**

The National Crime Prevention and Privacy Compact is enacted into law and entered into with all jurisdictions legally joining in the compact in the form substantially as set forth in this section, as follows:

Preamble.

Whereas, it is in the interest of the State to facilitate the dissemination of criminal history records from other states for use in North Carolina as authorized by state law; and

Whereas, the National Crime Prevention and Privacy Compact creates a legal framework for the cooperative exchange of criminal history records for noncriminal justice purposes; and

Whereas, the compact provides for the organization of an electronic information-sharing system among the federal government and the states to exchange

criminal history records for noncriminal justice purposes authorized by federal or state law, such as background checks for governmental licensing and employment; and

Whereas, under the compact, the FBI and the party states agree to maintain detailed databases of their respective criminal history records, including arrests and dispositions, and to make them available to the federal government and party states for authorized purposes; and

Whereas, the FBI shall manage the federal data facilities that provide a significant part of the infrastructure for the system; and

Whereas, entering into the compact would facilitate the interstate and federal-state exchange of criminal history information to streamline the processing of background checks for noncriminal justice purposes; and

Whereas, release and use of information obtained through the system for noncriminal justice purposes would be governed by the laws of the receiving state; and

Whereas, entering into the compact will provide a mechanism for establishing and enforcing uniform standards for record accuracy and for the confidentiality and privacy interests of record subjects.

Article I.
Definitions.

As used in this compact, the following definitions apply:

(1) "Attorney General" means the Attorney General of the United States.

(2) "Compact officer" means:

a. With respect to the federal government, an official so designated by the director of the FBI; and

b. With respect to a party state, the chief administrator of the state's criminal history record repository or a designee of the chief administrator who is a regular, full-time employee of the repository.

(3) "Council" means the compact council established under Article VI.

(4) "Criminal history record repository" means the State Bureau of Investigation's Division of Criminal Information.

(5) "Criminal history records" means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release. The term does not include identification information such as fingerprint records if the information does not indicate involvement of the individual with the criminal justice system.

(6) "Criminal justice" includes activities relating to the detection, apprehension, detention, pretrial release, posttrial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice includes criminal identification activities and the collection, storage, and dissemination of criminal history records.

(7) "Criminal justice agency" means: (i) courts; and (ii) a governmental agency or any subunit of an agency that performs the administration of criminal justice pursuant to a statute or executive order and allocates a substantial part of its annual budget to the administration of criminal justice. The term includes federal and state inspector general offices.

(8) "Criminal justice services" means services provided by the FBI to criminal justice agencies in response to a request for information about a particular individual or as an update to information previously provided for criminal justice purposes.

(9) "Direct access" means access to the national identification index by computer terminal or other automated means not requiring the assistance of or intervention by any other party or agency.

(10) "Executive order" means an order of the President of the United States or the chief executive officer of a state that has the force of law and that is promulgated in accordance with applicable law.

(11) "FBI" means the Federal Bureau of Investigation.

(12) "III system" means the interstate identification index system, which is the cooperative federal-state system for the exchange of criminal history records. The term includes the national identification index, the national fingerprint file, and, to the extent of their participation in the system, the criminal history record repositories of the states and the FBI.

(13) "National fingerprint file" means a database of fingerprints or of other uniquely personal identifying information that relates to an arrested or charged individual and that is maintained by the FBI to provide positive identification of record subjects indexed in the III system.

(14) "National identification index" means an index maintained by the FBI consisting of names, identifying numbers, and other descriptive information relating to record subjects about whom there are criminal history records in the III system.

(15) "National indices" means the national identification index and the national fingerprint file.

(16) "Noncriminal justice purposes" means uses of criminal history records for purposes authorized by federal or state law other than purposes relating to criminal justice activities, including employment suitability, licensing determinations, immigration and naturalization matters, and national security clearances.

(17) "Nonparty state" means a state that has not ratified this compact.

(18) "Party state" means a state that has ratified this compact.

(19) "Positive identification" means a determination, based upon a comparison of fingerprints or other equally reliable biometric identification techniques, that the subject of a record search is the same person as the subject of a criminal history record or records indexed in the III system. Identifications based solely upon a comparison of

subjects' names or other nonunique identification characteristics or numbers, or combinations thereof, does not constitute positive identification.

(20) "Sealed record information" means:

a. With respect to adults, that portion of a record that is:

1. Not available for criminal justice uses;

2. Not supported by fingerprints or other accepted means of positive identification; or

3. Subject to restrictions on dissemination for noncriminal justice purposes pursuant to a court order related to a particular subject or pursuant to a federal or state statute that requires action on a sealing petition filed by a particular record subject; and

b. With respect to juveniles, whatever each state determines is a sealed record under its own law and procedure.

(21) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

Article II.

Purposes.

The purposes of this compact are to:

(1) Provide a legal framework for the establishment of a cooperative federal-state system for the interstate and federal-state exchange of criminal history records for noncriminal justice uses;

(2) Require the FBI to permit use of the national identification index and the national fingerprint file by each party state and to provide, in a timely fashion, federal and state criminal history records to requesting states, in accordance with the terms of this compact and with rules, procedures, and standards established by the council under Article VI;

(3) Require party states to provide information and records for the national identification index and the national fingerprint file and to provide criminal history records, in a timely fashion, to criminal history record repositories of other states and the federal government for noncriminal justice purposes, in accordance with the terms of this compact and with rules, procedures, and standards established by the council under Article VI;

(4) Provide for the establishment of a council to monitor III system operations and to prescribe system rules and procedures for the effective and proper operation of the III system for noncriminal justice purposes; and

(5) Require the FBI and each party state to adhere to III system standards concerning record dissemination and use, response times, system security, data quality, and other duly established standards, including those that enhance the accuracy and privacy of such records.

Article III.

Responsibilities of Compact Parties.

(a) The director of the FBI shall:

(1) Appoint an FBI compact officer who shall:

a. Administer this compact within the Department of Justice and among federal agencies and other agencies and organizations that submit search requests to the FBI pursuant to Article V(c);

b. Ensure that compact provisions and rules, procedures, and standards prescribed by the council under Article VI are complied with by the Department of Justice and federal agencies and other agencies and organizations referred to in sub-subdivision (a)(1)a. of this Article III; and

c. Regulate the use of records received by means of the III system from party states when such records are supplied by the FBI directly to other federal agencies;

(2) Provide to federal agencies and to state criminal history record repositories criminal history records maintained in its database for the noncriminal justice purposes described in Article IV, including:

a. Information from nonparty states; and

b. Information from party states that is available from the FBI through the III system but is not available from the party states through the III system;

(3) Provide a telecommunications network and maintain centralized facilities for the exchange of criminal history records for both criminal justice purposes and the noncriminal justice purposes described in Article IV and ensure that the exchange of records for criminal justice purposes has priority over exchange for noncriminal justice purposes; and

(4) Modify or enter into user agreements with nonparty state criminal history record repositories to require them to establish record request procedures conforming to those prescribed in Article V.

(b) Each party state shall:

(1) Appoint a compact officer who shall:

a. Administer this compact within that state;

b. Ensure that compact provisions and rules, procedures, and standards established by the council under Article VI are complied with in the state; and

c. Regulate the in-state use of records received by means of the III system from the FBI or from other party states;

(2) Establish and maintain a criminal history record repository, which shall provide:

a. Information and records for the national identification index and the national fingerprint file; and

b. The state's III system-indexed criminal history records for noncriminal justice purposes described in Article IV;

(3) Participate in the national fingerprint file; and

(4) Provide and maintain telecommunications links and related equipment necessary to support the criminal justice services set forth in this compact.

(c) In carrying out their responsibilities under this compact, the FBI and each party state shall comply with III system rules, procedures, and standards duly established by the council concerning record dissemination and use, response times, data quality, system security, accuracy, privacy protection, and other aspects of III system operation.

(d) Use of the III system for noncriminal justice purposes authorized in this compact must be managed so as not to diminish the level of services provided in support of criminal justice purposes. Administration of compact provisions may not reduce the level of service available to authorized noncriminal justice users on the effective date of this compact.

Article IV.

Authorized Record Disclosures.

(a) To the extent authorized by section 552a of Title 5, United States Code (commonly known as the Privacy Act of 1974), the FBI shall provide on request criminal history records, excluding sealed record information, to state criminal history record repositories for noncriminal justice purposes allowed by federal statute, federal executive order, or a state statute that has been approved by the Attorney General to ensure that the state statute explicitly authorizes national indices checks.

(b) The FBI, to the extent authorized by section 552a of Title 5, United States Code (commonly known as the Privacy Act of 1974), and state criminal history record repositories shall provide criminal history records, excluding sealed record information, to criminal justice agencies and other governmental or nongovernmental agencies for noncriminal justice purposes allowed by federal statute, federal executive order, or a state statute that has been approved by the Attorney General to ensure that the state statute explicitly authorizes national indices checks.

(c) Any record obtained under this compact may be used only for the official purposes for which the record was requested. Each compact officer shall establish procedures consistent with this compact and with rules, procedures, and standards established by the council under Article VI, which procedures shall protect the accuracy and privacy of the records and shall:

(1) Ensure that records obtained under this compact are used only by authorized officials for authorized purposes;

(2) Require that subsequent record checks are requested to obtain current information whenever a new need arises; and

(3) Ensure that record entries that may not legally be used for a particular noncriminal justice purpose are deleted from the response and, if no information authorized for release remains, an appropriate "no record" response is communicated to the requesting official.

Article V.

Record Request Procedures.

(a) Subject fingerprints or other approved forms of positive identification must be submitted with all requests for criminal history record checks for noncriminal justice purposes.

(b) Each request for a criminal history record check utilizing the national indices made under any approved state statute must be submitted through that state's criminal history record repository. A state criminal history record repository shall process an interstate request for noncriminal justice purposes through the national indices only if the request is transmitted through another state criminal history record repository or the FBI.

(c) Each request for criminal history record checks utilizing the national indices made under federal authority must be submitted through the FBI or, if the state criminal history record repository consents to process fingerprint submissions, through the criminal history record repository in the state in which the request originated. Direct access to the national identification index by entities other than the FBI and state criminal history record repositories may not be permitted for noncriminal justice purposes.

(d) A state criminal history record repository or the FBI:

(1) May charge a fee, in accordance with applicable law, for handling a request involving fingerprint processing for noncriminal justice purposes; and

(2) May not charge a fee for providing criminal history records in response to an electronic request for a record that does not involve a request to process fingerprints.

(e) (1) If a state criminal history record repository cannot positively identify the subject of a record request made for noncriminal justice purposes, the request, together with fingerprints or other approved identifying information, must be forwarded to the FBI for a search of the national indices.

(2) If, with respect to a request forwarded by a state criminal history record repository under subdivision (e)(1) of this Article V, the FBI positively identifies the subject as having a III system-indexed record or records:

a. The FBI shall so advise the state criminal history record repository; and

b. The state criminal history record repository is entitled to obtain the additional criminal history record information from the FBI or other state criminal history record repositories.

Article VI.
Establishment of Compact Council.

(a) There is established a council to be known as the compact council which has the authority to promulgate rules and procedures governing the use of the III system for noncriminal justice purposes, not to conflict with FBI administration of the III system for criminal justice purposes. The council shall:

(1) Continue in existence as long as this compact remains in effect;

(2) Be located, for administrative purposes, within the FBI; and

(3) Be organized and hold its first meeting as soon as practicable after the effective date of this compact.

(b) The council must be composed of 15 members, each of whom must be appointed by the Attorney General, as follows:

(1) Nine members, each of whom shall serve a two-year term, who must be selected from among the compact officers of party states based on the recommendation of the compact officers of all party states, except that in the absence of the requisite number of compact officers available to serve, the chief administrators of the criminal history record repositories of nonparty states must be eligible to serve on an interim basis;

(2) Two at-large members, nominated by the director of the FBI, each of whom shall serve a three-year term, of whom:

a. One must be a representative of the criminal justice agencies of the federal government and may not be an employee of the FBI; and

b. One must be a representative of the noncriminal justice agencies of the federal government;

(3) Two at-large members, nominated by the chair of the council once the chair is elected pursuant to subsection (c)(3) of this Article VI, each of whom shall serve a three-year term, of whom:

a. One must be a representative of state or local criminal justice agencies; and

b. One must be a representative of state or local noncriminal justice agencies;

(4) One member who shall serve a three-year term and who shall simultaneously be a member of the FBI's advisory policy board on criminal justice information services, nominated by the membership of that policy board; and

(5) One member, nominated by the director of the FBI, who shall serve a three-year term and who must be an employee of the FBI.

(c) From its membership, the council shall elect a chair and a vice-chair of the council. Both the chair and vice-chair of the council: (i) must be a compact officer, unless there is no compact officer on the council who is willing to serve, in which case the chair may be an at-large member and (ii) shall serve two-year terms and may be reelected to only one additional two-year term. The vice-chair of the council shall serve as the chair of the council in the absence of the chair.

(d) The council shall meet at least once each year at the call of the chair. Each meeting of the council must be open to the public. The council shall provide prior public notice in the federal register of each meeting of the council, including the matters to be addressed at the meeting. A majority of the council or any committee of the council shall constitute a quorum of the council or of a committee, respectively, for the conduct

of business. A lesser number may meet to hold hearings, take testimony, or conduct any business not requiring a vote.

(e) The council shall make available for public inspection and copying at the council office within the FBI and shall publish in the federal register any rules, procedures, or standards established by the council.

(f) The council may request from the FBI reports, studies, statistics, or other information or materials that the council determines to be necessary to enable the council to perform its duties under this compact. The FBI, to the extent authorized by law, may provide assistance or information upon a request.

(g) The chair may establish committees as necessary to carry out this compact and may prescribe their membership, responsibilities, and duration.

Article VII.

Ratification of Compact.

This compact takes effect upon being entered into by two or more states as between those states and the federal government. When additional states subsequently enter into this compact, it becomes effective among those states and the federal government and each party state that has previously ratified it. When ratified, this compact has the full force and effect of law within the ratifying jurisdictions. The form of ratification must be in accordance with the laws of the executing state.

Article VIII.

Miscellaneous Provisions.

(a) Administration of this compact may not interfere with the management and control of the director of the FBI over the FBI's collection and dissemination of criminal history records and the advisory function of the FBI's advisory policy board chartered under the Federal Advisory Committee Act (5 U.S.C. App.) for all purposes other than noncriminal justice.

(b) Nothing in this compact may require the FBI to obligate or expend funds beyond those appropriated to the FBI.

(c) Nothing in this compact may diminish or lessen the obligations, responsibilities, and authorities of any state, whether a party state or a nonparty state, or of any criminal history record repository or other subdivision or component thereof under the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1973 (Public Law 92-544) or regulations and guidelines promulgated thereunder, including the rules and procedures promulgated by the council under Article VI(a), regarding the use and dissemination of criminal history records and information.

Article IX.

Renunciation.

(a) This compact shall bind each party state until renounced by the party state.

(b) Any renunciation of this compact by a party state must:

(1) Be effected in the same manner by which the party state ratified this compact; and

(2) Become effective 180 days after written notice of renunciation is provided by the party state to each other party state and to the federal government.

Article X.

Severability.

The provisions of this compact must be severable. If any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or to the Constitution of the United States or if the applicability of any phrase, clause, sentence, or provision of this compact to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability of the remainder of the compact to any government, agency, person, or circumstance may not be affected by the severability. If a portion of this compact is held contrary to the constitution of any party state, all other portions of this compact must remain in full force and effect as to the remaining party states and in full force and effect as to the party state affected, as to all other provisions.

Article XI.

Adjudication of Disputes.

(a) The council:

(1) Has initial authority to make determinations with respect to any dispute regarding:

a. Interpretation of this compact;

b. Any rule or standard established by the council pursuant to Article VI; and

c. Any dispute or controversy between any parties to this compact; and

(2) Shall hold a hearing concerning any dispute described in subdivision (a)(1) of this Article XI at a regularly scheduled meeting of the council and only render a decision based upon a majority vote of the members of the council. The decision must be published pursuant to the requirements of Article VI(e).

(b) The FBI shall exercise immediate and necessary action to preserve the integrity of the III system, to maintain system policy and standards, to protect the accuracy and privacy of records, and to prevent abuses until the council holds a hearing on the matters.

(c) The FBI or a party state may appeal any decision of the council to the Attorney General and after that appeal may file suit in the appropriate district court of the United States that has original jurisdiction of all cases or controversies arising under this compact. Any suit arising under this compact and initiated in a state court must be removed to the appropriate district court of the United States in the manner provided by section 1446 of Title 28, United States Code, or other statutory authority."

SECTION 3. The North Carolina Attorney General shall report to the General Assembly on or before March 1, 2004, on the following:

(1) The compact officer to be appointed pursuant to Article III of the National Crime Prevention and Privacy Compact.

(2) Any rules or procedures to be adopted to implement the Compact.

(3) Any provisions of the General Statutes that must be repealed or amended to conform to the Compact.

SECTION 4. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

HOUSE BILL 1091

Short Title:	Penalty for Illegal Indoor Pyro.	(Public)
Sponsors:	Representatives Goodwin, Blackwood, Dickson (Primary Sponsors); and Moore.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE PENALTY FOR INDOOR PYROTECHNICS EXHIBITIONS CONDUCTED WITHOUT A PERMIT, AND TO INCREASE THE PENALTIES FOR MULTIPLE RELATED ACTIVITIES IN VIOLATION OF THE NORTH CAROLINA BUILDING CODE.

Whereas, the recent tragedy in Rhode Island where indoor pyrotechnics were apparently used in a crowded indoor club without the permit required by state law has prompted many to see if a similar tragedy could occur in this State; and

Whereas, that tragedy was compounded by the use of combustible materials for soundproofing; and

Whereas, North Carolina like Rhode Island has a law requiring permits for the use of pyrotechnics, which are especially dangerous in crowded indoor situations, but the General Assembly has little knowledge about the extent of compliance with this law; and

Whereas, the same band that played at the Rhode Island nightclub date had played at a nightclub in Winston-Salem just a week earlier and, according to press reports, had used some form of pyrotechnics; and

Whereas, there are many local acts relating to pyrotechnic displays, some delegating from the county commission to county staff the authority to grant such permits, some delegating to municipalities the power to issue such permits, and one in Charlotte requiring an additional permit from the fire department; and

Whereas, current North Carolina law has only minor penalties for violation of the pyrotechnics laws and other related laws; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-415 reads as rewritten:

"**§ 14-415. Violation made misdemeanor.**

Any person violating any of the provisions of this Article, except as otherwise specified in said Article, shall be guilty of a Class 2 ~~misdemeanor.~~ misdemeanor, except

that it is a Class 1 misdemeanor if the exhibition is indoors and is knowingly conducted without a permit."

SECTION 2. G.S. 143-138(h) reads as rewritten:

"(h) Violations. – Any person who shall be adjudged to have violated this Article or the North Carolina State Building Code, except for violations of occupancy limits established by either, shall be guilty of a Class 3 misdemeanor and shall upon conviction only be liable to a fine, not to exceed fifty dollars ($50.00), for each offense. Each 30 days that such violation continues shall constitute a separate and distinct offense. Violation of occupancy limits established pursuant to the North Carolina State Building Code shall be a Class 3 misdemeanor. Any violation incurred more than one year after another conviction for violation of the occupancy limits shall be treated as a first offense for purposes of establishing and imposing penalties. It is a Class 1 misdemeanor knowingly to conduct any indoor pyrotechnic exhibition without a permit under the North Carolina Building Code or under G.S. 14-413.

(h1) It is a Class 2 misdemeanor knowingly to do two or more of the following and a Class 1 misdemeanor knowingly to do three of the following:

(1) Use plastic foam or other combustible materials as interior finish or trim except as permitted by the North Carolina State Building Code.

(2) Exceed the occupancy limit in a building that is a place of public assembly in violation of the North Carolina Building Code.

(3) Lock or block access to exit doors in a public building that is a place of public assembly in violation of the North Carolina State Building Code.

Any fine imposed pursuant to a Class 1 misdemeanor under this subsection shall not exceed two thousand dollars ($2,000)."

SECTION 3. The State Fire Marshal shall report to the Joint Legislative Commission on Governmental Operations no later than January 15, 2005, on the compliance with this act and its effectiveness in reducing the risk of disasters and on the compliance with the law requiring permits for pyrotechnics displays, as well as the current local legislation on the subject. The State Fire Marshal may include in that report any recommendations for additional legislation.

SECTION 4. This act becomes effective with respect to offenses committed on or after December 1, 2003.

HOUSE BILL 1091:
Penalty for Illegal Indoor Pyrotechnics.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Representatives Goodwin, Blackwood, and Dickson
Date:	April 29, 2003		
Version:	First Edition	**Summary by:**	Jeff Hudson Committee Counsel

SUMMARY: ***House Bill 1091 would increase the penalty for an indoor pyrotechnic exhibition knowingly conducted without a permit and would establish penalties for multiple activities in violation of the North Carolina State Building Code.***

BILL ANALYSIS:

Under current law, pyrotechnics, as defined in G.S. 14-414 (Attached), may not be discharged in the State except at public exhibitions under the supervision of experts when permitted by the board of county commissioners. Violation of this law is punished as a Class 2 misdemeanor (1 to 30 days of community punishment).

Section 1 would make it a Class 1 misdemeanor (1 to 45 days of community punishment) if a pyrotechnic exhibition is held indoors and is knowingly conducted without a public exhibition permit from the board of county commissioners.

Section 2 would make it a Class 1 misdemeanor (1 to 45 days of community punishment) to knowingly conduct an indoor pyrotechnic exhibition without a permit under the State Building Code or a public exhibition permit from the board of county commissioners.

Section 3 would make it a Class 2 misdemeanor (1 to 30 days of community punishment) to knowingly do two of the following or a Class 1 misdemeanor (1 to 45 days of community punishment) to knowingly do three of the following:

- Use plastic foam or other combustible materials as interior finish except as permitted by the State Building Code.
- Exceed the occupancy limit in a building that is a place of public assembly in violation of the State Building Code.
- Lock or block access to exits in a building that is a place of public assembly in violation of the State Building Code.

A fine imposed pursuant to a Class 1 misdemeanor under this provision may not exceed $2,000.

EFFECTIVE DATE: This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

H1091-SMSB-001

§ 14-414. Pyrotechnics defined; exceptions.

For the proper construction of the provisions of this Article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. This Article shall not apply to the sale, use, or possession of the following:

(1) Explosive caps designed to be fired in toy pistols, provided that the explosive mixture of the explosive caps shall not exceed twenty-five hundredths (.25) of a gram for each cap.

(2) Snake and glow worms composed of pressed pellets of a pyrotechnic mixture that produce a large, snake-like ash when burning.

(3) Smoke devices consisting of a tube or sphere containing a pyrotechnic mixture that produces white or colored smoke.

(4) Trick noisemakers which produce a small report designed to surprise the user and which include:

a. A party popper, which is a small plastic or paper item containing not in excess of 16 milligrams of explosive mixture. A string protruding from the device is pulled to ignite the device, expelling paper streamers and producing a small report.

b. A string popper, which is a small tube containing not in excess of 16 milligrams of explosive mixture with string protruding from both ends. The strings are pulled to ignite the friction-sensitive mixture, producing a small report.

c. A snapper or drop pop, which is a small, paper-wrapped item containing no more than 16 milligrams of explosive mixture coated on small bits of sand. When dropped, the device produces a small report.

(5) Wire sparklers consisting of wire or stick coated with nonexplosive pyrotechnic mixture that produces a shower of sparks upon ignition. These items must not exceed 100 grams of mixture per item.

(6) Other sparkling devices which emit showers of sparks and sometimes a whistling or crackling effect when burning, do not detonate or explode, do not spin, are hand-held or ground-based, cannot propel themselves through the air, and contain not more than 75 grams of chemical compound per tube, or not more than a total of 200 grams if multiple tubes are used. (1947, c. 210, s. 5; 1955, c. 674, s. 1; 1993, c. 437.)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE BILL 1139

Short Title:	Protect Rape Victims/Unfavorable Plea Bargain.	(Public)
Sponsors:	Representative Ellis.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A DEFENDANT WHO COMMITS A SEX OFFENSE THAT RESULTS IN THE VICTIM BECOMING PREGNANT SHALL NOT EXPLOIT HIS PARENTAL RIGHTS TO INTIMIDATE THE CRIME VICTIM OR NEGOTIATE A MORE FAVORABLE PLEA ARRANGEMENT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 30 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-226.2. Interfere with plea arrangement by exploiting parental rights to intimidate the crime victim in order to negotiate a more favorable plea.**

(a) A defendant who commits a sex offense that results in the victim becoming pregnant is guilty of a violation of this section if the defendant negotiates or attempts to negotiate a more favorable plea arrangement by intimidating the victim of the crime by threatening to exploit the defendant's parental rights with regard to adoption, visitation, custody, care, or welfare of the child.

(b) A violation of this section is a Class H felony."

SECTION 2. G.S. 15A-1021 is amended by adding a new subsection to read:

"(b1) Neither the defendant nor any person representing the defendant may bring improper pressure upon the victim of the crime to induce a more favorable plea arrangement for the defendant from the State."

SECTION 3. Article 57 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 15A-1013. Judicial approval required for plea arrangement in certain cases.**

(a) If the offense is a sex offense that resulted in the victim becoming pregnant, the parties shall not include any consideration of parental rights with regard to the adoption, visitation, custody, care, or welfare of the child as part of the negotiations or substance of a plea arrangement without the prior permission of the presiding, or resident, superior court judge. If the judge grants the permission requested, the judge

may participate in the discussions. If the State and defendant agree upon a plea arrangement in a case described in this subsection, they must disclose the substance of their plea negotiations and the substance of the plea agreement to the judge before the time the defendant is called upon to plead, unless the judge participated in the discussions and knows the full details of the negotiations and the substance of the plea agreement.

(b) Before accepting a plea pursuant to a plea arrangement for a sex offense that resulted in the victim becoming pregnant, the judge must advise the parties whether he or she approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, the judge must so inform the parties, refuse to accept the defendant's plea and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons the judge rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge, the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal."

SECTION 4. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1139

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

H1139-ARQ-13 [v.1]

Date 4-29-03 ,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Ellis

moves to amend the bill on page 1, line 22, by deleting the number "14" and substituting the number "15A".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

House Judiciary II

Committee

Minutes

April 30, 2003

9:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Rep. Farmer-Butterfield to make discuss **HB 1122** (Guardianship Training Requirements).

A proposed committee substitute was distributed to the members and Rep. Gulley moved that it be adopted. *(See Attachment I)* The motion passed.

Staff noted that the name "Institute of Government" has been changed to the "UNC School of Government." Rep. Goodwin moved to amend the bill with that change and to incorporate that change into a new Proposed Committee Substitute. The motion carried.

HB 1122 was displaced.

HB 1123 (Guardianship Amendments) was before the Committee for consideration. Rep. Farmer-Butterfield was recognized to discuss her bill.

Rep. Stam told the Committee that he had reviewed her bill and supports it.

Rep. Farmer-Butterfield said that **HB 1123** amends the law governing the appointment of guardians for incompetent persons to authorize the clerk to order a limited guardianship if the nature and extent of the ward's capacity justifies doing so. The bill also amends the law relating to the appointment of a guardian ad litem in a proceeding to determine incompetence. The amendment provides that the guardian ad litem must represent the interests of the alleged incompetent person.

Rep. Farmer-Butterfield moved for a favorable report and the motion passed.

Rep. Ellis noted that Rep. Culpepper was present.

HB 402 (DSS Worker/Right of Entry) and **HB 403** (Religious Freedom Restoration Act) were before the Committee.

Rep. Stam told the committee that Proposed Committee Substitutes had been drafted for both bills and explained that they each involved issues that were currently before the Courts. The Proposed Committee Substitutes added appropriations, therefore, making the two bills not subject to the crossover deadline.

He moved that they each be adopted and the motion passed. The bills ere displaced.

A committee substitute for HB 564 (Revise Exclusionary Rule), adopted on April 10, 2003, was again before the Committee. Rep. Stam was recognized to discuss his bill. He made a motion to give the proposed committee substitute a favorable report and an unfavorable report to the original bill.

He said the bill had been before the Committee about four times, and that it had been explained in "bits and pieces." He said he felt that the bill was a bipartisan effort. He told the Committee of his various experience in working for members of "the other party." He said in 1988, the *State vs. Carter* decision came out and he was immediately alarmed because it denied that there was a good faith exception in criminal cases in the State Constitution. The dissent by Chief Justice Burley Mitchell, who was, at that time, the highest elected official of the Democratic party, explained that this was not constitutionally required, and there was no need for it. Justice Mitchell, in his dissent, explained that 2+ percent of all felony cases are impacted by the "exclusionary rule." Rep. Stam said he thought that sufficient evidence of the need for his bill, even more than the statement from the State Public Appellate Defender, whose job it is to get convicted criminals' convictions reversed. He said he honored that, but he thought that the stated need for this, by the former Chief Justice Mitchell, was sufficient reputation of that argument. He also referenced the dissent by Chief Justice Lewis Meyer.

On the question of the constitutionality of HB 564, the majority in State vs. Carter, said, in deed, "yes," that if the Legislature wants to change this rule, it can do so by legislative action. So basically, all were unanimous on those points by high elected officials of the "other" party. After he filed his bill, he received an unsolicited letter from Superior Court Judge Robert H. Hobgood, which he had passed out at an earlier meeting. *(See AttachmentII)* Judge Hobgood had written an article for the *Campbell Law Review* explaining how North Carolina "tosses" more good evidence than we are required to, under the Federal Court decision. He said this gets to the heart of criminal cases. There is just no public reason or purpose to exclude evidence in a criminal case, when by definition, the officer was "acting in good faith." In *State vs. Carter*, a 70-year old rape victim trial occurs, a sample of blood was obtained from the defendant by "non-testimonial order," and that was unlawful, because the defendant was in custody, it should have been done by warrant. The majority of the N. C. Supreme Court said that there had to be a new trial.

Rep. Stam said he would like to have a unanimous vote, and he called for the "ayes and nos."

Rep. Nesbitt told Rep. Stam that he had requested that Ex Officio Members of the Committee be present to vote on this bill, because a member of the Committee, Rep. Bonner, was absent due to his wife's illness. Rep. Nesbitt also commented that he always had fought to ensure civil liberties and he thought that North Carolina's Exclusionary Rule served a good purpose.

Rep. Ellis was recognized and read from the Bill Analysis that the NCGS 15A-974 currently requires suppression of evidence in a criminal trial. He said Rep. Stam was basically asking that the Statute be changed to more closely reflect what they as members of the House are supposed to do. That is, he said, "that the Statute reflects the public's opinion." He said "we are not the courts," and that it is not the members responsibility to verify or not if what "we do is constitutional." He said the vote on this bill would reflect whether "we have responded to the public's cry for justice and the protection of their rights."

Rep. Bordsen expressed her concerns about changing the current law.

Rep. Goodwin said, in his opinion, support or non-support of **HB 564** was really a philosophical question. Historically, through the years, North Carolina has strongly supported civil liberties and individual rights, while at the same time having a strong record regarding public safety and law enforcement. He felt that the direction of the bill might be going against the philosophical reason that North Carolina signed on to the U. S. Constitution, that it demanded a strong protection of individual rights. He asked staff whether there were any other instances in the Bill of Rights where a state is prohibited from giving more protective to individual rights, where states are told they can't be more protective.

Rep. Moore said when he first read the bill he thought it was a bad idea, but now, after further research and thought, he supports it. He urged the Committee's support.

Rep. Walend added that the truth is ultimate, and if evidence is not admitted, the truth may not be revealed. She wondered how many states have less restrictive exclusionary rules, and why North Carolina is more restrictive than it is in the U. S. Constitution.

Rep. Stam was recognized for final comments on HB 564. He said the "exclusion rule" did not even come into jurus prudence at the federal level until 1913. It was a constitutional decision at the time, it was just "advisory" powers and it is not in the words of the U. S. Constitution, it is not in the words of the North Carolina Constitution. It came into North Carolina in 1988. It was in the Statutes from 1937 through the 1970s and then with a brief hiatus, it wasn't in there anymore"

Janette Lee, the Committee Assistant was asked to call the roll.

Vote:	<u>*No*</u>	<u>*Yes*</u>
	Bordsen	Ellis

Farmer-Butterfield	Gulley
Goodwin	Stam
Nesbitt	Walend
	Moore

Ex Officio Members:

Culpepper	Brubaker
Cunningham	Eddins

The proposed committee substitute for **HB 564** was given a favorable report.

HB 1091 (Penalty for Illegal Indoor Pyrotechnics) was again before the Committee. Rep. Goodwin was recognized for comments on his bill. He presented a proposed committee substitute to the Committee and Rep. Ellis moved that it be adopted. The motion passed.

Rep. Goodwin moved for a favorable report for the committee substitute, unfavorable to the original bill and the motion passed.

HB 1139 (Judicial Approval for Pleas in certain Cases) was again before the Committee and Rep. Ellis, the bill sponsor, was recognized to discuss his bill.

He handed out a proposed committee substitute and moved that it be adopted for discussion. The motion passed.

After brief remarks about changes in the committee substitute, Rep. Moore moved to given the proposed committee substitute a favorable report, unfavorable to the original bill and the motion passed.

The committee recessed until 1:00 p.m.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H D

HOUSE BILL 1122
PROPOSED COMMITTEE SUBSTITUTE H1122-CSRO-16 [v.1]

4/29/2003 10:40:46 PM

Short Title: Guardianship Training Requirements. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH TRAINING REQUIREMENTS FOR HEARING OFFICERS IN GUARDIANSHIP CASES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 35A-1203(a) reads as rewritten:

"(a) Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings brought or filed under this Subchapter. Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the estate for minors, for the appointment of guardians of the person or general guardians for minors who have no natural guardian, and of related proceedings brought or filed under this Subchapter. No clerk of superior court, assistant clerk, or other person appointed by a clerk of superior court who is not a licensed attorney, shall preside over a guardianship case pursuant to the clerk's judicial power without first being provided with training on the law and procedure of such cases by the faculty of the Institute of Government or other appropriate persons, as determined by the Administrative Office of the Courts."

SECTION 2. There is appropriated from the General Fund to the Administrative Office of the Courts the sum of fifty thousand dollars ($50,000) for the 2003-2004 fiscal year to develop and implement a training program for hearing officers in guardianship cases, as provided by Section 1 of this act.

SECTION 3. Section 1 of this act becomes effective January 1, 2004, and applies to persons appointed on or after that date. The remainder of this act becomes effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1123

Short Title:	Guardianship Amendments.	(Public)
Sponsors:	Representatives Farmer-Butterfield; Jones, Hackney, and Rapp.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO EXPRESSLY PROVIDE FOR LIMITED GUARDIANSHIPS FOR INCOMPETENT PERSONS AND TO CLARIFY THE DUTY OF A GUARDIAN AD LITEM APPOINTED TO REPRESENT A PERSON IN AN INCOMPETENCY ADJUDICATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 35A-1212(a) reads as rewritten:

"(a) The clerk shall make such inquiry and receive such evidence as the clerk deems necessary to determine:

(1) The nature and extent of the needed guardianship;

(2) The assets, liabilities, and needs of the ward; and

(3) Who, in the clerk's discretion, can most suitably serve as the guardian or guardians.

If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so."

SECTION 2. G.S. 35A-1215(b) reads as rewritten:

"(b) ~~The~~ If the clerk orders a limited guardianship as authorized by G.S. 35A-1212(a), the clerk may order that the ward retain certain legal rights and privileges to which he was entitled before he was adjudged incompetent; provided, any such order shall include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians."

SECTION 3. G.S. 35A-1107 reads as rewritten:

"**§ 35A-1107. Right to counsel or guardian ad litem.**

The respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. A guardian ad litem appointed pursuant to this section shall represent the expressed interests of the respondent unless the respondent is unable to express those interests, in which case the guardian ad litem shall make inquiry into the best interests of the respondent. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains

his own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services."

SECTION 4. This act is effective when it becomes law.

HOUSE BILL 1123:
Guardianship Amendments.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Farmer-Butterfield
Date:	April 30, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***House Bill 1123 amends the law governing the appointment of guardians for incompetent persons to authorize the clerk to order a limited guardianship if the nature and extent of the ward's capacity justify doing so. The bill also amends the law relating to the appointment of a guardian ad litem in a proceeding to determine incompetence. The amendment provides that the guardian ad litem must represent the interests of the alleged incompetent person.***

CURRENT LAW:

Under current law, the clerk of Superior Court has jurisdiction to hear a petition to adjudicate a person to be incompetent, and also to appoint a guardian ad litem to represent the alleged incompetent person in the proceeding. The clerk further has jurisdiction to appoint a guardian for the person once the adjudication has been made. A guardianship may be with respect to the person or the estate or may be a general guardianship.

In determining the appointment of a guardian, the clerk must consider the nature and extent of the needed guardianship; but currently the law does not specifically authorize the clerk to issue a limited guardianship.

BILL ANALYSIS:

Section 1. – Authorizes the clerk to order a limited guardianship if the nature and extent of the ward's capacity justify doing so.

Section 2. – Amends the law relating to the issuance of the clerk's order appointing a guardian to provide that if the clerk orders a limited guardianship, the ward may retain certain legal rights and privileges.

Section 3. – Amends the law relating to the appointment of a guardian ad litem to represent the respondent in the proceeding to determine incompetency. The bill clarifies that the guardian ad litem must represent the stated interests of the respondent unless the respondent is unable to express those interests, in which case the guardian ad litem must make inquiry into the best interests of the respondent.

Section 4. – This act would become effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 403
PROPOSED COMMITTEE SUBSTITUTE H403-PCS45104-SB-20

Short Title: Religious Freedom Restoration Act. (Public)

Sponsors:

Referred to:

March 11, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT THE NORTH CAROLINA RELIGIOUS FREEDOM RESTORATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 143C.**

"**Religious Freedom Restoration Act.**

"**§ 143C-1. Definitions.**

The following definitions apply in this Chapter:

(1) 'Demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(2) 'Exercise of religion' means an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

(3) 'Government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the State of North Carolina or a political subdivision of the State.

"**§ 143C-2. Findings and purposes.**

(a) The General Assembly finds the following:

(1) The free exercise of religion is an inherent, fundamental, and inalienable right secured by Article I, Section 13 of the North Carolina Constitution.

(2) Laws 'neutral' toward religion, as well as laws intended to interfere with the exercise of religion, may burden the exercise of religion.

(3) Government should not substantially burden the exercise of religion without compelling justification.

(4) In Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement under the First Amendment of the United States Constitution that government justify burdens on the exercise of religion imposed by laws neutral toward religion.

(5) In City of Boerne v. P. F. Flores, 521 U.S. 507 (1997), the Supreme Court held that an act passed by Congress to address the matter of burdens placed on the exercise of religion infringed on the legislative powers reserved to the states under the United States Constitution.

(6) The compelling interest test, as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963), is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) The purposes of this Chapter are as follows:

(1) To restore the compelling interest test, as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of compelling governmental interest will be imposed on all State and local laws, ordinances, policies, procedures, practices, and governmental actions in all cases in which the free exercise of religion is substantially burdened.

(2) To provide a claim or defense to persons whose exercise of religion is substantially burdened by government.

"**§ 143C-3. Free exercise of religion protected.**

Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

"**§ 143C-4. Judicial belief.**

If a person's exercise of religion has been burdened in violation of this Chapter, that person may assert that violation as a claim or defense in a judicial proceeding and may obtain appropriate relief against a government. A party who prevails in an action to enforce this Chapter against a government is entitled to recover attorneys' fees and costs incurred in maintaining the claim or defense.

"**§ 143C-5. Application of Chapter.**

(a) This Chapter applies to all State and local laws, ordinances, policies, procedures, practices, and governmental actions and their implementation, whether statutory or otherwise and whether adopted before or after the effective date of this Chapter.

(b) Nothing in this Chapter shall be construed to authorize a government to burden any religious belief.

(c) Nothing in this Chapter shall be construed to affect, interpret, or in any way address any of the following: (i) that portion of the First Amendment of the United States Constitution prohibiting laws respecting the establishment of religion, or (ii) Article I, Section 13 of the North Carolina Constitution, or (iii) the second sentence of

Article I, Section 19 of the North Carolina Constitution. Granting government funding, benefits, or exemptions, to the extent permissible under the three constitutional provisions described in items (i), (ii), and (iii), does not constitute a violation of this Chapter. In this subsection, 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(d) The governing body of a municipality or other unit of local government may enact ordinances, standards, rules, or regulations that protect the free exercise of religion in a manner or to an extent equal to or greater than the protection provided in this Chapter. If an ordinance, standard, rule, or regulation enacted under the authority of this section or under the authority of the unit of local government prohibits, restricts, narrows, or burdens a person's exercise of religion or permits the prohibitions, restriction, narrowing, or burdening of a person's exercise of religion, that ordinance, standard, rule, or regulation is void and unenforceable as to that person if it (i) is not in furtherance of a compelling governmental interest and (ii) is not the least restrictive means of furthering that governmental interest."

SECTION 2. There is appropriated from the General Fund to the Department of Justice the sum of fifty thousand dollars ($50,000) for the 2003-2004 fiscal year to provide information and training regarding compliance with the Religious Freedom Restoration Act, as enacted by Section 1 of this act.

SECTION 3. This act becomes effective July 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 402

Committee Substitute Favorable 4/16/03

PROPOSED COMMITTEE SUBSTITUTE H402-PCS50267-SB-19

Short Title: DSS Worker/Right of Entry. (Public)

Sponsors:

Referred to:

March 11, 2003

A BILL TO BE ENTITLED

AN ACT TO RESTRICT THE AUTHORITY OF A SOCIAL WORKER TO ENTER A PRIVATE RESIDENCE FOR INVESTIGATION PURPOSES.

Whereas, the Fourth Amendment to the Constitution of the United States reads:

"Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."; and

Whereas, the United States Supreme Court held in the cases of Wolf v. Colorado, 338 U.S. 25 (1949) and Mapp v. Ohio, 367 U.S. 643 (1961), that the Fourteenth Amendment has the effect of applying the Fourth Amendment to the states; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-302 is amended by adding a new subsection to read:

"(h) A social services worker may not enter a private residence for investigation purposes without at least one of the following:

(1) The social services worker reasonably believes the child to be in imminent danger.

(2) The permission of the parent or person responsible for the child's care.

(3) The accompaniment of a law enforcement officer who has legal authority to enter the residence.

(4) An order from a court of competent jurisdiction."

SECTION 2. There is appropriated from the General Fund to the Department of Justice the sum of fifty thousand dollars ($50,000) for the 2003-2004

fiscal year to provide training to social workers regarding when a social worker may enter a private residence pursuant to G.S. 7B-302(h), as enacted by Section 1 of this act.

SECTION 3. This act becomes effective October 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 564
PROPOSED COMMITTEE SUBSTITUTE H564-PCS80229-RK-21

Short Title: Revise Exclusionary Rule. (Public)

Sponsors:

Referred to:

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-974 reads as rewritten:

"**§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.**

Upon timely motion, evidence ~~must~~ may be suppressed ~~if~~ only if its exclusion is required by the United States Constitution or the North Carolina Constitution. Notwithstanding the provisions of this section, evidence shall not be suppressed for any constitutional violation if the official who committed the violation was acting in the good faith belief that the violative conduct was legal.

~~(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or~~

~~(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:~~

~~a. The importance of the particular interest violated;~~

~~b. The extent of the deviation from lawful conduct;~~

~~c. The extent to which the violation was willful;~~

~~d. The extent to which exclusion will tend to deter future violations of this Chapter.~~"

SECTION 2. This act becomes effective December 1, 2003, and applies to all criminal trials pending or commencing on or after that date.

HOUSE BILL 564:
Revise Exclusionary Rule.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Stam
Date:	April 9, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS to First Edition H564-CSRK-21 [v.4]		Committee Staff

SUMMARY: ***The bill would limit the exclusion or suppression of unlawfully obtained evidence in a criminal trial to when exclusion or suppression is required by the United States Constitution. The bill would become effective December 1, 2003, and apply to all criminal trials pending or commencing on or after that date.***

The PCS differs from the original bill by authorizing the suppression of evidence only when required by the U.S. Constitution or the N.C. State Constitution. It also provides for a good faith exception to the exclusionary rule by providing that evidence cannot be suppressed for a constitutional violation if the violation was committed with the good faith belief that the action was legal.

CURRENT LAW: G.S. 15A-974 currently requires suppression of evidence in a criminal trial when (i) required by the U.S. Constitution; (ii) required by the N.C. Constitution; or (iii) the evidence is obtained as the result of a substantial violation of Chapter 15A of the General Statutes (the Criminal Procedure Act). This statute directs the court, when considering whether a violation is substantial, to consider all circumstances, including the importance of the interest that is violated, the extent of the deviation from lawful conduct, the extent to which it was a willful violation, and the extent to which exclusion will deter future violations of the Criminal Procedure Act.

BILL ANALYSIS: House Bill 564 would amend G.S. 15A-974 by authorizing the suppression of evidence only when required by the U.S. Constitution. Thus, suppression of evidence would no longer be required if the evidence is obtained in violation of the N.C. Constitution or as a substantial violation of the Criminal Procedure Act.

The PCS would add back the requirement that the evidence has to be suppressed if it was obtained in violation of the N.C. Constitution. It also provides that evidence shall not be suppressed even though there was a constitutional violation in obtaining it if the official that committed the constitutional violation was acting with the good faith belief that the violative conduct was legal.

BACKGROUND: Under the federal Constitution, there is a "good faith" exception to the exclusionary rule. This exception allows unlawfully obtained evidence to be considered in a criminal trial. This "good faith" exception is not recognized under the State Constitution.

The United States Supreme Court has held that the U.S. Constitution does not require suppression of unlawfully obtained evidence when the evidence was obtained by law enforcement officers who acted in good faith. United States v. Leon, 468 U.S. 897 (1984). In 1988, the North Carolina Supreme Court refused to adopt the "good faith" exception to the exclusionary rule under the N.C. Constitution. State v. Carter, 322 N.C. 709 (1988) (allowing the suppression of a blood sample). Justice Meyer, in a strongly worded dissent, argued, "The law of search and seizure under the North Carolina Constitution should be interpreted as being no more restrictive than the fourth amendment to the United States Constitution."

Consequently, under current North Carolina law (1) unlawfully obtained evidence must be suppressed even when officers have acted under the objectively reasonable belief that their actions were lawful and when the evidence obtained is otherwise admissible under the federal Constitution, and (2) evidence that is otherwise admissible under both the federal and state Constitutions may be held inadmissible due to violations of North Carolina procedural statutory provisions.

H564-SMRQ-002: Hal Pell and Robin Johnson Staff Attorneys, Research Division contributed significantly to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1091
PROPOSED COMMITTEE SUBSTITUTE H1091-PCS30304-SB-29

Short Title: Penalty for Illegal Indoor Pyrotechnics. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE PENALTY FOR INDOOR EXHIBITIONS OF ILLEGAL PYROTECHNICS.

Whereas, the recent tragedy in Rhode Island where indoor pyrotechnics were apparently used in a crowded indoor club without the permit required by state law has prompted many to see if a similar tragedy could occur in this State; and

Whereas, that tragedy was compounded by the use of combustible materials for soundproofing; and

Whereas, North Carolina like Rhode Island has a law requiring permits for the use of pyrotechnics, which are especially dangerous in crowded indoor situations, but the General Assembly has little knowledge about the extent of compliance with this law; and

Whereas, the same band that played at the Rhode Island nightclub date had played at a nightclub in Winston-Salem just a week earlier and, according to press reports, had used some form of pyrotechnics; and

Whereas, there are many local acts relating to pyrotechnic displays, some delegating from the county commission to county staff the authority to grant such permits, some delegating to municipalities the power to issue such permits, and one in Charlotte requiring an additional permit from the fire department; and

Whereas, current North Carolina law has only minor penalties for violation of the pyrotechnic laws and other related laws; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-415 reads as rewritten:

"**§ 14-415. Violation made misdemeanor.**

Any person violating any of the provisions of this Article, except as otherwise specified in said Article, shall be guilty of a Class 2 ~~misdemeanor.~~ misdemeanor, except that it is a Class 1 misdemeanor if the exhibition is indoors."

SECTION 2. The State Fire Marshal shall report to the Joint Legislative Commission on Governmental Operations no later than January 15, 2005, on the compliance with this act and its effectiveness in reducing the risk of disasters and on the compliance with the law requiring permits for pyrotechnic displays, as well as the current local legislation on the subject. The State Fire Marshal may include in that report any recommendations for additional legislation.

SECTION 3. This act becomes effective with respect to offenses committed on or after December 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1139
PROPOSED COMMITTEE SUBSTITUTE H1139-PCS60329-RQ-18

Short Title: Judicial Approval for Pleas in Certain Cases. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE JUDICIAL APPROVAL FOR PLEA ARRANGEMENTS IN SEX OFFENSE CASES THAT RESULT IN THE VICTIM BECOMING PREGNANT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 57 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1013. Judicial approval required for plea arrangement in certain cases.**

If the offense is a sex offense that resulted in the victim becoming pregnant, the parties shall not include any consideration of parental rights with regard to the adoption, visitation, custody, care, or welfare of the child as part of the negotiations or substance of a plea arrangement without the prior permission of the presiding, or resident, superior court judge. If the judge grants the permission requested, the judge may participate in the discussions. If the State and defendant agree upon a plea arrangement in a case described in this subsection, they must disclose the substance of their plea negotiations and the substance of the plea agreement to the judge before the time the defendant is called upon to plead, unless the judge participated in the discussions and knows the full details of the negotiations and the substance of the plea agreement."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 30, 2003 9:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sherry Bradsher	DHHS/ DSS
Satana Deberry	DHHS
Jennifer M Sutton	NASW-NC
Paula J. Wolf.	Covenant w/ NC's Children
Jane Smith	NCDSS
Laura DeVine	NCGA
Patsy Harrison	CRC
Styles Hughes	Appellate Defender
Andy Romanet	NCACDL
R. Paul Wilms	NCAJA
Jack Betts	Charlotte Observer
Joint Sergeant-at-Arms	NC Council

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 30, 2003 9:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Deborah Greenblatt	Carolina Legal Assistance
John Mcthuz	Gov office
Amy Dobson	NC StateWatch
Elizabeth Curtis	NCPIRG
Steve Wall	Conservation Council
Jim Blackburn	County Commissioners Association
Robin Smith	DENR
Doug Lewis	DENR
Kari Barnes	DENR
Chris Sinha	NCAG / DHHS / DSS
JoAnn Lamm	DSS / DHHS

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — APRIL 30, 2003 9:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Lisa Martin	NC Home Builders Assn.
Bob Slocum	NC Forestry Assn.
Bobby Bryan	RRC
Debra Davis	
Lois A. Boyd	
Robert Pressel	Grandchildren/Grandparents Rights of N.C
Marcia Pressel	Grandchildren/Grandparents rights of NC
Henry J. Tuberville Sr.	" " " "
Maurice Mc Roberts	" " " "
Carol Mc Roberts	National Community of Grandparents for Children Rights Grandchildren Grandparents of NC
Tom Bennett	N.C. Child Fatality Task Force

VISITOR REGISTRATION SHEET

Name of Committee | Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jim Hunt	Polled Hereford Assoc.
LYMAN COOPER	CSX Railroad
Wayne Stam	Rep. Stam
Ed Regan	N.C.A.C.C.
Rob Johnson	Dist Atty 15A
R Rogers	DENR
Patricia Reeder	NCACC

Roll Call

HOUSE JUDICIARY II COMMITTEE

(Name of Committee)

DATES	H564 4-30-03
Rep. Bonner	/
Rep. Bordsen	N
Rep. Ellis	Y
Rep. Farmer-Butterfield	N
Rep. Gulley	Y
Rep. Stam	Y
Rep. Walend	Y
Rep. Nesbitt, Chairman	N
Rep. Goodwin, Vice Chairman	N
Rep. Moore, Vice Chairman	Y
Ex officios:	
Culpepper	N
Cunningham	N
Brubaker	Y
Eddins	Y
7 Ys 6 Nos	

1:00 p.m. The Committee reconvened.

Rep. Nesbitt called the meeting to order and recognized Rep. Connie Wilson whose **HB 1041** (APS Rules/Small Bus. Economic Impact) was again before the Committee. Rep. Wilson handed out a proposed committee substitute and Rep. Stam moved that it be adopted for consideration. The motion passed.

Rep. Wilson said that the new committee substitute incorporated all the amendments from yesterday's meeting.

Rep. Bordsen was concerned about how this bill would affect state agencies, in particular, the Department of Health and Human Services.

Rep. Nesbitt asked for public comment on the committee substitute and recognized Perri Morgan, representing the National Federal of Independent Businesses who spoke in favor of the bill. Lou Wilson, with the Long Term Care Association also supported bill.

Dr. Satana Deberry, Legal Counsel for the Department of Health and Human Services was recognized. She said this legislation would have an astronomical impact on her department, some $5 million or more.

Extensive discussion followed.

Rep. Nesbitt recognized Robin Smith, Assistant Secretary of the Department of Environmental and Natural Resources. She said she shares the concern about resources in that the department does about 15 to 75 fiscal notes on rules every year under the current $5 million threshold. Lowering the threshold and requiring a more specific analysis of business impact will increase that burden. There is no position in DENR that is dedicated to doing fiscal notes. They generally use program staff to do those and while their engineers and biologists are very bright people, they lack the appropriate expertise to produce the kind of impact analyst that Rep. Wilson would like.

Rep. Nesbitt asked Ms. Smith how this much legislation would increase the number of impact analyses the department would have to do. How many impact statements does the department do now and how many would the department be required to do under this legislation?

Ms. Wilson said the department is currently doing 50 to 75 fiscal impact statements a year based on the $5 million threshold now in the Administrative Procedures Act. Rep. Wilson's bill's threshold is less than half of that and also requires a more detailed analysis of the impact on specific sectors, so it is a little hard to quantify. The department has no staff to do the quality impact analysis required under Rep. Wilson's bill.

Rep. Moore was recognized and commented on the definition of a small business.

Ms. Smith told the committee that Small Business Administration says that a business with 1-19 employees is small, with 20-499 employees is medium and with over 500 employees the business is classified as large.

There was discussion about amending the bill to change the definition of a "Small Business" to one with less than 500 employees.

Rep. Nesbitt said that due to the lack of a fiscal note that the Committee would not vote on **HB 1041** at this meeting. The bill was displaced.

HB 1128 (Grandparent Visitation) was before the Committee and Rep. Culp was recognized to make comments on his bill.

He explained that this bill has a history and has been introduced several times. He said the bill provides for expansion of grandparent's rights under existing laws. *(See Bill Analysis –Attachment II)*

Rep. Nesbitt asked staff if there weren't already some law with regard to grandparent's visitation.

Drupti Chauhan was recognized. She said that there is standard visitation in three situations: if there is a custody dispute on going, after the custody has been determined, and when a child is adopted by a stepparent or other relatives.

She said the real issue is whether grandparents have standard visitation rights when a child is from an "intact" family.

Rep. Nesbitt wondered about when there is the death of a parent. He noted that this situation is not listed under the exceptions.

Rep. Farmer-Butterfield said she understood that this bill had been introduced before and wondered what was the rationale for introducing it again.

Rep. Culp said he doesn't think it is clear that grandparents can visit children in intact family.

Rep. Nesbitt commented that *McIntyre vs. McIntyre* arose in 1995 and enjoined the issue of whether or not grandparents could go to court to get visitation rights when the parents objected to the grandparents seeing their children. It has been an on-going issue.

Speakers in support of **HB 1128** included Miriam Preiser, other members of the Grandchildren/Grandparents Rights of North Carolina coalition, and Tammy Davis from Craven County.

Kathy Hartkopf was recognized and said she opposed the bill. She said that the United States Supreme Courts has held that parents have the fundamental right to raise their children with minimum interference. A Legislative Research Commission's report on this type of legislation in North Carolina says that it will likely fail upon judicial review. The U.S. Supreme Court had a very definitive answer when this issue came before them. In a landmark 2000 grandparent's visitation case, the court decided to favor the parents. In a concurrent statement, Justice Thomas states, "I believe in the plurality of this court's decision of a fundamental right of parents to direct the bringing up of their children has been resolved in this case."

Ms. Hartkopf said that even dissenting opinion to this case said "it must be recognized the force of domestic relations preceding in and of itself can constitute such imposition that is so disruptive of the parent/child relationship that the constitutional right of the custodial parent to make best determination of the child's welfare becomes implicated. The best interests of the child standards have at times been criticized as indeterminate, leading to unpredictable resolve."

Ms. Hartkopf said since the U. S. Supreme Court ruling, the six states that had expanded their visitations laws beyond what North Carolina's currently are, have joined five others in saying those laws are unconstitutional. Even in the nine states where their highest state courts upheld the constitutionality of the law, they have substantially narrowed it.

She said often the constitutional aspects of this are often "brushed under the rug" because this is such an emotional issue.

The Committee recessed, to convene again immediately after Session.

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The Committee recessed, to convene again immediately after Session.

12:15 a.m., May 1, 2003

Rep. Nesbitt called the meeting to order and recognized Committee counsel Drupti Chauhan to continue her comments on **HB 1128** (Grandparent Visitation). She said that **HB 1128** proposes that when one of both parents of a minor child is deceased, then a grandparent may apply to the court for visitation privileges. She added that this legislation would open the process for grandparents to go to court to get visitation privileges for "in-tact" families as well.

The procedure would be a "special proceeding" that the grandparents would have to institute before the court, the "writ of Habeas Corpus," to have the child brought before the court and after notice is given in a manner prescribed by the court, the court may award visitation right to the grandparent if the court determines that visitation would be in the best interest of the child, in this section, visitation does not mean custody.

The Order that the court issues would have to consider four things:

- Where a parent hasn't allowed a grandparent to visit with a child, and the grandparent has made a good-faith effort to visit with the child,
- Where there is a preexisting relationship, and whether that relationship had not been established because of a parent's refusal to allow grandparents to develop a relationship,
- And any other relevant circumstances that the court feels is necessary to determine the best interest of the child.

These are the things the court would have to consider before granting visitation rights.

Rep. Stam said he didn't like the bill because he though it wasn't good public policy.

Rep. Bordsen said she wasn't in favor of expanding the rights of grandparents regarding visitation.

Rep. Gulley did not agree and, instead, moved for a favorable report.

Rep. Nesbitt suggested that the bill be turned into a study bill and Rep. Bordsen so moved. The motion passed.

Rep. Sexton was recognized to discuss **HB 439** (Cartways). He said the bill would authorize a "cartway proceeding" to establish cartway access to a single-family homestead on landlocked property of at least seven acres. He said the cartway law was amended by the General Assembly in 1995, with legislation authorizing a cartway proceeding to establish cartway access to a single-family homestead on landlocked property of at least seven acres and that that amendment expired in 1997.

Giles Perry, Staff attorney with the Legislative Research Division, was recognized to give an analysis of the bill. He said that under current law there are some limited situations in which persons that owned landlocked properties could gain access to their property by filing an action to obtain a cartway. Those situations are uses of the land for cultivation, timber, quarries, mines or minerals, or the operating of any industrial or manufacturing plants, or public or private cemeteries, or is in preparation for these activities.

The procedures in the NC G.S. provide for the Clerk of Superior Court to appoint a jury of three disinterested landowners to lay off a cartway and assess damages to be paid to the owner of the land the cartway crosses.

Mr. Perry said that **HB 439** would expand the situations where one could get a cartway for landlocked property for establishing one or more seven-acre homesteads.

Discussion followed. Rep. Nesbitt observed that this was like private condemnation because one could pick whose property you want to go across.

Steve woods with the North Carolina Farm Bureau spoke in opposition of the bill.

When there was no further discussion, Rep. Stam moved to give the bill a favorable report and the motion passed.

The meeting adjourned at 12:55 a.m. on May 1, 2003.

_____

Rep. Martin L. Nesbitt
Chairman

_____

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1041
PROPOSED COMMITTEE SUBSTITUTE H1041-CSRO-17 [v.2]

4/30/2003 8:59:54 AM

Short Title: APA Rules/Small Bus. Economic Impact. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE AGENCIES PROPOSING PERMANENT RULES TO CONSIDER THE ADVERSE ECONOMIC IMPACT OF THE PROPOSED RULE ON SMALL BUSINESS; TO REQUIRE AGENCY REVIEW OF EXISTING RULES PRIOR TO AMENDMENT TO DETERMINE THE IMPACT ON SMALL BUSINESS; AND TO PROVIDE ADDITIONAL LIMITATIONS ON RULES ADOPTED BY THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2A of Chapter 150B of the General Statutes is amended by adding the following new Part to read:

"Part 2A. Regulatory Flexibility.

"**§ 150B-21.7A. Rules affecting small businesses.**

(a) As used in this Part, unless the context clearly requires otherwise, the term:

(1) 'Adverse economic impact' means an aggregate financial impact on small businesses affected by the rule of at least two million dollars ($2,000,000) in a 12-month period.

(2) 'Small business' means a business entity, including its affiliates, that is both independently owned and operated and has gross annual sales of less than ten million dollars ($10,000,000).

(b) Before an agency publishes in the North Carolina Register the proposed text of a permanent rule that would have an adverse impact on small businesses, the agency shall prepare an economic impact statement that includes the following:

(1) An identification and estimate of the number of small businesses subject to the proposed rule.

(2) The projected reporting, record keeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

(3) A statement of the probable effect on impacted small businesses.
(4) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.

"**§ 150B-21.7B. Review of existing rules.**

In order to minimize the adverse economic impact on small businesses, prior to amending a permanent rule, the agency shall consider the following:

(1) The continued need for the rule.
(2) The nature of complaints or comments received from the public concerning the rule.
(3) The complexity of the rule.
(4) The extent to which the rule overlaps, duplicates, or conflicts with other federal or State rules or local government ordinances.
(5) The length of time since the rule has been evaluated and an estimate on the length of time the rule will continue to be necessary.
(6) The degree to which technology, economic conditions, or other factors have changed in the area affected by the rule."

SECTION 2. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.
(2) It is clear and unambiguous.
(3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly, when considered in light of the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed and the legislative intent of the General Assembly in delegating the duty.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 and Part 2A of this Article. The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 or Part 2A of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 and Part 2A of this Article.

(b) Timetable. – The Commission must review a rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month."

SECTION 3. G.S. 150B-21.4 reads as rewritten:

"**§ 150B-21.4. Fiscal notes on rules.**

(a) State Funds. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the Executive Budget Act, Article 1 of Chapter 143, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Director of the Budget and obtain certification from the Director that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Director of the Budget must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(b) Local Funds. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Office of the Governor as provided by G.S. 150B-21.26, the Fiscal Research Division of the General Assembly, the Office of State Budget and Management, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, or if a fiscal note is required for a rule by subsection (b3) of this section, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal ~~note.~~ note, or if the fiscal note is required by subsection (b3) of this section, the agency must prepare the fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of

State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least five million dollars ($5,000,000) in a 12-month period.

(b2) Content. – A fiscal note required by subsection (b1) of this section must contain the following:

(1) A description of the persons who would be affected by the proposed rule change.

(2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.

(3) A description of the purpose and benefits of the proposed rule change.

(4) An explanation of how the estimate of expenditures was computed.

(b3) More Restrictive Rules. – For any rule adopted by the Department of Environment and Natural Resources or any of its constituent agencies pursuant to Article 9 of Chapter 130A or Articles 21, 21A or 21B of Chapter 143 of the General Statutes, where a person indicates that they or their property or activities are or potentially are regulated by any of those rules in a way that will impose costs on the person, and further indicates that the rules are more restrictive than applicable or comparable federal law, regulation, rule or other enforceable standard governing the same subject matter, the agency must prepare a fiscal note for the rule pursuant to subsections (b1) and (b2) of this section and must include in addition to the information required under those subsections, information on the economic costs attributable to the differences between the rule and the comparable federal rule, as well as the justification and benefits attributable to those differences.

(c) Errors. – An erroneous fiscal note prepared in good faith does not affect the validity of a rule."

SECTION 4. This act becomes effective October 1, 2003, and applies to proposed permanent rules the text of which is published in the North Carolina Register on and after that date.

HOUSE BILL 1128:
Grandparent Visitation

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Culp
Date:	April 28, 2003	**Summary by:**	Drupti Chauhan
Version:	1st Edition		Committee Co-Counsel

SUMMARY: ***This bill provides for an expansion of rights related to grandparent visitation under the existing statutes including situations where the children are living with their intact families. This act becomes effective when it becomes law.***

CURRENT LAW: The State Supreme Court has held that grandparents do not have standing to seek visitation with their grandchildren when the natural parents have legal custody of their children and are living with them as an intact family, where the parents are married and living together, and there has been no determination of custody. This holding has been based on the constitutional rights of parents to decide what is in the best interests of their children including with whom their children may associate. The courts have held that there are three situations where grandparents do have standing to seek visitation with their grandchildren:

- If custody of the minor child is at issue
- After custody of the minor child has been determined
- When the child is adopted by a stepparent or a relative of the child

BILL ANALYSIS:

Section 1 of the bill defines "custody" as only including visitation where "custody" applies to the parents of a minor child. The NC Supreme Court in *McIntyre v. McIntyre*, 124 NC App. 357 (1995) stated that in the context of grandparents' rights to visitation, "custody" and "visitation" did not mean the same thing as the statute is currently written. Therefore, this section would clarify the definition to reflect the interpretation of the Supreme Court and limits anyone other than parents to bringing custody suits, not visitation suits under this statute.

Section 2 of the bill deletes the language that defines "grandparent" as a biological grandparent of a child adopted by a stepparent or other relative of a child. This would open up the interpretation of who could be a "grandparent" for visitation purposes in the order for custody of a minor child.

Section 3 of the bill rewrites the section that provides grandparents to bring an action for visitation when a child has been adopted by a stepparent or relative of the child. The bill deletes the requirement that the grandparent must be a biological grandparent. The bill adds language allowing a grandparent to apply to the court for visitation when either or both of the parents of a minor child are deceased or where existing circumstances require that the grandparent petition for visitation. A court may award visitation rights to the grandparent if the court determines that it would be in the best interests of the child. The visitation will not include custody. The order must contain findings of fact that support the award or denial of the visitation rights based on the child's best interests. A rebuttable presumption is created that the parent's decision to deny the grandparent visitation or communication is in the best interests of the child.

Section 4 of the bill repeals G.S. 50-13.5(j) which allows a court to grant custody or visitation rights to grandparents in its discretion in any action where the custody of the minor child has been determined.

BACKGROUND: In 1997, the Legislative Research Commission studied the issues of grandparent visitation rights and submitted a report to the General Assembly in which it found that the relationships between grandparents and grandchildren are valuable and should be encouraged. It acknowledged the constitutional issues concerning the rights of parents but recommended that the current laws should be amended to allow grandparents to bring an action to seek visitation with a grandchild if the grandchild lives in an intact family.

HOUSE BILL 1128

Short Title:	Grandparent Visitation.	(Public)
Sponsors:	Representatives Culp (By Request); Parmon and McHenry.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR AN EXPANSION OF RIGHTS UNDER EXISTING LAWS RELATING TO GRANDPARENT VISITATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-13.1(a) reads as rewritten:

"(a) Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" as it applies to parents of a minor child shall be deemed to include custody or visitation or both."

SECTION 2. G.S. 50-13.2(b1) reads as rewritten:

"(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. ~~As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child.~~ Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights."

SECTION 3. G.S. 50-13.2A reads as rewritten:

"**§ 50-13.2A. Action for visitation ~~of an adopted grandchild.~~by grandparent.**

(a) A ~~biological~~ grandparent may institute an action or proceeding for visitation rights with a ~~child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child.~~grandchild under the provisions of this section. Where either or both of the parents of a minor child, residing within this State, is or are deceased, or where existing circumstances require otherwise, a grandparent of the child may apply to the court for visitation by commencing a special proceeding or by writ of habeas corpus to have the child brought before the court. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents,

neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. ~~A~~After notice is given to the parent or any other party having the care, custody, and control of the child in a manner prescribed by the court, a court may award visitation rights ~~if~~ to the grandparent as it determines ~~that visitation is~~to be in the best interest of the ~~child.~~grandchild. ~~An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child.~~ For purposes of this section, visitation shall not include custody.

(b) An order awarding or denying visitation under this section shall contain findings of fact supporting the award or denial of visitation based on the grandchild's best interest. In determining the best interest of the child, the court shall consider awarding or denying visitation to the grandparent under the following circumstances:

(1) Where a parent has not allowed a grandparent to visit with or communicate with the child and the grandparent has made good faith attempts to visit or communicate with the child.

(2) Where the grandparent has had a preexisting relationship with the child.

(3) Where the grandparent has not had a preexisting relationship with the child because of the parent's refusal to allow the grandparent to establish a relationship with the child.

(4) Any other relevant circumstances the court deems necessary in determining the best interest of the child.

There is a rebuttable presumption that the parent's decision to deny the grandparent visitation or communication with the child is in the best interest of the child. Procedure, venue, and jurisdiction ~~shall be~~are the same as in an action for custody."

SECTION 4. G.S. 50-13.5(j) is repealed.

SECTION 5. This act is effective when it becomes law.

VISITOR REGISTRATION SHEET

JII — Name of Committee

4/30/03 — Date

1pm

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Perri Morgan	NFIB
Leslie Bebcgn	NCCBI
Charles Case	Hunton & Williams
Lucius Pullen	Counsel, N.C. Mining Association
Nancy Thompson	MCIC
Julie Allen	NC Statewatch
Bob Slocum	NC Forestry Assn
R E McNair Jr	Georgia-Pacific Corp
Andy Romanet	NCLM
John Rust	NCFPC

VISITOR REGISTRATION SHEET

HOUSE JUDICIARY II — April 30, 2003 1:00 p.m.m

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Doug Lewis	DENR
Starla McKenney	DHHS
Jane Smith	DHHS
Jack Betts	Charlotte Observer
Warren Plonk	OSBM
Dena Stam	Rep. Stam
FRAN PRESTON	NCRMA
TOM SRI	NCRMA
Carol M. Roberts	GGRNC GGR for Children
Suzanne McRoberts	
Gary T. Jeter Jr.	" " " "

VISITOR REGISTRATION SHEET

HOUSE JUDICIARY II — April 30, 2003 1:00 p.m.m

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kathy Hartkopf	2405 Uphill Ct Hillsborough
Lon Wilson	NCAATC 7.
Stacy Flannery	NCHCFA
Amy Jo Horne	NCMS
Bob Lamy	NCDHHS
Kari Boursness	NCDENR
Robin Smith	DENR
Pricey Harrison	CRC
Gradey McCollin	N.C. Conservation Network
Brian Bueby	Conwest
Steve Wall	CCNC

VISITOR REGISTRATION SHEET

HOUSE JUDICIARY II — April 30, 2003 1:00 p.m.m

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Miriam Preiser	Grandchildren/Grandparents Rights of NC.
Robert Preiser	" " "
Bonbard Loebe	" " "
JOE DELUCA	NC RRC
Lou R. Boyd	
Debra Daugs	
Bobby Bryan	FRC
Steve Woodson	NC Farm Bureau
Kathie Austin	FRD
Colon Brannon	Grandchildren/Grandparents Rights of NC
Billie Pearl Shelton Bowden	Grandchildren/Grandparents Rights of NC
Tubby Swaim Roy Williams	VG Wad

12:15 a.m., May 1, 2003

Rep. Nesbitt called the meeting to order and recognized Committee counsel Drupti Chauhan to continue her comments on **HB 1128** (Grandparent Visitation). She said that **HB 1128** proposes that when one of both parents of a minor child is deceased, then a grandparent may apply to the court for visitation privileges. She added that this legislation would open the process for grandparents to go to court to get visitation privileges for "in-tact" families as well.

The procedure would be a "special proceeding" that the grandparents would have to institute before the court, the "writ of Habeas Corpus," to have the child brought before the court and after notice is given in a manner prescribed by the court, the court may award visitation right to the grandparent if the court determines that visitation would be in the best interest of the child, in this section, visitation does not mean custody.

The Order that the court issues would have to consider four things:

- Where a parent hasn't allowed a grandparent to visit with a child, and the grandparent has made a good-faith effort to visit with the child,
- Where there is a preexisting relationship, and whether that relationship had not been established because of a parent's refusal to allow grandparents to develop a relationship,
- And any other relevant circumstances that the court feels is necessary to determine the best interest of the child.

These are the things the court would have to consider before granting visitation rights.

Rep. Stam said he didn't like the bill because he though it wasn't good public policy.

Rep. Bordsen said she wasn't in favor of expanding the rights of grandparents regarding visitation.

Rep. Gulley did not agree and, instead, moved for a favorable report.

Rep. Nesbitt suggested that the bill be turned into a study bill and Rep. Bordsen so moved. The motion passed.

Rep. Sexton was recognized to discuss **HB 439** (Cartways). He said the bill would authorize a "cartway proceeding" to establish cartway access to a single-family homestead on landlocked property of at least seven acres. He said the cartway law was amended by the General Assembly in 1995, with legislation authorizing a cartway proceeding to establish cartway access to a single-family homestead on landlocked property of at least seven acres and that that amendment expired in 1997.

Giles Perry, Staff attorney with the Legislative Research Division, was recognized to give an analysis of the bill. He said that under current law there are some limited situations in which persons that owned landlocked properties could gain access to their property by filing an action to obtain a cartway. Those situations are uses of the land for cultivation, timber, quarries, mines or minerals, or the operating of any industrial or manufacturing plants, or public or private cemeteries, or is in preparation for these activities.

The procedures in the NC G.S. provide for the Clerk of Superior Court to appoint a jury of three disinterested landowners to lay off a cartway and assess damages to be paid to the owner of the land the cartway crosses.

Mr. Perry said that **HB 439** would expand the situations where one could get a cartway for landlocked property for establishing one or more seven-acre homesteads.

Discussion followed. Rep. Nesbitt observed that this was like private condemnation because one could pick whose property you want to go across.

Steve woods with the North Carolina Farm Bureau spoke in opposition of the bill.

When there was no further discussion, Rep. Stam moved to give the bill a favorable report and the motion passed.

The meeting adjourned at 12:55 a.m. on May 1, 2003.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1128

Short Title:	Grandparent Visitation.	(Public)
Sponsors:	Representatives Culp (By Request); Parmon and McHenry.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR AN EXPANSION OF RIGHTS UNDER EXISTING LAWS RELATING TO GRANDPARENT VISITATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-13.1(a) reads as rewritten:

"(a) Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" as it applies to parents of a minor child shall be deemed to include custody or visitation or both."

SECTION 2. G.S. 50-13.2(b1) reads as rewritten:

"(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. ~~As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child.~~ Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights."

SECTION 3. G.S. 50-13.2A reads as rewritten:

"**§ 50-13.2A. Action for visitation ~~of an adopted grandchild.~~by grandparent.**

(a) A ~~biological~~ grandparent may institute an action or proceeding for visitation rights with a ~~child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child.~~grandchild under the provisions of this section. Where either or both of the parents of a minor child, residing within this State, is or are deceased, or where existing circumstances require otherwise, a grandparent of the child may apply to the court for visitation by commencing a special proceeding or by writ of habeas corpus to have the child brought before the court. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents,

neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. ~~A~~After notice is given to the parent or any other party having the care, custody, and control of the child in a manner prescribed by the court, a court may award visitation rights ~~if~~ to the grandparent as it determines ~~that visitation is~~to be in the best interest of the ~~child.~~grandchild. ~~An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child.~~ For purposes of this section, visitation shall not include custody.

(b) An order awarding or denying visitation under this section shall contain findings of fact supporting the award or denial of visitation based on the grandchild's best interest. In determining the best interest of the child, the court shall consider awarding or denying visitation to the grandparent under the following circumstances:

(1) Where a parent has not allowed a grandparent to visit with or communicate with the child and the grandparent has made good faith attempts to visit or communicate with the child.

(2) Where the grandparent has had a preexisting relationship with the child.

(3) Where the grandparent has not had a preexisting relationship with the child because of the parent's refusal to allow the grandparent to establish a relationship with the child.

(4) Any other relevant circumstances the court deems necessary in determining the best interest of the child.

There is a rebuttable presumption that the parent's decision to deny the grandparent visitation or communication with the child is in the best interest of the child. Procedure, venue, and jurisdiction ~~shall be~~are the same as in an action for custody."

SECTION 4. G.S. 50-13.5(j) is repealed.

SECTION 5. This act is effective when it becomes law.

HOUSE BILL 1128: Grandparent Visitation

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Culp
Date:	April 28, 2003	**Summary by:**	Drupti Chauhan
Version:	1st Edition		Committee Co-Counsel

SUMMARY: ***This bill provides for an expansion of rights related to grandparent visitation under the existing statutes including situations where the children are living with their intact families. This act becomes effective when it becomes law.***

CURRENT LAW: The State Supreme Court has held that grandparents do not have standing to seek visitation with their grandchildren when the natural parents have legal custody of their children and are living with them as an intact family, where the parents are married and living together, and there has been no determination of custody. This holding has been based on the constitutional rights of parents to decide what is in the best interests of their children including with whom their children may associate. The courts have held that there are three situations where grandparents do have standing to seek visitation with their grandchildren:

- If custody of the minor child is at issue
- After custody of the minor child has been determined
- When the child is adopted by a stepparent or a relative of the child

BILL ANALYSIS:

Section 1 of the bill defines "custody" as only including visitation where "custody" applies to the parents of a minor child. The NC Supreme Court in *McIntyre v. McIntyre*, 124 NC App. 357 (1995) stated that in the context of grandparents' rights to visitation, "custody" and "visitation" did not mean the same thing as the statute is currently written. Therefore, this section would clarify the definition to reflect the interpretation of the Supreme Court and limits anyone other than parents to bringing custody suits, not visitation suits under this statute.

Section 2 of the bill deletes the language that defines "grandparent" as a biological grandparent of a child adopted by a stepparent or other relative of a child. This would open up the interpretation of who could be a "grandparent" for visitation purposes in the order for custody of a minor child.

Section 3 of the bill rewrites the section that provides grandparents to bring an action for visitation when a child has been adopted by a stepparent or relative of the child. The bill deletes the requirement that the grandparent must be a biological grandparent. The bill adds language allowing a grandparent to apply to the court for visitation when either or both of the parents of a minor child are deceased or where existing circumstances require that the grandparent petition for visitation. A court may award visitation rights to the grandparent if the court determines that it would be in the best interests of the child. The visitation will not include custody. The order must contain findings of fact that support the award or denial of the visitation rights based on the child's best interests. A rebuttable presumption is created that the parent's decision to deny the grandparent visitation or communication is in the best interests of the child.

Section 4 of the bill repeals G.S. 50-13.5(j) which allows a court to grant custody or visitation rights to grandparents in its discretion in any action where the custody of the minor child has been determined.

BACKGROUND: In 1997, the Legislative Research Commission studied the issues of grandparent visitation rights and submitted a report to the General Assembly in which it found that the relationships between grandparents and grandchildren are valuable and should be encouraged. It acknowledged the constitutional issues concerning the rights of parents but recommended that the current laws should be amended to allow grandparents to bring an action to seek visitation with a grandchild if the grandchild lives in an intact family.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 439

Committee Substitute Reported Without Prejudice 4/29/03

Short Title: Cartways. (Public)

Sponsors:

Referred to:

March 13, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS RELATING TO THE OPENING OF CARTWAYS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 136-69(a) reads as rewritten:

"(a) ~~If~~ In order to ensure that all landowners who do not have a deeded or documented easement or right-of-way to a public road shall have a legal means of obtaining access to that road, if any person, firm, association, or corporation shall be engaged in the cultivation of any land or the cutting and removing of any standing timber, or the working of any quarries, mines, or minerals, or the operating of any industrial or manufacturing plants, or public or private cemetery, or the use of land as single-family homesteads, or taking action preparatory to the operation of any such enterprises, to which there is leading no public ~~road~~ road, reasonable deeded or documented easement or right-of-way to a public road, or other adequate means of transportation, other than a navigable waterway, affording necessary and proper means of ingress thereto and egress ~~there from,~~therefrom, such person, firm, association, or corporation may institute a special proceeding as set out in ~~the preceding section (G.S. 136-68), and if it shall~~ G.S. 136-68. Should it be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road or watercourse or railroad over the lands of other persons, the court shall appoint a jury of view of three disinterested freeholders to view the premises and lay off a cartway, tramway, or railway of not ~~less~~ more than 18 feet ~~in width,~~ of travel surface or any other minimum width requested in the petition and found necessary and proper by the court, and not more than 30 feet in width for cuts, fills, and ditches or cableways, chutes, and ~~flumes, and~~ flumes.

If a cartway is granted for the use of one or more single-family homesteads, each single-family homestead shall consist of at least seven acres of land. Where there exists a private railroad crossing, the private railroad crossing may be used as part of the cartway established under this Article provided the person, firm, association, or

corporation seeking the cartway agrees to reimburse the railroad the cost of maintaining the private crossing and to protect and hold harmless the railroad against all liability associated with the crossing. Except as provided in this subsection for the establishment of a cartway over an existing private railroad crossing, no real estate, right-of-way, easement, leasehold, or other interest in land which has been condemned by a railroad or has been obtained for a railroad's use as a right-of-way, depot, or station house shall be used for the establishment of a cartway or other use under this Article except by agreement with the railroad. The jury of view shall assess the damages the owner or owners of the land crossed may sustain thereby, and make report of their findings in writing to the clerk of the superior court. Exceptions to said report may be filed by any interested party and such exceptions shall be heard and determined by the clerk of the superior court. The clerk of the superior court may affirm or modify said report, or set the same aside and order a new jury of view. All damages assessed by a judgment of the clerk, together with the cost of the proceeding, shall be paid into the clerk's office before the petitioners shall acquire any rights under said proceeding."

SECTION 2. This act is effective when it becomes law. Section 1 of this act shall expire July 1, 2005. This act applies to actions to establish cartways filed on or after the date the act becomes law, and before July 1, 2005.

HOUSE BILL 439: Cartways

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Rep. Sexton
Date:	April 30, 2003	**Summary by:**	Giles S. Perry
Version:	Second Edition		House Transportation Committee Counsel

SUMMARY: House Bill 439 authorizes a cartway proceeding to establish cartway access to a single-family homestead on landlocked property of at least seven acres.

CURRENT LAW: North Carolina law provides two different methods for an owner of landlocked property to gain access to his or her property, if no access is expressly granted in the deed to the property.

First, an owner of property has access to a road as a matter of right if, in the sale of a part of a tract of land, the part sold is entirely surrounded by the land of the seller, or entirely surrounded by the seller's land and the land of others. This is called an "easement by necessity."

Second, G.S. 136-69 authorizes "cartways" to landlocked property in certain situations. If someone buys or inherits land that is landlocked, with no access to public roads, then the buyer may institute a proceeding under G.S. 136-69 to establish an 18 ft. wide cartway. In order to get a cartway, the owner of the landlocked land must show that there is no reasonable access to the land, and the land is being used for cultivation, cutting and running timber, working of any quarries, mines or minerals, or the operating of any industrial or manufacturing plants, or public or private cemeteries, or is in preparation for these activities.

The procedures in the statute provide for the Clerk of Superior Court to appoint a jury of three disinterested landowners to lay off a cartway and assess damages to be paid to the owner of the land the cartway crosses.

BILL ANALYSIS: House Bill 439 authorizes a cartway proceeding to establish cartway access to one or more single-family homesteads of at least seven acres on landlocked property. The bill also requires maintenance and assumption of liability for use of any private railroad crossing as a part of a cartway, and forbids use of other railroad property for cartways without permission.

BACKGROUND: In 1995, an amendment to the cartway law was enacted by the General Assembly (S.L. 1995-513) authorizing a cartway proceeding to establish cartway access to a single-family homestead on landlocked property of at least seven acres. That amendment expired in 1997.

EFFECTIVE DATE: House Bill 439 is effective when it becomes law and expires July 1, 2005.

H439-SMRW-001

House Judiciary II

Committee

Minutes

May 8, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Senator Purcell to discuss **SB 226** (Unauthorized Admin. Meds. By Child Care Fac.). (***HB 109*** *– Unauthorized Admin. Meds. By Child Care Fac., sponsored by Rep. Goodwin was also before the Committee because of the similarity of the bills.*)

Sen. Purcell said the bill know as "Kaitlyn's Law" was named after a five-month old girl who died in an unlicensed, illegal daycare center in Alamance County. Her death was ruled a "Sids" death, but the Alamance County District Attorney, Mr. Rob Johnson, was not satisfied and requested a drug screen on the baby. That test found that Kaitlyn's blood contained diphenhydramine, commonly know as Benadryl. Some of the parents had noticed that the kids were sleepy when picked up, but the day caregiver said that the children had been playing very hard.

It could not be proved that the Benadryl caused the death of the child, but it could have been a contributing factor in that the baby was five-months old, found propped in a chair with a bottle in its mouth. The baby had been sedated and could have aspirated on her milk, which could have been a contributing factor.

When District Attorney Rob Johnson tried to prosecute the lady that ran the day care center, he found that there was no law that really dealt with this situation. She was ultimately prosecuted on some misdemeanor charges.

Sen. Purcell said that, with this bill, he is attempting to say to day care centers across North Carolina that it is unlawful for an employee, an owner, a household member, a volunteer, an operator of a licensed or unlicensed day care center to intentionally administer medications to children in the day care centers without written permission from the child's parent or guardian. The bill provides an exception for circumstances in which an emergency medical condition presents itself and the child's parent is unavailable.

Rep. Nesbitt asked Ms. Chauhan to explain the differences between and HB 109.

Drupti Chauhan was recognized. She said that HB **109** was the companion bill to **SB 226,** but **SB 226** went through substantial changes in the Senate. She said the 4th edition of **SB 226** was now considerable different from **HB 109**. **HB 152** is not in the Judiciary II Committee, but does contain similar language.

Ms. Chauhan said that **HB 109** does have the Class H felony, but doesn't distinguish between serious injury and any other injury. It does not provide for any type of medical emergency. She said that **HB 152** deals with sleeping positions.

Rep. Ellis had questions about the range of punishments set forth in and HB 152.

Ms. Chauhan said that a Class H carries a minimum of 4 months and an absolute maximum of 30 months actual punishment. A Class F felony is an absolute minimum of 10 months immediate punishment, supervised probation and active punishment to absolute maximum of 59 months, depending on prior convictions and other factors. The A-1 is up to 60 days of active punishment.

Rep. Bordsen said that when **HB 152** was on the House floor, there wasn't much discussion about the issue of medications.

Rep. Walend was recognized. She said that **HB 152** had more to do with a mistake and not an "intentional" act.

Rep. Nesbitt recognized Rob Johnson, District Attorney for Alamance County.

Mr. Johnson passed out a picture of Kaitlyn Shevlin. Mr. Johnson said the day care operator was giving the children in her car a generic form of Benadryl. It was an unlicensed day care home. Unlicensed, he said, does not mean illegal. Illegal may mean something over and beyond unlicensed. An unlicensed home can operate and be within the laws of the state, but they are not necessarily subject to the same regulations as a licensed day care home. He said there was dichotomy in the day care system in this state.

In 1998 the General Assembly passed a comprehensive bill dealing with day care regulations. So, he said **HB 226**, was proposed as a safety factor to further enhance those day care laws because he has discovered through Kaitlyn's case, that there is a huge gap

in the law in North Carolina. In that case, involving Josephine Burke's home where Kaitlyn was being kept, the State Office of Child Development had on five different occasions sent letters to her over the years and she would go out of business, only to come back and start operating again.

So, in Kaitlyn's situation he found that she along with all the other children in the Burke home were being sedated so they could be put away so the day care operator could do other things without any accountability to the parents.

He said **SB 226** is designed to "plug that gap" that exists when there are deliberate acts of a day care operator to medicate the children, so they can be more manageable. That is why **SB 226** addresses the "intentional" issue. That gets us to the two-tiered punishment structure.

For example, intentional acts of child abuse resulting in serious injury can be one level higher, or a Class E felony. But that is where the person who is abusing the child, intends to abuse the child, and intends to cause serious injury to the child.

Kaitlyn's Law (**SB 226**) is designed to deal with the intentional administration of the medication for some unlawful purpose, not necessarily the intentional result of harm, but the intentional act of giving the medicine without parental permission is a Class H felony because that is putting the child at risk. If the child should suffer an injury between Class H and Class F where you intend the harm to flow.

What if the child dies? If there is an intentional act on their part, and you can prove that the medication was the cause of the child's death, then the manslaughter and murder statutes are adequate to deal with that situation. But if you cannot prove the exact cause of a child's death, but there is anecdotal evidence that the death may not have happened but for....., you cannot use the manslaughter or the murder laws, because the probable cause issue fails. He said that **SB 226** plugs that gap.

Tom Bennett, Executive Director of the Child Fatality Task Force, was recognized. He said the Task Force has given serious attention to **SB 226** and it is one of their legislative recommendations. He said he hoped the Committee would give the bill a favorable report.

Peggy Ball, Director of the State Division of Child Development, was recognized. She said there is a very specific definition of a childcare facility. *(See Attachment I)*

She said in the Kaitlyn Devlin case, the daycare operator was operating illegally because she did meet the definition of a childcare facility. One is not allowed to administer any kind of medication that is not prescribed to them, no matter who authorizes you to do that. However, a parent can authorize any kind of over-counter medication, but the parent has to bring that medication to the facility and show that it is a prescription for their child and authorize that it be administered to the child.

Rep. Nesbitt had questions about the definition of a childcare facility. He said he wanted a better definition so he could determine which facilities **SB 226** would affect.

Drupti Chauhan said that the bill would apply only to licensed childcare facilities and those do not include arrangements.

Roz Savitt representing the North Carolina Childcare Coalition was recognized. She thanked Sen. Purcell for working with the Coalition in developing a bill that met some of their concerns. She said that initially, the bill did not have the word "intent" in it and the childcare providers around the state were very concerned that a piece of paper could fall out of a file and that they would be charged with a felony.

She said that childcare facilities do a good job. Ninety-nine percent of them comply with the rules and regulations of childcare including the authorization and dispensing of medications. But that is not a requirement. Childcare facilities do not have to give medications if they don't want to. They provide this as a service to the parents. Ms. Savitt said they were concerned initially with the bill, but when the word "intentionally" was added, that addressed their concerns. She wanted to impress upon the committee that the day care facility in which Kaitlyn Devlin died was in an illegally operating facility that the state knew about, but because the penalty is so low for closing an illegal facility, that person was able to continue to operate. She told the committee that Sen. Purcell has another bill that would look at the issue of illegally operating programs in our state.

Rep. Walend was concerned about **HB 152** which had already passed the House and it did not contain the language about "intent."

Rep. Nesbitt was concerned about facilities that were excluded from the definition of a childcare facility.

Rep. Bordsen told the committee that this tragedy happened in Alamance County and that she had been watching the frustration that has been occurring in the county about how to deal with the situation. She asked Mr. Johnson if he preferred **SB 226** over the other bills discussed today.

Mr. Johnson said he preferred **SB 226**, because it addresses a deliberate kind of conduct and says that if you engage in that conduct in general, then that makes it a Class H felony. He said he also preferred **SB 226** because it addresses the issue of where serious injury flows from deliberate conduct and it enhances the penalty for that to a Class F felony.

Rep. Nesbitt had questions about the definition of "intentional" and asked Mr. Johnson if all that was required to intentionally give medication, is just to give it. Mr. Johnson acknowledged that was correct.

Rep. Nesbitt said that more work needs to be done on the bill in this area.

The bill **(SB 226)** was carried over.

The meeting adjourned at 10:50 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

WHAT IS AND IS NOT CHILD CARE IN NORTH CAROLINA AS DEFINED IN G.S. 110

Definition of Child Care:

A program or arrangement where:
- three or more children less than 13 years old, and
- who do not reside where the care is provided, and
- receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day
- from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

These Arrangements are not Child Care:

a. Arrangements operated in the home of any child receiving care if all the children in care are related to each other and no more than two additional children are in care;
Example: A grandmother caring for her grandchildren

b. Recreational programs operated for less than four consecutive months in a year;
Example: Summer day camps

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;
Example: Drop-in care provided at a health club

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;
Example: Private schools

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;
Example: Residential child care facilities

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.
Example: Mother's Morning Out programs

Definition of Child Care Facility:

Includes child care centers, family child care homes, and any other child care arrangement not excluded in the list above, that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. A child care center is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. A family child care home is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 4

SENATE BILL 226

Health and Human Resources Committee Substitute Adopted 3/5/03
Judiciary II Committee Substitute Adopted 4/8/03
Fourth Edition Engrossed 4/10/03

Short Title: Unauthorized Admin. Meds. by Child Care Fac. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Article 7 of Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

(a) It is unlawful for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility as defined in G.S. 110-86, to intentionally administer prescription or over-the-counter medication to a child attending the child care facility without written authorization. For the purposes of this section, written authorization shall include the child's name, date or dates for which the authorization is applicable, dosage instructions, and signature of the child's parent or guardian.

(b) In the event of an emergency medical condition and the child's parent or guardian is unavailable, it shall not be unlawful to administer medication to a child attending the child care facility without written authorization as required under subsection (a) of this section if the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider. For purposes of this subsection, the following definitions apply:

(1) A bona fide medical care provider means an individual who is licensed, certified, or otherwise authorized to prescribe the medication.

(2) An emergency medical condition means circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

(c) A violation of this section that results in serious injury to the child shall be punished as a Class F felony.

(d) Any other violation of this section shall be punished as a Class H felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE BILL 109*

Short Title:	Unauthorized Admin. Meds. by Child Care Fac.	(Public)
Sponsors:	Representatives Goodwin, Coates, Clary, Earle (Primary Sponsors); Alexander, Bell, Bonner, Bordsen, Gibson, Glazier, Gorman, Insko, Jeffus, Lucas, Luebke, Michaux, Moore, Nye, Parmon, Sherrill, Warner, Warren, Weiss, A. Williams, and Wright.	
Referred to:	Judiciary II.	

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN OR A BONA FIDE MEDICAL CARE PROVIDER.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

It is unlawful for an employee, owner, or operator of a licensed or unlicensed child care facility to administer any type of medication to a child attending the child care facility without first obtaining written or oral authorization from the child's parent or guardian or a bona fide medical care provider. Any person who violates this section is guilty of a Class H felony. For purposes of this section, the term 'bona fide medical care provider' is limited to medical doctors, physician's assistants, registered nurses, or licensed practical nurses, emergency medical technicians, and paramedics."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, May 8, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

HB 109 and SB 226 Unauthorized Admin. Meds. By Child Care Fac., *Rep. Goodwin and Senator Purcell, Bill sponsors.*

HB 918 Increase Service of Process Fee, *Rep. Goodwin, Bill Sponsor*

HB 1190 First Offender/Expunge criminal Record, *Rep. Wright, Bill Sponsor*

3. **Adjourn.**

VISITOR REGISTRATION SHEET

House Committee on Judiciary II
Name of Committee

May 8, 2003 at 10:00 a.m.
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Peggy Ball	DCD-DHHS
Jane Rocklar	"
Stacia McKenzie	DHHS
[illegible]	AP
Colleen Kochanek	Hafer & Caldwell, P.A.
Jon Bennett	NCCFTF
Rob Stevenson	Alamance County D.A.'s Office
Rob Johnson	DA Alamance County
Peg Baer	Conference of DAs
Patricia Peeler	NCACC
Paula A. Wolf	Covenant w/ NC's Children

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

May 8, 2003 at 10:00 a.m. — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[signature]	NCACDSS
[signature]	AOC
Amy Pobson	NC State Watch
Ilana Stam	Rep. Stam
Lisa Rubert	CYPC
Ernestine Dueham	Executive Intern - Fiscal Research Division
John Mattox	GOC OFFICE
Roz Sawitt	NC Child Care Coalition
Brian Shank	AZ
John Bowdish	Action Research
[signature]	NCMS

J11

5/8/03

House Pages

1. Name: Jessica Brantley
   County: Randolph
   Sponsor: Harold Brubaker
2. Name: Laura Talley
   County: Johnston
   Sponsor: Billy Creech
3. Name: Dan Browning
   County: Catawba
   Sponsor: Rep. Mark Hilton
4. Name:
   County:
   Sponsor:
5. Name:
   County:
   Sponsor:

Sgt-At-Arms

1: Name: JAMES WORTH
2. Name: BILL SULLIVAN
3. Name:
4. Name:

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: SB 226 4th Edition

SHORT TITLE: Unauthorized Admin. Meds. By Child Care Fac.

SPONSOR(S): Senator Purcell

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring		**Unable to determine exact amount.**			
Nonrecurring					
Judicial					
Recurring		**Unable to determine exact amount.**			
Nonrecurring					
TOTAL EXPENDITURES:		**Unable to determine exact amount.**			
ADDITIONAL PRISON BEDS*		**Unable to determine exact number of beds.**			
POSITIONS: (cumulative)		**Unable to determine exact amount.**			

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2003

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: SB 226 amends Chapter 110 of the General Statutes by adding a new section making it a Class H felony for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility to intentionally administer any type of prescription or over-the-counter medication to a child attending the child care facility without first obtaining prior written authorization from the child's parent or guardian, except when the unauthorized administration of medicines results in a serous injury to the child which is punishable by a Class F felony. Written authorization is defined to include the child's name, date, dosage instructions, and signature of the child's parent or guardian.

In addition, the bill provides an exception for emergency medical conditions when the child's parent or guardian is unavailable. It is not unlawful to administer medication to a child for emergency medical conditions without written authorization from his or her parent if the medication is administered with the authorization and in accordance with instructions from a "bona fide medical provider". Emergency medical condition is defined as circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed. A "bona fide medical provider" is defined to include any person who is licensed, certified, or otherwise authorized to prescribe medicine.

ASSUMPTIONS AND METHODOLOGY:

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

Because SB 226 creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this bill on the prison population. It is not known how many offenders might be sentenced for this proposed offense. If there were three Class H felony convictions under the proposed statute per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year. In 2001-2002, the statewide average operating cost for one inmate was $62.43/day or $22,786.95/year. Furthermore, because it is not known how many of these offenses would result in serious injury, it is not known how many offenders might be sentenced for violations of a Class F felony. If, for example, there were three convictions of the Class F subsection under this proposed statute per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and three additional prison beds the second year. In 2000-2001, the average estimated time served for an offender convicted of a Class F felony was a minimum of 18 months and a maximum of 22 months.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Because SB 226 provides for two new felony offenses, AOC is unable to estimate the number of new felony charges. Because the Division of Child Development does not have data on how often medications are administered without prior authorization[1] nor is able to estimate the number of serious injuries that may result, AOC is unable to estimate the number of charges that could arise from the amended statute. For Class H felony offenses that are brought to trial, the estimated court cost per trial is $4,986. For Class H felony offenses not brought to trial, and where a guilty plea is entered, AOC estimates the cost per guilty plea at $248. For Class F felony offenses that are brought to trial, the estimate court cost per trial is $6,629. For Class F Felony offenses that are not brought to trial, and where a guilty plea is entered, AOC estimates the cost per guilty plea at $320.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser

Jim Mills

APPROVED BY: James D. Johnson, Director Fiscal Research Division

DATE: April 11, 2003

1 Administrative Office of the Courts Research and Planning Division.

House Judiciary II

Committee

Minutes

May 13, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and appointed a subcommittee for **HB 1006** and **HB 915** relating to manufactured housing. The members included Rep. Moore, Chair, Rep. Bonner, Rep. Farmer-Butterfield, Rep. Stam, and Rep. Walend.

SB 226 (Unauthorized Admin. Meds. By Child Care Fac.) Sponsored by Senator Purcell was again before the Committee. The bill has been taken up at a previous meeting on May 8, 2003 and carried over.

Rep. Nesbit told the Committee that Rep. Stam, who was not present, had proposed to amend the bill (*see Attachment I).*

He also said he was going to appoint a subcommittee on the bill because he thought it was creating a felony for a class of people who just happen to work for certain people, when it is not a crime if you work for another person and it might be unconstitutional.

Sen. Purcell was recognized and asked Rep. Nesbitt to recognize Peggy Ball.

Peggy Ball, Director of the State Division of Child Development was recognized. She said she understands Rep. Nesbitt's concerns, but she also understands that there is a need to protect children in lots of situations, but it is extremely difficult to broaden this and to apply it to every situation,. She said there are some very specific parallels for what is done in the care for the elderly where people are being cared for. There are applications for that about how you can administer medications but we don't have that same

protection for children where someone is acting in the place of the parents in caring for the child. She felt very strongly that the bill was needed to protect children. She said there have been a number of situations where children were medicated without parental permission and in one particular situation, a child died. She said the state needed to put into place a law that specifically addresses this issue.

Rep. Nesbitt asked her if she knew of any other situation where you could create a criminal offense simply because they are working for a licensed center.

Rep. Bordsen was not certain she understood Rep. Nesbitt's concerns.

Rep. Nesbitt referred to a list entitled "What Is and Is Not Child Care in North Carolina As Defined in G.S. 110." You have in this list a number of exceptions, which would be subject to this legislation. *(See Attachment II)*

Rob Johnson, District Attorney from District 15A (Alamance County) was recognized. He told the committee that the issue it was addressing is basically whether the penalty in the bill should be a Chapter 14 violation, a general crime violation versus a Chapter 110 violation, which comes under the day care law.

Rep. Nesbitt asked if there were other criminal penalties under the day care law.

Mr. Johnson said there was, under 110-103, if they are a licensed day care facility, then they can be found guilty of a Class 1 misdemeanor. If a family day care home, unlicensed, then it would be a Class 3 misdemeanor. He said there is a distinction between the family childcare home and the licensed day care facility.

Rep. Nesbitt and the District Attorney discussed what is and is not childcare in North Carolina as defined in the NC Gen. Stat. 110.

Mr. Johnson told Rep. Nesbitt that Kaitlin's Law, **SB 226**, applies evenly to any daycare facility whether legal or not.

Mr. Johnson revisited a couple of issues taken up at the May 8th meeting. He said with regard to this particular issue, this is a situation whether daycare centers are legal or illegal, they are in "loco parentis" of children. He said he felt that was recognized in the statutory language that is in the first statute of the daycare law.

What he was trying to accomplish in **SB 226**, was looking at those regulated facilities where you are going to have the vast majority of very small children who are non-verbal who can be put at risk by giving medications for whatever purpose the daycare provider might give, whether to sedate them or whether they just think it's a good idea.

Rep. Nesbitt pointed out the exemptions set forth in G.S. 110-86, and noted that all of these people in these exemptions are also loco parentis. He said that was bothering him. He wondered if you could use the law to enforce regulatory schemes.

Rep. Gulley asked Sen. Purcell if sunscreen was considered a medication and he said he thought it would be classified as medication.

Committee staff confirmed that it was a medication.

Rep. Walend said she thought this was an important bill and she would not like to see it bogged down.

Rep. Nesbitt said he would appoint a subcommittee to consider **SB 226**. The bill was displaced.

HB 918 (Increase Service of Process Fee) was before the Committee and Rep. Goodwin was recognized for comments. He said he had introduced a similar bill last session that had gotten bogged down in the Senate.

He explained that **HB 918** would increase the fee for service of process in most civil actions from $5.00 to $15.00 and would provide that at least 50% of the fees collected will be used by the county to ensure the timely process within the county.

He said the current $5.00 fee is inadequate and has been in place since 1990. Cost of services have risen and this bill would address that issue.

Rep. Walend was concerned that directing local law enforcement to ensure timely service of process might force law enforcement to hire more employees to handle this. She also wondered if the fee would be enough to cover this.

Speaking in favor of the bill were Patrice Roesler with the County Commissioners' Association and Eddie Caldwell with the North Carolina Sheriffs' Association.

When there was no further discussion, Rep. Farmer-Butterfield moved to give the bill a favorable report and the motion carried.

There being no further business, the meeting adjourned at 10:50 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

Attachment I

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 226

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

S226-ARQ-18 [v.1]

Date 5-13-03 ,2003

Comm. Sub. [NO]
Amends Title [NO]
Fourth Edition

Representative Stam

moves to amend the bill on page 1, line 12, by deleting the word "intentionally" and substituting the word "willfully".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

Attachment II

WHAT IS AND IS NOT CHILD CARE IN NORTH CAROLINA AS DEFINED IN G.S. 110

Definition of Child Care:

A program or arrangement where:
- three or more children less than 13 years old, and
- who do not reside where the care is provided, and
- receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day
- from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

These Arrangements are not Child Care:

a. Arrangements operated in the home of any child receiving care if all the children in care are related to each other and no more than two additional children are in care;
Example: A grandmother caring for her grandchildren

b. Recreational programs operated for less than four consecutive months in a year;
Example: Summer day camps

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;
Example: Drop-in care provided at a health club

e. Public schools;

Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;
Example: Private schools

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;
Example: Residential child care facilities

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.
Example: Mother's Morning Out programs

Definition of Child Care Facility:

Includes child care centers, family child care homes, and any other child care arrangement not excluded in the list above, that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

A child care center is an arrangement where, at any one time, there are three or more preschool-age children nine or more school-age children receiving child care.

b. A family child care home is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 4

SENATE BILL 226

Health and Human Resources Committee Substitute Adopted 3/5/03
Judiciary II Committee Substitute Adopted 4/8/03
Fourth Edition Engrossed 4/10/03

Short Title: Unauthorized Admin. Meds. by Child Care Fac. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Article 7 of Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

(a) It is unlawful for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility as defined in G.S. 110-86, to intentionally administer prescription or over-the-counter medication to a child attending the child care facility without written authorization. For the purposes of this section, written authorization shall include the child's name, date or dates for which the authorization is applicable, dosage instructions, and signature of the child's parent or guardian.

(b) In the event of an emergency medical condition and the child's parent or guardian is unavailable, it shall not be unlawful to administer medication to a child attending the child care facility without written authorization as required under subsection (a) of this section if the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider. For purposes of this subsection, the following definitions apply:

(1) A bona fide medical care provider means an individual who is licensed, certified, or otherwise authorized to prescribe the medication.

(2) An emergency medical condition means circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

(c) A violation of this section that results in serious injury to the child shall be punished as a Class F felony.

(d) Any other violation of this section shall be punished as a Class H felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SENATE BILL 226: Unauthorized Administration of Medication by Child Care Facilities

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. William Purcell
Date:	May 7, 2003	**Summary by:**	Drupti Chauhan*
Version:	Fourth		Committee Co-Counsel

SUMMARY: ***This bill would make the administration of prescription or over-the counter medication to a child attending a licensed or an unlicensed child care facility without written authorization. A violation of the statute that results in serious injury to the child shall be punished as a Class F felony and any other violation of the section is punishable as a Class H felony. The bill provides an exception for circumstances in which an emergency medical condition presents itself and the child's parent is unavailable. In this situation, medication may be lawfully administered without the parent's written authorization if the medication is administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions. The bill is effective December 1, 2003 and applies to offenses committed on or after that date.***

House Bill 152, Unauthorized Meds./Prevent SIDS/Child Care, which is currently in the Senate Health Committee also addresses the issues presented in this bill, however the punishment for the violation is a Class A1 misdemeanor.

CURRENT LAW: G.S. 110-91(9) directs the NC Child Care Commission to adopt rules to establish minimum requirements for record keeping for child care facilities. The scope of this authority includes records regarding authorization to administer medications. Rules adopted by the Commission in 1986, and amended in 1996, 1998, and 2001 include, among other things, the following with respect to the administration of medications in child care facilities:

- No drug or medication may be administered to any child in a licensed child care facility without specific written instructions from the child's parent or guardian.
- No drug or medication may be administered for a non-medical purpose, including inducing sleep.
- Prescribed medication may be administered only with parent's written authorization and the medication must be in its original container with proper labeling, including directions for dosage, or the parent must provide written instructions that must be signed and dated by the prescribing physician or health professional.
- Over-the-counter medication may be administered only with the parent's written authorization and only in accordance with written dosage instructions of the parent, physician or other authorized health professional.
- A parent may provide written authorization that is valid for up to six months to authorize the administration of medication to treat the symptoms of asthma and allergic reactions, and up to one year to administer sunscreen and over-the-counter diapering creams. The authorization

must be specific as to the symptoms or conditions for which the medication may be administered.

- A parent may provide written authorization for the administration of a one-time, weight appropriate dose of acetaminophen in the event the child has a fever and the parent cannot be reached.

Enforcement Authority:

Administrative penalties: G.S. 110-102.2 authorizes the Secretary of DHHS to impose one or more of the following against a licensee:

- Issue a written warning and a request for compliance;
- Issue an official reprimand;
- Place a licensee on probation;
- Suspend the license for a period not to exceed one year; and
- Permanently revoke the license.

Civil penalties: G.S. 110-103.1 authorizes the Secretary to impose a civil penalty, not to exceed $1,000 for each violation documented on any given date, against an operator of a child care facility who violates NC law governing child care facilities. In determining the amount of the penalty, the Secretary must consider the threat of or extent of harm to children and the consistency of violations.

BILL ANALYSIS:

- Makes the administration of medication to a child attending a licensed or an unlicensed child care facility without written authorization from the child's parent or guardian unlawful.
- An employee, owner, household member, volunteer or operator who violates the statute would be face a Class H felony.
- Provides for an enhanced penalty (Class F felony) for violations resulting in serious injury to a child.
- Provides an exception for emergency medical conditions when the child's parent is unavailable. The medication must be administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions.

Class H felony: Punishable by an absolute minimum of 4 months Community Service Punishment and an absolute maximum of 30 months Active Punishment, depending on prior convictions and aggravating factors.

Class F felony: Punishable by an absolute minimum of 10 months Intermediate Punishment (e.g. supervised probation) or Active Punishment to an absolute maximum of 59 months of Active Punishment, depending on prior convictions and aggravating factors.

BACKGROUND:

Inspiration for the legislation:

Senate Bill 226 is a recommendation of the NC Child Fatality Task Force. The Task Force was inspired to recommend the bill after hearing the story of Kaitlyn Shevlin, a 5-month-old who died in an unlicensed day-care home in Alamance County in 2001. According to Mr. Rob Johnson, District Attorney for Alamance County, although medical examiners could not find a definitive cause of death and as a result ruled that the child died from Sudden Infant Death Syndrome, law enforcement investigators suspect her day-care provider gave the child a generic form of the medicine Benadryl to make her sleepy. The day care provider was unlicensed and had numerous complaints of child neglect filed against her in the 20 years she operated her unlicensed facility. She was convicted of misdemeanor charges of child abuse and neglect served four months in prison.

Relevant Definitions (cut and pasted from G.S. 110-86):

- **Child care.** - A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

- **Child care facility.** - Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. **A child care center** is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. **A family child care home** is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

- **Child care does not include the following:**

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

- "**Household member**" to mean: "member of the household in a family child care home or nonlicensed child care home and is over 15 years old and is present when children are in care." (G.S. 110-90.2)
- "**Volunteer**" to mean "a person who works in a child care facility and is not monetarily compensated by the facility" (NCAC 10-3U.0102).

**Linda Attarian, former Research Attorney, contributed significantly to this bill*

S226-SMRQ-003

SENATE BILL 226: Unauthorized Administration of Medication by Child Care Facilities

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. William Purcell
Date:	June 5, 2003	**Summary by:**	Drupti Chauhan*
Version:	S226-PCS65311-RQ-33		Committee Co-Counsel

SUMMARY: ***This bill would make the administration of prescription or over-the counter medication to a child attending a licensed or an unlicensed child care facility without written authorization. A violation of the statute that results in serious injury to the child shall be punished as a Class F felony and any other violation of the section is punishable as a Class I felony. The bill provides an exception for circumstances in which an emergency medical condition presents itself and the child's parent is unavailable. In this situation, medication may be lawfully administered without the parent's written authorization if the medication is administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions. The bill is effective December 1, 2003 and applies to offenses committed on or after that date.***

CURRENT LAW: G.S. 110-91(9) directs the NC Child Care Commission to adopt rules to establish minimum requirements for record keeping for child care facilities. The scope of this authority includes records regarding authorization to administer medications. Rules adopted by the Commission in 1986, and amended in 1996, 1998, and 2001 include, among other things, the following with respect to the administration of medications in child care facilities:

- No drug or medication may be administered to any child in a licensed child care facility without specific written instructions from the child's parent or guardian.
- No drug or medication may be administered for a non-medical purpose, including inducing sleep.
- Prescribed medication may be administered only with parent's written authorization and the medication must be in its original container with proper labeling, including directions for dosage, or the parent must provide written instructions that must be signed and dated by the prescribing physician or health professional.
- Over-the-counter medication may be administered only with the parent's written authorization and only in accordance with written dosage instructions of the parent, physician or other authorized health professional.
- A parent may provide written authorization that is valid for up to six months to authorize the administration of medication to treat the symptoms of asthma and allergic reactions, and up to one year to administer sunscreen and over-the-counter diapering creams. The authorization must be specific as to the symptoms or conditions for which the medication may be administered.
- A parent may provide written authorization for the administration of a one-time, weight appropriate dose of acetaminophen in the event the child has a fever and the parent cannot be reached.

Enforcement Authority:

Administrative penalties: G.S. 110-102.2 authorizes the Secretary of DHHS to impose one or more of the following against a licensee:

- Issue a written warning and a request for compliance;
- Issue an official reprimand;
- Place a licensee on probation;
- Suspend the license for a period not to exceed one year; and
- Permanently revoke the license.

Civil penalties: G.S. 110-103.1 authorizes the Secretary to impose a civil penalty, not to exceed $1,000 for each violation documented on any given date, against an operator of a child care facility who violates NC law governing child care facilities. In determining the amount of the penalty, the Secretary must consider the threat of or extent of harm to children and the consistency of violations.

BILL ANALYSIS:

- Makes the administration of medication to a child attending a licensed or an unlicensed child care facility without written authorization from the child's parent or guardian unlawful.
- An employee, owner, household member, volunteer or operator who violates the statute would be face a Class H felony.
- Provides for an enhanced penalty (Class F felony) for violations resulting in serious injury to a child.
- Provides an exception for emergency medical conditions when the child's parent is unavailable. The medication must be administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions.

Class I felony: Punishable by an absolute minimum of 3 months Community Service Punishment and an absolute maximum of 12 months Intermediate or Active Punishment, depending on prior convictions and aggravating factors.

Class F felony: Punishable by an absolute minimum of 10 months Intermediate Punishment (e.g. supervised probation) or Active Punishment to an absolute maximum of 59 months of Active Punishment, depending on prior convictions and aggravating factors.

BACKGROUND:

Inspiration for the legislation:

Senate Bill 226 is a recommendation of the NC Child Fatality Task Force. The Task Force was inspired to recommend the bill after hearing the story of Kaitlyn Shevlin, a 5-month-old who died in an unlicensed day-care home in Alamance County in 2001. According to Mr. Rob Johnson, District Attorney for Alamance County, although medical examiners could not find a definitive cause of death and as a result ruled that the child died from Sudden Infant Death Syndrome, law enforcement investigators suspect her day-care provider gave the child a generic form of the medicine Benadryl to make her sleepy. The day care provider was unlicensed and had numerous complaints of child neglect filed against her in the 20 years she operated her unlicensed facility. She was convicted of misdemeanor charges of child abuse and neglect served four months in prison.

Relevant Definitions (cut and pasted from G.S. 110-86):

- **Child care**. - A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

- **Child care facility**. - Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. **A child care center** is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. **A family child care home** is a child-care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

- **Child care does not include the following**:

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

- "**Household member**" to mean: "member of the household in a family child care home or nonlicensed child care home and is over 15 years old and is present when children are in care." (G.S. 110-90.2)
- "**Volunteer**" to mean "a person who works in a child care facility and is not monetarily compensated by the facility" (NCAC 10-3U.0102).

*Linda Attarian, former Research Attorney, contributed significantly to this bill

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, May 13, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

SB 226 Unauthorized Admin. Meds. By Child Care Fac., *Senator Purcell, Bill sponsor. (Carried over from May 8, 2003 Meeting.)*

HB 918 Increase Service of Process Fee, *Rep. Goodwin, Bill Sponsor*

3. **Adjourn.**

JH

5/13/03

House Pages

1. Name: James (Jimothy) Cleveland
   County: Mecklenburg
   Sponsor: McMahan
2. Name: Anthony (M) Marshall
   County: Mecklenburg
   Sponsor:
3. Name: Michael White
   County: Guilford
   Sponsor:
4. Name: Raishael Lafty Tanner
   County: Pender
   Sponsor: Wright
5. Name: David Silvox
   County: Henderson
   Sponsor:

Sgt-At-Arms

1. Name: JAMES WORTH
2. Name: BILL SULLIVAN
3. Name:
4. Name:

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues., May 13, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Melma July	Democratic Women of NC Box 831 Ryesboro N.C. 28382
John Bourdeau	AstraZeneca
Barry Smith	Freedom Newspapers
Patricia Ramey	NAACP
Eddie Caldwell	NC Sheriffs / NC Law Enf Officers
Bob Lawrence	HHS
Starla McKenney	HHS

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues., May 13, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Lora Piercy	YMCAs of NC
Dana Sam	Rep. Sam
Roz Sawtt	NC Child Care Coalition
Pep Dorn	Conf. of DAs
Rob Johnson	DA - Dist. 15A
Joanne Stevens	Nursing
JOHN K. WILLIFORD	DOCTOR OF THE DAY
Dana Hill-Thomas	Dem. Women, Sampson Co.
Willie S. Byrd	Dem. Women Sampson Co.
Lee Byan	Demo. Women of Sampson Co. 95 Evans Bryant Lane Clinton, NC 28328
Betty Barnes	309 Eastover ave, Clinton NC 28328

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues., May 13, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Tom Bennett	NCCFTF
Rita Dussi Johnson	Democratic Women of Scotland Co.
Kathleen Purcell	" " " " "
Millie Yongue	" " " " "
Virginia B. Decker	" " " " "
Liberta Hailey	" " " " "
Leanne Winner	NCSBA
Frances McDuffie	Democratic Women of Scotland Co.
Gerald Johnson	" " "
June Locklear	DCD
Rosa Ball	DCD-DHHS

House Judiciary II

Committee

Minutes

May 15, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Sen. Dalton to discuss **SB 776** (Workers' Comp/Definition of Employee).

He said he had introduced this legislation for the Press Association to clarify the status of paper carriers for worker's compensation purposes. Most paper carriers are family businesses, wherein there is usually no holding of social security. They have traditionally been considered independent contractors.

In 2001, the Industrial Commission considered a case in which the plaintiff was injured in an automobile accident while delivering newspapers for the defendant, a newspaper publisher. The issue in the case was whether the injured plaintiff was an employee of the defendant newspaper publisher or an independent contractor. The majority found that the defendant newspaper publisher controlled the manner in which the injured plaintiff carried out her work. Based on this finding, the Commission concluded that an employer-employee relationship existed and allowed the injured plaintiff's workers' compensation claim to go forward. The dissent argued that the majority failed to acknowledge a 1933 North Carolina Supreme Court case in which the Court held that a fourteen-year old newsboy who made street sales was not an employee under the Workers' Compensation Act.

SB 776 would create a rebuttable presumption that a person is not an employee under the Workers' Compensation Act if the person performs services in the sale of newspapers or magazines to ultimate consumers under an arrangement where the newspapers or

magazines are sold by the person at a fixed price and the person's compensation is based on the retention of the difference between the fixed price and the amount the person was charged by the newspaper or magazine supplier. For such a person to claim compensation under the Workers' Compensation Act, the person would have to rebut the presumption that the person is not an employee by presenting evidence that the alleged employer exercised enough control over the person's work so that an employer-employee relationship existed.

Representatives from the AFL-CIO were in support of the bill.

Rep. Stam moved to amend the bill by changing its effective date and the motion passed. (See Attachment I)

Rep. Gulley moved to incorporate the amendment and bill into a proposed committee substitute bill, give that bill a favorable report and the original bill an unfavorable report. The motion passed.

SB 867 (Arson/Serious Injury to Firefighter) was before the Committee and Sen. Hagan was recognized to discuss the bill.

She said some firefighters from her district had asked her to introduce this legislation.

Currently, offenses of arson and other unlawful burnings are classified as Class D through Class H Felonies. If the burned building is occupied at the time of the burning, the offense is a Class D felony. The minimum presumptive punishment, assuming no prior convictions, for convictions of these felonies range from 5-6 months of community, intermediate, or active punishment (for a Class H felony) through 51-64 months of active punishment. SB 867 would create the offense of arson or other unlawful burnings that result in serious injury to a firefighter. Punishment would be a Class D felony.

Rep. Stam was concerned that the punishment of a Class D Felony was too great.

Sen. Hagan said it was her intent to raise the penalty to the same as Arson, First Degree.

Discussion followed about the various classes of felonies.

Rep. Bordsen and Rep. Ellis said they agreed with Rep. Stam.

Rep. Stam proposed to amend the bill to change the penalty from a Class D Felony to a Class E felony. The motion passed. *(See Attachment II)*

Rep. Stam moved that the amendment and bill be incorporated into a new committee substitute, to give that bill a favorable report, unfavorable as to original bill. The motion passed.

SB 721 (Post-Adoption Privileges) was before the Committee and Sen. Kinnaird was recognized to discuss the bill.

She said that currently, identifying information may be shared between birth parents and adopting parents only if the parties agree to do so before the adoption. There is nothing that authorizes or prohibits an agreement between adoptive parents and members of the adoptee's birth family.

SB 721 would allow adoptive parents and members of an adoptee's biological family to enter into an enforceable written agreement that allows specifically authorized post-adoption privileges, including visitation, communication, or other contact regarding the adoptee. The parties must enter into the agreement before or at the time the decree of adoption is granted, and the agreement must satisfy enumerated conditions and be approved by the court. *(See Bill Analysis – Attachment III)*

Sen. Kinnaird said that she would like for the bill to be amended and she asked that the Committee not vote on the bill today.

Discussion followed. Rep. Ellis was worried about the rights of the adoptive parents. Rep. Nesbitt was concerned about the procedure to form the original agreement. Is this a special proceeding or filed in the adoption action? How do you get to the court?

Sen. Kinnaird felt that it would be like a consent agreement.

Rep. Stam said it might simplify things if a Clerk of Court could approve the agreement so the agreement could be in the adoption file. To terminate the agreement would require a judge.

The bill was displaced.

The meeting adjourned at 10:50 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

Attachment I

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 776

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

S776-ASB-11 [v.1]

Date 5-15-03 ,2003

Comm. Sub. [YES]
Amends Title [NO]
Second Edition

Representative _____

moves to amend the bill on page 3, line 30,
by rewriting that line to read:

"**SECTION 2.** This act is effective when it becomes law and applies to any claim arising on or after ~~October 1, 2003.~~" that date

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

S 2

SENATE BILL 776
Judiciary I Committee Substitute Adopted 4/23/03

Short Title: Workers' Comp/Definition of Employee. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE DEFINITION OF EMPLOYEE UNDER THE WORKERS' COMPENSATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-2(2) reads as rewritten:

"(2) Employee. – The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer, and as relating to those so employed by the State, the term 'employee' shall include all officers and employees of the State, including such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term 'employee' shall include all officers and employees thereof, including such as are elected by the people. The term 'employee' shall include members of the North Carolina national guard while on State active duty under orders of the Governor and members of the North Carolina State Defense Militia while on State active duty under orders of the Governor. The term 'employee' shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation

of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, further, that any employee, as herein defined, of a municipality, county, or of the State of North Carolina, while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this Article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation under this Article.

Any such executive officer of a corporation may, notwithstanding any other provision of this Article, be exempt from the coverage of the corporation's insurance contract by such corporation's specifically excluding such executive officer in such contract of insurance, and the exclusion to remove such executive officer from the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus exempted from the coverage of the insurance contract shall not be employees of such corporation under this Article.

All county agricultural extension service employees who do not receive official federal appointments as employees of the United States Department of Agriculture and who are field faculty members with professional rank as designated in the memorandum of understanding between the North Carolina Agricultural Extension Service, North Carolina State University, A & T State University, and the boards of county commissioners shall be deemed to be employees of the State of North Carolina. All other county agricultural extension service employees paid from State or county funds shall be deemed to be employees of the county board of commissioners in the county in which the employee is employed for purposes of workers' compensation.

The term 'employee' shall also include members of the Civil Air Patrol currently certified pursuant to G.S. 143B-491(a) when performing duties in the course and scope of a State-approved mission pursuant to Article 11 of Chapter 143B of the General Statutes.

'Employee' shall not include any person performing voluntary service as a ski patrolman who receives no compensation for such services other than meals or lodging or the use of ski tow or ski lift facilities or any combination thereof.

Any sole proprietor or partner of a business or any member of a limited liability company may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner or member of a limited liability company shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

'Employee' shall include an authorized pickup firefighter of the Division of Forest Resources of the Department of Environment and Natural Resources when that individual is engaged in emergency fire suppression activities for the Division of Forest Resources. As used in this section, 'authorized pickup firefighter' means an individual who has completed required fire suppression training as a wildland firefighter and who is available as needed by the Division of Forest Resources for emergency fire suppression activities, including immediate dispatch to wildfires and standby for initial attack on fires during periods of high fire danger.

It shall be a rebuttable presumption that the term 'employee' shall not include any person performing services in the sale of newspapers or magazines to ultimate consumers under an arrangement whereby the newspapers or magazines are to be sold by that person at a fixed price and the person's compensation is based on the retention of the excess of the fixed price over the amount at which the newspapers or magazines are charged to the person."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 776:
Workers' Comp/Definition of Employee.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senators Dalton and Clodfelter
Date:	May 15, 2003	**Summary by:**	Jeff Hudson
Version:	Second Edition		Committee Counsel

SUMMARY: ***Senate Bill 776 would create a rebuttable presumption that a person who performs services in the sale of newspapers or magazines to consumers under certain circumstances is not an employee for purposes of workers' compensation claims.***

BACKGROUND: The Workers' Compensation Act provides a system under which employers pay compensation to employees for accidental injuries that arise out of and in the course of employment. This system is administered by the North Carolina Industrial Commission.

For the provisions of the Workers' Compensation Act to apply, an employer-employee relationship must exist at the time of the injury; an independent contractor is not covered by the Act. The existence of the employer-employee relationship is largely determined by the level of control exercised by the alleged employer over the work of the alleged employee. In making the determination of whether an employer-employee relationship existed, the Industrial Commission considers such factors as whether the alleged employee:

- Is engaged in an independent business or occupation.
- Has independent use of special skill, knowledge, or training in executing the work.
- Is not subject to discharge for adopting one method of doing the work over another.
- Is not in the regular employ of the alleged employer.
- Is free to use and has full control over assistants.

In 2001, the Industrial Commission considered a case in which the plaintiff was injured in an automobile accident while delivering newspapers for the defendant, a newspaper publisher. The issue in the case was whether the injured plaintiff was an employee of the defendant newspaper publisher or an independent contractor. The majority found that the defendant newspaper publisher controlled the manner in which the injured plaintiff carried out her work. Based on this finding, the Commission concluded that an employer-employee relationship existed and allowed the injured plaintiff's workers' compensation claim to go forward. The dissent argued that the majority failed to acknowledge a 1933 North Carolina Supreme Court case in which the Court held that a fourteen-year old newsboy who made street sales was not an employee under the Workers' Compensation Act.

BILL ANALYSIS: Senate Bill 776 would create a rebuttable presumption that a person is not an employee under the Workers' Compensation Act if the person performs services in the sale of newspapers or magazines to ultimate consumers under an arrangement where the newspapers or magazines are sold by the person at a fixed price and the person's compensation is based on the retention of the difference between the fixed price and the amount the person was charged by the newspaper or magazine supplier. For such a person to claim compensation under the Workers' Compensation Act, the person would have to rebut the presumption that the person is not an employee by presenting evidence that the alleged employer exercised enough control over the person's work so that an employer-employee relationship existed.

EFFECTIVE DATE: This act is effective when it becomes law.

S776-SMSB-002

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Thursday, May 15, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

SB 721 Post-Adoption Privileges – *Sen. Kinnaird, Bill Sponsor*

SB 776 Workers' Comp/Definition of Employee – *Sen. Dalton, Bill Sponsor*

SB 867 Arson/Serious Injury to Firefighter -- *Sen. Hagan*

3. **Adjourn.**

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 867
Judiciary II Committee Substitute Adopted 4/30/03

Short Title: Arson/Serious Injury to Firefighter. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE OFFENSE OF ARSON OR OTHER UNLAWFUL BURNINGS THAT RESULT IN SERIOUS INJURY TO A FIREFIGHTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 15 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-69.3. Arson or other unlawful burning that results in serious injury to a firefighter.**

A person is guilty of a Class D felony if the person commits an offense under Article 15 of Chapter 14 of the General Statutes and a firefighter suffers serious bodily injury while discharging or attempting to discharge the firefighter's duties as a result of the criminal offense."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SENATE BILL 867:
Arson/Serious Injury to Firefighter

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Hagan
Date:	May 15, 2003	**Summary by:**	Drupti Chauhan*
Version:	Second		Committee Co-Counsel

SUMMARY: ***Senate Bill 867 would create the offense of arson or other unlawful burnings that result in serious injury to a firefighter. Punishment would be a Class D felony.***

The Second Edition changes the punishment from a Class C to a Class D felony.

BILL ANALYSIS: Offenses of arson and other unlawful burnings currently are classified as Class D through Class H felonies. If the burned building is occupied at the time of the burning, the offense is a Class D felony. The minimum presumptive punishment, assuming no prior convictions, for convictions of these felonies range from 5-6 months of community, intermediate, or active punishment (for a Class H felony) through 51-64 months of active punishment (for a Class D felony).

The new offense would treat the crime as if the building was occupied at the time of the burning. It would be a Class D felony. The minimum presumptive punishment, assuming no prior convictions, for convictions of these felonies would be 51-64 months of active punishment.

The Sentencing Commission has suggested that the offense would be consistent with the criteria for a Class E felony.

EFFECTIVE DATE: The bill would become effective December 1, 2003, and would apply to offenses committed on or after that date.

Robin Johnson, Research Attorney, contributed significantly to this summary.
S867-SMRQ-001

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 867

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

S867-ARQ-19 [v.1]

Date 5-15 ,2003

Comm. Sub. [NO]
Amends Title [NO]
Second Edition

Representative Stam

moves to amend the bill on page 1, line 9, by deleting the letter "D" and substituting the letter "E".

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: SB 867 2nd Edition

SHORT TITLE: Arson/Serious Injury to Firefighter

SPONSOR(S): Senator Hagan

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring		Unable to determine exact amount.			
Judicial					
Recurring		Unable to determine exact amount.			
TOTAL EXPENDITURES:		Unable to determine exact amount.			
ADDITIONAL PRISON BEDS*		Unable to determine exact amount.			
POSITIONS: (cumulative)		Unable to determine exact amount.			

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction (DOC); Judicial Branch

EFFECTIVE DATE: December 1, 2003

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: SB 867 creates the offense of arson or other unlawful burnings that result in serious injury to a firefighter, punishable by a Class D felony. Under current law, all of the arson and other burning offenses under Article 15 are punishable as Class H, G, F, E, or D felonies. The only Class D offense under current Article 15 is 1st degree arson.

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division (FRD) does not assume savings due to deterrent effects for this bill or other criminal penalty bills.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Because SB 867 creates a new offense, the AOC has no data from which to estimate the number of charges that may arise as a result of this bill. However, data are available regarding the number of arson charges and other burning offenses as the AOC has offense codes for thirteen of the arson and other burning offenses under Article 15. AOC data for calendar year 2002 reveal that 756 defendants were charged with offenses under Article 15 (106 with 1st degree arson and 650 with other arson offenses). Data are not available on the number of defendants charged with these offenses who could be charged with the Class D felony offense involving serious injury to a firefighter under the bill.

Because the bill creates a Class D felony, the AOC anticipates that the defense would be vigorous and the litigation more time consuming. Trials and pleas would demand more court time and preparation time due to the stiffer penalties under the bill.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS: It is unclear whether the intent of the bill is that persons be charged with the offense under the bill in addition to other arson and burning offenses under Article 15.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser

and

Jim Mills

APPROVED BY: James D. Johnson, Director, Fiscal Research Division

DATE: April 29, 2003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 721
Judiciary II Committee Substitute Adopted 4/30/03

Short Title: Post-Adoption Privileges. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW AN ADOPTIVE PARENT AND A BIRTH RELATIVE TO ENTER INTO A WRITTEN AGREEMENT TO PROVIDE FOR POST-ADOPTION CONTACT AND COMMUNICATION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 48 of the General Statutes is amended by adding a new Article to read:

"Article 11.

"Post-Adoption Privileges.

"**§ 48-11-100. Definitions.**

For purposes of this Article, the following definitions apply:

(1) Birth relative. – The biological parent, grandparent, sibling, or any other member of an adoptee's biological family related to the adoptee by blood or marriage.

(2) Post-adoption privileges agreement. – A written agreement that allows specifically described post-adoption privileges.

(3) Post-adoption privileges. – Visitation, communication, or any other contact or conveyance of information regarding an adoptee.

"**§ 48-11-101. Post-adoption privileges agreement; terms; conditions.**

(a) An adoptive parent and a birth relative may enter into a post-adoption privileges agreement before or at the time a decree of adoption is granted.

(b) A post-adoption privileges agreement may include the following:

(1) Provisions for visitation between the adoptee and a birth relative.

(2) Provisions for other forms of communication including the exchange of letters and telephone contact between the adoptee and a birth relative.

(3) Provisions for sharing information about the adoptee by parties to the agreement.

(4) The following warnings in bold type:

a. After the court grants the adoption petition, the adoption shall not be set aside due to the failure of an adoptive parent, birth relative, or the adoptee to follow the terms of this agreement or modifications to the agreement.

b. A disagreement between the parties or litigation brought to enforce, modify, or terminate this agreement shall not affect the validity of the adoption or serve as a basis for orders affecting the custody of the adoptee.

c. A court will not act on a petition to modify, enforce, or terminate this agreement unless the petitioner has participated or attempted to participate in good faith in mediation or other appropriate dispute resolution proceedings to resolve any dispute.

(c) The court may approve a post-adoption privileges agreement only if all of the following conditions are satisfied:

(1) The court finds that there is a significant emotional attachment between the adoptee and the birth relative to whom the agreement gives post-adoption privileges.

(2) The adoptee, if the adoptee is 12 years of age or older, consents to the post-adoption privileges agreement. However, the court may waive the requirement for the adoptee's consent if the court finds that the adoptee is not capable of consenting or that the adoptee should not be required to consent because consenting would not be in the adoptee's best interest.

(3) The county department of social services or the licensed agency placing the adoptee for adoption or in the case of a direct placement adoption, the agency making the report to the court under G.S. 48-2-501 recommends the granting of post-adoption privileges.

(4) The adoptee is represented by a court-appointed guardian ad litem and the guardian recommends the granting of post-adoption privileges unless the court finds that the appointment of a guardian ad litem is not necessary to protect the adoptee's best interest.

(5) Each adoptive parent consents to the granting of post-adoption privileges.

(6) The adoptive parent and the birth relative execute a post-adoption privileges agreement and file the agreement with the court.

(7) The post-adoption privileges agreement includes an acknowledgment by the birth relative that the adoption is irrevocable regardless of whether the adoptive parent fails to abide by the post-adoption privileges agreement.

(8) The post-adoption privileges agreement includes an acknowledgment by the adoptive parent that the agreement, when approved by the court, grants the birth relative the right to seek enforcement in court of the post-adoption privileges specified in the agreement.

(9) Any other factors the court deems appropriate in determining whether the adoptee's best interests would be served by granting post-adoption privileges.

(d) A post-adoption privileges agreement is enforceable only if it is approved by the court and signed by a district court judge.

"**§ 48-11-102. Modification, enforcement, and termination.**

(a) A birth relative or an adoptive parent may file a new civil action in district court for the purpose of modifying, enforcing, or terminating a post-adoption privileges agreement.

(b) In an action under this section, the court may modify, enforce, or terminate a post-adoption privileges agreement if the court finds that the party seeking relief has participated or attempted to participate in good faith in mediating the dispute giving rise to the action or the court determines that the modification or termination is necessary to serve the best interests of the adoptee.

(c) The court shall not award monetary damages.

"**§ 48-11-103. Effect of failure to comply.**

The court shall not set aside a decree of adoption, revoke a written consent to an adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order for failure of a birth relative, an adoptive parent, or an adoptee to comply with any or all of the original terms of or subsequent modifications to the post-adoption privileges agreement."

SECTION 2. G.S. 48-1-100 reads as rewritten:

"**§ 48-1-100. Legislative findings and intent; construction of Chapter.**

(a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

(b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:

(1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption; and

(2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption, (ii) to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, (iii) to protect the privacy of the parties to the adoption,

and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

(c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(e) Nothing in this Chapter shall be construed to prevent an adoptive parent and a birth relative from entering into a post-adoption privileges agreement as provided in Article 11 of this Chapter."

SECTION 3. G.S. 7B-1100 reads as rewritten:

"**§ 7B-1100. Legislative intent; construction of Article.**

(a) The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) Nothing in this Article shall be construed to prevent the court in a proceeding under this Article for termination of parental rights from approving a post-adoption privileges agreement as provided in Article 11 of Chapter 48 of the General Statutes."

SECTION 4. This act is effective when it becomes law.

SENATE BILL 721: Post-Adoption Privileges.

BILL ANALYSIS

Committee:	Senate	**Introduced by:**	Sen. Kinnaird
Date:	April 29, 2003	**Summary by:**	Robin Johnson
Version:	Second		Committee Counsel

SUMMARY: ***Senate Bill 721 would allow adoptive parents and members of an adoptee's biological family to enter into an enforceable written agreement that allows specifically authorized post-adoption privileges, including visitation, communication, or other contact regarding the adoptee. The parties must enter into the agreement before or at the time the decree of adoption is granted, and the agreement must satisfy enumerated conditions and be approved by the court.***

The act is effective when it becomes law.

The Second Edition clarifies that the agreement is between the adoptive parent and biological relative. It also substitutes the term "adoptee" for the term "child".

CURRENT LAW: Currently, identifying information may be shared between birth parents and adopting parents only if the parties agree to do so before the adoption. There is nothing that authorizes or prohibits an agreement between adoptive parents and members of the adoptee's birth family. However, it is questionable as to whether an agreement would be enforceable.

BILL ANALYSIS: Senate Bill 721 would add a new Article 11 (*Post-Adoption Privileges*) to Chapter 48 (*Adoptions*) of the General Statutes. The bill would allow an adoptive parent and a birth relative to enter into a written post-adoption privileges agreement before or at the time the adoption decree is granted. The agreement is enforceable if it is approved by the court and signed by a district court judge.

A birth relative would include the adoptee's biological parent, grandparent, sibling, or other member of the adoptee's birth family related by blood or marriage. The agreement may include provisions for visitation, other forms of contact, and the sharing of information about the adoptee. It also must meet all of the following conditions:

- The court must find a significant emotional attachment between the adoptee and the birth relative.
- Both adoptive parents must consent.
- If the adoptee is at least 12, the adoptee must consent – unless the court waives this requirement.
- The county department of social services or specified child placing agency must recommend the granting of post-adoption privileges.
- If a guardian ad litem is appointed, the guardian must recommend the granting of post-adoption privileges.
- The adoptive parent and birth relative must execute the agreement and file it with the court.
- The agreement must include the birth relative's acknowledgment that the adoption is irrevocable regardless of whether the adoptive parent abides by the agreement.
- The agreement also must include the adoptive parent's acknowledgement that the agreement grants the birth relative the right to seek enforcement in court.

- Any other factors the court considers to be in the adoptee's best interests.

If a dispute arises subsequent to entering into the agreement, the parties must participate or attempt to participate in good faith in mediation or other appropriate dispute resolution proceedings. Either party may file an action in district court for the purpose of modifying, enforcing, or terminating the agreement. The court may modify, enforce, or terminate the agreement if the court finds (i) the petitioning party had participated or attempted to participate in good faith in mediating the dispute or (ii) it would be in the adoptee's best interests.

The court shall not award monetary damages. Nor shall the court set aside an adoption decree, revoke a written consent to adoption, rescind a relinquishment, or modify an order to terminate parental rights for any party's failure to comply with the agreement.

EFFECTIVE DATE: The act is effective when it becomes law.

S721-SMRH-002

ISSUE BRIEF

North Carolina Family Policy Council
Post Office Box 20607 • Raleigh, NC 27619
919-807-0800 • www.ncfamily.org

SB 721—Post-Adoption Privileges Would Undermine Adoptive Families

SUMMARY:
The legal right proposed by SB 721, which would allow a party outside of the intact family to enforce a post-adoption privileges agreement, is contrary to existing state policy and would significantly undermine the sanctity of adoptive families.

CURRENT ADOPTION LAW:
When considering the potential enactment of a law relating to adoption in North Carolina, it is important to note that North Carolina's adoption statutes and case law recognize the following:

> "A decree of adoption effects a complete substitution of families for all legal purposes after the entry of the decree." G.S. § 48-1-106(a).
>
> "...the adoptee... has the same legal status, including all legal rights and obligations of any kind whatsoever, as a child born the legitimate child of the adoptive parents." G.S. § 48-1-106(b).
>
> "A decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. ...the former parents are divested of all rights with respect to the adoptee." G.S. § 48-1-106(c).

In addition, one may look to the North Carolina Court of Appeals ruling in *Acker v. Barnes* for the prevailing case law in this area. These same legal principles were restated and reaffirmed in *Hill v. Newman*, 131 N.C.App. 793, 509 S.E.2d 226 (1998).

> "**By the express provisions of G.S. 48-23, every final order of adoption results in establishing the relationship of parent and child between the adoptive parents and the child, and from and after the entry of the final order of adoption, the natural parents 'shall be divested of all rights' with respect to such child. By adoption, the adopted child becomes legally the child of the adoptive parents and becomes legally a stranger to the bloodline of his natural parents.** See *Rhodes v. Henderson*, 14 N.C. App. 404, 188 S.E.2d 565 (1972)....**So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate. Where, as here, the parents firmly resist any move by others seeking authority to visit the children, the courts will not compel the parents to allow such visitation.** Annot., 98 A.L.R.2d 325 (1964). What was said in *Jackson v. Fitzgerald*, 185 A.2d 724, 726, 98 A.L.R.2d 322, 325 (D.C.Mun.App.1962), is pertinent here: '**Courts are not insensitive to the yearning of grandparents and other relatives for the company of children in their families. But such cannot be translated into a legal right without a showing that it is dictated by the needs and welfare of the child. In the absence of such a showing, custodial control goes along with custodial responsibility.**'" *Acker v. Barnes*, 33 N.C.App. 750, 751-752, 236 S.E.2d 715, 716, disc. review denied, 293 N.C. 360, 238 S.E.2d 149 (1977).

(OVER)

Clearly, current adoption law recognizes the sanctity of the adoptive family. It also recognizes the severance of all legal ties between the adoptee and the adoptee's biological family once the decree of adoption is finalized.

ANALYSIS OF SENATE BILL 721:
Under existing law, adoptive parents and the birth relatives of an adopted child may voluntarily enter into an agreement to allow visitation, communication or the passage of information between the parties. SB 721 would formalize these "post-adoption privileges agreements" by setting out specific conditions that must be met and by making them legally binding in court.

In stark contrast to existing adoption law, SB 721 would give members of an adoptee's biological family new legal standing to sue an intact family to enforce a post-adoption privileges agreement. This change would undermine existing state law, which clearly recognizes that once a child is adopted, that child is a member of the adoptive family, and legal ties with the biological relatives are severed. The current law properly recognizes the role of adoptive parents in making the difficult decisions regarding privileges by allowing for voluntary agreements between adoptive families and biological relatives in a way that preserves the rights of adoptive parents to raise their children as they see fit and to choose with whom their child should come in contact.

In addition to this significant shift in state policy, other concerns should be considered when weighing the potential impact of this bill:

- Making post-adoption privilege agreements legally enforceable could expose adoptive families to constant disruption, ongoing legal battles and related significant expenses.
- Such a law could make attorneys for birth families feel obligated to encourage their clients to seek these agreements in order to preserve their legal rights, even when this might not be in the best interest of the child and the adoptive family.
- Formalizing the post-adoption privileges process and making these agreements legally enforceable could place more pressure on adoptive parents to enter these agreements against their wishes, because such an agreement may be deemed a necessary part of the overall adoption agreement.
- Asking for the consent of an older child to the agreement may be a decision that no child is realistically capable of dealing with, especially when they are already at a point in life where they are being torn emotionally by being placed in a new family.
- Such agreements may not be in the best interests of some children, as they could face the confusion of having birth relatives periodically reappear in their lives. This could make it extremely difficult for these children to feel as if they are truly a part of their adoptive family.

CONCLUSION:
Giving post-adoption privilege agreements the status of a legally binding contract would significantly modify North Carolina law and state policy. Current law allows the parties in an adoption to voluntarily agree to visitation, communication or the sharing of information at the discretion of the adoptive family. Making these agreements legally binding would violate the fundamental right and responsibility of the adoptive parents to determine what is in the best interest of their family and with whom their child should come in contact. As a result, SB 721 should be defeated.

– END –

J11

5/15/03

House Pages

1. Name: Corey Jones
   County: Pender
   Sponsor: T. Wright
2. Name: Sean Kishbaugh
   County: Cumberland
   Sponsor: Glazier
3. Name: Herman Olguin
   County: Guilford
   Sponsor: Bowie
4. Name:
   County:
   Sponsor:
5. Name:
   County:
   Sponsor:

Sgt-At-Arms

1. Name: JAMES WORTH
2. Name: ~~JACKS~~
3. Name: Jim Brewer
4. Name:

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs. May 15, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Erin Culbreth	LBA
Elizabeth Dalton	Bone & Associates
Esther High	DHHS-DSS
Kim Hibbard	NCLM
Richard O'Brien	PFFPNC
Mike Okun	NC State AFL-CIO
Jere Royall	NC Family Policy Council
AL DE HTCH	DOA/YAFD
Bill Wilson	NCATL
Dick Taylor	NCAOP
JOHN BUSSIAN	NC Press Assn.
[illegible]	NCPPR

VISITOR REGISTRATION SHEET

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Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ted Vaden	Chapel Hill News
Teri Saylor	NC Press Assoc.
Amy Dobson	NC State Watch
Abby Youngkin	Intern.. Sen Hagan
PBP	NCFB

House Judiciary II

Committee

Minutes

May 20, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Moore, Vice-Chair, called the meeting to order.

SB 136 (Dissenter's Rights) was before the Committee and Sen. Clodfelter was recognized for comments.

He said **SB 136** would clarify that amendments to articles of incorporation that allow actions to be taken without a meeting of all shareholders, or without notice to all shareholders under certain circumstances, do not constitute amendments to exclude or limit the rights of shares to vote on any manner, or to cumulate votes, which otherwise give rights to dissenters' rights.

Mark Davidson from the Bar Association was recognized for comments.

Rep. Walend moved for a favorable report and the motion passed.

SB 439 (Omnibus ESC Changes) was before the Committee and Sen. Clodfelter was recognized for comments.

He said this bill was a series of several changes that originated with the Employment Security Commission Law Section. He told the Committee that Commissioner Harry Payne and David Clegg from the Employment Security Commission were in the audience. -

Sen. Clodfelter explained the bill, section by section. *(See Bill Analysis as Attachment I).*

When Sen. Clodfelter had concluded his explanation, Rep. Moore recognized Rep. Ellis who had concerns about the bill. He felt that the bill was fundamentally changing what the act was set up to do; to protect an employee from the inconsistent practices of an employer. Employers fund this through a charge and if the employer continues to hire back employees and lay them off, he gets an experience rate because the amount that he pays in at the end of the month goes up because the employee is the victim of the employer's ability to keep a steady work string going. And now we're expanding this, turning it into the "family medical leave act" which, Rep. Ellis, felt was another part of government's function. He didn't feel it was appropriate to use these funds for these types of circumstances. The last time he heard, he said, they were having a hard time keeping the fund full.

Sen. Clodfelter pointed out that Section 2 clarified that if the claimant leaves because of a family hardship, that is not a chargeable item against an employer's account, so the employer is not being charged for that.

Rep. Ellis said that he wouldn't be charged as a penalty for his actions, but he will be indirectly charged because the fund will be depleted more rapidly. Then, he said, everybody's rate will go up.

Sen. Clodfelter said they had looked at that issue when the bill was in the Senate, the question of rates was closely considered and it was determined that the changes in this bill could be funded within the current rate for the Trust Fund. In fact, because one of the changes, for example, produces a substantial savings to the Trust Fund and offsets some of the costs of the other items.

Mr. David Clegg was recognized. He said the issue of "non-charge" was made a part of the equation and non-charges were funded from the interest on the Trust Fund.

Rep. Stam said he disagreed with Rep. Ellis and that the tax really comes from the employees. He said he didn't think corporations pay this tax at all. The check comes from them, but it is really the employee who is paying. He was also concerned about the effective date of the bill.

Rep. Walend said that periodically there are reports that this fund is drying up. She wondered if the Trust Fund was able to take the changes outlined in the bill.

Commissioner Harry Payne was recognized. He said the Trust fund was still being affected by the actions of the 1995 General Assembly, which cut the trust fund contributions by a half. North Carolina went from having the second lowest contribution rate to being the lowest rate in the nation. He said the idea was to "bleed" the fund down to $800 million. It wasn't indexed to population, true cost, wage growth, or anything else. What happened is that it triggered back up 100 per cent of the rate if on August 1 of

every year the balance is ahead of $800 million. A few years ago the balance was $905 million, so he said they kept another half price special going, not by choice. During that week, the fund paid out $3.00 for every $1.00 it brought in.

Now the rate has triggered off, and is the third lowest in the country. Their best estimate is that they will bring in $850 million this year. He said their hope is that perhaps in the third or fourth quarter this year, things will pick up. He said they were trying to deal with that and from a cost-effectiveness standpoint; they are doing a good job. The part of the bill that Rep. Ellis is concerned about deals more with equity, whether or not a person who can afford a lawyer to go get a Chapter 50B domestic violence should be treated the same as somebody similarly situated who just doesn't have that. He said it was an equity issue that doesn't happen very often.

Rep. Ellis wondered if the public had access to see who receives unemployment. Commissioner Payne said there are some build in protections for privacy, but that every employer gets a list of charges every year when they get their employer rate.

Rep. Ellis was concerned about the protection in the system to prevent perpetrator of the violence from knowing whether the victim is.

Anne Winner with the Coalition Against Domestic Violence was recognized and told the Committee of the importance of the domestic violence.

Rep. Farmer-Butterfield wondered if any other groups had supported the bill.

Sen. Clodfelter read from a list entitled NC Alliance for Modernization of Unemployment Insurance. (*See Attachment II).*

Rep. Bordsen moved to give the bill a favorable report and the motion carried.

There being no further business, the Committee adjourned at 10:50 a.m.

Rep. Timothy Moore
Vice-Chairman

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 136

Judiciary I Committee Substitute Adopted 3/25/03

Short Title: Dissenters' Rights Clarifications. (Public)

Sponsors:

Referred to:

February 24, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAW GOVERNING DISSENTERS' RIGHTS WITH REGARD TO MAJORITY CONSENT ACTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 55-13-02(a) reads as rewritten:

"(a) In addition to any rights granted under Article 9, a shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

(1) Consummation of a plan of merger to which the corporation (other than a parent corporation in a merger whose shares are not affected under G.S. 55-11-04) is a party unless (i) approval by the shareholders of that corporation is not required under G.S. 55-11-03(g) or (ii) such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(2) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, unless such shares are then redeemable by the corporation at a price not greater than the cash to be received in exchange for such shares;

(2a) Consummation of a plan of conversion pursuant to Part 2 of Article 11A of this Chapter;

(3) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than as permitted by G.S. 55-12-01, including a sale in dissolution, but not including a sale pursuant to court order or a sale pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed in cash to the shareholders within one year after the date of sale;

(4) An amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it (i) alters or abolishes a preferential right of the shares; (ii) creates, alters,

or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares; (iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities; (iv) excludes or limits the right of the shares to vote on any matter, or to cumulate ~~votes;~~votes, other than an amendment of the articles of incorporation permitting action without meeting to be taken by less than all shareholders entitled to vote, without advance notice, or both, as provided in G.S. 55-7-04; (v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under G.S. 55-6-04; or (vi) changes the corporation into a nonprofit corporation or cooperative organization; or

(5) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares."

SECTION 2. This act becomes effective October 1, 2003.

SENATE BILL 136:
Dissenters' Rights Clarifications.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. Clodfelter
Date:	May 20, 2003	**Summary by:**	Drupti Chauhan*
Version:	Second Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 136 would clarify that amendments to articles of incorporation that allow actions to be taken without a meeting of all shareholders, or without notice to all shareholders under certain circumstances, do not constitute amendments to exclude or limit the rights of shares to vote on any manner, or to cumulate votes, which otherwise give rights to dissenters' rights.***

CURRENT LAW: G.S. 55-13-02(a)(4)(iv) gives dissenters' rights to corporate shareholders when the corporation adopts an amendment to its articles of incorporation that excludes or limits the right of the shares to vote on any matter, or to cumulate votes.

BILL ANALYSIS: Senate Bill 136 would clarify that certain amendments to articles of incorporation involving corporation actions to be taken without a meeting of all shareholders would not constitute amendments which give rise to dissenters' rights. G.S. 55-7-04(a) allows a corporation to take action without a meeting of all shareholders upon consent to the action without a meeting by a defined number of shareholders. G.S. 55-7-04(d), unless the articles of incorporation provide otherwise, requires notice of the action be given to shareholders who do not consent to action without a meeting. (See portions of relevant statutes attached.)

EFFECTIVE DATE: The bill becomes effective October 1, 2003.

****Walker Reagan, Research Attorney, wrote this summary.**

S136-SMRQ-001

§ 55-7-04. Action without meeting.

(a) Action required or permitted by this Chapter to be taken at a shareholders' meeting may be taken without a meeting and without prior notice except as required by subsection (d) of this section, if the action is taken by all the shareholders entitled to vote on the action or, subject to subsection (a1) of this section, if so provided in the articles of incorporation of a corporation that is not a public corporation at the time the action is taken, by shareholders having not less than the minimum number of votes that would be necessary to take the action at a meeting at which all shareholders entitled to vote were present and voted. The action must be evidenced by one or more written consents bearing the date of signature and signed by the number of shareholders sufficient to take the action without a meeting, before or after such action, describing the action taken and delivered to the corporation for inclusion in the minutes or filing with the corporate records. To the extent the corporation has agreed pursuant to G.S. 55-1-50, a shareholder's consent to action taken without meeting may be in electronic form and delivered by electronic means.

.....

(d) Unless the articles of incorporation otherwise provide, if shareholder approval is required by this Chapter for (i) an amendment to the articles of incorporation pursuant to Article 10 of this Chapter, (ii) a plan of merger or share exchange pursuant to Article 11 of this Chapter, (iii) a plan of conversion pursuant to Part 2 of Article 11A of this Chapter, (iv) the sale, lease, exchange, or other disposition of all, or substantially all, of the corporation's property pursuant to Article 12 of this Chapter, or (v) a proposal for dissolution pursuant to Article 14 of this Chapter, and the approval is to be obtained through action without meeting, the corporation must give its shareholders, other than shareholders who consent to the action, written notice of the proposed action at least 10 days before the action is taken. The notice shall contain or be accompanied by the same material that, under this Chapter, would have been required to be sent to shareholders not entitled to vote on the action in a notice of meeting at which the proposed action would have been submitted to shareholders for action.

SENATE BILL 439: Omnibus ESC Changes.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Clodfelter
Date:	May 20, 2003	**Summary by:**	Jeff Hudson*
Version:	Third Edition		Committee Counsel

SUMMARY: ***Senate Bill 439 would make several changes to the unemployment insurance law as requested by the Employment Security Commission.***

BILL ANALYSIS:

Section 1. Health/Disability in Family.

Under current law, an individual is disqualified from unemployment insurance benefits if the individual left work without good cause attributable to the employer. An individual is not disqualified if the individual left work due solely to a disability or health condition. The current law is written as if the disability or health condition must be the individual's own. Section 1 would amend the current law to remove the disqualification from unemployment insurance benefits if the disability or health condition were that of a minor child in the individual's custody, an aged or disabled parent of the individual, or any member of the individual's immediate family. Immediate family means an individual's wife, husband, mother, father, brother, sister, son, daughter, grandmother, grandfather, grandson, granddaughter, whether the relationship is a biological, step-, half-, or in-law relationship.

Section 2. Technical Correction.

Section 2 would restore language related to the charging of benefit payments that was inadvertently deleted during the 2001 Session.

Section 3. Broader Exemption from Disqualification for Domestic Violence, Sexual Offense, Stalking.

Under current law, an individual is exempted from disqualification for unemployment insurance benefits if the individual has been adjudged an aggrieved party under the domestic violence statutes. Section 3 would broaden the exemption to include an individual who has qualified for participation in the new Address Confidentiality Program or who can demonstrate domestic violence, sexual offense, or stalking through a number of means, including law enforcement, court, or agency records; documentation from a domestic violence or sexual assault program; or documentation from a professional from whom the claimant has sought assistance.

Section 4. No Refunds to Employers that Convert from Taxable to Reimbursable Status.

Under current law, most employers pay unemployment insurance taxes based on their experience rating in the unemployment insurance system. Some nonprofit employers, however, pay no taxes, but reimburse the system for each tax benefit that is paid. Section 4 provides that employers that convert from taxable to reimbursable status will not be refunded previous balances.

***Note:** Bill Gilkeson, Committee Counsel for Senate Judiciary I, substantially contributed to the preparation of this summary.

Section 5. Available for Part-Time Work.

Under current law, one of the main elements of qualification for unemployment insurance benefits is that the unemployed individual must be available for work; that is, actively willing to accept a full-time job. Section 5 would provide that the available for work qualification is met when an individual is only available for part-time work if the individual:

- Was working part-time during the period when the individual earned the wages that met the wage threshold for unemployment insurance benefits.
- Is actively seeking the same kind of part-time work the individual had before unemployment.
- Puts no other conditions on the individual's job search and is in a job market that has a reasonable demand for part-time work.

This provision does not affect the determination of unemployment insurance benefits for students or seasonal workers.

Section 6. Moving With Spouse.

Under current law, an individual who leaves work to move out of town with a spouse is temporarily disqualified for unemployment insurance benefits for a period of five weeks. Section 6 would decrease the disqualification period to two weeks. Section 6 would also provide that moving with a spouse who has been reassigned by the military is not a disqualification.

EFFECTIVE DATE: This act is effective when it becomes law.

*__Note:__ Bill Gilkeson, Committee Counsel for Senate Judiciary I, substantially contributed to the preparation of this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 3

SENATE BILL 439

Judiciary I Committee Substitute Adopted 4/9/03
Third Edition Engrossed 4/16/03

Short Title: Omnibus ESC Changes. (Public)

Sponsors:

Referred to:

March 17, 2003

A BILL TO BE ENTITLED

AN ACT MAKING OMNIBUS CHANGES TO THE EMPLOYMENT SECURITY LAWS OF NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 96-14(1) reads as rewritten:

"(1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer.

Where an individual leaves work due solely to a disability incurred or other health condition, whether or not related to the work, he shall not be disqualified for benefits if the individual shows:

a. That, at the time of leaving, an adequate disability or health ~~condition,~~ condition of the employee, of a minor child who is in the legally recognized custody of the individual, of an aged or disabled parent of the individual, or of a disabled member of the individual's immediate family, either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee from doing other alternative work offered by the employer which pays the minimum wage or eighty-five percent (85%) of the individual's regular wage, whichever is greater; and

b. That, at a reasonable time prior to leaving, the individual gave the employer notice of ~~his~~ the disability or health condition.

Where an employee is notified by the employer that such employee will be separated from employment on some future date and the

employee leaves work prior to this date because of the impending separation, the employee shall be deemed to have left work voluntarily and the leaving shall be without good cause attributable to the employer. However, if the employee shows to the satisfaction of the Commission that it was impracticable or unduly burdensome for the employee to work until the announced separation date, the permanent disqualification imposed for leaving work without good cause attributable to the employer may be reduced to the greater of four weeks or the period running from the beginning of the week during which the claim for benefits was made until the end of the week of the announced separation date.

An employer's placing an individual on a bona fide disciplinary suspension of 10 or fewer consecutive calendar days shall not constitute good cause for leaving work."

SECTION 2. G.S. 96-9(c)(2) reads as rewritten:

"(2) Charging of benefit payments. –

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12.01G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant's period of employment was 100 days or less; (v) separations made disqualifying under G.S. 96-14(2b) and (6a); (vi) separation due to leaving for disability or health condition; or (vii) separation of claimant solely as the result of an undue family ~~hardship;~~ hardship shall not be charged to the account of an employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding

any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer for benefit years ending on or before June 30, 1992, where benefits were paid as a result of a discharge due directly to the reemployment of a veteran mandated by the Veteran's Reemployment Rights Law, 38 USCA § 2021, et seq.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding. Provided, an overpayment of benefits paid shall be established in order to provide for the waiting period required by G.S. 96-13(c).

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):

1. The benefits are paid for unemployment due directly to a major natural disaster, and
2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e. 1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be

charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service."

SECTION 3. G.S. 96-14(1f) reads as rewritten:

"(1f) For the purposes of this Chapter, any claimant's leaving work, or discharge, if the claimant has been adjudged an aggrieved party as set forth by Chapter 50B of the General Statutes or there is evidence of domestic violence, sexual offense, or stalking, or the claimant has been granted program participant status pursuant to G.S. 15C-4 as the result of domestic violence committed upon the claimant or upon a minor child with or in the custody of the claimant by a person who has or has had a familial relationship with the claimant or minor child, shall constitute good cause for leaving work. Benefits paid on the basis of this section shall be noncharged. Evidence of domestic violence, sexual offense, or stalking may include: (i) law enforcement, court, or federal agency records or files; (ii) documentation from a domestic violence or sexual assault program if the claimant is alleged to be a victim of domestic violence or sexual assault; and (iii) documentation from a religious, medical, or other professional from whom the claimant has sought assistance in dealing with the alleged domestic violence, sexual abuse, or stalking."

SECTION 4. G.S. 96-9(d)(1) reads as rewritten:

"(1) a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less

than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1. Provided, however, no employer granted or in reimbursement status will be allowed refund of any previous balances used in a transfer to reimbursement status.

d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:

1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;

2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;
3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review."

SECTION 5. G.S. 96-13(a) is amended by adding a new subdivision to read:

"(6) An unemployed individual shall not be disqualified for eligibility for unemployment compensation benefits solely on the basis that the individual is only available for part-time work. If an individual restricts his or her eligibility to part-time work, the individual may be considered able and available to work if it is determined that all the following conditions exist:

a. The claimant's monetary eligibility is based predominately on wages from part-time work.
b. The claimant is actively seeking and is willing to accept work under essentially the same conditions as existed while the claimant's reported wages were accrued.
c. The claimant imposes no other restriction and is in a labor market in which a reasonable demand exists for part-time service.

This subdivision shall not be construed to amend subdivision (3) of this subsection as it applies to students or G.S. 96-16 as it applies to seasonal workers."

SECTION 6. G.S. 96-14(1d) reads as rewritten:

"(1d) For the purposes of this Chapter, any claimant leaving work to accompany the claimant's spouse to a new place of residence where that spouse has secured work in a location that is too far removed for

the claimant reasonably to continue his or her work shall serve a time certain disqualification for benefits for a period of ~~five~~ two weeks beginning the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits. Notwithstanding the other provisions of this subdivision, leaving work because a spouse has been reassigned from one military assignment to another shall be deemed good cause for leaving work."

SECTION 7. This act is effective when it becomes law.

List of folks who support S439

Attachment II

NC ALLIANCE FOR MODERNIZATION OF UNEMPLOYMENT INSURANCE

North Carolina Justice & Community Development Center

North Carolina AFL-CIO

North Carolina Coalition Against Domestic Violence

North Carolina Association of Women Attorneys

North Carolina Chapter of National Organization of Women (NC NOW)

North Carolina Council for Women and Domestic Violence Commission

Covenant With North Carolina's Children

State Employees Association of North Carolina (SEANC)

North Carolina Council of Churches

North Carolina Women United

North Carolina Alliance for Economic Justice

North Carolina Fair Share

Southerners for Economic Justice

Common Sense Foundation

UE – 150

North Carolina Association of Community Development Corporations

For Further Information: Bill Rowe, NC Justice & Community Development Center, P.O. Box 28068, Raleigh, NC 27611, (919) 856-2177, bill@ncjustice.org

SUPPORT SENATE BILL 439 - "OMNIBUS ESC CHANGES"

NEED

For most North Carolinians, no single program of state government provides a more critical safety net than unemployment insurance. The premise of the program is simple: small sums are contributed from each employer in the state for each employee to a centralized trust fund that is apart from the state budget. When workers lose their jobs through no fault of their own, they are entitled to a period of benefits (usually at a rate of about ½ their former wage, with a cap of 2/3 the average weekly wage) so long as they are available for and actively seeking new employment.

During the ongoing recession, well over a billion dollars in benefits has been paid out to unemployed workers. These funds have proved absolutely critical to thousands of families and communities struggling to stay afloat.

North Carolina's unemployment insurance system, however, is far from the nations most generous. Less than two out of five unemployed workers actually receive benefits. Many worthy workers are denied benefits or see them delayed unnecessarily because of burdensome or obsolete statutory language.

- **SB 439 has no opposition from any organization**
- **SB 439 passed the Senate 50-0**
- **SB 439 has bi-partisan support**

What Does SB 439 Do for Unemployed North Carolinians?

- *Helps Part-Time Workers*

A quirk of current law is its failure to help part-time workers, many of whom are women and work part-time because of family responsibilities. SB 439 would make clear that unemployed workers, for whom part-time work is their normal and customary occupation, may receive some benefits while they seek new part-time work.

- *Helps Victims of Domestic Violence*

SB 439 will make clear that compelling evidence of domestic violence (other than only a civil protective order) may be used to show that a worker left work in order to escape domestic violence.

- *Helps Alleviate Family Health Crises*

Many workers are ineligible for unemployment benefits when they must leave work due to the need to deal with family health crises. SB 439 would relax this restriction.

- *Helps When Spouses Must Relocate*

Under current law an employee who must leave work because his/her spouse is forced to relocate for another job or military assignment is disqualified for five weeks of unemployment benefits. SB 439 will reduce that disqualification to two weeks for non-military relocations and eliminate the disqualification for military reassignments.

SEE REVERSE FOR SUPPORTERS OF SB 439

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: SB 439 (Second Edition)

SHORT TITLE: Omnibus ESC Changes

SPONSOR(S): Senator Clodfelter

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
REVENUES					
EXPENDITURES					
Employment Securities Commission	See Assumptions and Methodology				
POSITIONS: (cumulative)					

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Employment Securities Commission

EFFECTIVE DATE: This act is effective when it becomes law.

BILL SUMMARY: The proposed legislation makes omnibus changes to the Employment Security laws of North Carolina. Individuals can claim unemployment benefits, if at the time of leaving work, an adequate disability or health condition existed for the employee, a minor child, an aged or disabled parent, or a disabled member of the individual's immediate family. Domestic violence program participant status is expanded, including situations where evidence exists of domestic violence as defined in the legislation. A technical change required by the US Department of Labor limits refunds upon employers transferring to reimbursement status. Unemployed individuals are not disqualified for eligibility for unemployment compensation benefits solely on the basis that they are only available for part-time work, assuming the conditions specified in the legislation are met. The proposed legislation also deems leaving work to accompany a spouse who has been reassigned, including military assignments, is good cause for leaving work and the disqualification for benefits is reduced.

ASSUMPTIONS AND METHODOLOGY: Several of the proposed changes to the employment laws of North Carolina are technical in nature and will not have a General Fund impact. Only those changes deemed to have a financial impact on the Employment Securities Commission (ESC) are detailed below.

Section 1 allows unemployment benefits claims for employees if the disability or health related condition is with minor children, aged or disabled parents, or members of their immediate family. In 2002, the ESC had 11,516 claimants qualifying for health related quits, totaling $27,249,000 in benefits (an average of $2,366 per claimant or 6 weeks of benefits). Based on claims disallowed, the ESC estimates another 5,000 claimants for family illnesses would be accepted under the proposed legislation. The table below shows the estimated cost (in $ millions) associated with the additional claims, adjusted 2% for inflation over time.

FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08
$11.83 M	$12.07 M	$12.31 M	$12.55 M	$12.81 M

Section 5 would allow claims for unemployment benefits for individuals who meet the conditions surrounding part-time work. For 2002, the ESC had 471,912 claimants in total, including 139,361 claimants with multiple employers in the base period. All of these claimants were instructed to look for full-time work. Had they been allowed to look for multiple part-time positions, they may have been able to return to work faster and cut time spent on unemployment benefits. **Though there is no way to estimate how many individuals would meet the qualifications and pursue part-time work, overall state unemployment benefit payments may be reduced.**

Section 6 would allow shorter disqualifications for benefits paid to individuals who receive trailing spouse benefits. In 2002, there were 660 claimants for a total of $899,518 in benefits. If the disqualification were to be reduced from five weeks to two weeks, benefits paid would be approximately $539,710 more for a total of $1.44 million. The table below shows the additional estimated cost associated with the benefits paid, adjusted 2% for inflation over time.

FY 03-04	FY 04-05	FY 05-06	FY 06-07	FY 07-08
$539,710	$550,504	$561,514	$572,744	$584,199

This section of the proposed legislation also allows no disqualification period for spouses of military personnel reassigned. Currently there are 43,326 military spouses in North Carolina. A scenario under the proposed bill would provide unemployment benefits to a spouse leaving work to follow a military member from a North Carolina base to another in-state base or a base in another state. The family must actually be reassigned or move from one base to another, not simply be assigned to active duty in a specific engagement. **Because of the uncertain military conditions surrounding the Middle East, there is no way to estimate how many military reassignments may occur.** Using the average benefits payment of $1,363 per claimant, for every 1% of military reassignments, the proposed change would cost approximately $590,000. In practice, the Commission sees short lengths of unemployment benefits due to military reassignments because of the career counseling and assistance provided by the military.

SOURCES OF DATA: Employment Securities Commission

TECHNICAL CONSIDERATIONS: None.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Stephanie Schmitt Stephanie Schmitt

APPROVED BY: James D. Johnson, Director, Fiscal Research Division

James D. Johnson

DATE: April 17, 2003

J11

5/20/03

House Pages

1. Name: Zachary Pope
   County: Haywood
   Sponsor:

2. Name: Lauren Everett
   County: Cumberland
   Sponsor: Glazier

3. Name:
   County:
   Sponsor:

4. Name:
   County:
   Sponsor:

5. Name:
   County:
   Sponsor:

Sgt-At-Arms

1. Name: JAMES WORTH
2. Name: BILL SULLIVAN
3. Name:
4. Name:

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues. May 20, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Laura Harper	SEANC
RAY RIFFE	NC AFL-CIO
Doris Weaver	NC CWA Political Council
Glenn Lama	UTU
Jim Blackburn	NC Association of County Commissioners
Richard Hollesbrook	UTU
Mike Okun	NC State AFL CIO
Dina DiMaio	NCBA
Kim Hibbard	NCCM
Brad Lovin	NC Manufactured Housing Inst.
Anne Dixon	Duke

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues. May 20, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bill Rowe	NC Justice Center
Jere Royall	NC Family Policy Council
PGP	NCFB
Al Ripley	NC Justice Ctr
[illegible]	ESC
Lockhart Taylor	ESC
A Payne	"
[illegible]	NC Statewatch

House Judiciary II

Committee

Minutes

May 22, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Goodwin called the meeting to order and recognized Senator Allran whose **SB 251** (Prohibit Rebirthing Therapy) was before the Committee for consideration.

Senator Allran said the tragic death of Candace Newmaker, the North Carolina child had prompted him to introduce this legislation. He referred to the Bill Analysis "Background" section, which reads as follows: *(See Attachment I)*

> Candace Newmaker, a 10-year old girl from Durham, North Carolina died on April 19, 1999, a day after a rebirthing session in the home of an unlicensed therapist in Colorado. During the session, the child was wrapped in a sheet, made to lie in the fetal position, and then huge pillows were placed over her. Four adults pushed against her while her mother urged the child to be "born" to her, to come out of the "womb" and start a new and better life. During the procedure, the child screamed and begged for air, telling them she would die, to which the therapists replied, "Go ahead and die". When the child was unwrapped 70 minutes latter, she wasn't breathing, and she died the next day. There therapy was supposed to help cur the child"s attachment disorder, characterized by violent behavior towards her mouth.
>
> The two unlicensed therapists were convicted of child abuse resulting in death and received 16 years in prison as punishment. The child's mother pled guilty to negligent child abuse resulting in death and was given a four-year deferred sentence and 400 hours of community service.

In 2001, Colorado enacted legislation, know as "Candace's Law" that outlaws rebirthing therapy.

Sen. Allran said there is a need for North Carolina to outlaw this procedure.

Committee Counsel Drupti Chauhan was recognized to give an explanation of the bill. She said **SB 251** would make it a criminal offense to practice the technique of "rebirthing", meaning a technique to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death. A criminal charge would be punishable as a Class A1 misdemeanor for the first offense (resulting up to 150 days' community/intermediate/active punishment) and a Class I felony for subsequent offenses (resulting in a minimum of 3 months' community punishment and a maximum of 12 months' intermediate/active punishment). This section of the bill would become effective December 1, 2003.

The bill would also specify that the rebirthing technique is not a permissible form of physical restraint and is not therapeutic treatment under the mental health statutes. This section of the bill would become effective when it becomes law.

Rep. Goodwin asked that "person" be defined. Ms. Drupti Chauhan said that the "person" could be any entity and was not required to be a physician.

Rep. Bonner was concerned that the punishment proposed was not enough.

Ms. Chauhan was recognized to explain why the punishment was not greater. She said that other offenses could be levied in that situation.

Rep. Moore moved to amend the bill (*See Attachment II)* and the motion passed.

Visitors to the meeting who expressed support for the bill were Sally Cameron with the NC Psychological Association, Randolph Cloud and Lue-Ann Coe with the North Carolina Psychiatrists Association, and Candance Newmaker's grandparents, Mr. And Mrs. David Davis.

Rep. Moore moved to give a proposed committee substitute a favorable report and the original bill an unfavorable report and the motion passed.

SB 315 (Minor's Entertainment and Sports Contracts) was before the Committee and Sen. Horton was recognized to make comments on the bill.

A proposed Committee Substitute for **HB 315** was given to the Committee and Rep. Moore moved that it be adopted for consideration. His motion passed.

Sen. Horton told the committee that SB 315 is closely modeled on California's "Jackie Coogan Law", which is designed to protect the earnings of performers and athletes who are minors.

Rep. Goodwin told Sen. Horton that he had introduced a similar bill several years ago and he was happy that Sen. Horton's bill has passed the Senate and was before the Committee.

Committee Counsel, Jeff Hudson, was recognized to explain the bill. He said that the changes in proposed Committee Substitute were purely technical in nature. He said **Senate Bill 315** would require that 15% of the earnings of a performer or athlete who is a minor be placed in a trust for the benefit of the minor. The bill would also establish a mechanism by which a superior court could approve a contract entered into by a performer or athlete who is a minor and the minor would not be able to disaffirm the court-approved contract. Under current law, there are no specific protections for performers or athletes who are minors. Under current law, a minor may void a contract made by the minor. This means that the contract cannot be enforced against the minor, but the minor may enforce the contract against the other contracting party. For purposes of contract law, a minor is an un-emancipated person under the age of 18. *(See Bill Analysis – Attachment III)*

When Mr. Hudson had concluded his remarks, Rep. Goodwin asked about how many minors in North Carolina would this apply to at this time. Sen. Horton wasn't certain, but said that at the School of the Arts, students were snapped up even before they graduate.

Rep. Bonner moved to give the proposed Committee Substitute a favorable report, unfavorable as to the original bill. The motion carried.

SB 647 (Self-Insured Localities) was before the Committee and Senator Gulley was recognized to explain the bill.

He said this legislation has already been put into effect in certain counties in North Carolina. **SB 647** authorizes cities and counties to waive sovereign immunity from liability claims through the creation of self-funded reserve funds in lieu of waiving sovereign immunity by the purchase of liability insurance.

Jim Blackburn with the County Commissioners' Association was recognized and said he supported this bill. Andy Romanet from the League of Municipalities said the League has no problems with this legislation.

Dick Taylor with the North Carolina Academy of Trial Lawyers also spoke in favor of the bill.

Rep. Stam and Rep. Walend expressed their support of the bill.

Rep. Moore moved to give **SB 647** a favorable report and the motion carried.

Rep. Stam introduced a guest visiting the Legislature from Beijing, Dr. Cho Chung Chow.

There being no further business, the meeting was adjourned at 10:45 a.m.

Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

5-22-03

Attachment I

SENATE BILL 251: Prohibit Rebirthing Therapy

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Allran
Date:	May 22, 2003	**Summary by:**	Drupti Chauhan*
Version:	2nd Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 251 would make it a criminal offense to practice the technique of "rebirthing", meaning a technique to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death. A criminal charge would be punishable as a Class A1 misdemeanor for the first offense (resulting up to 150 days' community/intermediate/active punishment) and a Class I felony for subsequent offenses (resulting in a minimum of 3 months' community punishment and a maximum of 12 months' intermediate/active punishment). This section of the bill would become effective December 1, 2003.***

The bill would also specify that the rebirthing technique is not a permissible form of physical restraint and is not therapeutic treatment under the mental health statutes. This section of the bill would become effective when it becomes law.

CURRENT LAW:

Criminal law currently does not specifically prohibit "rebirthing", but depending on the circumstances and whether injury or death occurs, conducting "rebirthing" could result in criminal charges.

Child abuse: Any parent of a child less than 16, or any other person providing care to or supervision of a child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to the child by other than accidental means is guilty of **misdemeanor child abuse**. Misdemeanor child abuse is a Class 1 misdemeanor offense, punishable by up to 45 days' community punishment. Intentional infliction of serious physical injury, or an intentional assault on a child which results in serious physical injury[1], is **felony child abuse**, a Class E felony punishable by 15-74 months' intermediate/active punishment. If serious bodily injury[2] to the child occurs, it is a Class C felony punishable by 44 to 210 months' active punishment.

Assault: A **simple assault**, i.e., an overt act or attempt, or the unequivocal appearance of attempt, with force and violence, to immediately physically injury another person, with the show of force or menace of violence being sufficient to put a reasonable person in fear of immediate physical injury, is a Class 2 misdemeanor, punishable by up to 60 days' community/intermediate/active punishment. If the assault is on a child under 12, or if serious injury is inflicted, it is a Class A1 misdemeanor, punishable by up to 150 days' community/intermediate/active punishment.

Manslaughter/Murder: A person is guilty of **involuntary manslaughter** even though an act that caused death is lawful, if the act was carried out in a reckless and careless manner with respect to the rights and safety of others. Involuntary manslaughter is a Class F felony, punishable by 10 months' intermediate/active to 49 months' active punishment. If a death results from cruel and reckless acts that

[1] "Serious physical injury" may be physical injury that causes great pain and suffering or serious mental injury.

[2] "Serious bodily injury" is bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

indicate a total disregard for human life, a person could be charged with **second degree murder**, which is a Class B2 felony, punishable by 94-392 months' active punishment.

Other: Under the mental health statutes[3], if an employee of or a volunteer at a facility, who other than as part of generally accepted medical or therapeutic procedure, knowingly causes pain or injury to a client, that person is guilty of a Class 1 misdemeanor (punishable by up to 120 days' community/intermediate/active punishment.

The **use of physical restraint** on a client under the mental health statutes is limited to circumstances when there is imminent danger of abuse or injury to the client or others, when substantial property damage is occurring, or when the restraint is necessary as a measure of therapeutic treatment. All instances of restraint must be documented and must be employed only by staff that have been trained and have demonstrated competence in the proper use of and alternatives to restraint.

BILL ANALYSIS: If enacted, it would be a specific criminal offense to practice rebirthing, whether or not a patient is actually injured during the therapy. A criminal charge would be punishable as a Class A1 misdemeanor for the first offense (resulting up to 150 days' community/intermediate/active punishment) and a Class I felony for subsequent offenses (resulting in a minimum of 3 months' community punishment and a maximum of 12 months' intermediate/active punishment). The bill would not change current law as it relates to child abuse, assault, manslaughter, and murder, so if circumstances warranted, a person practicing rebirthing could still be charged with one of these offenses.

The bill would also specify that rebirthing is not an acceptable form of mental health therapeutic treatment that would permit the use of restraint on a client.

BACKGROUND: Candace Newmaker, a 10-year old girl from Durham, North Carolina, died on April 19, 1999, a day after a rebirthing session in the home of an unlicensed therapist in Colorado. During the session, the child was wrapped in a sheet, made to lie in the fetal position, and then huge pillows were placed over her. Four adults pushed against her while her mother urged the child to be "born" to her, to come out of the "womb" and start a new and better life. During the procedure, the child screamed and begged for air, telling them she would die, to which the therapists replied, "Go ahead and die". When the child was unwrapped 70 minutes later, she wasn't breathing, and she died the next day. The therapy was supposed to help cure the child's attachment disorder, characterized by violent behavior towards her mother.

The two unlicensed therapists were convicted of child abuse resulting in death and received 16 years in prison as punishment. The child's mother pled guilty to negligent child abuse resulting in death and was given a four-year deferred sentence and 400 hours of community service.

In 2001, Colorado enacted legislation, known as "Candace's Law" that outlaws rebirthing therapy.

**Dianna Jessup, Research Attorney, contributed significantly to this summary.*
S251-SMRQ-001

[3] G.S. 122C-66(a).

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 251

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S251-ALN-38 [v.2]

Date 5-22- ,2003

Comm. Sub. [YES]
Amends Title [NO]
Second Edition

Representative Moore

moves to amend the bill on page 1, lines 20-21,
by rewriting the lines to read:
"(a) It is unlawful for a person to practice a technique, whether known as a "rebirthing technique" or referred to by any other name, to reenact the birthing process in a manner"; and

further moves to amend the bill on page 2, line 4,
by deleting "rebirthing" and substituting "a technique to reenact the birthing process".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 251

Health and Human Resources Committee Substitute Adopted 3/19/03

Short Title: Prohibit Rebirthing. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE PRACTICE OF THE "REBIRTHING" TECHNIQUE.

Whereas, United States Representative Sue Myrick, a member of the North Carolina congressional delegation, introduced House Concurrent Resolution 435 in Congress encouraging states to outlaw "rebirthing"; and

Whereas, the United States Congress adopted House Concurrent Resolution 435, which passed the House of Representatives by a vote of 397-0; and

Whereas, in House Concurrent Resolution 435, the United States Congress expressed the sense that the technique known as "rebirthing", a form of "attachment therapy", is a dangerous and harmful practice and should be prohibited; and

Whereas, Candace Newmaker, a child from North Carolina, died from use of the "rebirthing technique", and four other children have died from other forms of "attachment therapy"; and

Whereas, the American Psychological Association does not recognize "rebirthing" as proper treatment; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. Article 52 of Chapter 14 of the General Statutes is amended by adding the following new section to read:

"**§ 14-401.21. Practicing "rebirthing technique"; penalty.**

(a) It is unlawful for a person to practice the technique of "rebirthing". As used in this section, "rebirthing" means a technique to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death.

(b) A violation of this section is punishable as follows:

(1) For a first offense under this section, the person is guilty of a Class A1 misdemeanor.

(2) For a second or subsequent offense under this section, the person is guilty of a Class I felony."

SECTION 2. G.S. 122C-60(a) reads as rewritten:

"(a) Physical restraint or seclusion of a client shall be employed only when there is imminent danger of abuse or injury to the client or others, when substantial property damage is occurring, or when the restraint or seclusion is necessary as a measure of therapeutic treatment. For purposes of this section, "rebirthing" as defined by G.S. 14-401.21 is not a measure of therapeutic treatment. All instances of restraint or seclusion and the detailed reasons for such action shall be documented in the client's record. Each client who is restrained or secluded shall be observed frequently, and a written notation of the observation shall be made in the client's record."

SECTION 3. Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on and after that date. The remainder of this act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 251

Health and Human Resources Committee Substitute Adopted 3/19/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S251-PCS35296-RQ-28

Short Title: Prohibit Rebirthing. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE PRACTICE OF THE "REBIRTHING" TECHNIQUE.

Whereas, United States Representative Sue Myrick, a member of the North Carolina congressional delegation, introduced House Concurrent Resolution 435 in Congress encouraging states to outlaw "rebirthing"; and

Whereas, the United States Congress adopted House Concurrent Resolution 435, which passed the House of Representatives by a vote of 397-0; and

Whereas, in House Concurrent Resolution 435, the United States Congress expressed the sense that the technique known as "rebirthing", a form of "attachment therapy", is a dangerous and harmful practice and should be prohibited; and

Whereas, Candace Newmaker, a child from North Carolina, died from use of the "rebirthing technique", and four other children have died from other forms of "attachment therapy"; and

Whereas, the American Psychological Association does not recognize "rebirthing" as proper treatment; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. Article 52 of Chapter 14 of the General Statutes is amended by adding the following new section to read:

"**§ 14-401.21. Practicing "rebirthing technique"; penalty.**

(a) It is unlawful for a person to practice a technique, whether known as a "rebirthing technique" or referred to by any other name, to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death.

(b) A violation of this section is punishable as follows:

(1) For a first offense under this section, the person is guilty of a Class A1 misdemeanor.

(2) For a second or subsequent offense under this section, the person is guilty of a Class I felony."

SECTION 2. G.S. 122C-60(a) reads as rewritten:

"(a) Physical restraint or seclusion of a client shall be employed only when there is imminent danger of abuse or injury to the client or others, when substantial property damage is occurring, or when the restraint or seclusion is necessary as a measure of therapeutic treatment. For purposes of this section, a technique to reenact the birthing process as defined by G.S. 14-401.21 is not a measure of therapeutic treatment. All instances of restraint or seclusion and the detailed reasons for such action shall be documented in the client's record. Each client who is restrained or secluded shall be observed frequently, and a written notation of the observation shall be made in the client's record."

SECTION 3. Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on and after that date. The remainder of this act is effective when it becomes law.

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: SB 251 2nd Edition

SHORT TITLE: Prohibit Rebirthing

SPONSOR(S): Senator Allran

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring	Unable to determine exact amount; no substantial impact anticipated.				
Nonrecurring					
Judicial					
Recurring	Unable to determine exact amount; no substantial impact anticipated.				
Nonrecurring					
TOTAL EXPENDITURES:	Unable to determine exact amount; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Unable to determine exact number of beds; no substantial impact anticipated				
POSITIONS: (cumulative)	Unable to determine exact amount; additional positions not anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction (DOC); Judicial Branch

EFFECTIVE DATE: December 1, 2003

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: SB 251 amends article 52 of Chapter 14 of the General Statutes by adding a new section, G.S. 14-401.21, to prohibit the practice of rebirthing, defined as a technique to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death. A first offense for violation of G.S. 14-401.21 is punishable as a Class A1 misdemeanor; a second or subsequent offense is punishable as a Class I felony. The bill also adds amends G.S. 122C-60(a) to specify that rebirthing is not a measure of therapeutic treatment.

ASSUMPTIONS AND METHODOLOGY:

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

Since the proposed bill creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this bill on the prison population. It is not known how many offenders might be sentenced under this bill. In FY 2001-2002, 20% of Class A1 misdemeanor convictions resulted in active sentences. The average estimated time served was 55.1 days. It is likely that misdemeanants sentenced under this bill would be housed in local jails but paid for by the State at a cost of $18/day. (Active sentences between 1-90 days are served in local jails; the DOC reimburses counties for active sentences between 30-90 days). Because only A1 offenders falling in Prior Record Level III receive active sentences that might be served in the state prison system, convictions for this proposed offense would not be expected to have a significant impact on the prison population.

In addition, it is not known how many offenders might be sentenced under the Class I felony for a second or subsequent offense. For example, if there were 10 Class I convictions for this offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and three additional prison beds the second year. In 2001-2002, 9 percent of Class I felony offenders were sentenced to active sentences, 37 percent were sentenced to intermediate sanctions, and 54 percent were sentenced to community punishment. On average, offenders served between seven and nine months. In 2001-2002, the statewide average operating cost for one inmate was $62.43/day or $22,786.95 a year.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This

increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Because the bill creates a new offense, AOC is unable to estimate the number of new felony or misdemeanor charges that could arise from this bill. For offenses that are brought to trial as Class A1 misdemeanors, the estimated court cost per trial is $2,594. For Class A1 misdemeanor offenses not brought to trial, and where a guilty plea is entered, AOC estimates the cost per guilty plea at $214. While the number of Class I felony cases that could result under the bill is relatively low, trials would be jury trials in superior court rather than misdemeanor cases in district court, and total processing and position costs would also increase. For offenses that are brought to trial as Class I felonies, the estimated court cost per trial is $4,637. For Class I felony offenses not brought to trial and where a guilty plea is entered, AOC estimates the cost per guilty plea at $255.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

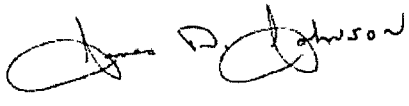
TECHNICAL CONSIDERATIONS:

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser
and

Jim Mills

APPROVED BY: James D. Johnson, Director Fiscal Research Division



DATE: March 25, 2003

5-22-03

Attachment III

SENATE BILL 315: Minor's Entertainment Contracts.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Horton
Date:	May 22, 2003	**Summary by:**	Jeff Hudson*
Version:	Second Edition		Committee Counsel

SUMMARY: ***Senate Bill 315 would require that 15% of the earnings of a performer or athlete who is a minor be placed in a trust for the benefit of the minor. The bill would also establish a mechanism by which a superior court could approve a contract entered into by a performer or athlete who is a minor and the minor would not be able to disaffirm the court-approved contract.***

CURRENT LAW:

Under current law, there are no specific protections for performers or athletes who are minors.

Under current law, a minor may void a contract made by the minor. This means that the contract cannot be enforced against the minor, but the minor may enforce the contract against the other contracting party. For purposes of contract law, a minor is an unemancipated person under the age of 18.

BILL ANALYSIS:

15% of Earnings Held in Trust: Senate Bill 315 would require that the earnings of performers and athletes who are minors be protected by a mandatory set-aside of 15% of earnings to go into a trust account to be held until the minor reaches 18 years of age.

Court Approval of Contracts: Senate Bill 315 would provide for superior court approval of certain contracts entered into by a performer or athlete who is a minor. If the contract is approved, the minor would not be able to disaffirm the contract.

Applicability: The 15%-in-trust requirement and the court approval provisions of Senate Bill 315 apply to the following types of contracts entered into by a performer or athlete who is a minor:

- Contracts in which the minor is employed to perform one of several artistic or creative services.
- Contracts in which the artistic property of the minor, including the minor's likeness, is purchased, leased, or otherwise acquired.
- Contracts in which the minor is employed as a participant or player in a sport.
- Contracts in which the minor renders services as an extra through an agency which provides such performers for a fee.

Talent Agency Contracts: Senate Bill 315 would provide for superior court approval of contracts between an artist who is a minor and a talent agency. If the contract is approved, the minor would not be able to disaffirm the contract.

BACKGROUND: Senate Bill 315 is closely modeled on California's "Jackie Coogan Law", which is designed to protect the earnings of performers and athletes who are minors.

EFFECTIVE DATE: This act is effective when it becomes law.

*Note: Bill Gilkeson, Committee Counsel for Senate Judiciary I, substantially contributed to the preparation of this summary.

S315-SMSB-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 315
Second Edition Engrossed 4/16/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S315-PCS35294-SB-34

Short Title: Minor's Entertainment and Sports Contracts. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT RELATING TO CONTRACTS OF MINORS FOR ARTISTIC, CREATIVE, OR ATHLETIC SERVICES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 48A-1 through G.S. 48A-3 are designated as Article 1, "Age of Majority", of Chapter 48A of the General Statutes.

SECTION 2. Chapter 48A of the General Statutes is amended by adding a new Article to read:

"Article 2.

"Certain Contracts of Minors.

"**§ 48A-11. Applicability.**

This Article applies to any of the following contracts entered into between an unemancipated minor and any third party or parties:

(1) A contract pursuant to which a person is employed or agrees to render artistic or creative services, either directly or through a third party, including, but not limited to, a personal services corporation or loan-out company. As used in this Article, the term "artistic or creative services" includes, but is not limited to, services as an actor, actress, dancer, musician, comedian, singer, stunt person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer.

(2) A contract pursuant to which a person agrees to purchase, or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic properties, or use of a person's likeness, voice recording, performance, or story of or incidents in his or her life, either tangible or intangible, or any rights therein for use in motion pictures,

television, the production of sound recordings in any format now known or hereafter devised, the legitimate or living stage, or otherwise in the entertainment field.

(3) A contract pursuant to which a person is employed or agrees to render services as a participant or player in a sport.

(4) Where a minor renders services as an extra, background performer, or in a similar capacity, through an agency or service that provides one or more performers for a fee, such as a casting agency, the agency or service shall be considered the minor's employer for the purposes of this Article.

"**§ 48A-12. No disaffirmance if approved by superior court.**

(a) A contract, otherwise valid, of a type described in G.S. 48A-11, entered into during minority, cannot be disaffirmed on that ground either during the minority of the person entering into the contract, or at any time thereafter, if the contract has been approved by the superior court in any county in which the minor resides or is employed or in which any party to the contract has its principal office in this State for the transaction of business.

(b) Approval of the court may be given on petition of any party to the contract, after reasonable notice to all other parties to the contract as is fixed by the court, with opportunity to the other parties to appear and be heard.

(c) Approval of the court given under this section extends to the whole of the contract and all of its terms and provisions, including, but not limited to, any optional or conditional provisions contained in the contract for extension, prolongation, or termination of the term of the contract.

(d) For the purposes of any proceeding under this Article, a parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time of the proceeding shall be considered the minor's guardian ad litem for the proceeding, unless the court shall determine that appointment of a different individual as guardian ad litem is required in the best interests of the minor.

"**§ 48A-12.1. Copies of certain documents to be provided.**

A parent or guardian, as the case may be, entitled to the physical custody, care, and control of a minor, who enters into a contract of a type described in G.S. 48A-11 shall provide a certified copy of the minor's birth certificate indicating the minor's minority to the other party or parties to the contract and in addition, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian.

"**§ 48A-13. Financial safeguards in court orders approving contracts.**

(a) Notwithstanding any other statute, in an order approving a minor's contract of a type described in G.S. 48A-11, the court shall require that fifteen percent (15%) of the minor's gross earnings pursuant to the contract be set aside by the minor's employer in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14. The court may also require that more than fifteen percent (15%) of the minor's gross earnings be set aside in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14, upon

request of the minor's parent or legal guardian, or the minor, through his or her guardian ad litem.

(b) The court shall require that at least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time the order is issued be appointed as trustee of the funds ordered to be set aside in trust for the benefit of the minor, unless the court shall determine that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor.

(c) The trustee or trustees of the funds ordered to be set aside in trust shall promptly provide the minor's employer with a true and accurate photocopy of the trustee's statement pursuant to G.S. 48A-14(c).

(d) The minor's employer shall deposit or disburse the funds as required by the order within 15 business days of receiving the order and receiving the trustee's statement pursuant to G.S. 48A-14 and thereafter as funds might be received. Notwithstanding any other statute, pending receipt of the trustee's statement, the minor's employer shall hold for the benefit of the minor the percentage ordered by the court of the minor's gross earnings pursuant to the contract.

(e) When making the initial deposit of funds pursuant to the order, the minor's employer shall provide the financial institution with a copy of the order.

(f) Once the minor's employer deposits the set-aside funds pursuant to G.S. 48A-14, in trust, in an account or other savings plan, the minor's employer shall have no further obligation or duty to monitor or account for the funds. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to monitor and account for those funds once they have been deposited by the minor's employer. The trustee or trustees shall do an annual accounting of the funds held in trust, in an account or other savings plan, in accordance with Article 21 of Chapter 28A of the General Statutes.

(g) The court shall have continuing jurisdiction over the trust established pursuant to the order and may at any time, upon petition of the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees, on good cause shown, order that the trust be amended or terminated, notwithstanding the provisions of the declaration of trust. An order amending or terminating a trust may be made only after reasonable notice to the beneficiary, to the parent or guardian, if any, and to the trustee or trustees of the funds if the beneficiary is then a minor, with opportunity for all parties to appear and be heard.

(h) The trustee or trustees of the funds ordered to be set aside shall promptly notify the minor's employer in writing of any change in facts that affect the employer's obligation or ability to set aside the funds in accordance with the order, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order issued pursuant to subsection (g) of this section amending or terminating the employer's obligations under the original order. The written notification shall include the information set forth in subsection (c) of this section and shall be accompanied by a true and accurate photocopy of the new or amended order.

"**§ 48A-13.1. Financial safeguards when no court order.**

(a) Notwithstanding any other statute, for any minor's contract of a type described in G.S. 48A-11 that is not being submitted for approval by the court pursuant to G.S. 48A-12, or for which the court has issued a final order denying approval, fifteen percent (15%) of the minor's gross earnings pursuant to the contract shall be set aside by the minor's employer in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14. At least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor, shall be the trustee of the funds set aside for the benefit of the minor, unless the court, upon petition by the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees of the trust, shall determine that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor.

(b) A parent or guardian, as the case may be, entitled to the physical custody, care, and control of the minor shall promptly provide the minor's employer with a true and accurate photocopy of the trustee's statement pursuant to G.S. 48A-14(c) and in addition, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian.

(c) The minor's employer shall deposit fifteen percent (15%) of the minor's gross earnings pursuant to the contract within 15 business days of receiving the trustee's statement pursuant to G.S. 48A-14(c), or if the court denies approval of the contract, within 15 business days of receiving a final order denying approval of the contract and thereafter as funds might be received. Notwithstanding any other statute, pending receipt of the trustee's statement or the final court order, the minor's employer shall hold for the benefit of the minor the fifteen percent (15%) of the minor's gross earnings pursuant to the contract.

(d) Once the minor's employer deposits the set-aside funds in trust, in an account or other savings plan pursuant to G.S. 48A-14, the minor's employer shall have no further obligation or duty to monitor or account for the funds. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to monitor and account for those funds once they have been deposited by the minor's employer. The trustee or trustees shall do an annual accounting of the funds held in trust, in an account or other savings plan, in accordance with G.S. 28A-21-1, et seq.

(e) Upon petition of the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees of the trust, to the superior court in any county in which the minor resides or in which the trust is established, the court may at any time, on good cause shown, order that the trust be amended or terminated, notwithstanding the provisions of the declaration of trust. An order amending or terminating a trust may be made only after reasonable notice to the beneficiary, to the parent or guardian, if any, and to the trustee or trustees of the funds if the beneficiary is then a minor, with opportunity for all parties to appear and be heard.

(f) A parent or guardian, as the case may be, entitled to the physical custody, care, and control of the minor shall promptly notify the minor's employer in writing of any change in facts that affect the employer's obligation or ability to set aside funds for

the benefit of the minor in accordance with this section, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order issued pursuant to subsection (e) of this section amending or terminating the employer's obligations under this section. The written notification shall be accompanied by a true and accurate photocopy of the trustee's statement and attachments pursuant to subdivision (c) of G.S. 48A-14, or a true and accurate photocopy of the new or amended order.

(g) Where a parent or guardian, as the case may be, is entitled to the physical custody, care, and control of a minor who enters into a contract of a type described in G.S. 48A-11, the relationship between the parent or guardian, as the case may be, and the minor is a fiduciary relationship that is governed by the law of trusts, whether or not a court has issued a formal order to that effect. The parent or guardian, as the case may be, acting in his or her fiduciary relationship, shall, with the earnings and accumulations of the minor under the contract, pay all liabilities incurred by the minor under the contract, including, but not limited to, payments for taxes on all earnings, including taxes on the amounts set aside under this section or G.S. 48A-13 and payments for personal or professional services rendered to the minor or the business related to the contract. Nothing in this subsection shall be construed to alter any other existing responsibilities of a parent or legal guardian to provide for the support of a minor child.

(h) With respect to contracts pursuant to which a person is employed to render services as a musician, singer, songwriter, musical producer, or arranger only, "gross earnings" for purposes of this Article means the amount paid directly to the minor pursuant to the contract, including the payment of any advances to the minor pursuant to the contract, but excluding deductions to offset those advances or other expenses incurred by the employer pursuant to the contract.

"**§ 48A-14. Trust to be established.**

(a) The trustee or trustees shall establish a trust pursuant to this section at a bank, savings and loan institution, credit union, brokerage firm, or company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., unless a similar trust has been previously established, for the purpose of preserving for the benefit of the minor the portion of the minor's gross earnings pursuant to G.S. 48A-13(a) or pursuant to G.S. 48A-13.1(a). The trustee or trustees shall establish the trust pursuant to this section within seven business days after the minor's contract is signed by the minor and the employer.

(b) Except as otherwise provided in this section, prior to the date on which the beneficiary of the trust attains the age of 18 years or the issuance of a declaration of emancipation of the minor under Article 35 of Chapter 7B of the General Statutes, no withdrawal by the beneficiary or any other individual, individuals, entity, or entities may be made of funds on deposit in trust without written order of the superior court pursuant to G.S. 48A-13(g) or G.S. 48A-13.1(e). Upon reaching the age of 18 years, the beneficiary may withdraw the funds on deposit in trust only after providing a certified copy of the beneficiary's birth certificate to the financial institution where the trust is located.

(c) The trustee or trustees shall, within 10 business days after the minor's contract is signed by the minor and the employer, prepare a written statement under penalty of perjury that shall include the name, address, and telephone number of the financial institution, the name of the account, the number of the account, the name of the minor beneficiary, the name of the trustee or trustees of the account, and any additional information needed by the minor's employer to deposit into the account the portion of the minor's gross earnings prescribed by G.S. 48A-13(a) or G.S. 48A-13.1(a). The trustee or trustees shall attach to the written statement a true and accurate photocopy of any information received from the financial institution confirming the creation of the account, such as an account agreement, account terms, passbook, or other similar writings.

(d) If the trust is established in the United States, it shall be established either with a financial institution that is and remains insured at all times by the Federal Deposit Insurance Corporation, the Securities Investor Protection Corporation, or the National Credit Union Share Insurance Fund or their respective successors, or with a company that is and remains registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq. If the trust is established outside the United States, the financial institution shall be an international banking corporation, as defined in G.S. 53-232.2. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to ensure that the funds remain in trust, in an account or other savings plan, in a financial institution insured in accordance with this section, or with a company that is and remains registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., as authorized by this section.

(e) Upon application by the trustee or trustees to the financial institution or company where the trust is held, the trust funds may be handled by the trustee or trustees in any of the following methods:

(1) The trustee or trustees may transfer funds to another account or other savings plan at the same financial institution or company, provided that the funds transferred shall continue to be held in trust and subject to this section.

(2) The trustee or trustees may transfer funds to another financial institution or company, provided that the funds transferred shall continue to be held in trust and subject to this Article and that the trustee or trustees have provided written notification to the financial institution or company to which the funds will be transferred that the funds are subject to this section and written notice of the requirements of this Article.

(3) The trustee or trustees may use all or a part of the funds to purchase, in the name of and for the benefit of the minor:

a. Investment funds offered by a company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., provided that if the underlying investments are equity securities, the investment fund is a broad-based index fund or invests broadly across the domestic or a foreign regional economy, is

not a sector fund, and has assets under management of at least two hundred fifty million dollars ($250,000,000); or

b. Government securities and bonds, certificates of deposit, money market instruments, money market accounts, or mutual funds investing solely in those government securities and bonds, certificates, instruments, and accounts that are available at the financial institution where the trust fund or other savings plan is held, provided that the funds remain in trust at a financial institution insured by the Federal Deposit Insurance Corporation, the Securities Investor Protection Corporation, or the National Credit Union Share Insurance Fund if within the United States or maintained in an international banking corporation, as defined in G.S. 53-232.2, if not within the United States; provided that those purchases have a maturity date on or before the date upon which the minor will attain the age of 18 years, and provided further that any proceeds accruing from those purchases be redeposited into that account or accounts or used to further purchase any of those or similar securities, bonds, certificates, instruments, funds, or accounts.

"**§ 48A-15. Talent agency contracts.**

(a) As used in this Article, the term 'talent agency' means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

(b) As used in this Article, the term 'artists' means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises.

"**§ 48A-16. Disaffirmance of talent agency contracts.**

A minor cannot disaffirm a contract, otherwise valid, entered into during minority, either during the actual minority of the minor entering into the contract or at any time thereafter, with a talent agency as defined in G.S. 48A-15, to secure engagements to render artistic or creative services in motion pictures, television, the production of phonograph records, the legitimate or living stage, or otherwise in the entertainment field including, but without being limited to, services as an actor, actress, dancer, musician, comedian, singer, or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor, or designer, where the contract has been approved by the superior court of the county where such minor resides or is employed. This approval may be given by the superior court on the petition of either party to the contract after reasonable notice to the other party thereto as may be fixed by said court, with opportunity to the other party to appear and be heard."

SECTION 3. This act is effective when it becomes law and applies to contracts entered into on or after January 1, 2004.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 315

Second Edition Engrossed 4/16/03

Short Title:	Minor's Entertainment Contracts.	(Public)
Sponsors:	Senator Horton.	
Referred to:	Judiciary I.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT RELATING TO CONTRACTS OF MINORS FOR ARTISTIC OR CREATIVE SERVICES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 48A of the General Statutes is amended by designating the existing Chapter as Article 1, to be entitled "Age of Majority", and by adding a new Article to read:

"Article 2.

"Certain Contracts of Minors.

"**§ 48A-11. Applicability.**

This Article applies to the following contracts entered into between an unemancipated minor and any third party or parties on or after January 1, 2004:

(1) A contract pursuant to which a person is employed or agrees to render artistic or creative services, either directly or through a third party, including, but not limited to, a personal services corporation (loan-out company). "Artistic or creative services" includes, but is not limited to, services as an actor, actress, dancer, musician, comedian, singer, stunt person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer.

(2) A contract pursuant to which a person agrees to purchase, or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic properties, or use of a person's likeness, voice recording, performance, or story of or incidents in his or her life, either tangible or intangible, or any rights therein for use in motion pictures, television, the production of sound recordings in any format now known or hereafter devised, the legitimate or living stage, or otherwise in the entertainment field.

(3) A contract pursuant to which a person is employed or agrees to render services as a participant or player in a sport.

(4) Where a minor renders services as an extra, background performer, or in a similar capacity, through an agency or service that provides one or more performers for a fee (casting agency), the agency or service shall be considered the minor's employer for the purposes of this Article.

"**§ 48A-12. No disaffirmance if approved by superior court.**

(a) A contract, otherwise valid, of a type described in G.S. 48A-11, entered into during minority, cannot be disaffirmed on that ground either during the minority of the person entering into the contract, or at any time thereafter, if the contract has been approved by the superior court in any county in which the minor resides or is employed or in which any party to the contract has its principal office in this State for the transaction of business.

(b) Approval of the court may be given on petition of any party to the contract, after such reasonable notice to all other parties to the contract as is fixed by the court, with opportunity to such other parties to appear and be heard.

(c) Approval of the court given under this section extends to the whole of the contract and all of its terms and provisions, including, but not limited to, any optional or conditional provisions contained in the contract for extension, prolongation, or termination of the term of the contract.

(d) For the purposes of any proceeding under this Article, a parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time of the proceeding shall be considered the minor's guardian ad litem for the proceeding, unless the court shall determine that appointment of a different individual as guardian ad litem is required in the best interests of the minor.

"**§ 48A-12.1. Copies of certain documents to be provided.**

A parent or guardian, as the case may be, entitled to the physical custody, care, and control of a minor who enters into a contract of a type described in G.S. 48A-11 shall provide a certified copy of the minor's birth certificate indicating the minor's minority to the other party or parties to the contract and in addition, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian.

"**§ 48A-13. Financial safeguards in court orders approving contracts.**

(a) Notwithstanding any other statute, in an order approving a minor's contract of a type described in G.S. 48A-11, the court shall require that fifteen percent (15%) of the minor's gross earnings pursuant to the contract be set aside by the minor's employer in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14. The court may also require that more than fifteen percent (15%) of the minor's gross earnings be set aside in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14, upon request of the minor's parent or legal guardian, or the minor, through his or her guardian ad litem.

(b) The court shall require that at least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time the

order is issued be appointed as trustee of the funds ordered to be set aside in trust for the benefit of the minor, unless the court shall determine that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor.

(c) The trustee or trustees of the funds ordered to be set aside in trust shall promptly provide the minor's employer with a true and accurate photocopy of the trustee's statement pursuant to G.S. 48A-14(c).

(d) The minor's employer shall deposit or disburse the funds as required by the order within 15 business days of receiving the order and receiving the trustee's statement pursuant to G.S. 48A-14 and thereafter as funds might be received. Notwithstanding any other statute, pending receipt of the trustee's statement, the minor's employer shall hold for the benefit of the minor the percentage ordered by the court of the minor's gross earnings pursuant to the contract.

(e) When making the initial deposit of funds pursuant to the order, the minor's employer shall provide the financial institution with a copy of the order.

(f) Once the minor's employer deposits the set-aside funds pursuant to G.S. 48A-14, in trust, in an account or other savings plan, the minor's employer shall have no further obligation or duty to monitor or account for the funds. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to monitor and account for those funds once they have been deposited by the minor's employer. The trustee or trustees shall do an annual accounting of the funds held in trust, in an account or other savings plan, in accordance with G.S. 28A-21-1 et seq.

(g) The court shall have continuing jurisdiction over the trust established pursuant to the order and may at any time, upon petition of the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees, on good cause shown, order that the trust be amended or terminated, notwithstanding the provisions of the declaration of trust. An order amending or terminating a trust may be made only after reasonable notice to the beneficiary, to the parent or guardian, if any, and to the trustee or trustees of the funds if the beneficiary is then a minor, with opportunity for all parties to appear and be heard.

(h) The trustee or trustees of the funds ordered to be set aside shall promptly notify the minor's employer in writing of any change in facts that affect the employer's obligation or ability to set aside the funds in accordance with the order, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order issued pursuant to subsection (g) of this section amending or terminating the employer's obligations under the original order. The written notification shall include the information set forth in subsection (c) of this section and shall be accompanied by a true and accurate photocopy of the new or amended order.

"**§ 48A-13.1. Financial safeguards when no court order.**

(a) Notwithstanding any other statute, for any minor's contract of a type described in G.S. 48A-11 that is not being submitted for approval by the court pursuant to G.S. 48A-12, or for which the court has issued a final order denying approval, fifteen percent (15%) of the minor's gross earnings pursuant to the contract shall be set aside by

the minor's employer in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with G.S. 48A-14. At least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor, shall be the trustee of the funds set aside for the benefit of the minor, unless the court, upon petition by the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees of the trust, shall determine that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor.

(b) A parent or guardian, as the case may be, entitled to the physical custody, care, and control of the minor shall promptly provide the minor's employer with a true and accurate photocopy of the trustee's statement pursuant to G.S. 48A-14(c) and in addition, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian.

(c) The minor's employer shall deposit fifteen percent (15%) of the minor's gross earnings pursuant to the contract within 15 business days of receiving the trustee's statement pursuant to G.S. 48A-14(c), or if the court denies approval of the contract, within 15 business days of receiving a final order denying approval of the contract and thereafter as funds might be received. Notwithstanding any other statute, pending receipt of the trustee's statement or the final court order, the minor's employer shall hold for the benefit of the minor the fifteen percent (15%) of the minor's gross earnings pursuant to the contract.

(d) Once the minor's employer deposits the set-aside funds in trust, in an account or other savings plan pursuant to G.S. 48A-14, the minor's employer shall have no further obligation or duty to monitor or account for the funds. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to monitor and account for those funds once they have been deposited by the minor's employer. The trustee or trustees shall do an annual accounting of the funds held in trust, in an account or other savings plan, in accordance with G.S. 28A-21-1 et seq.

(e) Upon petition of the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees of the trust, to the superior court in any county in which the minor resides or in which the trust is established, the court may at any time, on good cause shown, order that the trust be amended or terminated, notwithstanding the provisions of the declaration of trust. An order amending or terminating a trust may be made only after reasonable notice to the beneficiary, to the parent or guardian, if any, and to the trustee or trustees of the funds if the beneficiary is then a minor, with opportunity for all parties to appear and be heard.

(f) A parent or guardian, as the case may be, entitled to the physical custody, care, and control of the minor shall promptly notify the minor's employer in writing of any change in facts that affect the employer's obligation or ability to set aside funds for the benefit of the minor in accordance with this section, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order issued pursuant to subsection (e) of this section amending or terminating the employer's obligations under this section. The written notification shall be accompanied

by a true and accurate photocopy of the trustee's statement and attachments pursuant to subdivision (c) of G.S. 48A-14, or a true and accurate photocopy of the new or amended order.

(g) Where a parent or guardian, as the case may be, is entitled to the physical custody, care, and control of a minor who enters into a contract of a type described in G.S. 48A-11, the relationship between the parent or guardian, as the case may be, and the minor is a fiduciary relationship that is governed by the law of trusts, whether or not a court has issued a formal order to that effect. The parent or guardian, as the case may be, acting in his or her fiduciary relationship, shall, with the earnings and accumulations of the minor under the contract, pay all liabilities incurred by the minor under the contract, including, but not limited to, payments for taxes on all earnings, including taxes on the amounts set aside under this section or G.S. 48A-13 and payments for personal or professional services rendered to the minor or the business related to the contract. Nothing in this subsection shall be construed to alter any other existing responsibilities of a parent or legal guardian to provide for the support of a minor child.

(h) With respect to contracts pursuant to which a person is employed to render services as a musician, singer, songwriter, musical producer, or arranger only, "gross earnings" for purposes of this Article means the amount paid directly to the minor pursuant to the contract, including the payment of any advances to the minor pursuant to the contract, but excluding deductions to offset those advances or other expenses incurred by the employer pursuant to the contract.

"**§ 48A-14. Trust to be established.**

(a) The trustee or trustees shall establish a trust pursuant to this section at a bank, savings and loan institution, credit union, brokerage firm, or company registered under the Investment Company Act of 1940, unless a similar trust has been previously established, for the purpose of preserving for the benefit of the minor the portion of the minor's gross earnings pursuant to G.S. 48A-13(a) or pursuant to G.S. 48A-13.1(a). The trustee or trustees shall establish the trust pursuant to this section within seven business days after the minor's contract is signed by the minor and the employer.

(b) Except as otherwise provided in this section, prior to the date on which the beneficiary of the trust attains the age of 18 years or the issuance of a declaration of emancipation of the minor under G.S. 7A-3500 et seq., no withdrawal by the beneficiary or any other individual, individuals, entity, or entities may be made of funds on deposit in trust without written order of the superior court pursuant to G.S. 48A-13(g) or G.S. 48A-13.1(e). Upon reaching the age of 18 years, the beneficiary may withdraw the funds on deposit in trust only after providing a certified copy of the beneficiary's birth certificate to the financial institution where the trust is located.

(c) The trustee or trustees shall, within 10 business days after the minor's contract is signed by the minor and the employer, prepare a written statement under penalty of perjury that shall include the name, address, and telephone number of the financial institution, the name of the account, the number of the account, the name of the minor beneficiary, the name of the trustee or trustees of the account, and any additional information needed by the minor's employer to deposit into the account the portion of the minor's gross earnings prescribed by G.S. 48A-13(a) or G.S. 48A-13.1(a). The

trustee or trustees shall attach to the written statement a true and accurate photocopy of any information received from the financial institution confirming the creation of the account, such as an account agreement, account terms, passbook, or other similar writings.

(d) If the trust is established in the United States, it shall be established either with a financial institution that is and remains insured at all times by the Federal Deposit Insurance Corporation (FDIC), the Securities Investor Protection Corporation (SIPC), or the National Credit Union Share Insurance Fund (NCUSIF) or their respective successors, or with a company that is and remains registered under the Investment Company Act of 1940. If the trust is established outside the United States, the financial institution shall be a first-class international bank. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to ensure that the funds remain in trust, in an account or other savings plan, in a financial institution insured in accordance with this section, or with a company that is and remains registered under the Investment Company Act of 1940 as authorized by this section.

(e) Upon application by the trustee or trustees to the financial institution or company where the trust is held, the trust funds may be handled by the trustee or trustees in any of the following methods:

(1) The trustee or trustees may transfer funds to another account or other savings plan at the same financial institution or company, provided that the funds transferred shall continue to be held in trust and subject to this section.

(2) The trustee or trustees may transfer funds to another financial institution or company, provided that the funds transferred shall continue to be held in trust and subject to this Article and that the trustee or trustees have provided written notification to the financial institution or company to which the funds will be transferred that the funds are subject to this section and written notice of the requirements of this Article.

(3) The trustee or trustees may use all or a part of the funds to purchase, in the name of and for the benefit of the minor:

a. Investment funds offered by a company registered under the Investment Company Act of 1940, provided that if the underlying investments are equity securities, the investment fund is a broad-based index fund or invests broadly across the domestic or a foreign regional economy, is not a sector fund, and has assets under management of at least two hundred fifty million dollars ($250,000,000); or

b. Government securities and bonds, certificates of deposit, money market instruments, money market accounts, or mutual funds investing solely in those government securities and bonds, certificates, instruments, and accounts that are available at the financial institution where the trust fund or other savings plan is

held, provided that the funds remain in trust at a financial institution insured by the FDIC, SIPC, or NCUSIF if within the United States or maintained in a first-class international bank if not within the United States; provided that those purchases have a maturity date on or before the date upon which the minor will attain the age of 18 years, and provided further that any proceeds accruing from those purchases be redeposited into that account or accounts or used to further purchase any of those or similar securities, bonds, certificates, instruments, funds, or accounts.

"**§ 48A-15. Talent agency contracts.**

(a) As used in this Article, the term 'talent agency' means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

(b) As used in this Article, the term 'artists' means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises.

"**§ 48A-16. Disaffirmance of talent agency contracts.**

A minor cannot disaffirm a contract, otherwise valid, entered into during minority, either during the actual minority of the minor entering into such contract or at any time thereafter, with a talent agency as defined in G.S. 48A-15, to secure engagements to render artistic or creative services in motion pictures, television, the production of phonograph records, the legitimate or living stage, or otherwise in the entertainment field including, but without being limited to, services as an actor, actress, dancer, musician, comedian, singer, or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor, or designer, where the contract has been approved by the superior court of the county where such minor resides or is employed.

Such approval may be given by the superior court on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 647
Judiciary I Committee Substitute Adopted 4/14/03

Short Title: Self-Insured Localities. (Public)

Sponsors:

Referred to:

April 1, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE STATEWIDE AN ACT CURRENTLY APPLICABLE TO MECKLENBURG AND CATAWBA COUNTIES AND CHARLOTTE AND RALEIGH THAT DEEMS THE CREATION OF A SELF-FUNDED RISK PROGRAM AS THE PURCHASE OF INSURANCE FOR THE PURPOSE OF WAIVING GOVERNMENTAL IMMUNITY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 160A-485(a) reads as rewritten:

"(a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance. If a city uses a funded reserve instead of purchasing insurance against liability for wrongful death, negligence, or intentional damage to personal property, or absolute liability for damage to person or property caused by an act or omission of the city or any of its officers, agents, or employees acting within the scope of their authority and the course of their employment, the city council may adopt a resolution that deems the creation of a funded reserve to be the same as the purchase of insurance under this section. Adoption of such a resolution waives the city's governmental immunity only to the extent specified in the council's resolution, but in no event greater than funds available in the funded reserve for the payment of claims."

SECTION 2. G.S. 153A-435(a) reads as rewritten:

"(a) A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused

by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.

Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

If a county uses a funded reserve instead of purchasing insurance against liability for wrongful death, negligence, or intentional damage to personal property, or absolute liability for damage to person or property caused by an act or omission of the county or any of its officers, agents, or employees acting within the scope of their authority and the course of their employment, the county board of commissioners may adopt a resolution that deems the creation of a funded reserve to be the same as the purchase of insurance under this section. Adoption of such a resolution waives the county's governmental immunity only to the extent specified in the board's resolution, but in no event greater than funds available in the funded reserve for the payment of claims."

SECTION 3. Section 1 of Chapter 980 of the 1988 Session Laws and Section 2 of S.L. 1998-200, as amended by S.L. 2002-79, are repealed, but any resolution adopted under those sections and still effective on the effective date of this act shall continue to be valid as if they were adopted under G.S. 153A-435(a) or G.S. 160A-485(a) as amended by this act.

SECTION 4. This act is effective when it becomes law.

SENATE BILL 647:
Self-Insured Localities.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Gulley
Date:	May 20, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Second Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 647 authorizes cities and counties to waive sovereign immunity from liability claims through the creation of self-funded reserve funds in lieu of waiving sovereign immunity by the purchase of liability insurance.***

CURRENT LAW: Cities and counties have sovereign immunity from liability claims arising out of the performance of governmental functions unless that immunity is waived by the purchase of liability insurance or participation in a local government risk pool. Sovereign immunity is waived to the extent of insurance coverage. Mecklenburg and Catawba Counties and the Cities of Charlotte and Raleigh have authority to waive sovereign immunity by the creation of a self-funded reserve. The terms and conditions of the funded reserve act as liability insurance for the purpose of waiving sovereign immunity.

BILL ANALYSIS: Senate Bill 647 would authorize cities and counties to waive sovereign immunity for negligence claims through the creation of a funded reserve as is currently permitted for Charlotte and Raleigh. The reserve must be created by resolution adopted by the city council or the county commissioners and must set out the limit of liability that is further limited by the amount of funds available in the funded reserve.

Section 1 of the bill grants this authority to cities. Section 2 grants this authority to counties.

Section 3 repeals the local acts that apply to Catawba and Mecklenburg Counties and to Charlotte and Raleigh but allows their existing resolutions to continue in effect under this new law.

EFFECTIVE DATE: The bill is effective when it becomes law.

BACKGROUND: Larger local governments have found that they can self administer many of their risks through in-house personnel at a lower cost than going through an insurance company that adds its administrative cost to the risk reserve.

O. Walker Reagan, Counsel to the Senate Judiciary I Committee, is the original author of this summary.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs. May 22, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Scott Mooney	AP
Andy Romanet	NCLM
Lu-Ann Cole	NCPA
Cynthia Jerbotka	SHCRD
Robert E. Cheek	NCPA
Sally Cameron	NC Psychological Assoc
Ilana Starn	Rep. Starn
Mary E. Davis	Prohibit Reberthing
David Davis	Prohibit Reberthing
Fran Cockman	NC statewatch
CHRIS MEARS	REP. JOE. KISER

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs. May 22, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Stacia McKenney	NC DHHS
Dick Taylor	NCACC
Jim Blackburn	NC Association of County Commissioners
WIB Gulley	NC Senate
Tom Bean	NC Enviro Def
John Rust	NCFPC
Xiaochun Qiao	RGP Stam

House Judiciary II

Committee

Minutes

May 27, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Sen. Thomas to explain **SB 692** (Terror Response Plans).

Sen. Thomas explained that **SB 692** would create exceptions to the public records and open meetings laws for certain records and meetings related to terrorist activity. He said he had introduced the bill at the request of the Department of Crime Control and Public Safety. *(See Bill Analysis – Attachment I)*

Rep. Ellis was concerned about how this bill would relate to public schools.

Rep. Walend moved to give the bill a favorable report and the motion passed.

Rep. Nesbitt told the Committee that he had requested that **SB 439** be re-referred to Judiciary II because the Republican Caucus had expressed certain concerns about it that he did not understand. However, he felt that the section having to do with the military needed clarification.

He referred to language on page 7 of the bill, lines 5-7.

Commissioner Harry Payne, from the Employment Security Commission was recognized. He agreed with Rep. Nesbitt about the need for clarification regarding the section dealing with transfers in the Military and proposed that the bill be amended.

Rep. Ellis was concerned about Section 3, which dealt with "broader exemption from disqualification for domestic violence, sexual offense, stalking." He wondered whether any information given to the ESC was admissible in court. Commissioner Payne said it was not.

Rep. Ellis asked if a spouse was able to come to the ESC hearing and make some defense. Is there due process? Rep. Nesbitt said that it was his understanding that the victim of the domestic violence would have to get a 50B restraining order to be able to prove it. He said this section simply allows other evidence that a person needed to leave their employment to flee a domestic violence situation.

Rep. Ellis was concerned about the hearing process at the ESC and the lack of security. "For the sake of $268", he said, "this may subject the spouse to additional risk by bringing them to the ESC hearing."

Commissioner Payne said that currently they would have to go through the Chapter 50B hearing, but their concern is for someone who has been displaced from work.

Rep. Nesbitt said that this section just says that this is an excusable reason for leaving employment, non-chargeable to the employer.

Rep. Ellis disagreed with the ability to make a claim under those circumstances.

Rep. Nesbitt said that it was his sense that the Employment Security Trust Fund was created to provide for displaced workers. That wasn't defined, in his mind, to be "just" those who were laid off by their employer. The General Assembly has determined a number of various reasons that were appropriate for people to leave work besides being laid off. The domestic violence is "old law" and **SB 439** is merely amending that section. Rep. Nesbitt did not see how this bill dramatically changes the unemployment laws. He said the provision on part-time work will actually save money.

Rep. Ellis had further concerns about expansion of the ability to claim and the possible increase the employer pays into the Fund.

Rep. Nesbitt said **SB 439** was a revenue-neutral bill.

Rep. Bordsen asked Rep. Ellis which sections of the bill he opposed. He said he opposed the changes in Sections 1, 3, and 6.

Rep. Bordsen said that at the appropriate time, she would like to move for a favorable report on this bill.

Rep. Nesbitt read a proposed amendment relating to the military section. *(See Attachment II).*

Rep. Moore said he agreed with the amendment.

Leslie Bevacqua, representing the North Carolina Citizens for Business and Industry, was recognized. She said it was clear to her that several years ago the General Assembly made the decision about how to treat domestic violence with regard to unemployment compensation. She said that she was not qualified to tell the committee what the criteria should be with regard to "how" treat domestic violence. She said that when the original provision was added regarding domestic violence, NCCBI was okay with that language. With regard to any additional criteria, that is some that the experts in the field should be the ones to weigh in on that. With regard to the military section, she didn't feel that military persons should be treated differently that any other.

Commissioner Payne said that there is some situations where a spouse is deployed and his wife goes home to live with "mother." A person in that situation would not be eligible to claim unemployment.

Perri Morgan with the National Federation of Independent Business owners was recognized. She said she had concerns about the expanding employer liability issue. She said the ESC wasn't qualified to make diagnoses in domestic violence situations and while she had sympathy for victims of domestic violence, it seemed reasonable to her that a person in that situation would get a restraining order, to protect herself and other employees in her workplace. She said employers in North Carolina were seeing a "huge" increase in unemployment insurance this year, and this bill is another broadening of what unemployment insurance is going to be used for. She said the "road needs to stop. Employers just can't afford it."

Rep. Nesbitt asked Ms. Morgan if she understood that this bill was revenue-neutral, and that these things (in **SB 439**) are not charged to the employer.

Ms. Morgan said it is charged to the Trust fund and in a broader sense it is charged to the employer.

Rep. Nesbitt said that the provision allowing for part-time employment more than made up for any costs to the employer.

He asked Ms. Morgan if she had any basis for saying what the Employment Security Commission was created for. She said she wasn't a competent witness, but employers comply everyday about increase in unemployment premiums this year.

Commissioner Payne reminded the Committee that the Unemployment premium in North Carolina is the 3rd lowest rate in the country, in a large measure because of the speed to which they get people back to work. If North Carolina was at the national average for getting people back to work it would cost an additional $300 million a year. He said they were very sensitive to the costs to employers.

The was further discussion about the domestic violence issue in the bill.

Rep. Walend said that she keeps hearing that this bill is revenue-neutral and asked if there was a fiscal note.

Rep. Nesbitt said, according to the fiscal note, Section 1 costs about $12 million, Section 3 or the bill costs are undeterminable and not addressed in the fiscal note because it was thought that this would have no effect, Section 5, according to information from ESC, would save $11.3 million, and Section 6 of the bill is estimated to cost $539,000.

Rep. Ellis thanked the chairman for allowing the debate on **SB 439**.

Rep. Moore moved to adopt the amendment proposed earlier by Rep. Nesbitt and his motion passed.

Rep. Bordsen made a motion to incorporate the amendment and bill into a new committee substitute, give that bill a favorable report, the Senate Committee Substitute an unfavorable report.

Rep. Ellis continued to have concerns about the domestic violence issue and asked to be recorded as voting "No" on the bill.

Rep. Bordsen's motion was again before the Committee and the motion passed.

The meeting adjourned at 10:50 p.m.

Rep. Martin Nesbitt
Chairman

Janette W. Lee
Committee Assistant

SENATE BILL 692: Terror Response Plans.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Thomas
Date:	May 27, 2003	**Summary by:**	Jeff Hudson
Version:	Second Edition		Committee Counsel

SUMMARY: ***Senate Bill 692 would create exceptions to the public records and open meetings laws for certain records and meetings related to terrorist activity.***

CURRENT LAW AND BILL ANALYSIS:

Public Records:

Under current law, public records are all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. A person may obtain copies of public records for free or for the cost of reproducing the public records. Certain information, however, is exempted from the public records law and is not available to the public. This exempted information includes confidential communications between legal counsel and a public board, State tax information, local government service billing information, records of criminal investigations, records of criminal intelligence information, emergency response plans, and public security plans.

Senate Bill 692 would exempt from the public records law plans to prevent or respond to terrorist activity, to the extent the records contain vulnerability and risk assessments, potential targets, specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of government personnel or the public or the security of any government facility, building, structure, or information storage system.

Open Meetings:

Under current law, an official meeting of a public body must be open to the public and any person is entitled to attend. A public body may, however, hold a closed session and exclude the public for certain purposes. Many of these purposes are set out in Section 2 of the bill. (The definitions of "public body" and "official meeting", as defined in G.S. 143-318.10, are attached.)

Senate Bill 692 would authorize a public body to hold a closed session and exclude the public when the closed session is required to discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity and to receive briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken or to be taken to respond to the terrorist activity.

EFFECTIVE DATE: This act is effective when it becomes law.

§ 143-318.10. All official meetings of public bodies open to the public.

(a) Except as provided in G.S. 143-318.11, 143-318.14A, 143-318.15, and 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function. In addition, "public body" means the governing board of a "public hospital" as defined in G.S. 159-39 and the governing board of any nonprofit corporation to which a hospital facility has been sold or conveyed pursuant to G.S. 131E-8, any subsidiary of such nonprofit corporation, and any nonprofit corporation owning the corporation to which the hospital facility has been sold or conveyed.

(c) "Public body" does not include (i) a meeting solely among the professional staff of a public body, or (ii) the medical staff of a public hospital or the medical staff of a hospital that has been sold or conveyed pursuant to G.S. 131E-8.

(d) "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.

(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 692

Judiciary II Committee Substitute Adopted 4/24/03

Short Title: Terror Response Plans. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT CERTAIN INFORMATION CONCERNING PLANS TO RESPOND TO TERRORIST ACTIVITY ARE NOT SUBJECT TO THE PUBLIC RECORDS OR OPEN MEETINGS LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 132-1.7 reads as rewritten:

"**§ 132-1.7. Sensitive public security information.**

(a) Public records, as defined in G.S. 132-1, shall not include information containing specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities.

(b) Public records as defined in G.S. 132-1 do not include plans to prevent or respond to terrorist activity, to the extent such records set forth vulnerability and risk assessments, potential targets, specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public or the security of any governmental facility, building, structure, or information storage system.

(c) Information relating to the general adoption of public security plans and arrangements, and budgetary information concerning the authorization or expenditure of public funds to implement public security plans and arrangements, or for the construction, renovation, or repair of public buildings and infrastructure facilities shall be public records."

SECTION 2. G.S. 143-318.11(a) reads as rewritten:

"(a) Permitted Purposes. – It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

(1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or

not considered a public record within the meaning of Chapter 132 of the General Statutes.

(2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

(4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.

(5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.

(6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal

by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.

(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.

(9) To discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity and to receive briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken or to be taken to respond to such activity."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 3

SENATE BILL 439

Judiciary I Committee Substitute Adopted 4/9/03
Third Edition Engrossed 4/16/03

Short Title: Omnibus ESC Changes. (Public)

Sponsors:

Referred to:

March 17, 2003

A BILL TO BE ENTITLED

AN ACT MAKING OMNIBUS CHANGES TO THE EMPLOYMENT SECURITY LAWS OF NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 96-14(1) reads as rewritten:

"(1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer.

Where an individual leaves work due solely to a disability incurred or other health condition, whether or not related to the work, he shall not be disqualified for benefits if the individual shows:

a. That, at the time of leaving, an adequate disability or health ~~condition,~~ condition of the employee, of a minor child who is in the legally recognized custody of the individual, of an aged or disabled parent of the individual, or of a disabled member of the individual's immediate family, either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee from doing other alternative work offered by the employer which pays the minimum wage or eighty-five percent (85%) of the individual's regular wage, whichever is greater; and

b. That, at a reasonable time prior to leaving, the individual gave the employer notice of ~~his~~ the disability or health condition.

Where an employee is notified by the employer that such employee will be separated from employment on some future date and the

employee leaves work prior to this date because of the impending separation, the employee shall be deemed to have left work voluntarily and the leaving shall be without good cause attributable to the employer. However, if the employee shows to the satisfaction of the Commission that it was impracticable or unduly burdensome for the employee to work until the announced separation date, the permanent disqualification imposed for leaving work without good cause attributable to the employer may be reduced to the greater of four weeks or the period running from the beginning of the week during which the claim for benefits was made until the end of the week of the announced separation date.

An employer's placing an individual on a bona fide disciplinary suspension of 10 or fewer consecutive calendar days shall not constitute good cause for leaving work."

SECTION 2. G.S. 96-9(c)(2) reads as rewritten:

"(2) Charging of benefit payments. –

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12.01G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant's period of employment was 100 days or less; (v) separations made disqualifying under G.S. 96-14(2b) and (6a); (vi) separation due to leaving for disability or health condition; or (vii) separation of claimant solely as the result of an undue family ~~hardship;~~ hardship shall not be charged to the account of an employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding

any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer for benefit years ending on or before June 30, 1992, where benefits were paid as a result of a discharge due directly to the reemployment of a veteran mandated by the Veteran's Reemployment Rights Law, 38 USCA § 2021, et seq.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding. Provided, an overpayment of benefits paid shall be established in order to provide for the waiting period required by G.S. 96-13(c).

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):

1. The benefits are paid for unemployment due directly to a major natural disaster, and
2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e. 1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be

charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service."

SECTION 3. G.S. 96-14(1f) reads as rewritten:

"(1f) For the purposes of this Chapter, any claimant's leaving work, or discharge, if the claimant has been adjudged an aggrieved party as set forth by Chapter 50B of the General Statutes or there is evidence of domestic violence, sexual offense, or stalking, or the claimant has been granted program participant status pursuant to G.S. 15C-4 as the result of domestic violence committed upon the claimant or upon a minor child with or in the custody of the claimant by a person who has or has had a familial relationship with the claimant or minor child, shall constitute good cause for leaving work. Benefits paid on the basis of this section shall be noncharged. Evidence of domestic violence, sexual offense, or stalking may include: (i) law enforcement, court, or federal agency records or files; (ii) documentation from a domestic violence or sexual assault program if the claimant is alleged to be a victim of domestic violence or sexual assault; and (iii) documentation from a religious, medical, or other professional from whom the claimant has sought assistance in dealing with the alleged domestic violence, sexual abuse, or stalking."

SECTION 4. G.S. 96-9(d)(1) reads as rewritten:

"(1) a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less

than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1. Provided, however, no employer granted or in reimbursement status will be allowed refund of any previous balances used in a transfer to reimbursement status.

d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:

1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;

2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;
3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review."

SECTION 5. G.S. 96-13(a) is amended by adding a new subdivision to read:

"(6) An unemployed individual shall not be disqualified for eligibility for unemployment compensation benefits solely on the basis that the individual is only available for part-time work. If an individual restricts his or her eligibility to part-time work, the individual may be considered able and available to work if it is determined that all the following conditions exist:

a. The claimant's monetary eligibility is based predominately on wages from part-time work.
b. The claimant is actively seeking and is willing to accept work under essentially the same conditions as existed while the claimant's reported wages were accrued.
c. The claimant imposes no other restriction and is in a labor market in which a reasonable demand exists for part-time service.

This subdivision shall not be construed to amend subdivision (3) of this subsection as it applies to students or G.S. 96-16 as it applies to seasonal workers."

SECTION 6. G.S. 96-14(1d) reads as rewritten:

"(1d) For the purposes of this Chapter, any claimant leaving work to accompany the claimant's spouse to a new place of residence where that spouse has secured work in a location that is too far removed for

the claimant reasonably to continue his or her work shall serve a time certain disqualification for benefits for a period of ~~five~~ two weeks beginning the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits. Notwithstanding the other provisions of this subdivision, leaving work because a spouse has been reassigned from one military assignment to another shall be deemed good cause for leaving work."

SECTION 7. This act is effective when it becomes law.

SENATE BILL 439:
Omnibus ESC Changes.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Clodfelter
Date:	May 27, 2003	**Summary by:**	Jeff Hudson*
Version:	Third Edition		Committee Counsel

SUMMARY: ***Senate Bill 439 would make several changes to the unemployment insurance law as requested by the Employment Security Commission.***

BILL ANALYSIS:

Section 1. Health/Disability in Family.

Under current law, an individual is disqualified from unemployment insurance benefits if the individual left work without good cause attributable to the employer. An individual is not disqualified if the individual left work due solely to a disability or health condition. The current law is written as if the disability or health condition must be the individual's own. Section 1 would amend the current law to remove the disqualification from unemployment insurance benefits if the disability or health condition were that of a minor child in the individual's custody, an aged or disabled parent of the individual, or any member of the individual's immediate family. Immediate family means an individual's wife, husband, mother, father, brother, sister, son, daughter, grandmother, grandfather, grandson, granddaughter, whether the relationship is a biological, step-, half-, or in-law relationship.

Section 2. Technical Correction.

Section 2 would restore language related to the charging of benefit payments that was inadvertently deleted during the 2001 Session.

Section 3. Broader Exemption from Disqualification for Domestic Violence, Sexual Offense, Stalking.

Under current law, an individual is exempted from disqualification for unemployment insurance benefits if the individual has been adjudged an aggrieved party under the domestic violence statutes. Section 3 would broaden the exemption to include an individual who has qualified for participation in the new Address Confidentiality Program or who can demonstrate domestic violence, sexual offense, or stalking through a number of means, including law enforcement, court, or agency records; documentation from a domestic violence or sexual assault program; or documentation from a professional from whom the claimant has sought assistance.

Section 4. No Refunds to Employers that Convert from Taxable to Reimbursable Status.

Under current law, most employers pay unemployment insurance taxes based on their experience rating in the unemployment insurance system. Some nonprofit employers, however, pay no taxes, but reimburse the system for each tax benefit that is paid. Section 4 provides that employers that convert from taxable to reimbursable status will not be refunded previous balances.

***Note:** Bill Gilkeson, Committee Counsel for Senate Judiciary I, substantially contributed to the preparation of this summary.

Section 5. Available for Part-Time Work.

Under current law, one of the main elements of qualification for unemployment insurance benefits is that the unemployed individual must be available for work; that is, actively willing to accept a full-time job. Section 5 would provide that the available for work qualification is met when an individual is only available for part-time work if the individual:

- Was working part-time during the period when the individual earned the wages that met the wage threshold for unemployment insurance benefits.
- Is actively seeking the same kind of part-time work the individual had before unemployment.
- Puts no other conditions on the individual's job search and is in a job market that has a reasonable demand for part-time work.

This provision does not affect the determination of unemployment insurance benefits for students or seasonal workers.

Section 6. Moving With Spouse.

Under current law, an individual who leaves work to move out of town with a spouse is temporarily disqualified for unemployment insurance benefits for a period of five weeks. Section 6 would decrease the disqualification period to two weeks. Section 6 would also provide that moving with a spouse who has been reassigned by the military is not a disqualification.

EFFECTIVE DATE: This act is effective when it becomes law.

*Note: Bill Gilkeson, Committee Counsel for Senate Judiciary I, substantially contributed to the preparation of this summary.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT *Attachment II*

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 5-27-03

S. B. No. 439 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE ✓

Rep.) Nesbitt
Sen.)

1 moves to amend the bill on page 7, line 6
2 ( ) WHICH CHANGES THE TITLE
3 by rewriting that line to read:
4
5 " any claimant leaving work to accompany
6
7 the claimant's spouse to a new place
8
9 of residence because the spouse has
10
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SIGNED Nesbitt

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues. May 27, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bill Rowe	NC Justice Center
Aaran Cohen	Employment Security Commission
Kenny Payne	ESC
PERRI MORGAN	NFIB
Johnny Lee	NC VAN
Angela Wood	Wake County
Deana Vassar Lawson	Wake Cty.
Julie Allen	NC Statewatch
Mike Okun	NC State AFL-CIO
RAY RIFFE	NC AFL-CIO
MIKE WATERS	NCCRS

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues. May 27, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
CASANDRA SKINNER	CCPS
Jon Williams	CCPS
David Clegg	ESC
Doug Logan	ESC
Lockhart Taylor	ESC
Elizabeth Jordan	BTC
Dana Stam	Rep. Stam
Alicia Greenbaum	Sen. Dalton
Leslie Bucaram	NCCBI
Andy Romanet	NCLM
Lockhart Taylor	ESC
Jim Blackburn	NC Association of County Commissioners

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues. May 27, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Bussian	NC Press Assn.
Ted Kaplan	KEL
[illegible]	NC [illegible]
RL Schofield	NC Justice Center
Roz Swift	NCCA
PGP	NCFB

House Judiciary II

Committee

Minutes

May 29, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and asked Rep. Stam to give a report regarding HB 1006 (Manufactured Housing) that had been in a subcommittee of which he was a member.

Rep. Stam said that the two bills concerning manufactured housing, **HB 1006** and **HB 915**, had been considered by the subcommittee. He said it was decided to go with **HB 1006**, but there were good things in both bills.

A proposed Committee Substitute was distributed to the members and Rep. Stam moved that it be adopted. The motion passed.

Rep. Stam explained that the bill amends laws related to manufactured homes and increases consumer protections for owners of manufactured homes. He said it was a win/win situation for the consumer and the industry. He also pointed out that there is now a fee in the bill so it will need to go to the Finance Committee.

He continued explaining the bill *(See Bill Analysis as Attachment I)*

Rep. Nesbitt asked if something was going to be recorded at the Register of Deeds and Rep. Stam said something would be recorded at the Register of Deeds.

Rep. Bonner moved to give the proposed committee substitute a favorable report, unfavorable to original bill and that the committee substitute be re-referred to the Committee on Finance. The motion passed.

SB 995 (School Construction Report Flexibility) sponsored by Senator Garrou was before the Committee.

A proposed Committee substitute was distributed to the members and Rep. Goodwin moved that it be adopted for consideration. The motion passed.

Senator Garrou was recognized to discuss the bill. She explained that the bill would allow a local board of education to build a school using pre-qualified bidders. She said this bill came as a result of coordination of the Winston-Salem/Forsyth County School Board, which is very interested in the flexibility issue. The bill would allow additional flexibility options that many businesses use on a daily basis. Even some of our prisons are using financial options that speed construction and provide for additional space. *(See Bill Analysis as Attachment II)*

Henry Jones, representing the North Carolina Electrical Contractors Association, was recognized. He said the Association had a number of concerns about the bill. He said they were trying to adjust to the massage changes put in the law two years ago and he was concerned what this bill might do to the competitive business system. He said that the business system in North Carolina tries to let competition drive the market as much as possible. One page 1, Section 1 dealing with prequalification, Mr. Jones said that there have been prequalification bidders in the law since about 1995 and it is his understanding that those are working fairly well. He said that **SB 995** would add additional prequalification rights to owners. It says you can pre-qualify a limited number of bidders, but not all potential contractors would be able to bid these jobs. The bill would allow the Boards to pre-qualify a limited number and even beyond that, , from those that are pre-qualified, the Boards could invite bidders from an even smaller list of those. So a contractor could be "pre-qualified" and still might not be able to bid under this bill. Also in Section 1, Page 2 Lines 3-5, one of the concerns is that a contractor may think he's pre-qualified and do all the work that is necessary to estimate a job, which today can be costly, and then find out seven days before the bid date that he's not pre-qualified, so he can't bid. Section 2, the design/build contractor system has been in place in private construction. It is a negotiated system. It is not a hard-bid system. Historically, North Carolina has operated using competitive bidding. That is the system that most contractors in public construction feel comfortable with, since that is dealing with the public dollars. But the issue of negotiated jobs for public construction is a little troublesome to a lot of contractors.

Mr. Jones told the Committee at under G.S. 143-128, since 1995, on a project-to-project basis, if justified, the State Building Commission can grant school systems the authority to do design-build projects. That is in the system today and has been for eight years. But those are on a project-by-project basis dependent upon whether the circumstance is justified. But, he said, there has nothing been as sweeping as **SB 995**.
Rep. Bonner asked about the seven-day notice and wondered how much advance time would be ample. Mr. Jones said that from three weeks to a month should be sufficient.

Dave Simpson, representing the Carolinas Associated General Contractors, was recognized. He said, with regard to advance notice time, his group would like to know

up-front whether they are pre-qualified. No contractor should be put in a position where they are putting any time and money into putting together a bid, thinking they are pre-qualified and then learn that they're not.

Former Senator Ted Kaplan was recognized. He said he had worked with our staff to try to fix the language in the bill to address the issue, which concerns the contractors, which is modeled after the Mecklenburg bill.

Committee Counsel, Drupti Chauhan was recognized to explain the issue. She said, in terms of order, regarding public construction, the Institute of Government explained the reason the seven days is in there. That the school system would put out the specs, so all parties would have an opportunity to view them. Then they would do the pre-qualification. The seven-day period would be the time that a party who was not pre-qualified would be able to contest that.

Sen. Garrou told the Committee that **SB 995** came to the Senate as a local bill. But there were a number of senators who also wanted this option for their school boards, so the bill was amended as a statewide bill.

Dave Crawford, executive director of the American Institute of Architects, was recognized. He said the issue he is concerned about is not the design-build aspect. Many design-build projects are being done quite successfully. However, it appears to limit the marketplace for architectural services. On Page 2 of the bill, Line 13, he said you would see that the design-build team comes to the table with almost a complete set of plans so contractors can bid on this work. The problem there is that requires about $30,000 to $50,000 in up-front design work by a firm prior to ever being selected on one of these design-build teams. For the folks who are doing this kind of work in Charlotte/Mecklenburg and a few other counties, they are the larger architectural firms in the state. He said he presents both large and small firms and sometimes it puts him in an awkward position. What we have to do, however, is to recognize that we shouldn't be putting barriers to entry into the marketplace. One minor issue on Page 2, Line 16 where it says this package should be developed by an architect, ultimately the plan will have to be developed by an architect, so he suggest that "should" be changed to "must". Another issue, mostly regarding rural counties, if you are going to require three or five design-build teams to be selected, you might be limiting the access to small local design firms to get work in your local community, with only the larger firms doing these projects.

Rep. Nesbitt asked staff what Section 1 of the bill is doing. Ms. Chauha said this set out the criteria for prequalification and says that you can only pre-qualify single-prime contractors.

Rep. Nesbitt said the old way of doing business was "multi-prime" bids, where you had to receive bids from a general contractor and three sub-contractors. That was done for a long period of time. The pros of that were, we appeared to get lower bids. The downside of it was lack of coordination in projects. There were complaints that the general contractor didn't have enough control over the sub-contractors to make them do what they needed to do. Then we expanded in other areas. There are approximately 40,000 licensed subcontractors in North Carolina. Right after the $3 billion bond issue

passed for the University and community colleges, the first thing the University wanted to do was get the design-build, single-prime contractors and basically exclude subcontractors. Rep. Nesbitt said this was a continuation of that kind of evolution.

Rep. Ellis was concerned about the bid process

Rep. Nesbitt asked if all bidders must be accepted if they wished to be pre-qualified. Mr. Jones said, no.

Mr. Kaplan made comments and said that the lowest "qualified bidder" would get the job.

Rep. Ellis said he perceives this bill as an attack on small business.

There was further discussion about the standards and the possibility of limiting the number of contractors able to qualify to bid.

Rep. Garrou said they were just trying to find a way to move construction projects along timelier.

Leanne Winner representing the School Board Association was recognized. She said her Association was very supportive of **SB 995.** Ms. Winner concluded her remarks telling the Committee that single-prime was cheaper.

Rep. Nesbitt said he felt that the bill might need to go to a subcommittee.

The meeting adjourned at 10:55 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

HOUSE BILL 1006: Manufactured Housing

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Reps. Hunter and Barnhart
Date:	May 29, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS: H1006-CSRQ-16[v.10]		Committee Co-Counsel

SUMMARY: ***This bill amends laws related to manufactured homes and increases consumer protections for owners of manufactured homes. The effective date for the bill would be when it becomes law except for the last two sections which would become effective October 1, 2003. This latest edition of the PCS makes the following substantive changes from the earlier versions of the bill:***

- ***Section 1 amends G.S. 20-109.2 to allow owners of manufactured homes that have entered into a lease with a term of at least 20 years for the real property on which the manufactured home is located to surrender title to the manufactured home rather than just owners of manufactured homes who own the land on which the home will be affixed. This section amends the information that must be provided in the affidavit filed with the Division of Motor Vehicles to include a copy of the 20 year lease or a memorandum of the lease.***
- ***Provides that the Division of Motor Vehicles may charge $5.00 for a cancellation of the title to the manufactured home.***
- ***Section 2 amends G.S. 47-20.6 requires the owner of a manufactured home who has a lease term of 20 years for the land on which the manufactured home will be affixed who has surrender the title to the manufactured home to record the affidavit required in G.S. 20-109 with the registrar of deeds in the county where the real property is located.***
- ***Section 3 amends G.S. 47-20.7(a) to allow an owner of a manufactured home who has at least a 20 year lease for the property on which the real property is located or will be located to file a declaration of intent to affix the manufactured home to real property rather than just allowing the owner of the real property to file that declaration.***
- ***Section 4 amends the tax statutes to include as real property manufactured homes where the owner of the manufactured home has a lease of 20 years for the land on which the home is affixed. This section was amended to provide that the lease must expressly provide what will happen to the manufactured home if the lease is terminated before the 20 year term is over.***
- ***Section 5 addresses the notice period required when a manufactured home community (of at least five homes rather than 3) is converted rather just sold or closed. An owner of a manufactured home community must give each owner of a manufactured home (rather than resident as in the original bill) notice of an intended conversion of the community from one year to 180 days before the residents are required to vacate.***
- ***Section 6 requires the display of pricing on manufactured homes if the manufacturer of the manufactured home has published a suggested retail price and requires information on warranties and filing complaints be displayed.***
- ***Section 7 allows for the cancellation of the purchase agreement if any of the material terms of the agreement are changed by the dealer and deposits would be have to be returned within three***

business days in case of these changes. The Manufactured Housing Board is directed to adopt rules concerning deposits paid by buyers to sellers.

SECTION 1

Current Law: If a title for a manufactured home has been issued and the home qualifies as real property because the owner of the home also owns the property on which the home will be affixed, the owner must file an affidavit that home meets the definition of real property and surrender the title. The Division of Motor Vehicles must cancel the title to a manufactured home once the affidavit is filed stating, among other things, that the owner of the manufactured home is also the owner of the real property on which the manufactured home is affixed.

BILL ANALYSIS (including PCS Changes): This section amends the information required to be in the affidavit that is filed with the Division of Motor Vehicles. The owner of an manufactured home who has entered into a lease of at least 20 years must include in the affidavit that he has a lease term of 20 years for the property on which the manufactured home is located and must attached a copy of the lease or a copy of the memorandum of the lease. This section also allows the Division to charge five dollars for the cancellation of the title.

SECTIONS 2-4

Current Law: A manufactured home is not considered real property unless it is placed on property that is owned by the owner of the manufactured home and the owner has filed an affidavit with the registrar of deeds stating that the home meets the definition of real property and the title to the manufactured home has been surrendered to the Division of Motor Vehicles. If it is not on property owned by the owner, the manufactured home is considered tangible personal property. An owner of a manufactured home that has been placed on property that is owned by that owner may convey or encumber that real property and manufactured home by a mortgage and the owner may record that declaration of intent to affix the manufactured home to the real property.

The tax statutes currently define a manufactured home as real property if it is a residential structure, has the moving, hitch, wheels, and axles removed and is placed on a permanent foundation on land owned by the owner of the manufactured home.

BILL ANALYSIS for the PCS:

These PCS sections amend who can file the affidavit and declaration of intent to affix a manufactured home to include the owner of manufactured home who is not also the owner of the real property on which the manufactured home is affixed if the owner has entered into at least a 20 year lease for the real property on which the home is affixed. The PCS further amends the tax statutes to include real property to include a manufactured home if the owner of the home has a lease of at least 20 years for the real property on which the home is located. In addition, the lease must expressly provide what will happen to the manufactured home if the lease is terminated before the 20 year term is over.

SECTION 5:

BILL ANALYSIS: This adds a new section where the owner of a manufactured home community must give each resident notice of an intended sale or closure of the community at least one year before the residents are required to vacate unless the closure is due to a valid order of a state or local government. Then notice must be given of the closure within 3 days of the date of the order.

PCS CHANGES: The PCS changes the notice requirement to 6 months, rather than one year and changes for what the notice is required. The PCS states that a notice is required when a owner of a manufactured home community intends to ***convert*** the community to another use so that the homes will be required to move. The owner of the community must give the notice to the owner of the manufactured home this notice.

SECTION 6:

BILL ANALYSIS for the PCS: The PCS requires the display of pricing on manufactured homes only if the manufacturer of the manufactured home has published a suggested retail price. In addition, information on the North Carolina Manufactured Housing Board and how to file a consumer complaint with the Board along with warranty and protection information also must be displayed.

SECTION 7:

BILL ANALYSIS: This section requires that the purchase agreement clearly state that any changes to the terms of the purchase agreement by the dealer cancels the agreement and that each time the dealer gives the buyer a new set of financing terms, the buyer shall be given another three-day cancellation period and set-up procedures shall not start until after the 3 day cancellation period has run. A dealer of manufactured housing is required to maintain any funds that come into the dealer's but were not the dealer's property in a segregated escrow fund or trust account. The dealer must also disclose in writing the total purchase price, any points or fees and the length of time for any loan repayment.

PCS CHANGES: This latest PCS states that a new three day cancellation period would not begin if the buyer is given a new set of financing terms that are favorable to the buyer. It also changes the language in subsection (f) to state that the Manufactured Housing Board must adopt rules concerning deposits and that those rules may exempt deposits of less than $2,000.00. Moreover, the rules shall protect the deposits from the claims of creditors to the extent possible if the dealer should go into bankruptcy.

H1006-SMRQ-002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1006
PROPOSED COMMITTEE SUBSTITUTE H1006-CSRQ-16 [v.10]

5/28/2003 7:12:40 PM

Short Title: Manufactured Housing. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO GRANT GREATER CONSUMER PROTECTION TO RESIDENTS OF MANUFACTURED HOUSING IN NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-109.2 reads as rewritten:

"**§ 20-109.2. Surrender of title to manufactured home.**

(a) Surrender of Title. – If a title has been issued for a manufactured home and the manufactured home qualifies as real property as defined in G.S. 105-273(13), the owner shall submit an affidavit to the Division that the manufactured home meets this definition and surrender the certificate of title to the Division.

(b) Affidavit. – The affidavit must be in a form approved by the Commissioner and shall include or provide for all of the following information:

(1) The manufacturer and, if applicable, the model name of the manufactured home.

(2) The vehicle identification number and serial number of the manufactured home.

(3) The legal description of the real property on which the manufactured home is placed, stating that the owner of the manufactured home also owns the real ~~property.~~property or that the owner of the manufactured home has entered into a lease with a primary term of at least twenty years for the real property on which the manufactured home is affixed with a copy of the lease or a memorandum thereof pursuant to G.S. 47-18 attached to the affidavit, if not previously recorded.

(4) A description of any security interests in the manufactured home.

(5) A section for the Division's notation or statement that the title has been surrendered and cancelled by the Division.

(c) Cancellation. – Upon compliance by the owner with the procedure for surrender of title, the Division shall rescind and cancel the certificate of title. If a

security interest has been recorded on the certificate of ~~title,~~title and not released by the secured party, the Division may not cancel the title without written consent from all secured parties. After cancelling the title, the Division shall return the original of the affidavit to the owner, or to the secured party having the first recorded security interest, with the Division's notation or statement that the title has been surrendered and has been cancelled by the Division. The owner or secured party shall file the affidavit returned by the Division with the office of the register of deeds of the county where the real property is located. The Division may charge five dollars ($5.00) for a cancellation of a title under this section."

(d) Application for Title After Cancellation. – If the owner of a manufactured home whose certificate of title has been cancelled under this section subsequently seeks to separate the manufactured home from the real property, the owner may apply for a new certificate of title. The owner must submit to the Division an affidavit containing the same information set out in subsection (b) of this section, verification that the manufactured home has been removed from the real property, and written consent of any affected owners of recorded mortgages, deeds of trust, or security interests in the real property where the manufactured home was placed. The Commissioner may require evidence sufficient to demonstrate that all affected owners of security interests have been notified and consent. Upon receipt of this information, together with a title application and required fee, the Division is authorized to issue a new title for the manufactured home.

(e) Sanctions. – Any person who violates this section is subject to a civil penalty of up to one hundred dollars ($100.00), to be imposed in the discretion of the Commissioner. (2001-506, s. 2.)"

SECTION 2. G.S. 47-20.6(a) reads as rewritten:

"(a) If the owner of real property or the owner of the manufactured home who has entered into a lease with a primary term of at least twenty years for the real property on which the manufactured home is affixed has surrendered the title to a manufactured home that is placed on the real property and the title has been cancelled by the Division of Motor Vehicles under G.S. 20-109.2, the owner, or the secured party having the first security interest in the manufactured home at time of surrender, shall record the affidavit described in G.S. 20-109.2 with the office of the register of deeds of the county where the real property is located. Upon recordation, the affidavit shall be indexed on the grantor index in the name of the owner of the manufactured home and on the grantee index in the name of the secured party or lienholder, if any."

SECTION 3. G.S. 47-20.7(a) reads as rewritten:

"(a) A person who owns real property on which a manufactured home has been, or will be ~~placed,~~placed or the owner of a manufactured home who has entered into a lease with a primary term of at least twenty years for the real property on which the manufactured home has been or will be placed, as defined in G.S. 105-273(13), and either where the manufactured home has never been titled by the Division of Motor Vehicles or where the title to the manufactured home has been surrendered and cancelled by the ~~Division,~~Division prior to January 1, 2002, may record in the office of the register of deeds of the county where the real property is located a declaration of

intent to affix the manufactured home to the property and may convey or encumber the real property, including the manufactured home, by a deed, deed of trust, or other instrument recorded in the office of the register of deeds."

SECTION 4. Subdivision (13) of G.S. 105-273 reads as rewritten:

"**§ 105-273. Definitions.**

When used in this Subchapter (unless the context requires a different meaning):

...

(13) "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures on the land, and all rights and privileges belonging or in any way appertaining to the property. These terms also mean a manufactured home as defined in G.S. 143-143.9(6) if it is a residential structure; has the moving hitch, wheels, and axles removed; and is placed upon a permanent foundation either on land owned by the owner of the manufactured ~~home.~~ home or on land which the owner of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least twenty years for the real property on which the manufactured home is affixed and where the lease expressly provides for disposition of the manufactured home upon termination of the lease. A manufactured home as defined in G.S. 143-143.9(6) that does not meet all of these conditions is considered tangible personal property."

SECTION 5. Chapter 42 of the General Statutes is amended by adding a new section to read:

"**§ 42-14.3. Notice of conversion of manufactured home communities.**

(a) In the event that an owner of a manufactured home community (defined as a parcel of land, whether undivided or subdivided, that has been designed to accommodate at least five manufactured homes) intends to convert the manufactured home community or any part thereof, to another use that will require movement of the manufactured homes, the owner of the manufactured home community shall give each owner of a manufactured home notice of the intended conversion at least 180 days before the owner of a manufactured home is required to vacate and move the manufactured home, regardless of the term of the tenancy. Failure to give notice as required by this section is a defense in an action for possession.

(b) Notwithstanding subsection (a) of this section, if a manufactured home community is being closed pursuant to a valid order of any unit of state or local government, the owner of the community shall be required to give notice of the closure of the community to each resident of the community within three business days of the date on which the order is issued."

SECTION 6. Chapter 143 of the General Statutes is amended by adding a new section to read:

"**§ 143-143.20A. Display of pricing on manufactured homes.**

(a) If the manufacturer of a manufactured home publishes a manufacturer's suggested retail price, that price shall be displayed near the front entrance of the manufactured home.

(b) Each manufactured home dealer shall prominently display a sign and provide to each buyer a notice, developed by the North Carolina Manufactured Housing Board, containing information about the Board, including how to file a consumer complaint with the Board, and the warranties and protections provided for each new manufactured home under federal and State law."

SECTION 7. G.S. 143-143.21A reads as rewritten:

"**§ 143-143.21A. Purchase agreements; buyer cancellations.**

(a) A purchase agreement for a manufactured home shall include all of the following:

(1) A description of the manufactured home and all accessories included in the purchase.

(2) The purchase price for the home and all accessories.

(3) The amount of deposit or other payment toward or payment of the purchase price of the manufactured home and accessories that is made by the buyer.

(4) The date the retail purchase agreement is signed.

(5) The estimated terms of financing the purchase, if any, including the estimated interest rate, number of years financed, and monthly payment.

(6) The buyer's signature.

(7) The dealer's signature.

(b) The purchase agreement shall contain, in immediate proximity to the space reserved for the signature of the buyer and in at least ten point, all upper-case Gothic type, the following statement:

"I UNDERSTAND THAT I HAVE THE RIGHT TO CANCEL THIS PURCHASE BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE THAT I HAVE SIGNED THIS AGREEMENT. I UNDERSTAND THAT THIS CANCELLATION MUST BE IN WRITING. IF I CANCEL THE PURCHASE AFTER THE THREE-DAY PERIOD, I UNDERSTAND THAT THE DEALER MAY NOT HAVE ANY OBLIGATION TO GIVE ME BACK ALL OF THE MONEY THAT I PAID THE DEALER. I UNDERSTAND ANY CHANGE TO THE TERMS OF THE PURCHASE AGREEMENT BY THE DEALER WILL CANCEL THIS AGREEMENT."

(c) At the time the deposit or other payment toward or payment for the purchase price is received by the dealer, the dealer shall give the buyer a copy of the purchase agreement and a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the purchase agreement, be easily detachable, and explain the buyer's right to cancel the purchase and how that right can be exercised.

(d) The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer if the buyer cancels the purchase before midnight of the third business day after the date the buyer signed the purchase ~~agreement.~~agreement or

if any of the material terms of the purchase agreement are changed by the dealer. To make the cancellation effective, the buyer shall give the dealer written notice of the buyer's cancellation of the purchase. The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer within 15 business days after receipt of the notice of ~~cancellation.~~ cancellation or within three business days of any change by the dealer of the purchase agreement. For purposes of this section, "business day" means any day except Sunday and legal holidays. Each time the dealer gives the buyer a new set of financing terms, unless the financing terms are more favorable to the buyer, the buyer shall be given another three-day cancellation period. The dealer shall not commence setup procedures until after the final three-day cancellation period has expired.

(e) If the buyer cancels the purchase after the three-day cancellation period, but before the sale is completed, and if:

(1) The manufactured home is in the dealer's inventory, the dealer may retain from the deposit or other payment received from the buyer actual damages up to a maximum of ten percent (10%) of the purchase price; or

(2) The manufactured home is specially ordered from the manufacturer for the buyer, the dealer may retain actual damages up to the full amount of the buyer's deposit or other payment received from the buyer.

(f) The Board shall adopt rules concerning the terms of any deposit paid by a buyer to a dealer. The rules may exempt deposits of less than two thousand dollars ($2000.00). To the extent practicable, the rules shall protect the deposits from the claims of the creditors of a dealer that may thereafter be in bankruptcy. The rules shall further provide for the prompt return of a buyer's deposit if the buyer is entitled to its return.

SECTION 8. Sections 6 and 7 of this act become effective October 1, 2003. The remainder of this act becomes effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 3

SENATE BILL 995

Commerce Committee Substitute Adopted 4/17/03
Third Edition Engrossed 4/23/03

Short Title: School Construction/Repair Flexibility. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW FLEXIBILITY IN SCHOOL CONSTRUCTION AND REPAIR CONTRACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-129 is amended by adding a new subsection to read:

"(b1) Prequalified Bidders; Solicited Bid List. – Notwithstanding the other subsections of this section, a county on behalf of a local board of education ("county") may prequalify a limited number of contractors for a school facility construction, rebuilding, or renovation contract ("contract" and "project") and solicit bids from some or all of those prequalified contractors. The county must attempt to prequalify and solicit sealed bids from at least five contractors and may not award a contract pursuant to this section unless it receives at least three bids from the group of prequalified contractors. The county may prequalify only single prime contractors pursuant to this section.

The county shall award the contract or contracts to the lowest responsible bidder or bidders, taking into consideration quality, performance, compliance with the provisions of G.S. 143-128.2, and the time specified in the bids for the performance of the project. Notwithstanding the first paragraph of this subsection, if the county does not receive three or more proposals, it may again seek proposals for the project pursuant to this section and may award the contract to the lowest responsible bidder, even if only one proposal is received.

In prequalifying a contractor for purposes of this section, the county may consider the contractor's relevant experience on the type of project to be bid, ability to meet the project schedule, financial strength, commitment to the State or local goals program for minority business participation, payment history regarding subcontractors and material suppliers, and the contractor's failure to perform satisfactorily on past projects or a current project. The county's consideration of these factors shall be based upon

objective information provided in the public record of the prequalification process. The county must notify a disqualified bidder at least seven days prior to the opening of bids.

G.S. 143-128.2 applies to the construction of projects described in this subsection."

SECTION 2. G.S. 143-128(a1) is amended by adding a new subdivision to read:

"(6) Design-build contracting. – Notwithstanding G.S. 143-129, G.S. 143-132, and any other provision of this section, a county on behalf of a local board of education may use the design-build method of construction as follows:

a. The county must seek to prequalify and solicit at least five design-build teams to bid on the project and must receive sealed proposals from at least three of those teams. The request for proposals must contain a design criteria package that defines the project scope, including preliminary design and performance specifications, in a manner sufficient to allow the bidders to respond. This package should be developed by an architect.

b. The county shall interview at least three of the design-build teams that submit proposals. The county shall award the contract to the best qualified team, taking into account the time of completion of the project, compliance with the provisions of G.S. 143-128.2, and the cost of the project as the major factors.

c. Facilities constructed may be turnkey projects, including all materials, equipment, and supplies normally associated with school programs.

d. G.S. 143-128.2 applies to the construction of projects described in this subdivision."

SECTION 3. Other Methods. – Nothing in this act limits the use of any method of contracting already authorized by law under Articles 3D and 8 of Chapter 143 of the General Statutes.

SECTION 4. This act is effective when it becomes law.

SENATE BILL 995:
School Construction/Repair Flexibility

BILL ANALYSIS

Committee: House Judiciary II
Date: May 29, 2003
Version: 3rd Edition
PCS S995-CSRQ-30 [v.1]

Introduced by: Senator Garrou
Summary by: Drupti Chauhan
Committee Co-Counsel

SUMMARY: ***SB995 would allow a county on behalf of a local school board to solicit bids for school construction by using prequalified bidders and allow a county on behalf of a local school board to use design-build contracting through prequalifications of design build teams. This bill would be subject to minority business participation goals set forth in G.S. 143-128.2. This act would become effective when it becomes law.***

The PCS changes all references to "county" to "local board of education" so that the local board of education would be soliciting its own bids without the involvement of the county. It also changes the term "disqualified" bidder to "any bidder who does not meet the prequalification requirements".

CURRENT LAW: In 2001, the General Assembly expanded the public bidding procedures. State and local government may now bid construction and repair contracts under the following methods:

- Separate-Prime (also known as Multi-Prime) Contracting - portions of the work are bid by subcontractors
- Single-Prime Contracting – General contractors bid for the entire project
- Dual Bidding – bids are received from general contractors and subcontractors
- Construction Management at Risk – a construction manager contracts directly with subcontractors
- Alternative Contracting Methods (such as Design Build Contracting) – the public agency may apply to the State Building Commission to allow a different method of contracting.

G.S. 143-135.8 currently allows bidders to be prequalified for any public construction project.

BILL ANALYSIS: The bill would allow a local board of education to build a school using prequalified bidders. The prequalified bidders would have to be single prime contractors. The local board of education could prequalify a limited number of contractors for school facility construction, remodeling or renovation projects and solicit bids from those prequalified contractors. The local board of education must attempt to prequalify and solicit bids from at least 5 contractors. The local board of education could not award the bid pursuant to this new prequalification subsection if less than 3 contractors submitted bids. However, if less than 3 bids are received, the local board of education may again seek proposals for the project and may award the contract to the lowest responsible bidder, even if only one proposal is received.

The local board of education would award the contract to the lowest responsible bidder (which has been held to mean bidders that have the skill, judgment, integrity necessary for the faithful performance of the contract along with sufficient financial resources and ability).

When prequalifying a contractor, the local board of education may consider the contractor's relevant experience, ability to meet the project schedule, commitment to the State or local goals program for minority business participation, financial strength, and the contractor's past failure to perform on projects. The minority business participation requirements would apply to this method of contracting.

Section 2 of the bill allows a local board of education to use design-build contracting by prequalifying at least five design-build teams and it must receive sealed proposals from at least three of those teams. The request for the proposals must be developed by an architect and must define the project scope. At least three of the design-teams that submit proposals must be interviewed and the local board of education must take into account the time of completion of the project, compliance with the provisions of the minority participation goals statute, and the cost of the project.

BACKGROUND:

The Charlotte Mecklenburg School Board received authorization to do prequalified bidding and solicitation and design-build contracts through local legislation in 1999.

The act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 995

Commerce Committee Substitute Adopted 4/17/03
Third Edition Engrossed 4/23/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S995-CSRQ-30 [v.1]

5/28/2003 3:48:03 PM

Short Title: School Construction/Repair Flexibility. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW FLEXIBILITY IN SCHOOL CONSTRUCTION AND REPAIR CONTRACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-129 is amended by adding a new subsection to read:

"(b1) Prequalified Bidders; Solicited Bid List. – Notwithstanding the other subsections of this section, a local board of education may prequalify a limited number of contractors for a school facility construction, rebuilding, or renovation contract ("contract" and "project") and solicit bids from some or all of those prequalified contractors. The local board of education must attempt to prequalify and solicit sealed bids from at least five contractors and may not award a contract pursuant to this section unless it receives at least three bids from the group of prequalified contractors. The local board of education may prequalify only single prime contractors pursuant to this section.

The local board of education shall award the contract or contracts to the lowest responsible bidder or bidders, taking into consideration quality, performance, compliance with the provisions of G.S. 143-128.2, and the time specified in the bids for the performance of the project. Notwithstanding the first paragraph of this subsection, if the local board of education does not receive three or more proposals, it may again seek proposals for the project pursuant to this section and may award the contract to the lowest responsible bidder, even if only one proposal is received.

In prequalifying a contractor for purposes of this section, the local board of education may consider the contractor's relevant experience on the type of project to be bid, ability to meet the project schedule, financial strength, commitment to the State or local goals program for minority business participation, payment history regarding subcontractors and material suppliers, and the contractor's failure to perform

satisfactorily on past projects or a current project. The local board of education's consideration of these factors shall be based upon objective information provided in the public record of the prequalification process. The local board of education must notify any bidder who does not meet the prequalification requirements at least seven days prior to the opening of bids.

G.S. 143-128.2 applies to the construction of projects described in this subsection."

SECTION 2. G.S. 143-128(a1) is amended by adding a new subdivision to read:

"(6) Design-build contracting. – Notwithstanding G.S. 143-129, G.S. 143-132, and any other provision of this section, a local board of education may use the design-build method of construction as follows:

a. The local board of education must seek to prequalify and solicit at least five design-build teams to bid on the project and must receive sealed proposals from at least three of those teams. The request for proposals must contain a design criteria package that defines the project scope, including preliminary design and performance specifications, in a manner sufficient to allow the bidders to respond. This package should be developed by an architect.

b. The local board of education shall interview at least three of the design-build teams that submit proposals. The local board of education shall award the contract to the best qualified team, taking into account the time of completion of the project, compliance with the provisions of G.S. 143-128.2, and the cost of the project as the major factors.

c. Facilities constructed may be turnkey projects, including all materials, equipment, and supplies normally associated with school programs.

d. G.S. 143-128.2 applies to the construction of projects described in this subdivision."

SECTION 3. Other Methods. – Nothing in this act limits the use of any method of contracting already authorized by law under Articles 3D and 8 of Chapter 143 of the General Statutes.

SECTION 4. This act is effective when it becomes law.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs., May 29, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Daschiel Propes	NC DOT
Courtney Crowder	"
Amanda Reeder	Rep. Goodwin Intern
John Rust	NCFPC
Steve Wall	Conservation Council
Kevin Leonard	WCSR
Stephanie Simpson	NC Assn of Realtors
John McMillan	NFDS
Barry Smith	Freedom Newspapers
Ted Kaplan	KEL
Amanda Abrams	NCLHC

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs., May 29, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Al Ripley	NC Justice Ctr
Mike Owen	NC State AFL-CIO
Anne Wiinn	NCCTA
Molly Ryan	NCSBA
Leanne Winner	NCSBA
Kim Hibbard	NCLM
Dana Stam	Rep. Stam
Katherine Joyce	NCASA
Jim Dyer	SBE
Clayton Somers	ABC Commission
KBF	ACT

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs., May 29, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Julie Henry	NC Statewatch
[illegible]	DOJ
Greg [illegible]	DOT
Ashley Skinner	CCPS
Porter	Susie Anderson
Mike Robertson	NCALE
Ken Pike	NCALE
Mike Waters	NCPS
Hen. Jones	Attorney Raleigh
David Crawford	AIA NC
Dave Simpson	Carolinas AGC

VISITOR REGISTRATION SHEET

Name of Committee _____ Date _____

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE ASSISTANT

NAME	FIRM OR AGENCY
Chip Pate	Guest of Rep Tim Moore
Kirby Pate	" "

House Pages

1. Name: Heather Clayton
   County: Rowan
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   County:
   Sponsor:

Sgt-At-Arms

1. Name: EARL THARRINGTON
2. Name: BILL SULLIVAN
3. Name: JAMES WORTH
4. Name:

House Judiciary II

Committee

Minutes

June 3, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and told the Committee that **SB 996**, which had been on the agenda, has been without from our Committee and re-referred to the Committee on Rules.

Rep. Nesbitt told the Committee that two bills having to do with the display of the American Flag, **HB 404** and **SB 722** (Display of American Flag) would be heard by the Committee, but that only **SB 722** was eligible to pass.

Sen. Kinnaird, sponsor of **SB 722** was recognized. Rep. Capps, sponsor of **HB 404** was also in attendance.

Sen. Kinnaird said this issue came to her attention a few years ago when she read about a condominium complex whose homeowner's association would not let a veteran fly his flag on his own house. It was Veteran's Day, and the Association made the veteran take his flag down. She felt that this was one of the greatest insults to one who had put his life on the line for us.

Sen. Kinnaird said that some in the Senate had been concerned about "common areas" and wanted to make certain that this legislation would allow a person to fly a flag "only" on his own house, not in a common area. There was also concern about the size of the flag, so she said the bill limited the size of the flag to code.

She expressed her disapproval of the new proposed committee substitute, and said she wanted her "own" bill. She said she felt that the proposed Committee Substitute prepared by Rep. Stam on behalf of Rep. Capps, puts too much power in the covenants of the homeowner's associations and she did not feel that they should have the right to tell a veteran or anyone else that they cannot fly the American Flag. That issue, she said, has not been resolved in the proposed committee substitute and she asked to Committee to vote on her original bill, **SB 722** 3rd Edition.

Rep. Nesbitt said the original bill was before the committee.

Rep. Stam explained why he preferred the proposed committee substitute because it was more inclusive. He said the "guts" of both bill were similarly worded. All that is protected is the proper display of the flag. Under either bill, he said he doesn't think that homeowner's association will be stopping people from flying their flags. He pointed out that he was also interested in protecting people's property rights that some people may not like, for whatever reason, the American Flag. He said he could perhaps see on of these people developing "a flag-free subdivision" and if that person wants to have a flag-free subdivision and people with similar philosophies buy lots, so be it.

He said the original senate bill did not protect the property rights of a person who either hates America or hates display of the flag and that the proposed committee substitute he recommends would go further in protecting individual rights.

Rep. Nesbitt asked about the flagpole. He said that Sen. Kinnaird's bill addresses this issue.

Rep. Ellis had a question about conveyance under the proposed committee substitute.

Rep. Stam said covenants are in perpetuity.

Sen. Kinnaird said that the covenants always hold.

Rep. Ellis said he could not decide where to go on these two bills.

Discussion continued regarding size of flags and flagpoles.

Rep. Moore wondered if the bill was subject to zoning or governmental restrictions.

Rep. Nesbitt wondered if there was a problem passing a bill saying you could display an American flag that didn't allow display of other flags.

Drupti Chauhau said was a case in California regarding that issue because there were different standards displaying the American flag and other flags.

There was further discussion about the definition of the "Rule of construction." Rep. Stam explained that deals with how are we going to interpret the drafter of the words used and it is difficult to understand completely what the drafter's intent was. Looking back at what the drafter of covenants actually meant, he may not have even been thinking about our flag. That is why the "Rule of Construction" is treated more favorably by the courts.

Rep. Bordsen said one thing troubling her is that the proposed committee substitute has broadened the scope.

The proposed Committee Substitute **SB 722** was before the committee and Rep. Ellis moved that it be adopted for consideration.

Andy Romanet with the League of Municipalities was recognized. He said Sen. Kinnaird's bill did not affect cities and towns, but the proposed committee substitute does affect cities and towns. He felt that there were constitutional issues that need to be looked at.

Rep. Ellis was unsure of which bill he liked – the concern about PSC's broader scope- **HB 404** was broadest scope of all. He likes what Rep. Stam has written.

Rep. Capps was recognized and told the committee how hard he had worked on this issue. Following 911, 2001, Sgt. Tom Meyers USAF veteran who lives in Mitchell Glen subdivision in Mecklenburg County. He checked with a local flag sales office to determine the proper sized flag ordinance in Charlotte. He followed their recommendations and installed a 20 – foot pole with a 5'x7' flag. The leaders of his homeowner's association filed a complaint against him and he was fined $350 for flying his flag in what they determined was the covenant's restrictions concerning signs and banners. Mr. Meyer was unaware of anything that prevented him from displaying his American flag. He has paid $200 on his $350 fine. Since then he has worked with the homeowner's association to get a suitable solution, so far without success. The balance of $150 of the $300 fine will be considered as future association fees. Mr. Meyers needs relief. He moved the pole from the front yard to the back yard, but he is still being fined.

The bill was displaced and Rep. Nesbit said he would appoint a subcommittee to come up with a compromise bill.

SB 774 (Liability at Public Skateboard Parks) was before the Committee and Sen. Dalton was recognized to discuss his bill.

Sen. Dalton said that currently, no laws exist that specifically addresses these recreational activities. Chapter 99E contains Article 2 governing the safety and liability of roller skating rinks. Currently, liability for injuries resulting from inline skating, skateboard, or freestyle bicycling would be determined under basic tort law analysis.

Rep. Nesbitt proposed an amendment to change the effective date from January 1, 2003, to October 1, 2003 and the amendment was adopted.

Rep. Nesbitt asked Sen. Dalton if there is faulty construction and the skateboard ramp collapses, would the city or town still be immune.

Sen. Dalton said that in that instance, he thinks there would be liability.

There was discussion about negligence and gross negligence.

Rep. Nesbitt said the purpose of this bill is to limit liability of governmental entities that make public property available for skateboard parks.

Sen. Dalton said he felt the thrust of the bill was to encourage kids to skateboard in a designated area and this bill encourages municipalities to build these parks.

Rep. Nesbitt told the Committee that he felt the issue needed more study and that he would appoint a subcommittee for this purpose.

Andy Romanet with the League of Municipalities said the League supports this bill. He said municipalities were unable to get insurance and would not build these skateboards parks without immunity from liability.

Rep. Nesbitt appointed the subcommittee: Rep. Stam, Rep. Ellis, Rep. Walend, and Rep. Goodwin, Chairman.

The meeting adjourned at 11:00 a.m.

Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

S 3

SENATE BILL 722
Judiciary II Committee Substitute Adopted 4/23/03
Third Edition Engrossed 4/28/03

Short Title: Display of American Flag. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of American flag.**

(a) No covenant, condition, or restriction set forth in a deed, and no rule, regulation, bylaw, or other governing document or agreement of a homeowners, neighborhood, civic, or other association, shall prohibit or be construed to prohibit the placement on any property of a flagpole that is to be used for the purpose of displaying, or shall prohibit or be construed to prohibit the display on any property of, the flag of the United States if the flag is displayed in accordance with all of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The consent of the property's owner or of any person having lawful control of the property.

(3) The recommended minimum flagpole standards set forth in "Our Flag", published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(4) Any federal or State law, proclamation of the President of the United States or the Governor, or local ordinance or resolution. For the purpose of this subsection, the term "property" shall not include common areas.

(b) A covenant, condition, restriction, rule, regulation, bylaw, governing document, or agreement or a construction of any of these items that violates subsection (a) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (a) of this section.

(c) No declaration, bylaw, rule, regulation, or agreement of a condominium property or construction of any of these items by the board of managers of its unit owners' association shall prohibit the placement of a flagpole that is to be used for the purpose of displaying, or shall prohibit the display of, the flag of the United States on or within the facilities of a unit owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located, if the flag is displayed in accordance with all of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The recommended minimum flagpole standards set forth in "Our Flag", published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(3) Any federal or State law, proclamation of the President of the United States or the Governor, or local ordinance or resolution.

(d) A declaration, bylaw, rule, regulation, or agreement or the construction of any of these items that violates subsection (c) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (c) of this section."

SECTION 2. The title of Chapter 144 of the General Statutes reads as rewritten:

"**State Flag, American Flag, ~~Motto~~Motto, And Colors.**"

SECTION 3. This act is effective when it becomes law.

SENATE BILL 722:
Display of American Flag.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	June 10, 2003	**Summary by:**	Drupti Chauhan*
Version:	S722-CSRQ-25 [v.3]		Committee Co-Counsel

PCS SUMMARY: ***The PCS removes references to homeowners association and condominium association and states that "no private restriction" on the use of land can be construed to regulate or prohibit the US flag if it is displayed in accordance with the patriotic customs set forth in federal law. Restrictions that are registered prior to October 1, 2003 must specifically use the terms: (i) flag of the United States of America, (ii) American flag, or (iii) United States flag in order to be construed to regulate the US flag. For restrictions registered after October 1, 2003, the restriction has to be written on the first page of the instrument and it must specifically state that the document regulates or prohibits the display of the United States flag in order to be construed as regulating or prohibiting the display of the flag.***

Local governments also cannot prohibit the US flag from being flown or displayed if it is done in accordance with the federal statutes and if the person who has lawful control of the property consents. Local governments may provide reasonable restrictions on flag size, number of flags, and height of flagpoles for the purposes of protecting the public's health, safety, and welfare as long as the restrictions do not discriminate against the flag.

The PCS changes the effective date to October 1, 2003 but applies to construction of instruments and conveyances prior to that date.

BILL ANALYSIS: The bill would create a new **G.S. 144-7, Display of American Flag**, which provides that no covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners, neighborhood, civic, condominium, or other association may prohibit the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibit the display of the United States flag on any property, if the flag is displayed with the consent of the real property's owner or person having lawful control of the property and in accordance with any of the following conditions:

- Customs set forth 4 U.S.C.A. §§ 5-10 governing the display of the American flag.
- Flagpole standards set forth in S.C.R. 61, 105th Congress.
- Any federal law or proclamation of the President or Governor, or local ordinance or resolution.

S722-SMRQ-002: Tim Hovis and Robin Johnson, Staff Attorneys, contributed to this summary.

§ 5. Display and use of flag by civilians; codification of rules and customs; definition

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter [4 U.S.C.A. § 1 et seq.] shall be defined according to sections 1 and 2 of this title [4 U.S.C.A. § § 1 and 2] and Executive Order 10834 issued pursuant thereto.

§ 6. Time and occasions for display

(a) It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness.

(b) The flag should be hoisted briskly and lowered ceremoniously.

(c) The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.

(d) The flag should be displayed on all days, especially on New Year's Day, January 1; Inauguration Day, January 20; Martin Luther King Jr.'s birthday, third Monday in January; Lincoln's Birthday, February 12; Washington's Birthday, third Monday in February; Easter Sunday (variable); Mother's Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of States (date of admission); and on State holidays.

(e) The flag should be displayed daily on or near the main administration building of every public institution.

(f) The flag should be displayed in or near every polling place on election days.

(g) The flag should be displayed during school days in or near every schoolhouse.

§ 7. Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

(a) The flag should not be displayed on a float in a parade except from a staff, or as provided in subsection (i) of this section.

(b) The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff shall be fixed firmly to the chassis or clamped to the right fender.

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No

person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof: *Provided*, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

(d) The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag's own right, and its staff should be in front of the staff of the other flag.

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

(g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.

(h) When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half-staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out, union first, from the building.

(i) When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

(j) When the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

(k) When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

(l) The flag should form a distinctive feature of the ceremony of unveiling a statue or monument, but it should never be used as the covering for the statue or monument.

(m) The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. On Memorial Day the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any State, territory, or possession of the United States, the Governor of that State, territory, or possession may proclaim that the National flag shall be flown at half-staff. The flag shall be flown at

half-staff 30 days from the death of the President or a former President; 10 days from the day of death of the Vice President, the Chief Justice or a retired Chief Justice of the United States, or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice President, or the Governor of a State, territory, or possession; and on the day of death and the following day for a Member of Congress. The flag shall be flown at half-staff on Peace Officers Memorial Day, unless that day is also Armed Forces Day. As used in this subsection--

(1) the term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff;

(2) the term "executive or military department" means any agency listed under sections 101 and 102 of title 5 [5 U.S.C.A. § § 101 and 102], United States Code; and

(3) the term "Member of Congress" means a Senator, a Representative, a Delegate, or the Resident Commissioner from Puerto Rico.

(n) When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.

(o) When the flag is suspended across a corridor or lobby in a building with only one main entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

§ 8. Respect for flag

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor.

(a) The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property.

(b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free.

(d) The flag should never be used as wearing apparel, bedding, or drapery. It should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white, and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker's desk, draping the front of the platform, and for decoration in general.

(e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart.

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

§ 9. Conduct during hoisting, lowering or passing of flag

During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in review, all persons present except those in uniform should face the flag and stand at attention with the right hand over the heart. Those present in uniform should render the military salute. When not in uniform, men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Aliens should stand at attention. The salute to the flag in a moving column should be rendered at the moment the flag passes.

§ 10. Modification of rules and customs by President

Any rule or custom pertaining to the display of the flag of the United States of America, set forth herein, may be altered, modified, or repealed, or additional rules with respect thereto may be prescribed, by the Commander in Chief of the Armed Forces of the United States, whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation.

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FLAG PRESENTATION

Presentation of the flag during a ceremony should be preceded by a brief talk emphasizing the importance of the occasion. Following the presentation all present should salute the flag, recite the pledge of allegiance, and sing the national anthem.

FOLDING THE FLAG

1. Two persons, facing each other, hold the flag waist high and horizontally between them.
2. The lower striped section is folded, lengthwise, over the blue field. Hold bottom to top and edges together securely.
3. Fold the flag again, lengthwise, folded edge to open edge.
4. A triangular fold is started along the length of the flag, from the end to the heading by bringing the striped corner of the folded edge to meet the open edge.
5. The outer point is turned inward parallel with the open edge, forming a second triangle.
6. Repeat the triangular folding until the entire length of the flag is folded.
7. When the flag is completely folded only the triangular blue field should be visible.

CARE OF YOUR FLAG

The life of your flag depends on your care. Dirt can cut fabrics, dull colors, and cause wear. Most outdoor flags can be washed in mild detergent and thoroughly rinsed. Indoor and parade flags should be dry-cleaned. Many dry cleaners offer free cleaning of U.S. flags during the months of June and July. Damaged flags can be repaired and utilized as long as the overall dimensions are not noticeably altered. American Legion Posts and local governments often have facilities to dispose of unserviceable flags. Store your flags in a well ventilated area away from any harsh chemicals or cleaning compounds. If your flag gets wet, never store it until it is completely dry. Wet folds cause permanent creases. Dampness ruins fabric and causes mildew. Pole care is also related to flag care. Rust and scale cause permanent stains and some metallic oxides actually eat holes in fabric.

SIZES OF FLAGS

The size of the flag is determined by the exposed height of the flagpole from which it is flying. The only consideration is for the flag to be in proper proportion to its pole. Flags which fly from angled poles on homes and those which are displayed on standing poles in offices and other indoor displays are usually either 3' x 5' or 4' x 6'. Color guards usually carry flags measuring 4' x 6'. Other recommended sizes are shown in the following table:

Flagpole Height (ft.)	Flag Size (ft.)
20	4 x 6
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90	15 x 25
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200	30 x 40
250	40 x 50

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6-3-03

SENATE BILL 722:
Display of American Flag.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	June 3, 2003	**Summary by:**	Drupti Chauhan*
Version:	PCS to 3rd Edition		Committee Co-Counsel

The PCS to the 3rd Edition of the bill removes references to homeowners association and condominium association and simply states that "no restriction" on the use of land can be construed to regulate or prohibit the US flag if it is displayed in accordance with the conditions set forth below. Restrictions that are registered prior to October 1, 2003 must specifically use the terms: (i) flag of the United States of America, (ii) American flag, or (iii) United States flag. For restrictions registered after October 1, 2003, the restriction has to be written on the first page of the instrument and it must specifically state that the document regulates or prohibits the display of the United States flag in order to be construed as regulating or prohibiting the display of the flag.

SUMMARY: Senate Bill 722 would nullify, by declaring against public policy, any covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners association or condominium association that prohibits the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibits the display of the United States flag on any property, so long as the flag is displayed in accordance with certain conditions and requirements.

BILL ANALYSIS: The bill would create a new **G.S. 144-7, Display of American Flag,** which provides that no covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners, neighborhood, civic, condominium, or other association may prohibit the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibit the display of the United States flag on any property, if the flag is displayed with the consent of the real property's owner or person having lawful control of the property and in accordance with any of the following conditions:

- Customs set forth 4 U.S.C.A. §§ 5-10 governing the display of the American flag.
- Flagpole standards set forth in S.C.R. 61, 105th Congress.
- Any federal law or proclamation of the President or Governor, or local ordinance or resolution.

The PCS changes the effective date to October 1, 2003 but applies to construction of instruments and conveyances prior to that date unless they have been adjudicated by a Court.

EFFECTIVE DATE: Senate Bill 722 is effective when it becomes law.

S722-SMRQ-001: Tim Hovis and Robin Johnson, Staff Attorneys, contributed to this summary.

§ 5. Display and use of flag by civilians; codification of rules and customs; definition

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter [4 U.S.C.A. § 1 et seq.] shall be defined according to sections 1 and 2 of this title [4 U.S.C.A. § § 1 and 2] and Executive Order 10834 issued pursuant thereto.

§ 6. Time and occasions for display

(a) It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness.

(b) The flag should be hoisted briskly and lowered ceremoniously.

(c) The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.

(d) The flag should be displayed on all days, especially on New Year's Day, January 1; Inauguration Day, January 20; Martin Luther King Jr.'s birthday, third Monday in January; Lincoln's Birthday, February 12; Washington's Birthday, third Monday in February; Easter Sunday (variable); Mother's Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of States (date of admission); and on State holidays.

(e) The flag should be displayed daily on or near the main administration building of every public institution.

(f) The flag should be displayed in or near every polling place on election days.

(g) The flag should be displayed during school days in or near every schoolhouse.

§ 7. Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

(a) The flag should not be displayed on a float in a parade except from a staff, or as provided in subsection (i) of this section.

(b) The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff shall be fixed firmly to the chassis or clamped to the right fender.

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No

person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof: *Provided*, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

(d) The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag's own right, and its staff should be in front of the staff of the other flag.

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

(g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.

(h) When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half-staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out, union first, from the building.

(i) When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

(j) When the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

(k) When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

(l) The flag should form a distinctive feature of the ceremony of unveiling a statue or monument, but it should never be used as the covering for the statue or monument.

(m) The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. On Memorial Day the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any State, territory, or possession of the United States, the Governor of that State, territory, or possession may proclaim that the National flag shall be flown at half-staff. The flag shall be flown at

half-staff 30 days from the death of the President or a former President; 10 days from the day of death of the Vice President, the Chief Justice or a retired Chief Justice of the United States, or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice President, or the Governor of a State, territory, or possession; and on the day of death and the following day for a Member of Congress. The flag shall be flown at half-staff on Peace Officers Memorial Day, unless that day is also Armed Forces Day. As used in this subsection--

(1) the term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff;

(2) the term "executive or military department" means any agency listed under sections 101 and 102 of title 5 [5 U.S.C.A. § § 101 and 102], United States Code; and

(3) the term "Member of Congress" means a Senator, a Representative, a Delegate, or the Resident Commissioner from Puerto Rico.

(n) When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.

(o) When the flag is suspended across a corridor or lobby in a building with only one main entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

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§ 9. Conduct during hoisting, lowering or passing of flag

During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in review, all persons present except those in uniform should face the flag and stand at attention with the right hand over the heart. Those present in uniform should render the military salute. When not in uniform, men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Aliens should stand at attention. The salute to the flag in a moving column should be rendered at the moment the flag passes.

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1. Two persons, facing each other, hold the flag waist high and horizontally between them.
2. The lower striped section is folded, lengthwise, over the blue field. Hold bottom to top and edges together securely.
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7. When the flag is completely folded only the triangular blue field should be visible.

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GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 722

Judiciary II Committee Substitute Adopted 4/23/03
Third Edition Engrossed 4/28/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S722-CSRQ-25 [v.3]

6/3/2003 4:27:19 PM

Short Title: Display of American Flag. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of the American flag; private restrictions.**

No private restriction on the use of land shall be construed to regulate or prohibit the display of the flag of the United States which is displayed in accordance with the patriotic customs set forth in 4 U.S.C.A. §§5-10, as amended, governing the display and use of the flag of the United States unless:

(a) For restrictions registered prior to October 1, 2003, the restriction specifically uses the following terms:

(1) flag of the United States of America,

(2) American flag, or

(3) United States flag.

(b) For restrictions registered on or after October 1, 2003, the restriction shall be written on the first page of the instrument or conveyance in print no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States flag only if the restriction specifically states: 'THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA'.

SECTION 2. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7.1. Display of the American flag; public restrictions.**

(a) A unit of local government shall not prohibit the flag of the United States from being flown or displayed if the flag is flown or displayed:

(1) In accordance with the patriotic customs set forth in 4 U.S.C.A. §§5-10, as amended, governing the display and use of the flag of the United States, and

(2) Upon private or public property with the consent of either the owner of the property or of any person having lawful control of the property.

(b) Notwithstanding subsection (a), for the purpose of protecting the public health, safety, and welfare, reasonable restrictions on flag size, number of flags, and height of flagpoles are not prohibited provided that such restrictions shall not discriminate against the flag in any manner.

SECTION 3. The title of Chapter 144 of the General Statutes reads as rewritten:

"**STATE FLAG, AMERICAN FLAG, ~~MOTTO~~ MOTTO, AND COLORS.**"

SECTION 4. This act is effective October 1, 2003, but it applies to the construction of instruments or ordinances adopted or registered prior to its effective date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 774

Short Title:	Liability at Public Skateboard Parks.	(Public)
Sponsors:	Senators Dalton; and Lucas.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH THE DUTIES OF OPERATORS OF SKATEBOARD PARKS, TO ESTABLISH THE DUTIES OF PERSONS WHO ENGAGE IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES, AND TO LIMIT THE LIABILITY OF GOVERNMENTAL ENTITIES FOR DAMAGE OR INJURIES THAT ARISE OUT OF A PERSON'S PARTICIPATION IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES AND THAT OCCUR IN AN AREA DESIGNATED FOR CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 99E of the General Statutes is amended by adding a new Article to read:

"Article 3.

"Hazardous Recreation Parks Safety and Liability.

"**§ 99E-21. Purpose.**

The purpose of this Article is to encourage governmental owners or lessees of property to make land available to a governmental entity for hazardous recreational activities. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, if insurance can be obtained for such activities. It is also recognized that risks and dangers are inherent in these activities, which risks and dangers should be assumed by those participating in the activities.

"**§ 99E-22. Definitions.**

The following definitions apply in this Article:

(1) Governmental entity. –

a. The State, any county or municipality, or any department, agency, or other instrumentality thereof.

b. Any school board, special district, authority, or other entity exercising governmental authority.

(2) Hazardous recreational activity. – Skateboarding, inline skating, or freestyle bicycling.

(3) Inherent risk. – Those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, and freestyle bicycling.

"**§ 99E-23. Duties of operators of skateboard parks.**

(a) No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and knee pads.

(b) For any facility, owned or operated by a governmental entity, that is designed and maintained for the purpose of recreational skateboard use, and that is not supervised on a regular basis, the requirements under subsection (a) of this section are satisfied when all of the following occur:

(1) The governmental entity adopted an ordinance requiring any person riding a skateboard at the facility to wear a helmet, elbow pads, and knee pads.

(2) Signs are posted at the facility affording reasonable notice that any person riding a skateboard in the facility must wear a helmet, elbow pads, and knee pads, and that any person failing to do so will be subject to citation under the ordinance under subdivision (1) of this subsection.

"**§ 99E-24. Duties of persons engaged in hazardous recreational activities.**

(a) Any person who participates in or assists in hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself or other persons or property that result from these activities. Any person who observes hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself that result from these activities. No public entity that sponsors, allows, or permits skateboarding, inline skating, or freestyle bicycling on its property is required to eliminate, alter, or control the inherent risks in these activities.

(b) While engaged in hazardous recreational activities, irrespective of where such activities occur, a participant is responsible for doing all of the following:

(1) Acting within the limits of his or her ability and the purpose and design of the equipment used.

(2) Maintaining control of his or her person and the equipment used.

(3) Refraining from acting in any manner that may cause or contribute to death or injury of himself or herself, or other persons.

(c) Failure to comply with the requirement of subsection (b) of this section constitutes negligence.

"**§ 99E-25. Liability of governmental entities.**

(a) This section does not grant authority or permission for a person to engage in hazardous recreational activities on property owned or controlled by a governmental entity unless such governmental entity has specifically designated such area for these activities.

(b) No governmental entity or public employee shall be liable to any person who voluntarily participates in hazardous recreation activities for any damage or injury to property or persons that arises out of a person's participation in the activity and that takes place in an area designated for the activity.

(c) This section does not limit liability that would otherwise exist for any of the following:

(1) The failure of the governmental entity or public employee to guard against or warn of a dangerous condition of which a participant does not and cannot reasonably be expected to have notice.

(2) An act of gross negligence by the governmental entity or public employee that is the proximate cause of the injury.

(d) Nothing in this section creates a duty of care or basis of liability for death, personal injury, or damage to personal property. Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances.

(e) Nothing in this section limits the liability of an independent concessionaire, or any person or organization other than a governmental entity or public employee, whether or not the person or organization has a contractual relationship with a governmental entity to use the public property, for injuries or damages suffered in any case as a result of the operation of equipment for hazardous recreational activities on public property by the concessionaire, person, or organization.

(f) The fact that a governmental entity carries insurance that covers any activity subject to this Article does not constitute a waiver of the liability limits under this section, regardless of the existence or limits of the coverage."

SECTION 2. This act becomes effective January 1, 2003, and applies to activities engaged in on or after that date and to actions that arise on or after that date.

6-3-03

SENATE BILL 774:
Liability at Public Skateboard Parks.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Dalton
Date:	May 27, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 774 adds a new Article to Chapter 99E of the General Statutes to limit the liability of governmental entities that make public property available for skateboard parks and to establish duties and responsibilities for operators of skateboard parks and persons who engage in inline skating, skateboarding or freestyle bicycling. The bill becomes effective January 1, 2003 and applies to activities engaged in on or after that date and to lawsuits that arise on or after that date.***

CURRENT LAW:

Currently, no laws exist that specifically address these recreational activities. Chapter 99E contains Article 2 governing the safety and liability of roller skating rinks. Currently, liability for injuries resulting from inline skating, skateboarding, or freestyle bicycling would be determined under basic tort law analysis.

BILL ANALYSIS:

Immunity from liability: The bill provides limited immunity from liability for governmental entities (including the State, any county or municipality or school board) that make land available or designate public property for activities defined by the bill as "hazardous recreational activities". The bill defines "hazardous recreational activities" as skateboarding, inline skating, and freestyle bicycling. Under the bill, no governmental entity or public employee would be liable for personal injury or property damage arising out of a person's participation in a hazardous recreational activity at a location or area that has been specifically designated for the activity.

The immunity from liability does not attach if the governmental entity or employee fails to warn the participants of a dangerous condition existing in the skateboard park that the participant does not know about and cannot reasonably be expected to know about. Nor does the bill shield governmental entities or employees from gross negligence. The fact that the governmental entity carries liability insurance does not constitute a waiver of the liability limits provided under the bill.

The bill does not limit the liability of an independent concessionaire or any person or organization other than a governmental entity or public employee.

Assumption of risk: The bill provides that all persons who engage in skateboarding, inline skating, or freestyle bicycling, (irrespective of age) are legally responsible for all damages, injuries or death to themselves or to others. Further, the bill provides that observers or spectators assume the known or unknown risks inherent in these activities, irrespective of age and are also legally responsible for all damages, injuries or death to themselves.

Duties of operators: Operators of skateboard parks are required to:

- Prohibit skateboarders from using the skateboard park unless the skateboarder is wearing a helmet, elbow pads, and knee pads, however, if the skateboard park is owned or operated by a governmental entity, then this requirement is met if the governmental entity:
    - Adopts an ordinance requiring skateboarders to wear helmets and pads; and
    - Posts signs that provide reasonable notice to skateboarders of the helmet and pads ordinance and the penalty for failure to comply with the ordinance.

This provision does not appear to apply to other hazardous recreational activities.

Duties of participants: Participants are required to do the following, without regard to where the activities occur. Those who fail to comply are negligent as a matter of law:

- Act within the limits of his or her ability and the purpose and design of the equipment.
- Maintain control of the equipment and his or her person.
- Refrain from acting "in any manner that may cause or contribute to death or injury of himself, herself, or other persons".

Section 2 would make the act effective retroactively to January 1, 2003, and would apply to activities engaged in on or after that date and to actions that arise on or after that date.

Linda Attarian, former Counsel to the Senate Judiciary II Committee, contributed substantially to this summary.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 774

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S774-ARO-28 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Nesbitt

moves to amend the bill on page 3, line 24, by rewriting the line to read:

"**SECTION 2.** This act becomes effective ~~when it becomes law~~ Oct. 1, 2003; and applies to".

SIGNED Martha Nesbitt
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED V FAILED _____ TABLED _____

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues., June 3, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Romanet	NCLM.
Rick Zechini	NC Assoc. of REALTORS
Don Willis	DMHDDSAS
Mike Waters	NCRPS
Tom Bean	NC Gen. Def
Tyler Mansfield	NC Env. Def.
Scott Mayhew	AP
Tim Crowley	UNC TV
Karen Tam	AP
Eric Reeves	NC State Senate
Stephanie Simpson	NC Assn. of Realtors
Ron Aycock	NCDS County Com. Assoc

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues., June 3, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jim Blackburn	NC Association of County Commissioners

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, June 3, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

   HB 404 Flag Freedom Bill, *Rep. Capps, Bill Sponsor*

   SB 722 Display of American Flag, *Sen. Kinnaird, Bill Sponsor*

   SB 774 Liability at Public Skateboard Parks, *Sen. Dalton, Bill Sponsor*

   SB 786 State Institution Resident Damage Claims, *Sen. Reeves, Bill Sponsor*

   SB 996 ABC-Sexually Explicit Conduct, *Sen. Garrou, Bill Sponsor*

3. **Adjourn.**

House Judiciary II

Committee

Minutes

June 5, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Sen. Reeves to explain **SB 786** (State Institution Resident Damage Claims).

Sen. Reeves said the bill would allow an institution under the Department of Health and Human, such as a mental institution, if it loses, destroys, or otherwise damages through negligence a resident's property, to replace the property or reimburse the resident without going through the State Tort Claims process, if the damages are less than $500.

Rep. Stam moved to amend the bill, which was just a technical amendment. His motion passed.

Rep. Goodwin moved to incorporate the bill and the amendment into a committee substitute bill, give that bill a favorable report and the original bill an unfavorable report. The motion passed.

SB 226 (Unauthorized Admin. Meds. By Child Care Fac.) sponsored by Sen. Purcell was again before the Committee.

A proposed committee substitute was presented to the Committee and Rep. Goodwin moved that it be adopted for consideration. The motion passed.

Rep. Goodwin, who chaired the subcommittee on **SB 226,** said that there had been quite a lot of discussion of this issue. He said one of the issues they focused on was the scope of

the bill; for example, should the scope be limited to those facilities deemed a childcare facility. He said the subcommittee decided that the scope should be limited as such. One of the concerns was that, if you broadened the scope of the bill, it would become quite unwieldy in trying to enforce the provisions of the bill. Also, it would cause quite a number of unintended consequences that the subcommittee felt would gut the intentions behind the bill.

Committee Counsel Drupti Chauhan was recognized to explain the changes made in the proposed committee substitute. She said that PCS changes the word "intentionally" to "willfully" on Page 1, line 12 and moves the phrase "without written authorization" from page 1, line 13 to page 1, line 12, after the world "administer."

Rep. Ellis asked about the difference between punishments for Class H felony and Class F felony.

Ms. Chauhan said that for a Class H Felony, there is 4 months community service with a maximum of 30 months active punishment. For a Class F Felony, there is 10 months intermediate supervised to a maximum of 15 months active punishment. An AI Misdemeanor carries a minimum of 60 days.

He wanted to hear the rationalization for the selection of the punishment.

Tom Bennett from the Child Fatality task Force was recognized. He said he liked the changes done by the subcommittee and he felt the punishment was not so severe, but appropriate.

Rep. Nesbitt wasn't in agreement and read the offenses for Class F Felonies which include: Involuntary Manslaughter, Assault Inflicting Serious Bodily Injury, Assault on a Government Officer or Employee, Burning of Certain Buildings, Indecent Liberties with Children, and habitual impaired driving.

Rep. Nesbitt told the committee that there would be no penalty for child daycare facilities operated by non-public schools. How did the subcommittee rationalize that?

Rep. Bordsen said she was under the impression that there already were regulations regarding schools.

Peggy Ball, from the Division of Child Development, was recognized. She said there was a Memorandum of Understanding with Public Schools although they are exempted from daycare licensure. For the daycare facilities, they voluntarily ask the Division to come in and license them so they don't have to do that regulation. So childcare facilities in public schools, through the Memorandum of Understanding, would fall under this, so therefore, those children would be protected also.

Rep. Ellis moved for a favorable report for the proposed committee substitute for **SB 226**, unfavorable to the original bill.

Rep. Bordsen supported the motion, as did Rep. Farmer-Butterfield.

A lengthy discussion followed about the penalty. Rep. Nesbitt was concerned about the harshness of the penalty.

There was discussion about church facilities. Roz Savitt with the North Carolina Childcare Coalition was recognized. She said church facilities can operate two ways, one is licensed and the other is unlicensed. However, if they operate unlicensed, they still must adhere to a whole "laundry-list" of health care regulations.

Rep. Nesbitt wanted to know if this bill would apply to them. Ms. Savitt said yes. Also, those that are not accredited by Southern Association of Colleges and Schools would fall under this bill.

Discussion followed.

Rep. Nesbitt said he was having an amendment drawn to change the punishment from a Class H felony to a Class I felony. Rep. Nesbitt said Sen. Purcell, the bill sponsor, said he had no problem with that.

Rep. Bordsen didn't want to penalty changed.

Rep. Nesbitt told the committee that if you make the punishment too great, it will be difficult to get personnel to work in day care facilities.

Discussion followed about the word "willfully." Rep. Nesbitt said that could apply, just be giving a child medication.

Rep. Nesbitt proposed to amend the bill. *(See attachment I)* The motion passed.

Rep. Ellis moved to incorporate the amendment and the Proposed Committee Substitute into a new proposed committee substitute, give that bill a favorable report, unfavorable to the original bill. The motion passed. The Committee also voted to re-refer the bill to the Committee on Appropriations.

Rep. Goodwin asked for a moment of privilege and introduced his Intern, Amanda Ritter.

A new proposed Committee for **SSB 774** (Liability at Public Skateboard Parks) (Sponsored by Sen. Dalton) was before the Committee.

Rep. Goodwin moved to adopt the committee substitute for consideration and the motion carried.

He said that the subcommittee had a good debate on the bill.

Senator Dalton said he supported what the Subcommittee had done.

Committee Counsel, Karen Cochrane Brown, was recognized. She said the only change the Subcommittee made to the original bill was to change the effective date from January 1, 2003 to October 1, 2003.

The issue of concern to the committee had been that of gross negligence and that thoroughly debated and agreed upon.

Rep. Stam said the other concern dealt with "construction." If the skateboard park is constructed by a private entity, they would still be liable.

Rep. Bonner moved to give the new proposed committee substitute a favorable report, unfavorable to the original bill. The motion passed.

Meeting adjourned at 11:00 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 786

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S786-ARO-29 [v.2]

Date 6-5- ,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Stam

moves to amend the bill on page 1, line 13, by deleting the "**§ 143-285.1.**" and substituting "**§ 143-295.1.**".

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

6-5-03

SENATE BILL 786:
State Institution Resident Damage Claims.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. Reeves
Date:	June 3, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 786 would allow an institution under the Department of Health and Human Services, such as a mental institution, if it loses, destroys, or otherwise damages through negligence a resident's property, to replace the property or reimburse the resident without going through the State Tort Claims process, if the damages are less than $500. Effective when becomes law.***

CURRENT LAW:

The State Tort Claims Act in Article 31 of G.S. Chapter 143 provides a process whereby people who believe they have incurred damages through the negligence of State agencies or employees may seek compensation. Claims of more than $25,000 may be settled by the Attorney General with the approval of the Industrial Commission, and claims of $25,000 and less may be settled by the Attorney General without the approval of the Industrial Commission.

BILL ANALYSIS:

Senate Bill 786 would permit an institution under DHHS, such as a mental institution, if it loses, destroys, or otherwise damages through negligence a resident's property, to replace the property or reimburse the resident without going through the State Tort Claims process, if the damages are less than $500.

Bill Gilkeson, Counsel to the Senate Judiciary I Committee, is the original author of this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 786

Short Title:	State Institution Resident Damage Claims.	(Public)
Sponsors:	Senator Reeves.	
Referred to:	Judiciary I.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT WHEN THE PROPERTY OF A RESIDENT OF A STATE INSTITUTION UNDER THE DEPARTMENT OF HEALTH AND HUMAN SERVICES IS LOST, DESTROYED, OR OTHERWISE DAMAGED THROUGH NEGLIGENT HANDLING BY THE INSTITUTION, THE INSTITUTION MAY MAKE DIRECT PAYMENT OR PROVIDE REPLACEMENT OF THE ITEM TO THE RESIDENT WITHOUT RECOURSE TO THE TORT CLAIMS PROCESS IF THE AMOUNT OF DAMAGES IS LESS THAN FIVE HUNDRED DOLLARS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 31 of Chapter 143 of the General Statutes is amended by adding a new section to read:

"**§ 143-285.1. Settlement of small claims against institutions of the Department of Health and Human Services.**

When the property of a resident of a State institution under the Department of Health and Human Services is lost, destroyed, or otherwise damaged through negligent handling by the institution, and the amount of damages is less than five hundred dollars ($500.00), the institution may make direct payment or provide replacement of the item to the resident without recourse to the procedures otherwise provided by this Article."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 226

Health and Human Resources Committee Substitute Adopted 3/5/03
Judiciary II Committee Substitute Adopted 4/8/03
Fourth Edition Engrossed 4/10/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S226-CSRQ-33 [v.1]

6/2/2003 6:00:08 PM

Short Title: Unauthorized Admin. Meds. by Child Care Fac. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Article 7 of Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

(a) It is unlawful for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility as defined in G.S. 110-86, to willfully administer, without written authorization, prescription or over-the-counter medication to a child attending the child care facility. For the purposes of this section, written authorization shall include the child's name, date or dates for which the authorization is applicable, dosage instructions, and signature of the child's parent or guardian.

(b) In the event of an emergency medical condition and the child's parent or guardian is unavailable, it shall not be unlawful to administer medication to a child attending the child care facility without written authorization as required under subsection (a) of this section if the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider. For purposes of this subsection, the following definitions apply:

(1) A bona fide medical care provider means an individual who is licensed, certified, or otherwise authorized to prescribe the medication.

(2) An emergency medical condition means circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

(c) A violation of this section that results in serious injury to the child shall be punished as a Class F felony.

(d) Any other violation of this section shall be punished as a Class H felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 6-5-03

S. B. No. 226 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE ✓

(Rep.) ~~Stam~~ Nesbitt
Sen.)

1 moves to amend the bill on page 2, line 6

2 ( ) WHICH CHANGES THE TITLE

3 by replacing the words "Class H felony." with

4

5 the words "Class I felony.".

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SIGNED Martin Nesbitt

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 226

Health and Human Resources Committee Substitute Adopted 3/5/03
Judiciary II Committee Substitute Adopted 4/8/03
Fourth Edition Engrossed 4/10/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S226-PCS65311-RQ-33

Short Title: Unauthorized Admin. Meds. by Child Care Fac. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Article 7 of Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

(a) It is unlawful for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility as defined in G.S. 110-86, to willfully administer, without written authorization, prescription or over-the-counter medication to a child attending the child care facility. For the purposes of this section, written authorization shall include the child's name, date or dates for which the authorization is applicable, dosage instructions, and signature of the child's parent or guardian.

(b) In the event of an emergency medical condition and the child's parent or guardian is unavailable, it shall not be unlawful to administer medication to a child attending the child care facility without written authorization as required under subsection (a) of this section if the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider. For purposes of this subsection, the following definitions apply:

(1) A bona fide medical care provider means an individual who is licensed, certified, or otherwise authorized to prescribe the medication.

(2) An emergency medical condition means circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

(c) A violation of this section that results in serious injury to the child shall be punished as a Class F felony.

(d) Any other violation of this section shall be punished as a Class I felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SENATE BILL 226: Unauthorized Administration of Medication by Child Care Facilities

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. William Purcell
Date:	May 7, 2003	**Summary by:**	Drupti Chauhan*
Version:	PCS to the 4th Edition		Committee Co-Counsel
	S226-CSRQ-33[v.1]		

The PCS changes the word "intentionally" to willfully on page 1, line 12 and moves the phrase "without written authorization" from page 1, line 13 to page 1, line 12, after the word "administer".

SUMMARY: ***This bill would make the administration of prescription or over-the counter medication to a child attending a licensed or an unlicensed child care facility without written authorization. A violation of the statute that results in serious injury to the child shall be punished as a Class F felony and any other violation of the section is punishable as a Class H felony. The bill provides an exception for circumstances in which an emergency medical condition presents itself and the child's parent is unavailable. In this situation, medication may be lawfully administered without the parent's written authorization if the medication is administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions. The bill is effective December 1, 2003 and applies to offenses committed on or after that date.***

House Bill 152, Unauthorized Meds./Prevent SIDS/Child Care, which is currently in the Senate Health Committee also addresses the issues presented in this bill, however the punishment for the violation is a Class A1 misdemeanor.

CURRENT LAW: G.S. 110-91(9) directs the NC Child Care Commission to adopt rules to establish minimum requirements for record keeping for child care facilities. The scope of this authority includes records regarding authorization to administer medications. Rules adopted by the Commission in 1986, and amended in 1996, 1998, and 2001 include, among other things, the following with respect to the administration of medications in child care facilities:

- No drug or medication may be administered to any child in a licensed child care facility without specific written instructions from the child's parent or guardian.
- No drug or medication may be administered for a non-medical purpose, including inducing sleep.
- Prescribed medication may be administered only with parent's written authorization and the medication must be in its original container with proper labeling, including directions for dosage, or the parent must provide written instructions that must be signed and dated by the prescribing physician or health professional.
- Over-the-counter medication may be administered only with the parent's written authorization and only in accordance with written dosage instructions of the parent, physician or other authorized health professional.
- A parent may provide written authorization that is valid for up to six months to authorize the administration of medication to treat the symptoms of asthma and allergic reactions, and up to

one year to administer sunscreen and over-the-counter diapering creams. The authorization must be specific as to the symptoms or conditions for which the medication may be administered.

- A parent may provide written authorization for the administration of a one-time, weight appropriate dose of acetaminophen in the event the child has a fever and the parent cannot be reached.

Enforcement Authority:

Administrative penalties: G.S. 110-102.2 authorizes the Secretary of DHHS to impose one or more of the following against a licensee:

- Issue a written warning and a request for compliance;
- Issue an official reprimand;
- Place a licensee on probation;
- Suspend the license for a period not to exceed one year; and
- Permanently revoke the license.

Civil penalties: G.S. 110-103.1 authorizes the Secretary to impose a civil penalty, not to exceed $1,000 for each violation documented on any given date, against an operator of a child care facility who violates NC law governing child care facilities. In determining the amount of the penalty, the Secretary must consider the threat of or extent of harm to children and the consistency of violations.

BILL ANALYSIS:

- Makes the administration of medication to a child attending a licensed or an unlicensed child care facility without written authorization from the child's parent or guardian unlawful.
- An employee, owner, household member, volunteer or operator who violates the statute would be face a Class H felony.
- Provides for an enhanced penalty (Class F felony) for violations resulting in serious injury to a child.
- Provides an exception for emergency medical conditions when the child's parent is unavailable. The medication must be administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions.

Class H felony: Punishable by an absolute minimum of 4 months Community Service Punishment and an absolute maximum of 30 months Active Punishment, depending on prior convictions and aggravating factors.

Class F felony: Punishable by an absolute minimum of 10 months Intermediate Punishment (e.g. supervised probation) or Active Punishment to an absolute maximum of 59 months of Active Punishment, depending on prior convictions and aggravating factors.

BACKGROUND:

Inspiration for the legislation:

Senate Bill 226 is a recommendation of the NC Child Fatality Task Force. The Task Force was inspired to recommend the bill after hearing the story of Kaitlyn Shevlin, a 5-month-old who died in an unlicensed day-care home in Alamance County in 2001. According to Mr. Rob Johnson, District Attorney for Alamance County, although medical examiners could not find a definitive cause of death and as a result ruled that the child died from Sudden Infant Death Syndrome, law enforcement investigators suspect her day-care provider gave the child a generic form of the medicine Benadryl to make her sleepy. The day care provider was unlicensed and had numerous complaints of child neglect filed against her in the 20 years she operated her unlicensed facility. She was convicted of misdemeanor charges of child abuse and neglect served four months in prison.

Relevant Definitions (cut and pasted from G.S. 110-86):

- **Child care**. - A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

- **Child care facility**. - Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. **A child care center** is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. **A family child care home** is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

- **Child care does not include the following**:

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

- "**Household member**" to mean: "member of the household in a family child care home or nonlicensed child care home and is over 15 years old and is present when children are in care." (G.S. 110-90.2)
- "**Volunteer**" to mean "a person who works in a child care facility and is not monetarily compensated by the facility" (NCAC 10-3U.0102).

**Linda Attarian, former Research Attorney, contributed significantly to this bill*

S226-SMRQ-004

10-3U.0803. ADMINISTERING MEDICATION

(a) No drug or medication shall be administered to any child without specific instructions from the child's parent, a physician, or other authorized health professional. No drug or medication shall be administered after its expiration date. No drug or medication shall be administered for non-medical reasons, such as to induce sleep.

(1) Prescribed medicine shall be in its original container bearing the pharmacist's label which lists the child's name, date the prescription was filled, the physician's name, the name of the medicine or the prescription number, and directions for dosage, or be accompanied by written instructions for dosage, bearing the child's name, which are dated and signed by the prescribing physician or other health professional. Prescribed medicine shall be administered as authorized in writing by the child's parent, only to the person for whom it is prescribed.

(2) Over-the-counter medicines, such as cough syrup, decongestant, acetaminophen, ibuprofen, topical teething medication, topical antibiotic cream for abrasions, or medication for intestinal disorders shall be in its original container and shall be administered as authorized in writing by the child's parent, not to exceed amounts and frequency of dosage specified in the printed instructions accompanying the medicine. The parent's authorization shall give the child's name, the specific name of the over-the-counter medicine, dosage instructions, the parent's signature, and the date signed. Over-the-counter medicine may also be administered in accordance with written instructions from a physician or other authorized health professional.

(3) When any questions arise concerning whether medication provided by the parent should be administered, that medication shall not be administered without signed, written dosage instructions from a licensed physician or authorized health professional.

(4) A written statement from a parent may give blanket permission for up to six months to authorize administration of medication for asthma and allergic reactions. A written statement from a parent may give blanket permission for up to one year to authorize administration of sunscreen and over-the-counter diapering creams. The written statement shall describe the specific conditions under which these medications and creams are to be administered and detailed instructions on how they are to be administered.

(5) A written statement from a parent may give blanket permission to administer a one-time, weight appropriate dose of acetaminophen in cases where the child has a fever and the parent cannot be reached.

(b) Any medication remaining after the course of treatment is completed shall be returned to the child's parents.

(c) Any time medication other than sunscreen or diapering creams is administered by center personnel to children receiving care, the child's name, the date, time, amount and type of medication given, and the name and signature of the person administering the medication shall be recorded. This information shall be noted on a medication permission slip, or on a separate form developed by the provider which includes the required information. This information shall be available for review by a representative of the Division during the time period the medication is being administered and for at least six months after the medication is administered.

Authority G.S. 110-91(1),(9); 143B-168.3.

Eff. January 1, 1986; Amended Eff. April 1, 2001; July 1, 1998; January 1, 1996.

§ 110-86. Definitions.

Unless the context or subject matter otherwise requires, the terms or phrases used in this Article shall be defined as follows:

(1) Commission. – The Child Care Commission created under this Article.

(2) Child care. – A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption. Child care does not include the following:

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

(2a) Child care administrator. – A person who is responsible for the operation of a child care facility and is on-site on a regular basis.

(3) Child care facility. – Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S.

110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. A child care center is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. A family child care home is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

(4) Repealed by Session Laws 1997-506, s. 3.

(4a) Department. – Department of Health and Human Services.

(5) Repealed by Session Laws 1975, c. 879, s. 15.

(5a) Lead teacher. – An individual who is responsible for planning and implementing the daily program of activities for a group of children in a child care facility.

(6) License. – A permit issued by the Secretary to any child care facility which meets the statutory standards established under this Article.

(7) Operator. – Includes the owner, director or other person having primary responsibility for operation of a child care facility subject to licensing.

(8) Secretary. – The Secretary of the Department of Health and Human Services. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 4, ss. 1-3; 1983, c. 46, s. 1; c. 297, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 78; 1985, c. 589, s. 36; c. 757, s. 155(c); 1987, c. 788, s. 2; 1989, c. 234; 1991, c. 273, s. 1; 1991 (Reg. Sess., 1992), c. 904, ss. 1, 2; c. 1024, s. 1; c. 1030, s. 51.12; 1997-443, ss. 11A.118(a), 11A.122; 1997-506, s. 3.)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 774
PROPOSED HOUSE COMMITTEE SUBSTITUTE S774-PCS65312-RO-23

Short Title: Liability at Public Skateboard Parks. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH THE DUTIES OF OPERATORS OF SKATEBOARD PARKS, TO ESTABLISH THE DUTIES OF PERSONS WHO ENGAGE IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES, AND TO LIMIT THE LIABILITY OF GOVERNMENTAL ENTITIES FOR DAMAGE OR INJURIES THAT ARISE OUT OF A PERSON'S PARTICIPATION IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES AND THAT OCCUR IN AN AREA DESIGNATED FOR CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 99E of the General Statutes is amended by adding a new Article to read:

"Article 3.

"Hazardous Recreation Parks Safety and Liability.

"**§ 99E-21. Purpose.**

The purpose of this Article is to encourage governmental owners or lessees of property to make land available to a governmental entity for hazardous recreational activities. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, if insurance can be obtained for such activities. It is also recognized that risks and dangers are inherent in these activities, which risks and dangers should be assumed by those participating in the activities.

"**§ 99E-22. Definitions.**

The following definitions apply in this Article:

(1) Governmental entity. –

a. The State, any county or municipality, or any department, agency, or other instrumentality thereof.

b. Any school board, special district, authority, or other entity exercising governmental authority.

(2) Hazardous recreational activity. – Skateboarding, inline skating, or freestyle bicycling.

(3) Inherent risk. – Those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, and freestyle bicycling.

"**§ 99E-23. Duties of operators of skateboard parks.**

(a) No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and kneepads.

(b) For any facility owned or operated by a governmental entity that is designed and maintained for the purpose of recreational skateboard use, and that is not supervised on a regular basis, the requirements under subsection (a) of this section are satisfied when all of the following occur:

(1) The governmental entity adopted an ordinance requiring any person riding a skateboard at the facility to wear a helmet, elbow pads, and kneepads.

(2) Signs are posted at the facility affording reasonable notice that any person riding a skateboard in the facility must wear a helmet, elbow pads, and kneepads and that any person failing to do so will be subject to citation under the ordinance under subdivision (1) of this subsection.

"**§ 99E-24. Duties of persons engaged in hazardous recreational activities.**

(a) Any person who participates in or assists in hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself or other persons or property that result from these activities. Any person who observes hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself that result from these activities. No public entity that sponsors, allows, or permits skateboarding, inline skating, or freestyle bicycling on its property is required to eliminate, alter, or control the inherent risks in these activities.

(b) While engaged in hazardous recreational activities, irrespective of where such activities occur, a participant is responsible for doing all of the following:

(1) Acting within the limits of his or her ability and the purpose and design of the equipment used.

(2) Maintaining control of his or her person and the equipment used.

(3) Refraining from acting in any manner that may cause or contribute to death or injury of himself or herself or other persons.

(c) Failure to comply with the requirement of subsection (b) of this section constitutes negligence.

"**§ 99E-25. Liability of governmental entities.**

(a) This section does not grant authority or permission for a person to engage in hazardous recreational activities on property owned or controlled by a governmental

entity unless such governmental entity has specifically designated such area for these activities.

(b) No governmental entity or public employee shall be liable to any person who voluntarily participates in hazardous recreation activities for any damage or injury to property or persons that arises out of a person's participation in the activity and that takes place in an area designated for the activity.

(c) This section does not limit liability that would otherwise exist for any of the following:

(1) The failure of the governmental entity or public employee to guard against or warn of a dangerous condition of which a participant does not have and cannot reasonably be expected to have had notice.

(2) An act of gross negligence by the governmental entity or public employee that is the proximate cause of the injury.

(d) Nothing in this section creates a duty of care or basis of liability for death, personal injury, or damage to personal property. Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances.

(e) Nothing in this section limits the liability of an independent concessionaire or any person or organization other than a governmental entity or public employee, whether or not the person or organization has a contractual relationship with a governmental entity to use the public property, for injuries or damages suffered in any case as a result of the operation of equipment for hazardous recreational activities on public property by the concessionaire, person, or organization.

(f) The fact that a governmental entity carries insurance that covers any activity subject to this Article does not constitute a waiver of the liability limits under this section, regardless of the existence or limits of the coverage."

SECTION 2. This act becomes effective October 1, 2003, and applies to activities engaged in on or after that date and to actions that arise on or after that date.

House Pages

1. Name: Cameron Falkner
   County: Vance
   Sponsor: Stan Fox
2. Name: Tempe Williamson
   County: Franklin
   Sponsor: Lucy Allen
3. Name: Duncan Briley
   County: Columbus
   Sponsor: Dewey Hill
4. Name: Elizabeth Beavers
   County: Rockingham
   Sponsor: Wayne Sexton
5. Name:
   County:
   Sponsor:

Sgt-At-Arms

1. Name: JAMES WORTH
2. Name: BILL SULLIVAN
3. Name:
4. Name:

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs., June 5, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Romanet	NCLM
Angela Horne	NCMS
Mike Waters	NCRPS
Tasha Clay	YAIO
John Boutlis	AstraZeneca
Dave Sumpter	CAMPAIGN AFC
Leanne Winner	NCSBA
Henry Jones	Attorney - Raleigh
Jane Allen	DMH/DD/SAS
David Crawford	AIA NC
Brad Thompson	Office of John Edwards

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Thurs., June 5, 2003 at 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jessica Dandy	Covenant w/ NC's children
Amanda Reder	intern/Rep Goodwin
Bill Purcell	NC Senate
Pam Ball	DPD - DHHS
Bill Welch	NCATL
Thomas V. Bennett	NCCFTF
Roz Sawicki	NC child Care Coalition
Alicia Armenteros	Sen. Dalton's office
Paula L. Wolf	Covenant w/NC's Children
Josh Kimsey	NCATL
Katherine Joyce	NCASA

House Judiciary II

Committee

Minutes

June 10, 03

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Sen. Hartsell to explain, **SB 230** (Revise UCC Article on Bulk Transfers).

Sen. Hartzell told the Committee that there had been previous efforts to repeal the UCC Article on Bulk, but these efforts so far have failed in the Senate as the result of the efforts from one person. In fact, nationwide, the vast majority of states that have a bulk transfers provision have repealed it outright. In a spirit of doing what could be done, the General Statutes Commission, who is charged with looking at uniform laws, having failed to get it repealed, has submitted a proposal that would revise the UCC Article on Bulk Transfers. This revised Article has been adopted by about six or seven states. There are only about two or three states that have the original article in place.

The reason it is set to be revised or repealed is that the bulk-transfer law goes back to about the turn of the century when most transactions were held by small individual stores and it goes back to the predecessors to the UCC. It actually provides a trap now because many times in the situation, people who are involved in the transactions do not or cannot know when it applies. In fact, after the fact, innocent purchasers may be stuck paying for things, or essentially not receiving things that they had anticipated because there was no notice given to creditors in advance. Currently, he said, the language of the statute is imprecise. What **SB 230** does is not to repeal it, but to more specifically identify the circumstances under which the bulk transfer law would apply and the requirements, procedurally, for going through that in a way that would at least limit the exposure of the

parties, giving everybody notice, but also avoiding the practice, perhaps, and the unnecessary consequences of an innocent purchaser being stuck with the situation.

When he had concluded his remarks, Rep. Nesbitt recognized Rep. Stam who said he has a proposed committee substitute he would like to offer that would repeal the law. Rep. Nesbitt said he preferred to stay on the original bill at this time.

Rep. Walend requested clarification about the UCC Bulk Transfer Article and the situations that might be involved in transfers.

Rep. Nesbitt said, for example, if someone is selling your business out, by not selling the whole business, etc., now you go through what is called a "bulk transfer." That puts everybody on notice and then if there is not enough money to pay everybody, the sale is good. If that is not done, the sale can be set aside.

Rep. Nesbitt wanted to hear how to protect the creditors, in a case where somebody sells out to the brother for "a dollar on a hundred" and opening a shop next-door and wiping out all the creditors.

Sen. Hartzell said the fraudulent transfer act would take care of that. He said you can actually do the same thing today by having a "going-out-of-business sale."

Sen. Hartzell gave the example of a mom and pop grocery store selling out. The egg-farmer who supplies the eggs is entitled to notice under the bulk transfer law. In a going out of business sale, the egg farmer would not be entitled to notification since this is not a bulk sale.

Sen. Hartzell said the original law rose from the panic of 1893. He said they were trying to create more of a direct sale kind of situation.

Rep. Nesbitt asked Sen. Hartzell is he would support Rep. Stam's proposed committee substitute and he said he would.

Rep. Moore said he would also like for Article 6 to be repealed outright.

Speaking on behalf of the General Statutes Commission was Floyd Lewis. Both said that this bill was the best they could get at this time.

Michelle Frazier was recognized and said that the NC Bar Association supports repeal of Article 6.

Committee Counsel, Drupti Chauhan, was recognized to give an analysis of the bill. (*See Attachment I)*

Discussion followed about fraudulent transfers.

Sen. Hartzell said what is truly critical about this bill is that it is important to have consistencies with other states. That consistency could be total repeal or this bill, but leaving the law as it is a trap, particularly in the current economy. Other states that have adopted this legislation are Arizona, California, District of Columbia, Indiana and Virginia. States that have totally repealed Article 6 include South Carolina, Tennessee, Florida, and Alabama.

Rep. Stam makes a motion to adopt this proposed committee substitution for consideration and the motion passed.

Rep. Nesbitt said he was concerned with the rewrite of the Article. Sen. Hartzell agreed.

Rep. Ellis was concerned that if the original bill passes, it would create a different problem.

Rep. Stam moved to give the proposed committee substitute a favorable report and the original bill an unfavorable report. The motion passed.

SB 881(Permit Tobacco Payment w/o Reopening Estate) was before the Committee and Sen. Hartzell was recognized to explain his bill.

A technical amendment was sent forth by Rep. Stam.

Karen Cochrane-Brown explained that the amendment was fairly technical and clarified some of the language in the bill.

The amendment was adopted by the Committee.

Sen. Hartzell was recognized. He said that **Senate Bill 881** implements a recommendation of the General Statutes Commission to permit Phase II payments under the National Tobacco Grower Settlement Trust to be paid to a decedent's devisees or heirs without reopening a decedent's estate. He said the bill is designed simply to make the process easier.

Rep. Ellis moved to incorporate the amendment and bill into a proposed committee substitute, give the committee substitute a favorable report and the original bill an unfavorable report. The motion passed.

Rep. Bordsen requested that **SB 226** be re-referred to the Judiciary II Committee and Rep. Nesbitt told her the bill had not been reported out of the Committee and he would bring the bill back up if time permitted.

There being no further business, the meeting adjourned at 10:50 a.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

Attachment I

SENATE BILL 230:
Revise UCC Article on Bulk Transfers

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Hartsell
Date:	June 10, 2003	**Summary by:**	Drupti Chauhan
Version:	2nd Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 230 would replace the current Article 6(Bulk Transfers) of the Uniform Commercial Code (UCC) and would enact revised Article 6 (Bulk Sales) in its place as recommended by the Uniform Law Commissioners. This bill comes to the General Assembly as a recommendation of The General Statutes Commission.***

CURRENT LAW: Article 6 of Chapter 25 of the General Statutes regulates bulk transfers (that are not made in the ordinary course of the transferor's business) of a major part of the materials, supplies, merchandise or other inventory of the business. The purpose of the current Article 6 of the UCC is to provide protection for creditors of these businesses. Creditors of these businesses can be susceptible to a bulk transfer where the business owner may sell a large part of the inventory of the business to a any buyer for any price outside the ordinary course of business, pockets the proceeds and disappears without paying his creditors. The current Article 6 requires bulk sale buyers to provide notice to the seller's creditors of the impending bulk transfer and to maintain a list of the creditors along with a schedule of property obtained in the bulk transfer for six months after the sale takes place. This notice must be sent 10 days before paying for or taking possession of the goods, whichever comes first. If these procedures are not followed, the creditors can void the sale. Auctioneers must follow a similar procedure of notice and listing of creditors. Article 6 requires compliance even when there is no reason to believe that a fraudulent transfer is going to occur.

BILL ANALYSIS: This bill would enact revised Article 6 and makes the following major substantive changes to current Article 6.

- The revised article applies only to sales of inventory from stock and not to other transfers (§ 25-6-102(a)(3)).
- The revised article applies only when the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale (§ 25-6-102(a)(3)).
- The revised article does not apply to a sale in which the seller's equity is less than $10,000 or a sale having a value of more than $25,000,000 (§ 25-6-103(c)(12)).
- The notice period to the seller's creditors is increased from 10 days to 15 days (§ 25-6-105(d)), and the statute of limitations is extended from six months to one year (§ 25-6-110).
- The notice to creditors must include a copy of a schedule of distribution setting forth how the net contract price is to be distributed (§§ 25-6-105(b) and 25-6-106(a)).
- A buyer who makes a good faith effort to comply with the requirements of the revised article or to exclude the sale from the application of the article, or who acts on the good faith belief that the article does not apply to the sale, is not liable for noncompliance (§ 25-6-107(c)).
- A buyer's noncompliance no longer renders the sale ineffective but rather gives rise to a claim for damages, which are essentially capped at an amount no greater than the contract price (§ 25-6-107(a), (d), and (h)).

- The revised article applies to a bulk sale conducted by a liquidator on the seller's behalf, as well as to a bulk sale conducted by an auctioneer, by imposing upon liquidators and auctioneers duties and liabilities that are similar, but not always identical, to those of a buyer (§ 25-6-108).
- The revised article applies when the seller's place of business is located in this State, rather than when the goods are located in this State. Where the seller has more than one place of business, the seller is deemed to be located at the seller's chief executive office (§ 25-6-103(a) and (b)).
- The revised article imposes liability on a person in direct or indirect control of a seller that is an organization if that person knowingly, intentionally, and without legal justification fails or causes the seller to fail to distribute the net contract price in accordance with the schedule of distribution (§ 25-6-107(k)).

Revised Article 6 lessens the burden on the bulk sale buyer and provides definitions for terms such as "assets", "bulk sale", 'date of sale" etc. which the current Article 6 does not do. For example, "bulk sale" is defined as a "sale of more than half the seller's inventory" outside the ordinary course of business and under conditions in which the "buyer has notice...that the seller will not contribute to operate the same or a similar kind of business after the sale." The risk to creditors arises from sales in which the seller goes out of business so provisions of revised Article 6 apply specifically to those situations.

Sections 2 and 3 of the bill make conforming changes to references to Article 6 in other statutes.

Section 4 of the bill authorizes the Revisor of Statutes to include the official comments to the UCC Revised Article 6 and all explanatory comments of the drafters of the act as the Revisor deems appropriate.

EFFECTIVE DATE: This act becomes effective January 1, 2004 and applies to bulk sales for which the date of the bulk sales agreement occurs on or after January 1, 2004.

BACKGROUND: Approximately 41 states have repealed Article 6 of the UCC and have not adopted the revised version. Four states and the District of Columbia have adopted revised Article 6. Because the business environment has changed since Article 6 was first promulgated, in 1988 the Uniform Law Commissioners encouraged those states that enacted Article 6 to repeal it. The arguments set forth are that creditors are able to make more informed decisions about extending credit through technology and credit reporting services. Creditors have better opportunities to collect their debts through revised jurisdiction laws that allow creditors to bring actions against debtors that flee to other states. Article 9 of the UCC, Secured Transactions, provides creditors other avenues to retain security interests in their inventory. If the bulk transfer is a fraud and the buyer is party to the fraud, then the creditor may have remedies under the Uniform Fraudulent Transfer Act, G.S. 39-23.1 et. seq. Many have also described the original Article 6 as a practice trap for the unwary because it creates an exception to normal commercial rules where good faith purchasers are protected against claims by a seller's creditors, rather than having to give the notice as they do in Article 6.

The General Statutes Commission supports the repeal of Article 6. However, bills to repeal it failed to be enacted in the 1997, 1999, and 2001 sessions of the North Carolina General Assembly, and the GSC believes that enactment of Revised Article 6 is a better alternative to retaining existing Article 6. Therefore, the GSC recommends the above-referenced bill for enactment in North Carolina.

S230-SMRQ-003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 230*
PROPOSED COMMITTEE SUBSTITUTE S230-CSRQ-2 [v.2]

3/17/2003 2:26:46 PM

Short Title: Revise UCC Article on Bulk Transfers. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE RELATING TO BULK TRANSFERS AND TO ENACT CONFORMING AMENDMENTS TO THE UNIFORM COMMERCIAL CODE AND OTHER SECTIONS OF THE GENERAL STATUTES.

SECTION 1. Article 6 of Chapter 25 of the General Statutes is repealed.

SECTION 2. G.S. 25-1-105(2), reads as rewritten:

"(2) Where one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102).

Governing law in the article on Funds Transfers. (G.S. 25-4A-507).

Letters of Credit. (G.S. 25-5-116).

~~Bulk transfers subject to the article on bulk transfers. (G.S. 25-6-102).~~

Applicability of the article on investment securities. (G.S. 25-8-110).

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. (G.S. 25-9-301 through G.S. 25-9-307)."

SECTION 3. G.S. 25-2-403(4) reads as rewritten:

"(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions ~~(article 9), bulk transfers (article 6)~~ (article 9) and documents of title (article 7)."

SECTION 4. G.S. 66-186 reads as rewritten:

"**§ 66-186. Uniform commercial practice.**

(a) This Article does not affect a security interest of the supplier in the inventory of the dealer.

~~(b) A repurchase of inventory under this Article shall not be subject to the bulk sales provisions of Article 6 of Chapter 25 of the General Statutes.~~"

SECTION 5. G.S. 85B-2(a)(11) reads as rewritten:

"(11) Sales of collateral, sales conducted to enforce carriers' or warehousemen's liens, ~~bulk sales,~~ sales of goods by a presenting bank following dishonor of a documentary draft, resales of rightfully rejected goods, resales of goods by an aggrieved seller, or other resales conducted pursuant to authority in Articles 2, 4, ~~6, 7~~ 7, and 9 of Chapter 25 of the General Statutes (the Uniform Commercial Code)."

SECTION 6. This act becomes effective January 1, 2004. Rights and obligations arising under Article 6 of Chapter 25 of the General Statutes and former G.S. 25-9-111 before the effective date of this act remain valid and may be enforced as though those statutes had not been repealed.

STATE OF NORTH CAROLINA
GENERAL STATUTES COMMISSION
POST OFFICE BOX 629
RALEIGH, NORTH CAROLINA 27602
(919) 716-6800

MEMORANDUM

TO: House Judiciary II Committee

FROM: General Statutes Commission

DATE: June 9, 2003

RE: Senate Bill 230 (Revise UCC Article on Bulk Transfers)

General Comments

This bill replaces Article 6 of Chapter 25 of the General Statutes with a revised article.

Chapter 25 contains North Carolina's version of the Uniform Commercial Code (UCC). Article 6 regulates bulk transfers, i.e., any transfer in bulk, not in the ordinary course of the transferor's business, of a major part of the materials, supplies, merchandise or other inventory of an enterprise if the principal business of the enterprise is the sale of merchandise from stock. Please note that the Article only applies to a narrow category of sales. If it applies, it makes a bulk transfer ineffective against any creditor of the transferor unless the buyer gives a 10-day advance notice of the transfer to these creditors and keeps a list of the creditors and a schedule of property obtained in the bulk transfer for six months after the bulk transfer takes place.

The National Conference of Commissioners on Uniform State Laws and the American Law Institute are in the process of revising the entire UCC. When they revisited Article 6, they concluded that it has become obsolete and that changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. Both bodies withdrew their support for the Article and encourage states to repeal it. At the same time, however, for those states that wish to continue to regulate bulk sales, the Conference and the Institute promulgated Revised Article 6 (Bulk Sales) as an alternative. To date, 41 states have repealed Article 6 outright, and four states (Arizona, California, Indiana, and Virginia) and the District of Columbia have enacted Revised Article 6. Only five states (Georgia, Maryland, Missouri, North Carolina, and Wisconsin) retain the original Article 6 or a version of it.

The General Statutes Commission (GSC) fully agrees with the Conference and the Institute that Article 6 should be repealed. However, bills to repeal it failed to be enacted in the 1997, 1999, and 2001 sessions of the North Carolina General Assembly, and the GSC believes that enactment of Revised Article 6 is a better alternative than retaining existing Article 6. Therefore, the GSC recommends the above-referenced bill for enactment in North Carolina.

The bill consists of three parts: Part I is based on Revised Article 6, Part II makes conforming amendments to other articles of Chapter 25, and Part III authorizes the printing of official and drafters' comments and provides an effective date of January 1, 2004. The applicability provision in Part III was added by the Senate.

Changes from Current Law

The bill makes the following major substantive changes to current Article 6:

- The revised article applies only to sales of inventory from stock and not to other types of transfers (§ 25-6-102(a)(3)).

- The revised article applies only when the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale (§ 25-6-102(a)(3)).

- The revised article does not apply to a sale in which the seller's equity is less than $10,000 or a sale having a value of more than $25,000,000 (§ 25-6-103(c)(12)).

- The notice period to the seller's creditors is increased from 10 days to 15 days (§ 25-6-105(d)), and the statute of limitations is extended from six months to one year (§ 25-6-110).

- The notice to creditors must include a copy of a schedule of distribution setting forth how the net contract price is to be distributed (§§ 25-6-105(b) and 25-6-106(a)).

- A buyer who makes a good faith effort to comply with the requirements of the revised article or to exclude the sale from the application of the article, or who acts on the good faith belief that the article does not apply to the sale, is not liable for noncompliance (§ 25-6-107(c)).

- A buyer's noncompliance no longer renders the sale ineffective but rather gives rise to a claim for damages, which are essentially capped at an amount no greater than the contract price (§ 25-6-107(a), (d), and (h)).

- The revised article applies to a bulk sale conducted by a liquidator on the seller's behalf, as well as to a bulk sale conducted by an auctioneer, by imposing upon liquidators and auctioneers duties and liabilities that are similar, but not always identical, to those of a buyer (§ 25-6-108).

- The revised article applies when the seller's place of business is located in this State, rather than when the goods are located in this State. Where the seller has more than one place of business, the seller is deemed to be located at the seller's chief executive office (§ 25-6-103(a) and (b)).

- The revised article imposes liability on a person in direct or indirect control of a seller that is an organization if that person knowingly, intentionally, and without legal justification fails or causes the seller to fail to distribute the net contract price in accordance with the schedule of distribution (§ 25-6-107(k)).

Differences Between this Bill and the Revised Uniform Act

The GSC made the following major changes to the Uniform text of Revised Article 6 in preparing this bill:

- The GSC eliminated Revised Article 6's provision for public filing of bulk sale notices in a single filing office, such as the office of the Secretary of State, because the expense appeared to outweigh the benefits.

- Revised Article 6 requires the buyer to give creditors notice of the bulk sale not less than 45 days before the date of the bulk sale and not more than 30 days after obtaining the list of claimants. The GSC was of the opinion that this 45-day period was commercially unreasonable and reduced it to 15 days, which is still longer than the current 10-day period. It reduced the 30-day period to 10 days. Also, Revised Article 6's period for giving notice of an amended schedule of distribution (new agreement between the buyer and the seller on how the net contract price is to be distributed) has been reduced from 14 days to 10 days.

- Revised Article 6's applicability provisions permitting the article to apply to a foreign buyer in a foreign transaction have been omitted.

Specific Comments

§ 25-6-101. This section changes the short title of Article 6 from "Uniform Commercial Code–Bulk Transfers" to "Uniform Commercial Code–Bulk Sales" because Revised Article 6 applies only to sales and not to other transfers.

§ 25-6-102. This section defines key terms used in Revised Article 6. Some of the more notable terms are "assets," "bulk sale," "claim," "claimant," "date of the bulk sale," "date of the bulk-sale agreement," "net contract price," and "net proceeds."

The definition of "bulk sale" is more specific than the existing definition of "bulk transfer" in that a bulk sale is defined as a sale of more than half of the seller's inventory, as opposed to the current "major part" of materials, supplies, merchandise, or other inventory. The buyer must also know, or be able to know after reasonable inquiry, that the seller is not going to continue to operate the business or a similar business.

§ 25-6-103. This section provides that Revised Article 6 applies to a bulk sale if the seller's principal business is the sale of inventory from stock and the seller is located in this State on the date of the bulk-sale agreement. This section also lists transactions that are excluded from the scope of the Article. These now include a sale to a buyer who assumes specified debts of the seller and gives written notice of the assumption, a sale of assets having a value, net of liens and security interests, of either less than $10,000 or a value more than $25,000,000 on the date of the bulk-sale agreement, and a sale required by, and made pursuant to, statute. Section 25-6-103 also sets forth the required contents of a notice of assumption and certain presumptions as to the value of assets for purposes of determining whether a sale of assets having a value of either less than $10,000 or more than $25,000,000 is excluded.

§ 25-6-104. This section sets forth the buyer's obligations in a bulk sale conducted by the seller, e.g., obtaining from the seller a list of claimants, making the list available to claimants, obtaining from the seller or preparing a schedule of distribution, and giving notice of the bulk sale.

§ 25-6-105. This section sets requirements for notice to claimants and the contents of the notice, including a statutory form for the notice of sale. The buyer must give notice of the bulk sale by sending or delivering written notice of the bulk sale to each claimant on the list of claimants and to any other claimant of whom the buyer has knowledge at the time the notice is sent or delivered. The notice must be given not less than 15 days before the date of the bulk sale and not more than 10 days after obtaining the list of claimants and must be accompanied by a copy of the schedule of distribution.

§ 25-6-106. This section imposes on the buyer and seller the obligation to agree on how the net contract price is to be distributed and to set forth their agreement in a written schedule of distribution. This section also lists circumstances under which the buyer or seller is excused from complying with the buyer's or seller's undertakings in the schedule of distribution and also sets forth notice requirements for an amended schedule of distribution.

§ 25-6-107. This section sets forth the buyer's liability for noncompliance with the buyer's obligations in a bulk sale conducted by the seller. In a single bulk sale the buyer's maximum cumulative liability to the seller's creditors is an amount equal to the "net contract

price" (defined in § 25-6-102(a)(11)) of the inventory and equipment. When the assets sold include property other than inventory and equipment, the maximum cumulative liability to the creditors is an amount equal to the "net value" (defined in § 25-6-107(e)) of the inventory and equipment. The wording in the bill differs from the wording in the Uniform text, but the change is intended to be a clarifying change.

The buyer's failure to comply with the buyer's obligations does not (1) impair the buyer's rights in or title to the assets, (2) render the sale ineffective, void, or voidable, (3) entitle a creditor to more than a single satisfaction of the creditor's claim, or (4) create liability other than as provided in Revised Article 6. Section 25-6-107 also imposes liability on a person in direct or indirect control of a seller that is an organization if that person knowingly, intentionally, and without legal justification fails or causes the seller to fail to distribute the net contract price in accordance with the schedule of distribution.

§ 25-6-108. This section imposes upon auctioneers and liquidators obligations and liabilities that are similar, but not always identical, to those of a buyer. This section also sets forth notice requirements and a statutory form for the notice of sale.

§ 25-6-109. This section is shown as reserved for future codification purposes due to the omission of Revised Article 6's provision for public filing of bulk sale notices in a single filing office.

§ 25-6-110. This section provides that an action under Revised Article 6 must be commenced within one year after the date of the bulk sale. However, if the buyer, auctioneer, or liquidator conceals the fact that the bulk sale has occurred, an action may be commenced within one year after the bulk sale is discovered or should have been discovered, but no case later than two years after the date of the bulk sale.

SENATE BILL 881:
Permit Tobacco Payment w/o Reopening Estate.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Hartsell
Date:	June 10, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 881 implements a recommendation of the General Statutes Commission to permit Phase II payments under the National Tobacco Grower Settlement Trust to be paid to a decedent's devisees or heirs without reopening a decedent's estate.***

BILL ANALYSIS:

Section 1. – Adds a new section to Article 15 of Chapter 28A relating to the discovery of assets in a decedent's estate. The new section provides that a Phase II payment under the National Tobacco Grower Settlement Trust shall be the property of the distributees paid in accordance with new G.S. 28A-21-3.1, which is enacted in Section 2 of the bill.

Section 2. – Creates a new section in Article 21 of Chapter 28A (Accounting), which establishes a procedure for Phase II payments to be paid to a decedent's devisees or heirs after a solvent estate is closed without reopening the estate. At the time of filing a final accounting and before the estate is closed, the personal representative or collector may prepare a list of devisees or heirs who would be entitled to any Phase II payments. The section requires that the decedent was a tobacco grower or a tobacco quota owner as defined in the trust agreement establishing the National Tobacco Grower Settlement Trust during 1993 or any subsequent year, there are no unsatisfied creditors or general monetary bequests, and all assets of the estate other than any potential Phase II payments have been distributed. The list must be signed under oath and must contain identifying information about the personal representative or collector, the decedent, and each of the devisees and heirs entitled to receive Phase II payments as well as the percentage of Phase II payments to be received by each.

The clerk of superior court must review the list to determine if the list of distributees and their shares of potential Phase II payments are in accordance with the decedent's will or with the Intestate Succession Act. The clerk's approval of the list is prima facie evidence of correctness.

When the North Carolina Phase II Tobacco Certification Entity, Inc., determines that the estate of a decedent entitled to any Phase II payment covering a time period when the decedent was alive has been closed, the payment may be paid to the distributees on the list filed pursuant to this section without the estate having to be reopened. The bill also provides that an estate may be reopened in order to file a list of Phase II distributees. Finally, the bill provides that Phase II payments are deemed cash and do not pass by virtue of any devise or inheritance of the decedent's real property.

This act would become effective when it becomes law and applies to payments made on or after that date.

BACKGROUND: The General Statutes Commission was authorized to study the issue of allowing a method for distribution of property coming to an estate after the estate is closed without reopening the estate by S.L. 2002-180 (the Studies Bill).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 881
PROPOSED HOUSE COMMITTEE SUBSTITUTE S881-PCS55198-RO-26

Short Title: Permit Tobacco Payment w/o Reopening Estate. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT PHASE II PAYMENTS UNDER THE NATIONAL TOBACCO GROWER SETTLEMENT TRUST TO BE PAID WITHOUT REOPENING A DECEDENT'S ESTATE, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 15 of Chapter 28A of the General Statutes is amended by adding a new section to read:

"**§ 28A-15-9.1. Phase II payments.**

A Phase II payment as defined in G.S. 28A-21-3.1 shall be the property of the distributees paid in accordance with that section."

SECTION 2. Article 21 of Chapter 28A of the General Statutes is amended by adding a new section to read:

"**§ 28A-21-3.1. Phase II tobacco grower and quota owner payments; list of Phase II distributees.**

(a) The following definitions apply in this section:

(1) "National Tobacco Grower Settlement Trust" means the trust established by tobacco companies to provide payments to tobacco growers and tobacco quota owners in 14 states for the purposes of ameliorating potential adverse economic consequences of likely reduction in demand, sales, and prices for tobacco as an agricultural product as a result of the Master Settlement Agreement incorporated in the consent decree entered in the action of State of North Carolina vs. Philip Morris, Incorporated, et al., 98 CVS 14377, in the General Court of Justice, Superior Court Division, Wake County, North Carolina.

(2) "Phase II payment" means an amount certified by the North Carolina Phase II Tobacco Certification Entity, Inc., to be paid pursuant to the

trust agreement establishing the National Tobacco Grower Settlement Trust.

(b) A personal representative or collector of the estate of a decedent who, during 1993 or any subsequent year, was a tobacco grower or a tobacco quota owner as defined in Section 4.01 of the trust agreement establishing the National Tobacco Grower Settlement Trust may file, along with a final account, a list of Phase II distributees for Phase II payments if all of the following conditions are met:

(1) There are no unsatisfied creditors.

(2) There are no unsatisfied general monetary bequests.

(3) All assets other than any potential Phase II payments have been distributed.

(c) A list of Phase II distributees, signed under oath, must contain the following information:

(1) The name and address of the personal representative or collector.

(2) The name and social security number of the decedent.

(3) The name and address, if known, of each devisee or heir entitled to receive Phase II payments and the percentage of Phase II payments to be received by each.

(d) The clerk of superior court must review the list of Phase II distributees to determine if the list of distributees and their shares of potential Phase II payments are in accordance with the will or, if there is no will, in accordance with the Intestate Succession Act. If the clerk accepts the list of Phase II distributees for filing, the clerk must endorse the clerk's approval thereon, which shall be prima facie evidence of correctness.

(e) Upon determination by the North Carolina Phase II Tobacco Certification Entity, Inc., that the estate of a decedent entitled to any Phase II payment covering a time period when the decedent was alive has been closed, the payment may be paid directly to those distributees and in those shares set forth on a list of Phase II distributees filed under this section without the estate's having to be reopened under G.S. 28A-23-5.

(f) The estate of a decedent who is entitled to any Phase II payment may be reopened, if necessary, in accordance with G.S. 28A-23-5 in order to file a list of Phase II distributees under this section.

(g) For purposes of this section, Phase II payments covering a time period when decedent was alive are deemed cash and shall not pass by virtue of any devise or inheritance of the decedent's real property."

SECTION 3. This act is effective when it becomes law and applies to payments made on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 881

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S881-ARO-32 [v.1]

Date 6-10- ,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Representative Stam

moves to amend the bill on page 1, lines 28-29, by rewriting the lines to read: "Phase II Tobacco Certification Entity, Inc., to be paid pursuant to";

and on page 2, line 5, by deleting the words "pursuant to" and substituting the word "in";

and on page 2, line 20, by deleting the word "share" and substituting the word "shares";

and on page 2, line 34, by inserting the phrase "covering a time period when decedent was alive" between the words "payments" and "are".

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues., June 10, 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Amanda Fiedler	Intern/Rep Goodwin
Mark Brown	Capitol Group
Judd Dyer	SBE
Martha Clark	NCDAICS
Molly Ryan	NCSBA
Fran Cockman	NC statewatch
Andy Romanet	NCLM
Leo Rubert	CJPC
John O'Hale	Governor's Office
John Rustin	NCFPC

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, June 10, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

SB 230 Revise UCC Article on Bulk Transfers, *Sen. Hartsell, Bill Sponsor*

SB 722 Display of American Flag, *Sen. Kinnaird, Bill Sponsor*

SB 881 Permit Tobacco Payment W/O Reopening Estate, *Sen. Hartsell, Bill Sponsor*

SB 995 School Construction/Repair Flexibility, *Sen. Garrou, Bill Sponsor*

3. **Adjourn.**

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Tues., June 10, 10:00 a.m.

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ken Melton	Alley Associates
TED KAPLAN	KEL
Jim Blackburn	NC Association of County Commissioners
Leanne Winner	NCSBA
Bean Mills	NCCM
Floyd Lewis	General Statutes Commission
Michelle Frazier	NC Bar Ass'n
Pamela Bart	AOC
Billy Hall	GSC
John Cyrus	NC State Treasurer
John McHugh	GOV OFFICE

House Judiciary II

Committee

Minutes

June 11, 2003

Fifteen minutes after Session (6:15 p.m.)

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order. Rep. Bordsen asked if SB 226 (Unauthorized Admin. Meds by Child Care Fac.) could be taken up.

Rep. Nesbitt said he would allow out-of-town visitors to speak on the bill, but a vote would not be taken before the next meeting of the Committee.

Rob Johnson, District Attorney from Alamance County was recognized and explained the sentencing grid. He said that the issue he was asking the Committee was a very narrow issue. He referred to a sentencing chart that he had provided to members of the Committee. *(See Attachment I)*. He referred to the I Felony, specifically blocks C, C/I/ and I.

He said those parts of the grid in yellow, a judge can give an active or intermediate sentence. For the Class H felony proposed for "Kaitlyn's Law" record level I have C/I/A allowing the judge to give three different penalties.

Mr. Johnson said that if the penalty in SB 226 is left as a Class I Felony you could have an individual who drugged 10 children, who was prosecuted with drugging 10 children would have to be sentenced as a record level Class I, level one, if they have no prior record. Let's say that person does this again. The judge can count all ten offenses as only one conviction. In other words, they get 2 points. Let's say they come back and have 10 more children they have sedated two years later, they would only be a level 2. He said the judge could give a "split" sentence – under which they could be sentenced to

serve jail time.

Rep. Nesbitt observed that the judge could sentence the accused to jail on the second offense. Mr. Johnson concurred.

Mr. Johnson continued explained why he felt the penalty in Kaitlyn's Law should be a Class H felony. Under that, the judge has the option to choose at any record level whether he is going to impose the community sentence, the intermediate sentence, or the active sentence.

Mr. Johnson introduced Kaitlyn's parents, Mr. and Mrs. Shevlin.

Mr. Johnson said the judge's hands would be tied unless the penalty level is increased to a Class H felony.

Rep. Nesbitt asked if there wasn't a problem with proof in Kaitlyn's death and Mr. Johnson said that was because the medical examiner ruled it a SIDS death and did not do the toxicology test. Only at Mr. Johnson's request was the toxicology test done. The medical examiner maintained that the death was a SIDS death.

Rep. Nesbitt said he wanted to raise that issue because he didn't want to leave people with the impression that this law is not aimed at a serious punishment for someone who harms a child in any way. Under the bill as currently drawn, the accused will probably go to jail. However, you would need proof of causation.

Mr. Johnson told the committee that Andrew Mason, former Chief Toxicologist with the State of North Carolina was retained as an expert witness in the Kaitlyn case and his report contained this statement: "Every time you administer medication to an infant you are essentially performing an experiment."

Rep. Nesbitt told the committee that he had recently learned that so many things now could be labeled as medication, even sunscreen.

Rep. Nesbitt said the other problem he has with this legislation is that some people who keep children will be affected and others will no. So it's a felony if one person commits this act, but there is no harm-no foul if it is done in a public school or a daycare in a public school.

Rep. Nesbitt said the committee would not be voting on this bill today.

Rep. Bordsen was recognized. She stressed the need to make the penalty more severe.

Rep. Stam said his definition of felony is "something you can be executed for." Mr. Johnson's problem is with the Class I felony.

Kaitlyn's father, Mr. Shevlin was recognized and made comments to the committee. He made an impassioned plea for the committee to vote as Mr. Johnson would like.

The bill was carried over.

SB 537 (Amend Public Enter. Customer Billing Privacy) was before the committee and Sen. Rand was recognized to discuss his bill.

Sen. Rand explained that **SB 537** would exclude airports from the provision of G.S. 132-1.1 that removes public enterprise bill information from the definition of public records. This would return airport bill information to the public record status it had before the enactment of the 2001 amendment.

Rep. Ellis moved to give the bill a favorable report and the motion carried.

SB 521 (Pyrotechnic Regulation Enhanced) was before the Committee and Sen. Rand was recognized to discuss his bill.

Sen. Rand said the bill was a result of the Great White incident in New England where they were performing and set the place on fire. This bill says for any in-door use, for a person to do that the county board of commissioners cannot issue a permit unless the local or state Fire Marshall has certified that they have adequate fire suppression, that the structure is safe and that the building has adequate egress based on the size of the expected crowd.

Rep. Nesbit told Sen. Rand that the committee had passed a bill earlier in the Session that addressed the same situation. That bill was sponsored by Rep. Goodwin

Rep. Nesbitt asked staff to define the differences between the two bills.

Jeff Hudson, Committee Counsel, was recognized. He said that **SB 521** Sections 1 and 2 are not included in rep. Goodwin's bill. These basically provide the standards for county commissioners to issue permits. Section 2 would make conforming changes and would provide that The University of North Carolina and the University of North Carolina at Chapel Hill are required to apply the same safety standards for permitting purposes that counties and certain cities are required to apply. Section 3 increases the penalty for violating the law governing indoor pyrotechnic exhibitions.

He said Rep. Goodwin's bill was basically the same, just that the language was different.

Rep. Goodwin moved to amend the bill by harmonizing his bill with Sen. Rand's bill. ***(See Attachment II)*** The amendment was adopted.

Rep. Gully moved to incorporate the amendment and the bill into a proposed Committee Substitute, give that bill a favorable report, unfavorable as to original bill. The motion passed.

SB 995 (School Construction/Repair Flexibility), sponsored by Sen. Garrou, was before the Committee. The bill had previously been before the Committee and was sent to a subcommittee, of which Rep. Goodwin was chair.

Rep. Goodwin was recognized to explain what the subcommittee had recommended He said that the bill, which had started out as local, had been made into a statewide bill.

He presented a proposed committee substitute to the Committee and moved that it be adopted for consideration. The motion passed. (*See Attachment III)*

Rep. Goodwin said the subcommittee felt it would be best to take the bill back to its original intent, thus making it a local bill.

Rep. Nesbitt moved to amend the bill and the motion passed. (*See Attachment IV).*

Rep. Ellis moved to amend the bill and the motion passed. (*See Attachment V*).

Rep. Ellis moved to incorporate the amendments and the PCS into a new PCS, give that bill a favorable report, the original bill an unfavorable report. The motion passed.

SB 563 (Uniform Athlete Agents Act) was before the Committee and Sen. Hagan was recognized to discuss her bill.

Sen. Hagan said that in the early 1990s, the National Collegiate Athletic Association and several universities asked the National Conference of Commissioners on Uniform State Laws (Conference) to draft a uniform athlete agent's law. The Conference completed the Uniform Athlete Agents Act in 2000. As of June 10, 2003, 21 states and the District of Columbia have enacted that Act.

Currently the Athlete Agency provides valuable services for .student athletes. Improper contact between the agents and athletes threaten the loss of eligibility for the athlete to play and also could cause sanctions to be imposed on educational institutions. She said the law must be fair to both of these parties. These kinds of instances are highly publicized, time-consuming, and disruptive to the college or university. By adopting this bill, Sen. Hagan said, we will be providing protection to amateur athletes that reside in the schools in North Carolina.

Sen. Hagan said the bill was highly supported by all the athletic directors she contacted.

Rep. Nesbitt asked Sen. Hagan is a attorney presenting a student athlete would have to register as an agent. She said that if an attorney presented more than two student athletes, then he would have to register with the Secretary of State.

Rep. Nesbitt said generally attorneys were exempted from this kind of legislation because they are regulated by the Bar Association.

Mr. Clyde Holt with the North Carolina Bar Association was recognized. He said that he has been working with some of the states universities and Sen. Hagan in an attempt to adopt this Act. As we all know, on any given day, the amateur athletes in this state and the competition between our major universities is now on a nationwide basis. This Act would regulate as well as protect amateur athletes who reside in our state or who reside elsewhere, but attend universities in North Carolina.

Mr. Holt said this would require an attorney to apply with the Secretary of State's office to comply with the provisions of the Act when representing more than two in a given year. The primary protection for the athletes as well as the universities is that creates for the first time a private cause of action, either for an amateur that is injured by someone who is violating the Act, or for the university against someone who has violated the Act.

Rep. Nesbitt asked at what point do you become an agent. Mr. Holt said you would become an agent when you are soliciting or engaged to represent an amateur athlete for the first of their professional career or if they were soliciting you.

Rep. Ellis was concerned about the "with the intent" language in the bill.

Rep. Stam sent forth two amendments at the request of the bill sponsor, Sen. Hagan. (Amendment *1 (see AttachmentVI)* and Amendment 2 *(see Attachment VII)*

Rep. Goodwin was concerned about opening up the attorney-client privilege, and asked Mr. Holt if that issue had been addressed by the Bar Association.

Mr. Holt said that issue had not been specifically addressed by the Bar Association. He said he would think that a registered athletic agent, when the athlete loses his amateur status and employs that agent, that the athlete is going to be waiving any claim for confidentiality concerning that particular conflict. But if the athlete is under the jurisdiction of this Act, as is the agent, there would be a waiver of the right of confidentiality as far as the contractual relationship.

Rep. Nesbitt told the committee that this issue is extremely important, because lawyers are already strictly regulated by the Bar Association as to what they can and cannot do. Otherwise they could be bound by two "masters" who have conflicting requirements.

Rep. Goodwin agreed and said he felt that some language should be added that client confidentiality is waived knowingly by the Bar Association.

Mr. Holt agreed.

Jeff Hudson, Committee Counsel, was recognized. He raid the existing Article 8 of Chapter 78C which is being replaced by this Act provides that the "registration requirements in this section do not apply to a North Carolina licensed resident attorney who neither advertises directly for or solicits

any athlete by representing to any person that he has special experience and qualifications with regard to representing athletes and represents no more than two athletes."

Mr. Holt said it was the intent that that language be carried forward in **SB 563.**

Rep. Nesbitt requested that an amendment be prepared to put that language in the bill.

Rep. Goodwin was also concerned about a conflict between **SB 315** and **SB 563** and asked if something needs be added to **SB 563** regarding minors who are athletes.

Three was discussion about the two bills and Mr. Holt said he didn't think there was any conflict.

Rep. Stam's amendments were before the Committee for adoption. Amendment No. 2 (ASB-19 [v.1] was adopted and Amendment No. 1 was withdrawn ASB-20 [v.1].

The bill was displaced.

SB 963 (Prevent Price Gouging During Disasters) was before the Committee and Sen. Swindell was recognized to discuss his bill.

He presented the Committee a proposed committee substitute and Rep. Goodwin moved that it be adopted for consideration. *(See Attachment VIII).* The motion passed.

Sen. Swindell said the bill was driven by all the disasters we have had in North Carolina. He says there seems to be a situation whereby there are people who want to take advantage of folks' hardships and taken advantage of them during disasters.
(See Bill Analysis – Attachment IX)

Discussion followed. Members of the Committee were concerned about the impact of this legislation and wondered if the effect would to decrease merchandize available for the public.

There was also concern that the bill might negatively impact a merchant who might be wrongfully accused of price gouging. To address that concern, Rep. Nesbitt moved to amend the bill and the motion passed. *(See Attachment X)*

Rep. Stam was conflicted about the bill from an economic point of view (*supply and demand).*

Andy Ellen, with the North Carolina Retail Merchant's Association, was recognized. He said his association supported the concept of the bill, but had concerns about the "gross disparity" language in the bill. He said that once a merchant got "labeled as a price gouger" it is hard to every recover from that. If for example, a store raised the price of ice during a disaster from $1.00 to $1.15, then that would be considered a gross disparity.

Therefore, everyone who bought a bag of ice from that store at that price would have a cause of action against the store under the proposed legislation.

The bill was carried over.

SB 722 (Display of American Flag) was before the Committee.

Rep. Stam passed out a proposed committee substitute to the Committee and moved that it be adopted for consideration. The motion passed.

He explained that the proposed committee substitute removed references to homeowners association and condominium association and states that "no private restriction" on the use land can be construed to regulate or prohibit the US Flag if it is displayed in accordance with the patriotic customs set forth in federal law. Restrictions that are registered prior to October 1, 2003 must specifically use the terms? (i) flag of the United States of America, (ii) American flag, or (iii) United States flag in order to be construed to regulate the US flag. For restrictions registered after October 1, 2003, the restriction has to be written on the first page of the instrument and it must specifically state that the document regulates or prohibits the display of the United Stats flag in order to be construed as regulating or prohibiting the display of the flags.

Rep. Ellis said he liked the bill.

The bill was carried over.

The meeting adjourned at 8:20 p.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

Attachment

	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A	A	A	A	A	A	
	240-300	288-360	336-420	384-480	fe Imprisonment without Parc		Aggravated
B1	192-240	230-288	269-336	307-384	346-433	384-480	PRESUMPTIVE
	144-192	173-230	202-269	230-307	260-346	288-384	Mitigated
	A	A	A	A	A	A	
	157-196	189-237	220-276	251-313	282-353	313-392	Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	08-10	09-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	
	06-08	08-10	10-12	11-14	15-19	20-25	Aggravated
H	05-06	06-08	08-10	09-11	12-15	16-20	PRESUMPTIVE
	04-05	04-06	06-08	07-09	09-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	
	06-08	06-08	06-08	08-10	09-11	10-12	Aggravated
I	04-06	04-06	05-06	06-08	07-09	08-10	PRESUMPTIVE
	03-04	03-04	04-05	04-06	05-07	06-08	Mitigated

☐ Denotes those categories of offenders appropriate for Sentencing Services

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From Michie, North Carolina Law and Procedure, 1998 Ed.

What is new?

Sentencing Services

Our name

Community Penalties is now Sentencing Services. This change reduces confusion regarding our program identity and purpose.

Our mission

Our new mission is to provide the judicial system with information that will assist judges in identifying the most effective community and correctional resources available for offenders.

Our product

Our plans will provide the court with a detailed assessment of the offender and information about available resources.

Our customer

Judges, defense attorneys, district attorneys, and the defendant may refer cases to our program. While local program policies govern the procedure, all plans prepared will now be submitted to the court.

More local participation

Each judicial district has a board comprised of local citizens and justice officials who establish policies for operation. These policies will tailor program operation to better serve the judicial district. The Senior Resident Superior Court Judge will be invited to review the policies to maximize coordination within the district.

Candidates for our services

Programs will focus resources on felony offenders, which will enable us to provide more information on the tough cases. Judges may also refer misdemeanor cases falling in Class A1 and Class 1, prior record level III.

Working within the new case management system

Sentencing Services recognizes that good service must be timely. That is why your Sentencing Services program is working with the District Attorney to coordinate our services within the new case management system.

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SENATE BILL 226: Unauthorized Administration of Medication by Child Care Facilities

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. William Purcell
Date:	June 5, 2003	**Summary by:**	Drupti Chauhan*
Version:	S226-PCS65311-RQ-33		Committee Co-Counsel

SUMMARY: ***This bill would make the administration of prescription or over-the counter medication to a child attending a licensed or an unlicensed child care facility without written authorization. A violation of the statute that results in serious injury to the child shall be punished as a Class F felony and any other violation of the section is punishable as a Class I felony. The bill provides an exception for circumstances in which an emergency medical condition presents itself and the child's parent is unavailable. In this situation, medication may be lawfully administered without the parent's written authorization if the medication is administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions. The bill is effective December 1, 2003 and applies to offenses committed on or after that date.***

CURRENT LAW: G.S. 110-91(9) directs the NC Child Care Commission to adopt rules to establish minimum requirements for record keeping for child care facilities. The scope of this authority includes records regarding authorization to administer medications. Rules adopted by the Commission in 1986, and amended in 1996, 1998, and 2001 include, among other things, the following with respect to the administration of medications in child care facilities:

- No drug or medication may be administered to any child in a licensed child care facility without specific written instructions from the child's parent or guardian.
- No drug or medication may be administered for a non-medical purpose, including inducing sleep.
- Prescribed medication may be administered only with parent's written authorization and the medication must be in its original container with proper labeling, including directions for dosage, or the parent must provide written instructions that must be signed and dated by the prescribing physician or health professional.
- Over-the-counter medication may be administered only with the parent's written authorization and only in accordance with written dosage instructions of the parent, physician or other authorized health professional.
- A parent may provide written authorization that is valid for up to six months to authorize the administration of medication to treat the symptoms of asthma and allergic reactions, and up to one year to administer sunscreen and over-the-counter diapering creams. The authorization must be specific as to the symptoms or conditions for which the medication may be administered.
- A parent may provide written authorization for the administration of a one-time, weight appropriate dose of acetaminophen in the event the child has a fever and the parent cannot be reached.

Enforcement Authority:

Administrative penalties: G.S. 110-102.2 authorizes the Secretary of DHHS to impose one or more of the following against a licensee:

- Issue a written warning and a request for compliance;
- Issue an official reprimand;
- Place a licensee on probation;
- Suspend the license for a period not to exceed one year; and
- Permanently revoke the license.

Civil penalties: G.S. 110-103.1 authorizes the Secretary to impose a civil penalty, not to exceed $1,000 for each violation documented on any given date, against an operator of a child care facility who violates NC law governing child care facilities. In determining the amount of the penalty, the Secretary must consider the threat of or extent of harm to children and the consistency of violations.

BILL ANALYSIS:

- Makes the administration of medication to a child attending a licensed or an unlicensed child care facility without written authorization from the child's parent or guardian unlawful.
- An employee, owner, household member, volunteer or operator who violates the statute would be face a Class H felony.
- Provides for an enhanced penalty (Class F felony) for violations resulting in serious injury to a child.
- Provides an exception for emergency medical conditions when the child's parent is unavailable. The medication must be administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions.

Class I felony: Punishable by an absolute minimum of 3 months Community Service Punishment and an absolute maximum of 12 months Intermediate or Active Punishment, depending on prior convictions and aggravating factors.

Class F felony: Punishable by an absolute minimum of 10 months Intermediate Punishment (e.g. supervised probation) or Active Punishment to an absolute maximum of 59 months of Active Punishment, depending on prior convictions and aggravating factors.

BACKGROUND:

Inspiration for the legislation:

Senate Bill 226 is a recommendation of the NC Child Fatality Task Force. The Task Force was inspired to recommend the bill after hearing the story of Kaitlyn Shevlin, a 5-month-old who died in an unlicensed day-care home in Alamance County in 2001. According to Mr. Rob Johnson, District Attorney for Alamance County, although medical examiners could not find a definitive cause of death and as a result ruled that the child died from Sudden Infant Death Syndrome, law enforcement investigators suspect her day-care provider gave the child a generic form of the medicine Benadryl to make her sleepy. The day care provider was unlicensed and had numerous complaints of child neglect filed against her in the 20 years she operated her unlicensed facility. She was convicted of misdemeanor charges of child abuse and neglect served four months in prison.

Relevant Definitions (cut and pasted from G.S. 110-86):

- **Child care**. - A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

- **Child care facility**. - Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. **A child care center** is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. **A family child care home** is a child-care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

- **Child care does not include the following**:

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

- "**Household member**" to mean: "member of the household in a family child care home or nonlicensed child care home and is over 15 years old and is present when children are in care." (G.S. 110-90.2)
- "**Volunteer**" to mean "a person who works in a child care facility and is not monetarily compensated by the facility" (NCAC 10-3U.0102).

*Linda Attarian, former Research Attorney, contributed significantly to this bill

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 226

Health and Human Resources Committee Substitute Adopted 3/5/03
Judiciary II Committee Substitute Adopted 4/8/03
Fourth Edition Engrossed 4/10/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S226-PCS65311-RQ-33

Short Title: Unauthorized Admin. Meds. by Child Care Fac. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Article 7 of Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

(a) It is unlawful for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility as defined in G.S. 110-86, to willfully administer, without written authorization, prescription or over-the-counter medication to a child attending the child care facility. For the purposes of this section, written authorization shall include the child's name, date or dates for which the authorization is applicable, dosage instructions, and signature of the child's parent or guardian.

(b) In the event of an emergency medical condition and the child's parent or guardian is unavailable, it shall not be unlawful to administer medication to a child attending the child care facility without written authorization as required under subsection (a) of this section if the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider. For purposes of this subsection, the following definitions apply:

(1) A bona fide medical care provider means an individual who is licensed, certified, or otherwise authorized to prescribe the medication.

(2) An emergency medical condition means circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

(c) A violation of this section that results in serious injury to the child shall be punished as a Class F felony.

(d) Any other violation of this section shall be punished as a Class I felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 537

Short Title:	Amend Public Enter. Customer Billing Privacy.	(Public)
Sponsors:	Senator Rand.	
Referred to:	Judiciary I.	

March 26, 2003

A BILL TO BE ENTITLED

AN ACT TO EXCLUDE AIRPORTS FROM THE PUBLIC ENTERPRISE BILLING INFORMATION PRIVACY LAW.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 132-1.1 reads as rewritten:

"**§ 132-1.1. Confidential communications by legal counsel to public board or agency; State tax information; public enterprise billing information.**

(a) Confidential Communications. – Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body.

(b) State and Local Tax Information. – Tax information may not be disclosed except as provided in G.S. 105-259. As used in this subsection, "tax information" has the same meaning as in G.S. 105-259. Local tax records that contain information about a taxpayer's income or receipts may not be disclosed except as provided in G.S. 153A-148.1 and G.S. 160A-208.1.

(c) Public Enterprise Billing Information. – Billing information compiled and maintained by a city or county or other public entity providing utility services in

connection with the ownership or operation of a public enterprise, excluding airports, is not a public record as defined in G.S. 132-1. Nothing contained herein is intended to limit public disclosure by a city or county of billing information:

~~(i)~~ (1) ~~that~~ That the city or county determines will be useful or necessary to assist bond counsel, bond underwriters, underwriters' counsel, rating agencies or investors or potential investors in making informed decisions regarding bonds or other obligations incurred or to be incurred with respect to the public enterprise;

~~(ii)~~(2) ~~that~~ That is necessary to assist the city, county, State, or public enterprise to maintain the integrity and quality of services it provides; or

~~(iii)~~(3) ~~that~~ That is necessary to assist law enforcement, public safety, fire protection, rescue, emergency management, or judicial officers in the performance of their duties.

As used herein, "billing information" means any record or information, in whatever form, compiled or maintained with respect to individual customers by any owner or operator of a public enterprise, as defined in G.S. 160A-311, excluding subdivision (9), and G.S. 153A-274, excluding subdivision (4), or other public entity providing utility services, excluding airports, relating to services it provides or will provide to the customer."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 537:
Amend Public Enter. Customer Billing Privacy.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Rand
Date:	June 11, 2003	**Summary by:**	Karen Cochrane Brown
Version:	First Edition		Committee Co-Counsel

SUMMARY: ***Senate Bill 537 would exclude airports from the public enterprise billing information privacy law.***

CURRENT LAW:

G.S. 132-1 defines "public records" and states that those records are the property of the people and shall be made available to the public unless otherwise specified by law. G.S. 132-1.1 excludes certain types of records from the definition of public records, such as attorney-client communications, and state and local tax information. In 2001, G.S. 132-1.1 was amended to exclude public enterprise billing information from the definition of public records. Public enterprises are defined in Article 16 of Chapter 160A (G.S. 160A-311) for cities and in Article 15 of Chapter 153A (G.S. 153A-274) for counties. Public enterprises include: electric services, water services, wastewater collection and treatment, gas production and distribution, public transportation systems, solid waste collection and disposal, cable television, off-street parking facilities and systems, stormwater management programs, and airports.

The 2001 amendment addressed the problem of customers who were served by cities and counties (often not by choice, but because of their location) and who were being put at a disadvantage because their records were subject to scrutiny that they would not otherwise be if they were customers of a private provider.

BILL ANALYSIS:

Senate Bill 537 would exclude airports from the provision of G.S. 132-1.1 that removes public enterprise billing information from the definition of public records. This would return airport billing information to the public record status it had before the enactment of the 2001 amendment.

EFFECTIVE DATE: The act would be effective when it becomes law.

O. Walker Reagan, Counsel to the Senate Judiciary II Committee, contributed substantially to this summary.

S537-SMRO-001

SENATE BILL 521:
Pyrotechnic Regulation Enhanced

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Rand
Date:	June 11, 2003	**Summary by:**	Jeff Hudson*
Version:	Third Edition		Committee Counsel

SUMMARY: Senate Bill 521 would provide specific safety standards that must be met before a permit for the indoor use of pyrotechnics at a concert or public exhibition can be issued. Senate Bill 521 would also increase the penalty for violation of pyrotechnic laws at an indoor public exhibition from a Class 2 misdemeanor to a Class 1 misdemeanor.

CURRENT LAW: Pyrotechnics, as defined in G.S. 14-414 (Attached), may not be discharged in the State except at public exhibitions under the supervision of experts when permitted by the board of county commissioners. Other than the determination by the commissioners that the discharge will be at a public exhibition under the supervision of experts, there are no other safety requirements set forth in the General Statutes. Violation of this law is punished as a Class 2 misdemeanor.

A permit from the commissioners is not required for a public exhibition of pyrotechnics authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on University lands or buildings in Orange County. Local modifications of the pyrotechnics statutes also allow certain city councils to permit public exhibitions of pyrotechnics.

BILL ANALYSIS:

Section 1 would provide that for indoor use of pyrotechnics at concerts or public exhibitions the local fire marshal or State Fire Marshal must first certify that:

- Adequate fire suppression will be used at the site.
- The structure is safe for the use of the pyrotechnics with the type of fire suppression to be used.
- The building has adequate egress based on the size of the expected crowd.

This section would also apply to any city that is authorized to issue pyrotechnic permits by a local act.

Section 2 would make conforming changes and would provide that The University of North Carolina and the University of North Carolina at Chapel Hill are required to apply the same safety standards for permitting purposes that counties and certain cities are required to apply.

Section 3 would make it a Class 1 misdemeanor to violate the law governing indoor pyrotechnic exhibitions. The punishment for all other pyrotechnic violations remains a Class 2 misdemeanor.

EFFECTIVE DATE: Sections 1 and 2 apply to permits issued on or after the date the bill becomes law. Section 3 is effective December 1, 2003, and applies to offenses committed on or after that date.

TECHNICAL NOTE: Senate Bill 521 and House Bill 1091 both increase the penalty for violation of pyrotechnics laws at indoor exhibitions to a Class 1 misdemeanor. The language in the two bills, however, is different and should be made consistent.

***Note:** Walker Reagan, Senate Judiciary I Committee Counsel, contributed to the preparation of this summary.

S521-SMSB-001

Article 54.

Sale, etc., of Pyrotechnics.

§ 14-410. Manufacture, sale and use of pyrotechnics prohibited; exceptions; sale to persons under the age of 16 prohibited.

(a) It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the State of North Carolina: provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or discharged; provided, further, that such written authority from the board of commissioners is not required for a public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill; provided, further, that it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business.

(b) Notwithstanding the provisions of G.S. 14-414, it shall be unlawful for any individual, firm, partnership, or corporation to sell pyrotechnics as defined in G.S. 14-414 (2), (3), (4)c., (5), or (6) to persons under the age of 16. (1947, c. 210, s. 1; 1993 (Reg. Sess., 1994), c. 660, s. 3; 1995, c. 475, s. 1.)

§ 14-411. Sale deemed made at site of delivery.

In case of sale or purchase of pyrotechnics, where the delivery thereof was made by a common or other carrier, the sale shall be deemed to be made in the county wherein the delivery was made by such carrier to the consignee. (1947, c. 210, s. 2.)

§ 14-412. Possession prima facie evidence of violation.

Possession of pyrotechnics by any person, for any purpose other than those permitted under this article, shall be prima facie evidence that such pyrotechnics are kept for the purpose of being manufactured, sold, bartered, exchanged, given away, received, furnished, otherwise disposed of, or used in violation of the provisions of this article. (1947, c. 210, s. 3.)

§ 14-413. Permits for use at public exhibitions.

For the purpose of enforcing the provisions of this Article, the board of county commissioners of any county is hereby empowered and authorized to issue permits for use in connection with the conduct of public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. Provided that no such permit shall be required for a public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill. (1947, c. 210, s. 4; 1993 (Reg. Sess., 1994), c. 660, s. 3.1; 1995, c. 509, s. 11.)

§ 14-414. Pyrotechnics defined; exceptions.

For the proper construction of the provisions of this Article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. This Article shall not apply to the sale, use, or possession of the following:

(1) Explosive caps designed to be fired in toy pistols, provided that the explosive mixture of the explosive caps shall not exceed twenty-five hundredths (.25) of a gram for each cap.

(2) Snake and glow worms composed of pressed pellets of a pyrotechnic mixture that produce a large, snake-like ash when burning.

(3) Smoke devices consisting of a tube or sphere containing a pyrotechnic mixture that produces white or colored smoke.

(4) Trick noisemakers which produce a small report designed to surprise the user and which include:

a. A party popper, which is a small plastic or paper item containing not in excess of 16 milligrams of explosive mixture. A string protruding from the device is pulled to ignite the device, expelling paper streamers and producing a small report.

b. A string popper, which is a small tube containing not in excess of 16 milligrams of explosive mixture with string protruding from both ends. The strings are pulled to ignite the friction-sensitive mixture, producing a small report.

c. A snapper or drop pop, which is a small, paper-wrapped item containing no more than 16 milligrams of explosive mixture coated on small bits of sand. When dropped, the device produces a small report.

(5) Wire sparklers consisting of wire or stick coated with nonexplosive pyrotechnic mixture that produces a shower of sparks upon ignition. These items must not exceed 100 grams of mixture per item.

(6) Other sparkling devices which emit showers of sparks and sometimes a whistling or crackling effect when burning, do not detonate or explode, do not spin, are hand-held or ground-based, cannot propel themselves through the air, and contain not more than 75 grams of chemical compound per tube, or not more than a total of 200 grams if multiple tubes are used. (1947, c. 210, s. 5; 1955, c. 674, s. 1; 1993, c. 437.)

§ 14-415. Violation made misdemeanor.

Any person violating any of the provisions of this Article, except as otherwise specified in said Article, shall be guilty of a Class 2 misdemeanor. (1947, c. 210, s. 6; 1969, c. 1224, s. 3; 1993, c. 539, s. 288; 1994, Ex. Sess., c. 24, s. 14(c).)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 3

SENATE BILL 521

Commerce Committee Substitute Adopted 4/21/03
Third Edition Engrossed 4/22/03

Short Title: Pyrotechnic Regulation Enhanced. (Public)

Sponsors:

Referred to:

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO ENHANCE THE REGULATION OF PYROTECHNIC DISPLAYS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-413 reads as rewritten:

"**§ 14-413. Permits for use at public exhibitions.**

(a) For the purpose of enforcing the provisions of this Article, the board of county commissioners of any county ~~is hereby empowered and authorized to~~ may issue permits for use in connection with the conduct of concerts or public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. Provided that no such permit shall be required for a public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill.

(b1) For any indoor use of pyrotechnics at a concert or public exhibition, the board of commissioners may not issue any permit unless the local fire marshal or the State Fire Marshal (or in the case of The University of North Carolina or the University of North Carolina at Chapel Hill it may not authorize such concert or public exhibition unless the State Fire Marshal) has certified that:

(1) Adequate fire suppression will be used at the site.

(2) The structure is safe for the use of such pyrotechnics with the type of fire suppression to be used.

(3) Adequate egress from the building is available based on the size of the expected crowd.

(b2) The requirements of subsection (b1) of this section also apply to any city authorized to grant pyrotechnic permits by local act and to the officer delegated the power to grant such permits by local act."

SECTION 2. G.S. 14-410 reads as rewritten:

"**§ 14-410. Manufacture, sale and use of pyrotechnics prohibited; exceptions; sale to persons under the age of 16 prohibited.**

(a) It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the State of North Carolina: provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at concerts or public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or ~~discharged; provided, further, that such~~ discharged. ~~written~~ Written authority from the board of commissioners is not ~~required~~ required, however, for a concert or public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel ~~Hill; provided, further, that it~~ Hill, but such exhibition, use, or discharge of pyrotechnics shall be under supervision of experts who have previously secured written authority from The University of North Carolina or the University of North Carolina at Chapel Hill. Notwithstanding any provision of this section, it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business. The requirements of G.S. 14-413(b1) and G.S. 14-413(b2) apply to this section.

(b) Notwithstanding the provisions of G.S. 14-414, it shall be unlawful for any individual, firm, partnership, or corporation to sell pyrotechnics as defined in G.S. 14-414 (2), (3), (4)c., (5), or (6) to persons under the age of 16."

SECTION 3. G.S. 14-415 reads as rewritten:

"**§ 14-415. Violation made misdemeanor.**

Any person violating any of the provisions of this Article, except as otherwise specified in said Article, shall be guilty of a Class 2 misdemeanor. Violation of this Article at any indoor public exhibition of pyrotechnics is a Class 1 misdemeanor."

SECTION 4. Section 3 of this act becomes effective December 1, 2003, and applies to offenses committed on or after that date. The remainder of the act is effective when it becomes law and applies to any permits granted on or after the effective date.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 521

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S521-ASB-17 [v.1]

Date 6-12-03 ,2003

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Representative Goodwin

moves to amend the bill on page 2, lines 30 through 32, by rewriting those lines:

"Any person violating any of the provisions of this Article, except as otherwise specified in said Article, shall be guilty of a Class 2 ~~misdemeanor.~~ misdemeanor, except that it is a Class 1 misdemeanor if the exhibition is indoors.'".

SIGNED Goodwin
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

S D

SENATE BILL 995
Commerce Committee Substitute Adopted 4/17/03
Third Edition Engrossed 4/23/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S995-CSRQ-35 [v.1]

6/4/2003 2:03:29 PM

Short Title: School Construction/Repair Flexibility. (Local)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW FLEXIBILITY IN SCHOOL CONSTRUCTION AND REPAIR CONTRACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-128(a1) is amended by adding a new subdivision to read:

"(6) Design-build contracting. – Notwithstanding G.S. 143-129, G.S. 143-132, and any other provision of this section, a local board of education may use the design-build method of construction as follows:

a. The local board of education must seek to prequalify and solicit at least five design-build teams to bid on the project and must receive sealed proposals from at least three of those teams. The request for proposals must contain a design criteria package that defines the project scope, including preliminary design and performance specifications, in a manner sufficient to allow the bidders to respond. This package should be developed by an architect.

b. The local board of education shall interview at least three of the design-build teams that submit proposals. The local board of education shall award the contract to the best qualified team, taking into account the time of completion of the project, compliance with the provisions of G.S. 143-128.2, and the cost of the project as the major factors.

c. Facilities constructed may be turnkey projects, including all materials, equipment, and supplies normally associated with school programs.

d. G.S. 143-128.2 applies to the construction of projects described in this subdivision."

SECTION 2. Other Methods. – Nothing in this act limits the use of any method of contracting already authorized by law under Articles 3D and 8 of Chapter 143 of the General Statutes.

SECTION 3. This act only applies to the Winston-Salem/Forsyth County School System.

SECTION 4. If the procedure set forth in Section 1 of this act is used, the Winston-Salem/Forsyth County School Board shall make an annual report to the North Carolina State Building Commission, beginning in January 2005 and continuing in January of each successive year, concerning the comparative costs and effectiveness, efficiency, and economy, if any, achieved by its implementation of this act. The Board shall submit a final report to the Commission in January 2007.

SECTION 5. This act is effective when it becomes law.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 995

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S995-ARQ-28 [v.1]

Date 6-11-03 ,2003

Comm. Sub. [YES]
Amends Title [YES]
S995-CSRQ-35 [v.1]

Representative Nesbitt

moves to amend the bill on page 1, line 3 by deleting "CONTRACTS." and substituting the following:
"CONTRACTS FOR THE WINSTON-SALEM/FORSYTH COUNTY SCHOOL SYSTEM.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

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NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

Attachment V

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 995 DATE 6/11/03

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE S995-CSRQ-35 [v.1]

Rep.) Ellis
)
Sen.)

moves to amend the bill on page 1, line 5 12-17

( ) WHICH CHANGES THE TITLE

by rewriting the lines to read:

"receive sealed proposals from at least three of these teams."

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 563

Judiciary II Committee Substitute Adopted 4/16/03

Short Title: Uniform Athlete Agents Act. (Public)

Sponsors:

Referred to:

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE LAWS REGULATING ATHLETE AGENTS AND TO ADOPT THE UNIFORM ATHLETE AGENTS ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 8 of Chapter 78C of the General Statutes is repealed.

SECTION 2. Chapter 78C of the General Statutes is amended by adding a new Article to read:

"Article 8A.

"Uniform Athlete Agents Act.

"**§ 78C-85. Title.**

This Article may be cited as the 'Uniform Athlete Agents Act'.

"**§ 78C-86. Definitions.**

The following definitions apply in this Article:

(1) Agency contract. – An agreement in which a student-athlete authorizes a person to negotiate or solicit on behalf of the student-athlete a professional-sports-services contract or an endorsement contract.

(2) Athlete agent. – An individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual is an athlete agent. The term does not include a spouse, parent, sibling, or guardian of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization.

(3) Athletic director. – An individual responsible for administering the overall athletic program of an educational institution or, if an educational institution has separately administered athletic programs for male students and female students, the athletic program for males or the athletic program for females, as appropriate.

(4) Contact. – A communication, direct or indirect, between an athlete agent and a student-athlete to recruit or solicit the student-athlete to enter into an agency contract.

(5) Endorsement contract. – An agreement under which a student-athlete is employed or receives consideration to use on behalf of the other party any value that the student-athlete may have because of publicity, reputation, following, or fame obtained because of athletic ability or performance.

(6) Intercollegiate sport. – A sport played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics.

(7) Person. – An individual, company, corporation, partnership, association, or any other legal or commercial entity.

(8) Professional-sports-services contract. – An agreement under which an individual is employed or agrees to render services as a player on a professional sports team, with a professional sports organization, or as a professional athlete.

(9) Record. – Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) Registration. – A certificate issued by the Secretary of State evidencing that a person has satisfied the requirements of an athlete agent pursuant to this Article.

(11) Student-athlete. – An individual who engages in, is eligible to engage in, or may be eligible in the future to engage in any intercollegiate sport. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for purposes of that sport.

"**§ 78C-87. Service of process; subpoenas.**

(a) By acting as an athlete agent in this State, a nonresident individual appoints the Secretary of State as the individual's agent for service of process in any civil action in this State related to the individual's acting as an athlete agent in this State.

(b) The Secretary of State may issue subpoenas for any material that is relevant to the administration of this Article.

"**§ 78C-88. Athlete agents; registration required; void contracts.**

(a) Except as otherwise provided in subsection (b) of this section, an individual may not act as an athlete agent in this State without holding a certificate of registration under G.S. 78C-90 or G.S. 78C-92.

(b) Before being issued a certificate of registration, an individual may act as an athlete agent in this State for all purposes except signing an agency contract if: (i) a student-athlete or another person acting on behalf of the student-athlete initiates communication with the individual; and (ii) within seven days after an initial act as an

athlete agent, the individual submits an application for registration as an athlete agent in this State.

(c) An agency contract resulting from conduct in violation of this section is void, and the athlete agent shall return any consideration received under the contract.

"**§ 78C-89. Registration as athlete agent; form; requirements.**

(a) An individual seeking registration as an athlete agent shall submit an application for registration to the Secretary of State in a form prescribed by the Secretary of State. The application must be in the name of an individual and, except as otherwise provided in subsection (b) of this section, signed or otherwise authenticated by the applicant under penalty of perjury and must state or contain the following:

(1) The name of the applicant and the address of the applicant's principal place of business.

(2) The name of the applicant's business or employer, if applicable.

(3) Any business or occupation engaged in by the applicant for the five years immediately preceding the date of submission of the application.

(4) A description of the applicant's:

a. Formal training as an athlete agent.

b. Practical experience as an athlete agent.

c. Educational background relating to the applicant's activities as an athlete agent.

(5) The names and addresses of three individuals not related to the applicant who are willing to serve as references.

(6) The name, sport, and last known team for each individual for whom the applicant acted as an athlete agent during the five years immediately preceding the date of submission of the application.

(7) The names and addresses of all persons who are:

a. With respect to the athlete agent's business if it is not a corporation, the partners, members, officers, managers, associates, or profit-sharers of the business.

b. With respect to a corporation employing the athlete agent, the officers, directors, and any shareholder of the corporation having an interest of five percent (5%) or greater.

(8) Whether the applicant or any person named under subdivision (7) of this section has been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony and identify the crime.

(9) Whether there has been any administrative or judicial determination that the applicant or any person named under subdivision (7) of this section has made a false, misleading, deceptive, or fraudulent representation.

(10) Any instance in which the conduct of the applicant or any person named under subdivision (7) of this section resulted in the imposition of a sanction, suspension, or declaration of ineligibility to participate

in an interscholastic or intercollegiate athletic event on a student-athlete or educational institution.

(11) Any sanction, suspension, or disciplinary action taken against the applicant or any person named under subdivision (7) of this section arising out of occupational or professional conduct.

(12) Whether there has been any denial of an application for, suspension or revocation of, or refusal to renew the registration or licensure of the applicant or any person named under subdivision (7) of this section as an athlete agent in any state.

(b) An individual who has submitted an application for registration or licensure as an athlete agent in another state or who holds a certificate of registration or licensure as an athlete agent in another state may submit a copy of the application and certificate in lieu of submitting an application in the form prescribed pursuant to subsection (a) of this section. The Secretary of State shall accept the application and the certificate from the other state as an application for registration in this State if the application to the other state satisfied all of the following criteria:

(1) Was submitted in the other state within six months immediately preceding the submission of the application in this State and the applicant certifies that the information contained in the application is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(c) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-90. Certificate of registration; issuance or denial; renewal.**

(a) Except as otherwise provided in subsection (b) of this section, the Secretary of State shall issue a certificate of registration to an individual who complies with G.S. 78C-89(a) or whose application has been accepted under G.S. 78C-89(b).

(b) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent. In making the determination, the Secretary of State may consider whether the applicant has:

(1) Been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony.

(2) Made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent.

(3) Engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity.

(4) Engaged in conduct prohibited by G.S. 78C-98.

(5) Had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state.

(6) Engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student-athlete or educational institution.

(7) Engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity.

(c) In making a determination under subsection (b) of this section, the Secretary of State shall consider: (i) how recently the conduct occurred; (ii) the nature of the conduct and the context in which it occurred; and (iii) any other relevant conduct of the applicant.

(d) An athlete agent may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. The application for renewal must be signed by the applicant under penalty of perjury and must contain current information on all matters required in an original registration.

(e) An individual who has submitted an application for renewal of registration or licensure in another state, in lieu of submitting an application for renewal in the form prescribed pursuant to subsection (d) of this section, may file a copy of the application for renewal and a valid certificate of registration or licensure from the other state. The Secretary of State shall accept the application for renewal from the other state as an application for renewal in this State if the application to the other state satisfied the following:

(1) Was submitted in the other state within six months immediately preceding the filing in this State and the applicant certifies the information contained in the application for renewal is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application for renewal submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(f) A certificate of registration or a renewal of a registration is valid for one year.

(g) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-91. Suspension; revocation; refusal to renew registration.**

(a) The Secretary of State may suspend, revoke, or refuse to renew a registration for conduct that would have justified denial of registration under G.S. 78C-90(b).

(b) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration or licensure only after proper notice and an opportunity for a hearing in accordance with the Administrative Procedures Act pursuant to Article 3 of Chapter 150B of the General Statutes.

"**§ 78C-92. Temporary registration.**

The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending.

"**§ 78C-93. Registration; renewal of fees.**

An application for registration or renewal of registration must be accompanied by a fee in the following amount:

(1) Application for registration.....$200.00

(2) Application for registration based upon a certificate of registration or licensure issued by another state 200.00
(3) Application for renewal of registration 200.00
(4) Application for renewal of registration based upon an application for renewal of registration or licensure submitted in another state ... 200.00.

"**§ 78C-94. Required form of contract.**

(a) An agency contract must be in a record, signed or otherwise authenticated by the parties.

(b) An agency contract must state or contain the following:

(1) The amount and method of calculating the consideration to be paid by the student-athlete for services to be provided by the athlete agent under the contract and any other consideration the athlete agent has received or will receive from any other source for entering into the contract or for providing the services.

(2) The name of any person not listed in the application for registration or renewal of registration who will be compensated because the student-athlete signed the agency contract.

(3) A description of any expenses that the student-athlete agrees to reimburse.

(4) A description of the services to be provided to the student-athlete.

(5) The duration of the contract.

(6) The date of execution.

(c) An agency contract must contain, in close proximity to the signature of the student-athlete, a conspicuous notice in boldface type in capital letters stating:

WARNING TO STUDENT-ATHLETE

IF YOU SIGN THIS CONTRACT:

(1) YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT;

(2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR; AND

(3) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT MAY NOT REINSTATE YOUR ELIGIBILITY.

(d) An agency contract that does not conform to this section is voidable by the student-athlete. If a student-athlete voids an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

(e) The athlete agent shall give a record of the signed or otherwise authenticated agency contract to the student-athlete at the time of execution.

"**§ 78C-95. Notice to educational institution.**

(a) Within 72 hours after entering into an agency contract or before the next scheduled athletic event in which the student-athlete may participate, whichever occurs first, the athlete agent shall give notice in a record of the existence of the contract to the

athletic director of the educational institution at which the student-athlete is enrolled or the athlete agent has reasonable grounds to believe the student-athlete intends to enroll.

(b) Within 72 hours after entering into an agency contract or before the next athletic event in which the student-athlete may participate, whichever occurs first, the student-athlete shall inform the athletic director of the educational institution at which the student-athlete is enrolled that he or she has entered into an agency contract.

"**§ 78C-96. Student-athlete's right to cancel.**

(a) A student-athlete may cancel an agency contract by giving notice of the cancellation to the athlete agent in a record within 14 days after the contract is signed.

(b) A student-athlete may not waive the right to cancel an agency contract.

(c) If a student-athlete cancels an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

"**§ 78C-97. Required records.**

(a) An athlete agent shall retain the following records for a period of five years:

(1) The name and address of each individual represented by the athlete agent.

(2) Any agency contract entered into by the athlete agent.

(3) Any direct costs incurred by the athlete agent in the recruitment or solicitation of a student-athlete to enter into an agency contract.

(b) Records required to be retained by subsection (a) of this section are open to inspection by the Secretary of State during normal business hours.

"**§ 78C-98. Prohibited conduct.**

(a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, shall not:

(1) Give any materially false or misleading information or make a materially false promise or representation.

(2) Furnish anything of value to a student-athlete before the student-athlete enters into the agency contract.

(3) Furnish anything of value to any individual other than the student-athlete or another registered athlete agent.

(b) An athlete agent shall not intentionally:

(1) Initiate contact with a student-athlete unless the athlete agent is registered under this Article.

(2) Refuse or fail to retain or permit inspection of the records required to be retained by G.S. 78C-97.

(3) Fail to register as required by G.S. 78C-88.

(4) Provide materially false or misleading information in an application for registration or renewal of registration.

(5) Predate or postdate an agency contract.

(6) Fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that the signing or authentication may make the student-athlete ineligible to participate as a student-athlete in that sport.

"§ 78C-99. Criminal penalties.

An athlete agent who violates any provision under G.S. 78C-98 is guilty of a Class I felony.

"§ 78C-100. Civil remedies.

(a) An educational institution has a right of action against an athlete agent or a former student-athlete for damages caused by a violation of this Article. In an action under this section, the court may award costs and reasonable attorneys' fees to the prevailing party.

(b) Damages suffered by an educational institution under subsection (a) of this section include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Article or was penalized, disqualified, or suspended from participation in athletics by: (i) a national association for the promotion and regulation of athletics; (ii) an athletic conference; or (iii) reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by an athletic organization.

(c) A right of action under this section does not accrue until the educational institution discovers, or by the exercise of reasonable diligence would have discovered, the violation by the athlete agent or former student-athlete.

(d) Any liability of the athlete agent or the former student-athlete under this section is several and not joint.

(e) This Article does not restrict rights, remedies, or defenses of any person under law or equity.

"§ 78C-101. Administrative penalty.

The Secretary of State may assess a civil penalty against an athlete agent not to exceed twenty-five thousand dollars ($25,000) for a violation of this Article.

"§ 78C-102. Uniformity of application and construction.

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"§ 78C-103. Electronic Signatures in Global and National Commerce Act.

The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

"§ 78C-104. Severability.

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable.

"§ 78C-105. Rules.

The Secretary of State may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out the provisions of this Article."

SECTION 2. G.S. 78C-99 becomes effective December 1, 2003, and applies to acts committed on and after that date. The rest of the act is effective when it becomes law.

SENATE BILL 563:
Uniform Athlete Agents Act.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Hagan
Date:	June 11, 2003	**Summary by:**	Jeff Hudson*
Version:	Second Edition		Committee Counsel

SUMMARY: Senate Bill 563 would repeal Article 8 of Chapter 78C, Regulation of Athlete Agents, and replace it with Article 8A, the Uniform Athlete Agents Act.

CURRENT LAW: Article 8 of Chapter 78C regulates the relationships between agents and student athletes.

Definitions: An athlete (student athlete) is a person who seeks to be employed as a professional athlete and is enrolled in a North Carolina high school or has been admitted to an institution of higher education in North Carolina. An athlete agent (agent) is a person who, for remuneration, solicits a student athlete to represent the athlete in either an agent contract or a financial services contract. An agent contract authorizes the agent to receive compensation in exchange for attempting to obtain employment for the student athlete with a professional sports team. A financial services contract is an agreement between the parties that allows the agent to make financial and investment decisions for a student athlete. An agent must post a bond of $100,000 with the Secretary of State when the agent enters into a financial services contract with a student athlete.

Registration with Secretary of State: Agents must register with the Secretary of State before the agent has any contact with a student athlete. The agent must provide its principal place of business, the agent's occupation for the last 5 years, the names and addresses of any financially interested partners or profit sharers, and, if requested by the Secretary of State, five professional references. The registration fee is $200 and the registration lasts for one year. A North Carolina licensed and resident attorney is not required to register if the attorney does not advertise directly or solicit student athletes and does not represent more than 2 student athletes. The Secretary of State may suspend, revoke, or deny the registration of an agent who fails to comply with Article 8, and may investigate any suspected violations.

Content of Contracts: Contracts with student athletes must contain a notice that the agent is registered with the Secretary of State, that the student athlete should read the contract before signing it and should not sign the contract if it contains blank spaces, and that the student athlete may cancel the contract within 16 days of signing it. The agent must file a memorandum of contract with the Secretary of State and the student athlete's high school principal or the athletic director of the student's college within 5 days of the signing of a contract.

Prohibited Acts: An agent may not make any false, fraudulent, or misleading statements. An agent may not have an agreement to provide anything of value to any employee of the student athlete's high school or college in return for the referral of any clients to the agent. The agent may not offer anything of value to induce a student athlete to enter into a contract, except the agent may expend "reasonable entertainment expenses and transportation expenses" to and from the agent's place of business. An agent may not contact the student athlete until after the completion of the athlete's last high school or intercollegiate contest, including post-season games.

Criminal and Civil Penalties: It is a Class I Felony to fail to register with the Secretary of State or to engage in any of the prohibited acts listed above. A contract with an agent who does not comply with the

law is voidable at the discretion of the injured party. The Secretary of State may impose a civil penalty of between $2,500 and $25,000 for willful violations.

BILL ANALYSIS: The Uniform Athlete Agents Act contained in Senate Bill 563 differs from current law as follows:

- Contains revised and additional definitions but generally does not expand or contract the scope of who is covered.
- Requires more specific registration information, including information regarding the agent's expertise, prior felony convictions or convictions for crimes of moral turpitude.
- The registration application must contain a sworn statement that the information is true under penalty of perjury.
- Does not contain bonding requirements.
- Creates reciprocity of registration and renewal if the applicant has applied within the last 6 months in another state that has similar registration requirements.
- Contract warning language no longer warns the student to read the contract before signing it, but does includes a notice that by signing the contract, the student may lose eligibility to compete as a student athlete in their sport.
- Shortens the contract cancellation period from 16 days to 14 days.
- The right of cancellation may not be waived.
- Does not require an agent to provide notice to the student athlete's principal or athletic director prior to contacting a student athlete, but does require the agent and student athlete to notify the student athlete's athletic director within 72 hours of signing a contract or before the next athletic event.
- Makes it a Class I felony for an agent to:
    - Furnish anything of value to the student athlete prior to signing a contract if it is furnished with the intent to induce the student to sign the contract
    - Furnish anything of value to anyone who isn't the student athlete or another agent if it is furnished with the intent to induce the student to sign the contract.
- Creates a civil cause of action by the high school or college against the agent or student athlete for damages caused by a violation of the law.

BACKGROUND: In the late 1990s, the National Collegiate Athletic Association and several universities asked the National Conference of Commissioners on Uniform State Laws (Conference) to draft a uniform athlete agents law. The Conference completed the Uniform Athlete Agents Act in 2000. As of June 10, 2003, 21 states and the District of Columbia had enacted the Uniform Athlete Agents Act.

EFFECTIVE DATE: The act is effective when it becomes law except the criminal provisions are effective December 1, 2003.

***Note:** Kory Goldsmith, Senate Judiciary II Committee Counsel, substantially contributed to the preparation of this summary.

S563-SMSB-001

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 563

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S563-ASB-19 [v.1]

Date 6-11-03 ,2003

Comm. Sub. [YES]
Amends Title [NO]
Second Edition

Representative Stam

moves to amend the bill on page 9, line 1 by replacing **"SECTION 2."** with **"SECTION 3."**.

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 563

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

S563-ASB-20 [v.1]

Date 6-11-03 ,2003

Comm. Sub. [YES]
Amends Title [NO]
Second Edition

Representative Stam

moves to amend the bill on page 8, lines 2 and 3,
by rewriting those lines to read:

"An athlete agent who violates any provision under G.S. 78C-98(a)(1) or G.S. 78C-98(b) is guilty of a Class I felony.".

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED Withdrawn TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S **D**

SENATE BILL 963

Second Edition Engrossed 4/28/03

PROPOSED HOUSE COMMITTEE SUBSTITUTE S963-CSRQ-37 [v.1]

6/11/2003 1:50:49 PM

Short Title: Prevent Price Gouging During Disasters. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT SELLERS FROM EXCESSIVELY RAISING PRICES ON THEIR MERCHANDISE DURING DECLARED STATES OF DISASTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 75 of the General Statutes is amended by adding a new section to read:

"**§ 75-36. Prohibit excessive pricing during states of disaster.**

(a) It shall be unlawful for any person to sell or rent or offer to sell or rent at retail during a state of disaster, in the area for which the state of disaster has been declared, any merchandise or services which are consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or comfort of persons or their property with the knowledge and intent to charge an excessive price for the merchandise or service. As used in this section, merchandise or services consumed or used as a direct result of an emergency shall include but shall not be limited to water, ice, building products, food, generators, chain saws, self-storage, hotel and motel rooms, petroleum products, batteries, and automobiles.

(b) As used in this section, the following mean:

(1) Excessive price. – A price that is excessive as compared to the price at which the consumer good or service was sold or offered for sale by the seller in the usual course of business immediately prior to the state of disaster. A price shall be deemed excessive if either of the following conditions applies:

a. The price exceeds by more than ten percent (10%) the price at which the good or service was sold or offered for sale by the seller in the usual course of business immediately prior to the state of disaster, unless:

1. The price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the state of disaster; or
2. The seller offered to sell or rent the merchandise or service at a price that was below the seller's average price in the preceding sixty days.

b. In those situations where the increase in price is attributable to additional costs imposed by the seller's supplier or additional costs of providing the good or service during the state of disaster, the price represents an increase of more than ten percent (10%) in the amount of the markup from cost, compared to the markup customarily applied by the seller in the usual course of business immediately prior to the state of disaster.

c. In those situations where the seller did not sell or rent or offer to sell or rent the merchandise or service in question prior to the time the state of disaster was declared, the price at which the merchandise or service was generally available in the trade area shall be used to determine if the seller is charging an excessive price.

(2) State of disaster. – The earlier of forty-five days or the termination of a natural or man-made disaster or emergency as declared in accordance with G.S. 166A-6 or G.S. 166A-8.

(c) In the event the Attorney General investigates a complaint for a violation of this section and determines that the seller has not violated the provisions of this section, the Attorney General shall issue a press release to a television station and newspaper of general circulation in the county or counties where the seller is located stating that the seller has not charged excessive prices during a state of disaster.

(d) The Attorney General may investigate any complaints received alleging violations of this section. If, after investigating a complaint the Attorney General finds that there has been a violation, the Attorney General may bring an action to impose a civil penalty and to seek any other appropriate relief including equitable relief to restrain the violation pursuant to G.S. 75-14. Actions for civil penalties under this section shall be consistent with the provisions of G.S. 75-15.2 except that the penalty imposed for a violation of this section shall not exceed five hundred dollars ($500.00) per violation.

(e) A trade association, corporation, or partnership may register an agent for the purposes of being notified when the Governor declares and terminates a state of disaster. A trade association, corporation, or partnership may designate up to three persons to be notified on behalf of the organization's members and is responsible from maintaining current information for the designated agent or agents. The Office of the Governor is responsible for notifying the registered agents simultaneous to the declaration and termination of the state of disaster.

SECTION 2. This act becomes effective July 1, 2003.

SENATE BILL 963:
Prevent Price Gouging During Disasters.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Swindell
Date:	June 11, 2003	**Summary by:**	Drupti Chauhan*
Version:	S963-CSRQ-37[v.1]		Committee Co-Counsel

The PCS makes the following changes to the bill:

- ***Adds renting at excessive prices to be price gouging***
- ***Adds services as a part of the bill***
- ***Gives examples of services and merchandise that would be included such as water, ice building products***
- ***Provides another exception to the 10% markup threshold to exclude items if the items were on-sale before the disaster***
- ***Adds subsection (b)(1)(c) to include transient business which comes into the State during disasters***
- ***Limits the time that the law would be in effect to 45 days or the termination of the disaster, whichever occurs first***
- ***Provides that if the Attorney General makes an investigation and determines that there has not been a violation, then the AG must issue a press release stating that no excessive prices were charged***
- ***Requires the Governor's Office to notify registered agents of trade associations, corporations, or partnerships when a disaster is declared and terminated***
- ***Provides that the penalty imposed will not exceed $500.00 per violation (as opposed to the statutory $5000.00 currently in G.S. 75-15.2)***

SUMMARY: ***Senate Bill 963 would restrict merchants from selling essential goods at excessive prices during declared states of disaster. The bill would limit price increases during disasters to 10% of the pre-disaster price or a 10% additional markup if the merchant's costs for obtaining the goods during a disaster are higher. Violation of this bill would be considered an unfair trade practice under Chapter 75 and would subject the violator to fines, treble damages and attorneys fees.***

CURRENT LAW: Current law does not control or restrict prices that may be charged for goods during disasters. The Governor and General Assembly are authorized to declare states of disaster under G.S. 166A-6, which can include a determination of the length of the disaster period and the geographic location to which the state of disaster applies. Local governments are allowed to declare local states of emergency.

BILL ANALYSIS: Senate Bill 963 would make it unlawful for a person, during a declared state of disaster or 30 days thereafter, to sell any merchandise that is consumed or used as a direct result of an emergency, or which is consumed or used to preserve, protect or to sustain life, health, safety or comfort of people or their property during a state of disaster at an excessive price.

The bill defines "excessive price" as the price at which the good or service is sold or offered during the disaster period as compared to the price the good or service was sold for immediately prior to the disaster, that exceeds the original price by more than 10%. If the cost of the good or service is higher because of higher prices imposed by the seller's supplier or additional costs of providing the good or service during the disaster, the price may not be more than a 10% markup above the normal markup for the good or service immediately prior to the disaster.

The bill defines a state of disaster as one declared by the Governor or General Assembly under G.S. 160A-6 or a local emergency declaration under G.S. 160A-8.

By being codified as part of Article 1 of Chapter 75, a violation of this bill would be treated as an unfair trade practice. As such an action could be brought by the Attorney General to stop the violation and to collect a fine of up to $5000 for each violation. Individuals injured by the violation can sue for treble damages and recovery of reasonable attorneys fees.

EFFECTIVE DATE: The bill becomes effective July 1, 2003.

Walker Reagan, Research Attorney, contributed significantly to this summary.

S963-SMRQ-001

Attachment X

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 6-11-03

S. B. No. 963 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

(Rep.) Nesbitt
Sen.)

1 moves to amend the bill on page 2, line 27
2 ( ) WHICH CHANGES THE TITLE
3 by inserting the word "immediately" after
4
5 the word "shall".
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SIGNED Martin Nesbitt

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 722

Judiciary II Committee Substitute Adopted 4/23/03
Third Edition Engrossed 4/28/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S722-CSRQ-25 [v.3]

6/3/2003 4:27:19 PM

Short Title: Display of American Flag. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of the American flag; private restrictions.**

No private restriction on the use of land shall be construed to regulate or prohibit the display of the flag of the United States which is displayed in accordance with the patriotic customs set forth in 4 U.S.C.A. §§5-10, as amended, governing the display and use of the flag of the United States unless:

(a) For restrictions registered prior to October 1, 2003, the restriction specifically uses the following terms:

(1) flag of the United States of America,

(2) American flag, or

(3) United States flag.

(b) For restrictions registered on or after October 1, 2003, the restriction shall be written on the first page of the instrument or conveyance in print no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States flag only if the restriction specifically states: 'THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA'.

SECTION 2. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7.1. Display of the American flag; public restrictions.**

(a) A unit of local government shall not prohibit the flag of the United States from being flown or displayed if the flag is flown or displayed:

(1) In accordance with the patriotic customs set forth in 4 U.S.C.A. §§5-10, as amended, governing the display and use of the flag of the United States, and

(2) Upon private or public property with the consent of either the owner of the property or of any person having lawful control of the property.

(b) Notwithstanding subsection (a), for the purpose of protecting the public health, safety, and welfare, reasonable restrictions on flag size, number of flags, and height of flagpoles are not prohibited provided that such restrictions shall not discriminate against the flag in any manner.

SECTION 3. The title of Chapter 144 of the General Statutes reads as rewritten:

"STATE FLAG, AMERICAN FLAG, ~~MOTTO~~ MOTTO, AND COLORS."

SECTION 4. This act is effective October 1, 2003, but it applies to the construction of instruments or ordinances adopted or registered prior to its effective date.

SENATE BILL 722:
Display of American Flag.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	June 10, 2003	**Summary by:**	Drupti Chauhan*
Version:	S722-CSRQ-25 [v.3]		Committee Co-Counsel

PCS SUMMARY: ***The PCS removes references to homeowners association and condominium association and states that "no private restriction" on the use of land can be construed to regulate or prohibit the US flag if it is displayed in accordance with the patriotic customs set forth in federal law. Restrictions that are registered prior to October 1, 2003 must specifically use the terms: (i) flag of the United States of America, (ii) American flag, or (iii) United States flag in order to be construed to regulate the US flag. For restrictions registered after October 1, 2003, the restriction has to be written on the first page of the instrument and it must specifically state that the document regulates or prohibits the display of the United States flag in order to be construed as regulating or prohibiting the display of the flag.***

Local governments also cannot prohibit the US flag from being flown or displayed if it is done in accordance with the federal statutes and if the person who has lawful control of the property consents. Local governments may provide reasonable restrictions on flag size, number of flags, and height of flagpoles for the purposes of protecting the public's health, safety, and welfare as long as the restrictions do not discriminate against the flag.

The PCS changes the effective date to October 1, 2003 but applies to construction of instruments and conveyances prior to that date.

BILL ANALYSIS: The bill would create a new **G.S. 144-7, Display of American Flag**, which provides that no covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners, neighborhood, civic, condominium, or other association may prohibit the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibit the display of the United States flag on any property, if the flag is displayed with the consent of the real property's owner or person having lawful control of the property and in accordance with any of the following conditions:

- Customs set forth 4 U.S.C.A. §§ 5-10 governing the display of the American flag.
- Flagpole standards set forth in S.C.R. 61, 105th Congress.
- Any federal law or proclamation of the President or Governor, or local ordinance or resolution.

S722-SMRQ-002: Tim Hovis and Robin Johnson, Staff Attorneys, contributed to this summary.

§ 5. Display and use of flag by civilians; codification of rules and customs; definition

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter [4 U.S.C.A. § 1 et seq.] shall be defined according to sections 1 and 2 of this title [4 U.S.C.A. § § 1 and 2] and Executive Order 10834 issued pursuant thereto.

§ 6. Time and occasions for display

(a) It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness.

(b) The flag should be hoisted briskly and lowered ceremoniously.

(c) The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.

(d) The flag should be displayed on all days, especially on New Year's Day, January 1; Inauguration Day, January 20; Martin Luther King Jr.'s birthday, third Monday in January; Lincoln's Birthday, February 12; Washington's Birthday, third Monday in February; Easter Sunday (variable); Mother's Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of States (date of admission); and on State holidays.

(e) The flag should be displayed daily on or near the main administration building of every public institution.

(f) The flag should be displayed in or near every polling place on election days.

(g) The flag should be displayed during school days in or near every schoolhouse.

§ 7. Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

(a) The flag should not be displayed on a float in a parade except from a staff, or as provided in subsection (i) of this section.

(b) The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff shall be fixed firmly to the chassis or clamped to the right fender.

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No

person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof: *Provided*, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

(d) The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag's own right, and its staff should be in front of the staff of the other flag.

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

(g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.

(h) When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half-staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out, union first, from the building.

(i) When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

(j) When the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

(k) When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

(l) The flag should form a distinctive feature of the ceremony of unveiling a statue or monument, but it should never be used as the covering for the statue or monument.

(m) The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. On Memorial Day the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any State, territory, or possession of the United States, the Governor of that State, territory, or possession may proclaim that the National flag shall be flown at half-staff. The flag shall be flown at

half-staff 30 days from the death of the President or a former President; 10 days from the day of death of the Vice President, the Chief Justice or a retired Chief Justice of the United States, or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice President, or the Governor of a State, territory, or possession; and on the day of death and the following day for a Member of Congress. The flag shall be flown at half-staff on Peace Officers Memorial Day, unless that day is also Armed Forces Day. As used in this subsection--

(1) the term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff;

(2) the term "executive or military department" means any agency listed under sections 101 and 102 of title 5 [5 U.S.C.A. § § 101 and 102], United States Code; and

(3) the term "Member of Congress" means a Senator, a Representative, a Delegate, or the Resident Commissioner from Puerto Rico.

(n) When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.

(o) When the flag is suspended across a corridor or lobby in a building with only one main entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

§ 8. Respect for flag

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor.

(a) The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property.

(b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free.

(d) The flag should never be used as wearing apparel, bedding, or drapery. It should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white, and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker's desk, draping the front of the platform, and for decoration in general.

(e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart.

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

§ 9. Conduct during hoisting, lowering or passing of flag

During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in review, all persons present except those in uniform should face the flag and stand at attention with the right hand over the heart. Those present in uniform should render the military salute. When not in uniform, men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Aliens should stand at attention. The salute to the flag in a moving column should be rendered at the moment the flag passes.

§ 10. Modification of rules and customs by President

Any rule or custom pertaining to the display of the flag of the United States of America, set forth herein, may be altered, modified, or repealed, or additional rules with respect thereto may be prescribed, by the Commander in Chief of the Armed Forces of the United States, whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation.

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FLAG PRESENTATION

Presentation of the flag during a ceremony should be preceded by a brief talk emphasizing the importance of the occasion. Following the presentation all present should salute the flag, recite the pledge of allegiance, and sing the national anthem.

FOLDING THE FLAG

1. Two persons, facing each other, hold the flag waist high and horizontally between them.
2. The lower striped section is folded, lengthwise, over the blue field. Hold bottom to top and edges together securely.
3. Fold the flag again, lengthwise, folded edge to open edge.
4. A triangular fold is started along the length of the flag, from the end to the heading by bringing the striped corner of the folded edge to meet the open edge.
5. The outer point is turned inward parallel with the open edge, forming a second triangle.
6. Repeat the triangular folding until the entire length of the flag is folded.
7. When the flag is completely folded only the triangular blue field should be visible.

CARE OF YOUR FLAG

The life of your flag depends on your care. Dirt can cut fabrics, dull colors, and cause wear. Most outdoor flags can be washed in mild detergent and thoroughly rinsed. Indoor and parade flags should be dry-cleaned. Many dry cleaners offer free cleaning of U.S. flags during the months of June and July. Damaged flags can be repaired and utilized as long as the overall dimensions are not noticeably altered. American Legion Posts and local governments often have facilities to dispose of unserviceable flags. Store your flags in a well ventilated area away from any harsh chemicals or cleaning compounds. If your flag gets wet, never store it until it is completely dry. Wet folds cause permanent creases. Dampness ruins fabric and causes mildew. Pole care is also related to flag care. Rust and scale cause permanent stains and some metallic oxides actually eat holes in fabric.

SIZES OF FLAGS

The size of the flag is determined by the exposed height of the flagpole from which it is flying. The only consideration is for the flag to be in proper proportion to its pole. Flags which fly from angled poles on homes and those which are displayed on standing poles in offices and other indoor displays are usually either 3' x 5' or 4' x 6'. Color guards usually carry flags measuring 4' x 6'. Other recommended sizes are shown in the following table:

Flagpole Height (ft.)	Flag Size (ft.)	
20	4 x 6	24 sq. ft
25	5 x 8	40 sq. ft
40	6 x 10	60 sq. ft
50	8 x 12	96 sq. ft

60	10 x 15
70	12 x 18
90	15 x 25
125	20 x 30
200	30 x 40
250	40 x 50

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Printer-friendly page

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

Wed. June, 11, 2003 15 Minutes after session — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Rick Zechini	NC Assoc. of REALTORS
Steph Simpson	NC Assn. of Realtors
Andy Ellen	NCLMA
Michelle Frazier	NC Bar Ass'n
Leanne Winner	NCSBA
Reshma Ball	DCD-DHHS
Roz Sawyer	NC Child Care Coalition
Clyde Holt	NC Bar Association
ELLIS HANKINS	NCLM
Andy Romanet	NCLM
Jere Royall	NC Family Policy Council

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — Wed. June, 11, 2003 15 Minutes after session

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John McHugh	GOV ~~OFFICE~~
Richard & Barbara Shevlin	Parents of Kaitlyn Shevlin
Joe Johnson	Insider
Ted Kaplan	KEL
Henry Jones	Attorney - Raleigh
David Crawford	AIA NC

House Judiciary II

Committee

Minutes

June 12, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Sen. Purcell to discuss **SB 226** Unauthorized Admin. Meds. By Child Care Fac.)

Rep. Nesbitt said it has been determined that day care centers in the public schools are not covered by this bill.

Roz Savitt with the North Carolina Child Care Coalition was recognized and explained that while public school day care centers are exempted, they are licensed and regulated by the Department of Health and Human Services.

Leanne Winner representing the North Carolina School Board Association was recognized. She said the day care centers in public schools are licensed under a Memorandum of Understanding. They have voluntarily allowed themselves to be licenses. They are not licensed under the statutory structure.

Rep. Stam moved to give the proposed committee substitute a favorable report.

Rep. Bordsen moved to amend the proposed committee substitute by changing the criminal penalty. *(See Attachment I)*

Rep. Moore wanted to debate the motion. He said it was the strangest debate on a bill he has heard, because it increases the penalty of the least serious violation, yet no one wanted to talk about increasing the most serious penalty, "serious injury." Where there is no injury, a Class I Felony. He said this bill was prompted because of a serious injury to a child, that the bill was named after a child who died because of this.

Rep. Nesbitt said that from time to time in the General Assembly, you see things happen over and over. He said what he heard, for the first time, at last night's meeting from the District Attorney, was that there was no evidence that the Benadryl caused the death of the child.

Rep. Nesbitt said the Medical Examiner considered the death as a SIDS death and that District Attorney Ron Johnson has asked the Medical Examiner to reconsider. The Medical Examiner reconsidered and confirmed his original finding.

Rep. Ellis said that perhaps the period of time between the two examinations was a factor in the Medical Examiner's confirming his original finding.

Rep. Stam said he favored the bill, but opposed Rep. Bordsen's proposed amendment. He said he felt that the Class I Felony penalty was appropriate.

Rep. Moore was recognized and said he noticed there was no language in the bill referring to "death or homicide." He asked staff if that would be a remedy now, even without this law.

Rep. Nesbitt said he remembered earlier in discussions that a homicide or death was omitted because the "Death" statutes would already cover it.

Anand Ramaswamy, Assistant District Attorney from Alamance County was recognized. He said he prosecuted the case (the Kaitlyn Devlin case). He said they needed a safety statute in order to proceed. The question underlying these facts was proof to the scientific certainty of causation. He said in the absence of proof, they did revisit this matter and that there were adverse feelings between the District Attorney's office and the Medical Examiner. He encouraged the committee to support Rep. Bordsen's amendment.

The amendment was adopted.

Rep. Stam moved to incorporate the amendment into a new proposed committee substitute, give the committee substitute a favorable report and the original bill an unfavorable report. The motion passed.

The meeting adjourned at 10:40 a.m.

Martin Nesbitt

Rep. Martin L. Nesbitt
Chairman

Janette W Lee

Janette W. Lee
Committee Assistant

Attachment 1

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 6-12-03

S. B. No. 226 Amendment No. 1
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE S226-PCS6 5311-RQ-33

Rep.)
) Bordsen
Sen.)

1 moves to amend the bill on page 2, line 6
2 ( ) WHICH CHANGES THE TITLE
3 by deleting the term "Class I" and substituting
4 "Class H".
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SIGNED Allen L Bordsen

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

SENATE BILL 226: Unauthorized Administration of Medication by Child Care Facilities

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Sen. William Purcell
Date:	June 5, 2003	**Summary by:**	Drupti Chauhan*
Version:	S226-PCS65311-RQ-33		Committee Co-Counsel

SUMMARY: ***This bill would make the administration of prescription or over-the counter medication to a child attending a licensed or an unlicensed child care facility without written authorization. A violation of the statute that results in serious injury to the child shall be punished as a Class F felony and any other violation of the section is punishable as a Class I felony. The bill provides an exception for circumstances in which an emergency medical condition presents itself and the child's parent is unavailable. In this situation, medication may be lawfully administered without the parent's written authorization if the medication is administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions. The bill is effective December 1, 2003 and applies to offenses committed on or after that date.***

CURRENT LAW: G.S. 110-91(9) directs the NC Child Care Commission to adopt rules to establish minimum requirements for record keeping for child care facilities. The scope of this authority includes records regarding authorization to administer medications. Rules adopted by the Commission in 1986, and amended in 1996, 1998, and 2001 include, among other things, the following with respect to the administration of medications in child care facilities:

- No drug or medication may be administered to any child in a licensed child care facility without specific written instructions from the child's parent or guardian.
- No drug or medication may be administered for a non-medical purpose, including inducing sleep.
- Prescribed medication may be administered only with parent's written authorization and the medication must be in its original container with proper labeling, including directions for dosage, or the parent must provide written instructions that must be signed and dated by the prescribing physician or health professional.
- Over-the-counter medication may be administered only with the parent's written authorization and only in accordance with written dosage instructions of the parent, physician or other authorized health professional.
- A parent may provide written authorization that is valid for up to six months to authorize the administration of medication to treat the symptoms of asthma and allergic reactions, and up to one year to administer sunscreen and over-the-counter diapering creams. The authorization must be specific as to the symptoms or conditions for which the medication may be administered.
- A parent may provide written authorization for the administration of a one-time, weight appropriate dose of acetaminophen in the event the child has a fever and the parent cannot be reached.

Enforcement Authority:

Administrative penalties: G.S. 110-102.2 authorizes the Secretary of DHHS to impose one or more of the following against a licensee:

- Issue a written warning and a request for compliance;
- Issue an official reprimand;
- Place a licensee on probation;
- Suspend the license for a period not to exceed one year; and
- Permanently revoke the license.

Civil penalties: G.S. 110-103.1 authorizes the Secretary to impose a civil penalty, not to exceed $1,000 for each violation documented on any given date, against an operator of a child care facility who violates NC law governing child care facilities. In determining the amount of the penalty, the Secretary must consider the threat of or extent of harm to children and the consistency of violations.

BILL ANALYSIS:

- Makes the administration of medication to a child attending a licensed or an unlicensed child care facility without written authorization from the child's parent or guardian unlawful.
- An employee, owner, household member, volunteer or operator who violates the statute would be face a Class H felony.
- Provides for an enhanced penalty (Class F felony) for violations resulting in serious injury to a child.
- Provides an exception for emergency medical conditions when the child's parent is unavailable. The medication must be administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions.

Class I felony: Punishable by an absolute minimum of 3 months Community Service Punishment and an absolute maximum of 12 months Intermediate or Active Punishment, depending on prior convictions and aggravating factors.

Class F felony: Punishable by an absolute minimum of 10 months Intermediate Punishment (e.g. supervised probation) or Active Punishment to an absolute maximum of 59 months of Active Punishment, depending on prior convictions and aggravating factors.

BACKGROUND:

Inspiration for the legislation:

Senate Bill 226 is a recommendation of the NC Child Fatality Task Force. The Task Force was inspired to recommend the bill after hearing the story of Kaitlyn Shevlin, a 5-month-old who died in an unlicensed day-care home in Alamance County in 2001. According to Mr. Rob Johnson, District Attorney for Alamance County, although medical examiners could not find a definitive cause of death and as a result ruled that the child died from Sudden Infant Death Syndrome, law enforcement investigators suspect her day-care provider gave the child a generic form of the medicine Benadryl to make her sleepy. The day care provider was unlicensed and had numerous complaints of child neglect filed against her in the 20 years she operated her unlicensed facility. She was convicted of misdemeanor charges of child abuse and neglect served four months in prison.

Relevant Definitions (cut and pasted from G.S. 110-86):

- **Child care**. - A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

- **Child care facility**. - Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. **A child care center** is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. **A family child care home** is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

- **Child care does not include the following**:

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

- "**Household member**" to mean: "member of the household in a family child care home or nonlicensed child care home and is over 15 years old and is present when children are in care." (G.S. 110-90.2)
- "**Volunteer**" to mean "a person who works in a child care facility and is not monetarily compensated by the facility" (NCAC 10-3U.0102).

*Linda Attarian, former Research Attorney, contributed significantly to this bill

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 226

Health and Human Resources Committee Substitute Adopted 3/5/03
Judiciary II Committee Substitute Adopted 4/8/03
Fourth Edition Engrossed 4/10/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S226-PCS65311-RQ-33

Short Title: Unauthorized Admin. Meds. by Child Care Fac. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Article 7 of Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

(a) It is unlawful for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility as defined in G.S. 110-86, to willfully administer, without written authorization, prescription or over-the-counter medication to a child attending the child care facility. For the purposes of this section, written authorization shall include the child's name, date or dates for which the authorization is applicable, dosage instructions, and signature of the child's parent or guardian.

(b) In the event of an emergency medical condition and the child's parent or guardian is unavailable, it shall not be unlawful to administer medication to a child attending the child care facility without written authorization as required under subsection (a) of this section if the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider. For purposes of this subsection, the following definitions apply:

(1) A bona fide medical care provider means an individual who is licensed, certified, or otherwise authorized to prescribe the medication.

(2) An emergency medical condition means circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

(c) A violation of this section that results in serious injury to the child shall be punished as a Class F felony.

(d) Any other violation of this section shall be punished as a Class I felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

THURS. JUNE 12, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Joel Frady	UNC-TV
Karina Chapman	PPHS intern
Peg Dorer	Conference of DAs
Leane Winner	NCSA
Jim Royall	NCFPC
John Rustin	NCFPC
ERIC DYER	Gen News & Record
Barry Smith	Freedom Newspapers
ANAND RAMASWAMY	ASST. D.A., 212 W ELM ST, GRAHAM ALAMANCE COUNTY
Peggy Ball	DCD-DHHS
Dina Carter	DCD-DHHS

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

THURS. JUNE 12, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Amy Fullbright	Hunton & Williams
Ed Regan	N.C.A.C.C.
Jim Blackburn	NC Association of County Commissions
Kim Hibbard	Friend of Jim Blackburn

House Judiciary II

Committee

Minutes

June 17, 2003

10:00 a.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Goodwin called the meeting to order and recognized Sen. Hagan to discuss **SB 563** (Uniform Athlete Agents Act) which had previously been before the committee.

Sen. Hagan presented a proposed committee substitute to the Committee and Rep. Ellis moved that it be adopted for consideration. The motion passed.

Jeff Hudson, Committee Counsel, was recognized to explain the changes in the proposed committee substitute. He said the PSC for **SB 563** differs from **SB 563**, second edition as follows:

- The PCS contains a specific exception from registration requirements for North Carolina licensed and resident attorneys.
- The PCS provides that when a student-athlete enters into an agency contract, the student-athlete waives the attorney-client privilege with respect to records that the agent must retain and that may be inspected by the Secretary of State. The PCS also provides that an agency contract must contain specific language alerting the student-athlete to the fact that signing the contract constitutes a waiver of the attorney-client privilege with respect to these records.
- The PCS provides that certain prohibited conduct is subject to a Class I felony, while other prohibited conduct is not.
- The technical amendment that was adopted by the House Judiciary II Committee on Wednesday, June 11, 2003 has been engrossed into the PCS.

(See Bill Analysis as Attachment I)

Rep. Stam moved to give the proposed committee substitute for **SB 563** a favorable report.

Clyde Holt representing the North Carolina bar Association was recognized and said he support the PCS.

Scott Templeton from the North Carolina Secretary of State's office was recognized. He wanted to point out that changes made to the criminal provision in this bill makes the conduct under model law, not criminal in North Carolina. It also takes conduct, which is currently criminal under existing North Carolina law and makes that not criminal. He said he thought this was a very reasonable policy.

Rep. Stam observed that the change would be to make "it not a felony."

The motion to give the proposed committee substitute for **SB 563** a favorable report was before the Committee and passed.

SB 722 (Display of American Flag) was again before the Committee and Sen. Kinnaird was recognized to discuss her bill.

Rep. Stam was recognized to send forward a proposed Committee Substitute and Rep. Ellis moved that it be adopted for consideration. The motion passed.

Sen. Kinnaird said she objected to the Proposed Committee Substitute sent forth by Rep. Stam. She said his bill did not address her concerns and she felt that it was more of a "developer's bill."

Rep. Stam was recognized to explain the proposed committee substitute. He said that one thing that was different is Section 2, which does relate to towns and local governments. He said the League of Municipalities had agreed to the language in the bill. He said it was more encompassing because it's all private restrictions on land, rather than just being covenants. He said there are many other ways to create private restrictions on land. Secondly, the exception for the covenants that are referred to on Page 1 of the PCS is there to protect the American value to control the use of a person's land. He said he felt that the original bill might violate the Constitution.

Rep. Bordsen said she supported the bill and felt that it does affect those measures in the original bill.

Rep. Ellis also expressed support for the proposed committee substitute.

Sen. Kinnaird said her original bill had the language wanted by the League of Municipalities.

Rep. Nesbitt asked Rep. Stam if we could restrict the flying of the flag to the smallest flag?

Rep. Stam said the city council could restrict size even in a subdivision.

Rep. Nesbitt moved to amend the bill to allow the flying of the American flag at the minimum size, which would allow other controls of the size of flags.

Discussion followed regarding the size of the pole and of the flag.

Rep. Nesbitt read his proposed amendment... "no private restriction on the use of law shall be construed to regulate or prohibit display of flag of the United States, of the size no greater than 4' by 6', ..."

Rep. Nesbitt's amendment was before the Committee and was adopted.

Rep. Nesbitt moved to amend the bill a second time to make the language on Page 1, Lines 20-21 all be in large capital letters and "bold faced." The amendment was adopted.

Rep. Nesbitt moved that those two amendments be incorporated into a new Proposed Committee, that the new bill be given a favorable report and the original bill an unfavorable report. The motion passed.

Rep. Capps was recognized. He said he had been trying to get a bill passed to protect the flying of the American flag for many years. He commended Sen. Kinnaird and the Committee for their work.

SB 963 (Prevent Price Gouging During Disasters) was before the Committee and Sen. Swindell was recognized to discuss his bill.

A proposed committee substitute was distributed to the members and Rep. Ellis moved that it be adopted for consideration. The motion passed.

Sen. Swindell told the committee that this was a new committee substitute that addressed the concerns expressed by members at the last meeting.

Rep. Stam explained the changes the subcommittee had made to the bill. *See Bill Analysis – Version S963-CSRQ-41 [v.4]. – Attachment I I).*

He also had a handout for the Committee. *(See Attachment III).*

Rep. Nesbitt moved to amend the bill on Page 2, line 19 by inserting the word "promptly," and Page 1, line 22, insert the word "be" between the words shall and deemed. The motion passed.

Rep. Walend said she supported the bill, but still had concerns about the 10% for services.

Rep. Ellis was worried about the negative "p. r." that might result from this legislation and he said he couldn't support the bill as it is currently written.

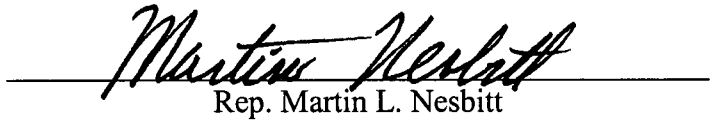
Discussion followed regarding "unconscionable pricing." Rep. Nesbitt wasn't comfortable with the bill. He said he didn't think the proposed committee substitute addressed the original intent of the bill. Rather than dealing with an increase in goods, it deals with services. He said he thought it was aimed at the necessities that people need to live.

Rep. Ellis moved to report the bill out of the Committee "without prejudice," but his motion wasn't accepted.

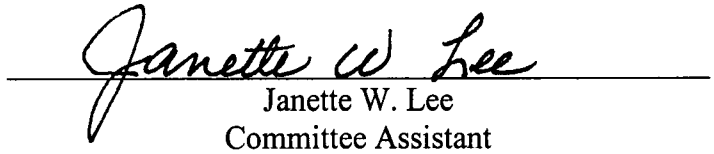
Discussion followed. It was the feeling of the committee that the language in the bill needed to be more general, that it could be, if you will, a work in progress.

Rep. Nesbitt said he felt the bill needed more work, but he moved to give the proposed committee substitute a favorable report, unfavorable to the original bill. The motion passed. He did this in the event that the Committee wasn't allowed to have another meeting.

The meeting adjourned at 11:00 a.m.



Rep. Martin L. Nesbitt
Chairman



Janette W. Lee
Committee Assistant

AGENDA

HOUSE COMMITTEE ON JUDICIARY II

Representative Martin L. Nesbitt, Chair

Representative Wayne Goodwin, Vice-Chair
Representative Tim Moore, Vice-Chair

Tuesday, June 17, 2003
10:00 a.m.
Room 421 LOB

1. **Call Meeting to Order.**

2. **Consideration of the following bills:**

SB 563 Uniform Athlet Agents Act – *Sen. Hagan, Bill Sponsor*
SB 722 Display of American Flag - Sen. Kinnaird, *Bill Sponsor*
SB 963 Prevent Price Gouging During Disasters – *Sen. Swindell, Bill Sponsor*

3. **Adjourn.**

SENATE BILL 563: Uniform Athlete Agents Act.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Hagan
Date:	June 17, 2003	**Summary by:**	Jeff Hudson*
Version:	Proposed Committee Substitute S563-CSSB-43 [v.2]		Committee Counsel

SUMMARY: The Proposed Committee Substitute for Senate Bill 563 would repeal Article 8 of Chapter 78C, Regulation of Athlete Agents, and replace it with Article 8A, the Uniform Athlete Agents Act.

PROPOSED COMMITTEE SUBSTITUTE: The Proposed Committee Substitute for Senate Bill 563 (PCS) differs from Senate Bill 563, Second Edition, as follows:

- The PCS contains a specific exception from registration requirements for North Carolina licensed and resident attorneys. (page 3, lines 4 through 8)
- The PCS provides that when a student-athlete enters into an agency contract, the student-athlete waives the attorney-client privilege with respect to records that the agent must retain and that may be inspected by the Secretary of State. (page 7, lines 31 through 33) The PCS also provides that an agency contract must contain specific language alerting the student-athlete to the fact that signing the contract constitutes a waiver of the attorney-client privilege with respect to these records. (page 6, lines 36 through 38)
- The PCS provides that certain prohibited conduct is subject to a Class I felony, while other prohibited conduct is not. (page 8, line 14)
- The technical amendment that was adopted by the House Judiciary II Committee on Wednesday, June 11, has been engrossed into the PCS. (page 9, line 13)

CURRENT LAW: Article 8 of Chapter 78C regulates the relationships between agents and student-athletes.

Definitions: An athlete (student-athlete) is a person who seeks to be employed as a professional athlete and is enrolled in a North Carolina high school or has been admitted to an institution of higher education in North Carolina. An athlete agent (agent) is a person who, for remuneration, solicits a student-athlete to represent the student-athlete in either an agent contract or a financial services contract. An agent contract authorizes the agent to receive compensation in exchange for attempting to obtain employment for the student-athlete with a professional sports team. A financial services contract is an agreement between the parties that allows the agent to make financial and investment decisions for a student-athlete. An agent must post a bond of $100,000 with the Secretary of State when the agent enters into a financial services contract with a student-athlete.

Registration with Secretary of State: Agents must register with the Secretary of State before the agent has any contact with a student-athlete. The agent must provide its principal place of business, the agent's occupation for the last five years, the names and addresses of any financially interested partners or profit sharers, and, if requested by the Secretary of State, five professional references. The registration fee is $200 and the registration lasts for one year. A North Carolina licensed and resident attorney is not required to register if the attorney does not advertise directly or solicit student-athletes and does not

represent more than two student-athletes. The Secretary of State may suspend, revoke, or deny the registration of an agent who fails to comply with Article 8, and may investigate any suspected violations.

Content of Contracts: Contracts with student-athletes must contain a notice that the agent is registered with the Secretary of State, that the student-athlete should read the contract before signing it and should not sign the contract if it contains blank spaces, and that the student-athlete may cancel the contract within 16 days of signing it. The agent must file a memorandum of contract with the Secretary of State and the student-athlete's high school principal or the athletic director of the student athlete's college within five days of the signing of a contract.

Prohibited Acts: An agent may not make any false, fraudulent, or misleading statements. An agent may not have an agreement to provide anything of value to any employee of the student-athlete's high school or college in return for the referral of any clients to the agent. The agent may not offer anything of value to induce a student-athlete to enter into a contract, except the agent may expend "reasonable entertainment expenses and transportation expenses" to and from the agent's place of business. An agent may not contact the student-athlete until after the completion of the student-athlete's last high school or intercollegiate contest, including post-season games.

Criminal and Civil Penalties: It is a Class I Felony to fail to register with the Secretary of State or to engage in any of the prohibited acts listed above. A contract with an agent who does not comply with the law is voidable at the discretion of the injured party. The Secretary of State may impose a civil penalty of between $2,500 and $25,000 for willful violations.

BILL ANALYSIS: The Uniform Athlete Agents Act contained in the Proposed Committee Substitute for Senate Bill 563 differs from current law as follows:

- Contains revised and additional definitions but generally does not expand or contract the scope of who is covered.
- Requires more specific registration information, including information regarding the agent's expertise, prior felony convictions or convictions for crimes of moral turpitude.
- The registration application must contain a sworn statement that the information is true under penalty of perjury.
- Does not contain bonding requirements.
- Creates reciprocity of registration and renewal if the applicant has applied within the last six months in another state that has similar registration requirements.
- Contract warning language no longer warns the student-athlete to read the contract before signing it, but does includes a notice that by signing the contract, the student-athlete may lose eligibility to compete as a student-athlete in their sport.
- Shortens the contract cancellation period from 16 days to 14 days.
- The right of cancellation may not be waived.
- Does not require an agent to provide notice to the student-athlete's principal or athletic director prior to contacting a student-athlete, but does require the agent and student-athlete to notify the student-athlete's athletic director within 72 hours of signing a contract or before the next athletic event.

- Requires an agent to retain certain records that are subject to inspection by the Secretary of State and provides that by entering into an agency contract, a student-athlete waives the attorney-client privilege with respect to those records.
- Makes it a Class I felony for an agent to:
    - Furnish anything of value to the student-athlete prior to signing a contract if it is furnished with the intent to induce the student-athlete to sign the contract.
    - Furnish anything of value to anyone who isn't the student-athlete or another agent if it is furnished with the intent to induce the student-athlete to sign the contract.
- Creates a civil cause of action by the high school or college against the agent or student-athlete for damages caused by a violation of the law.

BACKGROUND: In the late 1990s, the National Collegiate Athletic Association and several universities asked the National Conference of Commissioners on Uniform State Laws (Conference) to draft a uniform athlete agents law. The Conference completed the Uniform Athlete Agents Act in 2000. As of June 10, 2003, 21 states and the District of Columbia had enacted the Uniform Athlete Agents Act.

EFFECTIVE DATE: The act is effective when it becomes law except the criminal provisions are effective December 1, 2003.

***Note:** Kory Goldsmith, Senate Judiciary II Committee Counsel, substantially contributed to the preparation of this summary.

S563-SMSB-002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 563

Judiciary II Committee Substitute Adopted 4/16/03

PROPOSED HOUSE COMMITTEE SUBSTITUTE S563-CSSB-43 [v.2]

6/16/2003 4:42:50 PM

Short Title: Uniform Athlete Agents Act. (Public)

Sponsors:

Referred to:

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE LAWS REGULATING ATHLETE AGENTS AND TO ADOPT THE UNIFORM ATHLETE AGENTS ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 8 of Chapter 78C of the General Statutes is repealed.

SECTION 2. Chapter 78C of the General Statutes is amended by adding a new Article to read:

"Article 8A.

"Uniform Athlete Agents Act.

"**§ 78C-85. Title.**

This Article may be cited as the 'Uniform Athlete Agents Act'.

"**§ 78C-86. Definitions.**

The following definitions apply in this Article:

(1) Agency contract. – An agreement in which a student-athlete authorizes a person to negotiate or solicit on behalf of the student-athlete a professional-sports-services contract or an endorsement contract.

(2) Athlete agent. – An individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual is an athlete agent. The term does not include a spouse, parent, sibling, or guardian of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization.

(3) Athletic director. – An individual responsible for administering the overall athletic program of an educational institution or, if an educational institution has separately administered athletic programs

for male students and female students, the athletic program for males or the athletic program for females, as appropriate.

(4) Contact. – A communication, direct or indirect, between an athlete agent and a student-athlete to recruit or solicit the student-athlete to enter into an agency contract.

(5) Endorsement contract. – An agreement under which a student-athlete is employed or receives consideration to use on behalf of the other party any value that the student-athlete may have because of publicity, reputation, following, or fame obtained because of athletic ability or performance.

(6) Intercollegiate sport. – A sport played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics.

(7) Person. – An individual, company, corporation, partnership, association, or any other legal or commercial entity.

(8) Professional-sports-services contract. – An agreement under which an individual is employed or agrees to render services as a player on a professional sports team, with a professional sports organization, or as a professional athlete.

(9) Record. – Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) Registration. – A certificate issued by the Secretary of State evidencing that a person has satisfied the requirements of an athlete agent pursuant to this Article.

(11) Student-athlete. – An individual who engages in, is eligible to engage in, or may be eligible in the future to engage in any intercollegiate sport. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for purposes of that sport.

"**§ 78C-87. Service of process; subpoenas.**

(a) By acting as an athlete agent in this State, a nonresident individual appoints the Secretary of State as the individual's agent for service of process in any civil action in this State related to the individual's acting as an athlete agent in this State.

(b) The Secretary of State may issue subpoenas for any material that is relevant to the administration of this Article.

"**§ 78C-88. Athlete agents; registration required; exceptions; void contracts.**

(a) Except as otherwise provided in this section, an individual may not act as an athlete agent in this State without holding a certificate of registration under G.S. 78C-90 or G.S. 78C-92.

(b) Before being issued a certificate of registration, an individual may act as an athlete agent in this State for all purposes except signing an agency contract if: (i) a student-athlete or another person acting on behalf of the student-athlete initiates

communication with the individual; and (ii) within seven days after an initial act as an athlete agent, the individual submits an application for registration as an athlete agent in this State.

(c) A North Carolina licensed and resident attorney may act as an athlete agent in this State for all purposes without registering pursuant to this section if the attorney neither advertises directly for, nor solicits, any student-athlete by representing to any person that the attorney has special experience or qualifications with regard to representing student-athletes and represents no more than two student-athletes.

(d) An agency contract resulting from conduct in violation of this section is void, and the athlete agent shall return any consideration received under the contract.

"**§ 78C-89. Registration as athlete agent; form; requirements.**

(a) An individual seeking registration as an athlete agent shall submit an application for registration to the Secretary of State in a form prescribed by the Secretary of State. The application must be in the name of an individual and, except as otherwise provided in subsection (b) of this section, signed or otherwise authenticated by the applicant under penalty of perjury and must state or contain the following:

(1) The name of the applicant and the address of the applicant's principal place of business.

(2) The name of the applicant's business or employer, if applicable.

(3) Any business or occupation engaged in by the applicant for the five years immediately preceding the date of submission of the application.

(4) A description of the applicant's:

a. Formal training as an athlete agent.

b. Practical experience as an athlete agent.

c. Educational background relating to the applicant's activities as an athlete agent.

(5) The names and addresses of three individuals not related to the applicant who are willing to serve as references.

(6) The name, sport, and last known team for each individual for whom the applicant acted as an athlete agent during the five years immediately preceding the date of submission of the application.

(7) The names and addresses of all persons who are:

a. With respect to the athlete agent's business if it is not a corporation, the partners, members, officers, managers, associates, or profit-sharers of the business.

b. With respect to a corporation employing the athlete agent, the officers, directors, and any shareholder of the corporation having an interest of five percent (5%) or greater.

(8) Whether the applicant or any person named under subdivision (7) of this section has been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony and identify the crime.

(9) Whether there has been any administrative or judicial determination that the applicant or any person named under subdivision (7) of this

section has made a false, misleading, deceptive, or fraudulent representation.

(10) Any instance in which the conduct of the applicant or any person named under subdivision (7) of this section resulted in the imposition of a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event on a student-athlete or educational institution.

(11) Any sanction, suspension, or disciplinary action taken against the applicant or any person named under subdivision (7) of this section arising out of occupational or professional conduct.

(12) Whether there has been any denial of an application for, suspension or revocation of, or refusal to renew the registration or licensure of the applicant or any person named under subdivision (7) of this section as an athlete agent in any state.

(b) An individual who has submitted an application for registration or licensure as an athlete agent in another state or who holds a certificate of registration or licensure as an athlete agent in another state may submit a copy of the application and certificate in lieu of submitting an application in the form prescribed pursuant to subsection (a) of this section. The Secretary of State shall accept the application and the certificate from the other state as an application for registration in this State if the application to the other state satisfied all of the following criteria:

(1) Was submitted in the other state within six months immediately preceding the submission of the application in this State and the applicant certifies that the information contained in the application is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(c) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-90. Certificate of registration; issuance or denial; renewal.**

(a) Except as otherwise provided in subsection (b) of this section, the Secretary of State shall issue a certificate of registration to an individual who complies with G.S. 78C-89(a) or whose application has been accepted under G.S. 78C-89(b).

(b) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent. In making the determination, the Secretary of State may consider whether the applicant has:

(1) Been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony.

(2) Made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent.

(3) Engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity.

(4) Engaged in conduct prohibited by G.S. 78C-98.

(5) Had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state.

(6) Engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student-athlete or educational institution.

(7) Engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity.

(c) In making a determination under subsection (b) of this section, the Secretary of State shall consider: (i) how recently the conduct occurred; (ii) the nature of the conduct and the context in which it occurred; and (iii) any other relevant conduct of the applicant.

(d) An athlete agent may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. The application for renewal must be signed by the applicant under penalty of perjury and must contain current information on all matters required in an original registration.

(e) An individual who has submitted an application for renewal of registration or licensure in another state, in lieu of submitting an application for renewal in the form prescribed pursuant to subsection (d) of this section, may file a copy of the application for renewal and a valid certificate of registration or licensure from the other state. The Secretary of State shall accept the application for renewal from the other state as an application for renewal in this State if the application to the other state satisfied the following:

(1) Was submitted in the other state within six months immediately preceding the filing in this State and the applicant certifies the information contained in the application for renewal is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application for renewal submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(f) A certificate of registration or a renewal of a registration is valid for one year.

(g) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-91. Suspension; revocation; refusal to renew registration.**

(a) The Secretary of State may suspend, revoke, or refuse to renew a registration for conduct that would have justified denial of registration under G.S. 78C-90(b).

(b) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration or licensure only after proper notice and an opportunity for a hearing in accordance with the Administrative Procedures Act pursuant to Article 3 of Chapter 150B of the General Statutes.

"**§ 78C-92. Temporary registration.**

The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending.

"§ 78C-93. Registration; renewal of fees.

An application for registration or renewal of registration must be accompanied by a fee in the following amount:

(1) Application for registration $200.00
(2) Application for registration based upon a certificate of registration or licensure issued by another state 200.00
(3) Application for renewal of registration 200.00
(4) Application for renewal of registration based upon an application for renewal of registration or licensure submitted in another state ... 200.00.

"§ 78C-94. Required form of contract.

(a) An agency contract must be in a record, signed or otherwise authenticated by the parties.

(b) An agency contract must state or contain the following:

(1) The amount and method of calculating the consideration to be paid by the student-athlete for services to be provided by the athlete agent under the contract and any other consideration the athlete agent has received or will receive from any other source for entering into the contract or for providing the services.
(2) The name of any person not listed in the application for registration or renewal of registration who will be compensated because the student-athlete signed the agency contract.
(3) A description of any expenses that the student-athlete agrees to reimburse.
(4) A description of the services to be provided to the student-athlete.
(5) The duration of the contract.
(6) The date of execution.

(c) An agency contract must contain, in close proximity to the signature of the student-athlete, a conspicuous notice in boldface type in capital letters stating:

WARNING TO STUDENT-ATHLETE

IF YOU SIGN THIS CONTRACT:

(1) YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT;

(2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR;

(3) YOU WAIVE YOUR ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO THIS CONTRACT AND CERTAIN INFORMATION RELATED TO IT; AND

(4) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT MAY NOT REINSTATE YOUR ELIGIBILITY.

(d) An agency contract that does not conform to this section is voidable by the student-athlete. If a student-athlete voids an agency contract, the student-athlete is not

required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

(e) The athlete agent shall give a record of the signed or otherwise authenticated agency contract to the student-athlete at the time of execution.

"**§ 78C-95. Notice to educational institution.**

(a) Within 72 hours after entering into an agency contract or before the next scheduled athletic event in which the student-athlete may participate, whichever occurs first, the athlete agent shall give notice in a record of the existence of the contract to the athletic director of the educational institution at which the student-athlete is enrolled or the athlete agent has reasonable grounds to believe the student-athlete intends to enroll.

(b) Within 72 hours after entering into an agency contract or before the next athletic event in which the student-athlete may participate, whichever occurs first, the student-athlete shall inform the athletic director of the educational institution at which the student-athlete is enrolled that he or she has entered into an agency contract.

"**§ 78C-96. Student-athlete's right to cancel.**

(a) A student-athlete may cancel an agency contract by giving notice of the cancellation to the athlete agent in a record within 14 days after the contract is signed.

(b) A student-athlete may not waive the right to cancel an agency contract.

(c) If a student-athlete cancels an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

"**§ 78C-97. Required records; waiver of attorney-client privilege.**

(a) An athlete agent shall retain the following records for a period of five years:

(1) The name and address of each individual represented by the athlete agent.

(2) Any agency contract entered into by the athlete agent.

(3) Any direct costs incurred by the athlete agent in the recruitment or solicitation of a student-athlete to enter into an agency contract.

(b) Records required to be retained by subsection (a) of this section are open to inspection by the Secretary of State during normal business hours.

(c) Where a student-athlete enters into an agency contract regulated under this Article, the student-athlete will be deemed to waive the attorney-client privilege with respect to records required to be retained by subsection (a) of this section.

"**§ 78C-98. Prohibited conduct.**

(a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, shall not:

(1) Give any materially false or misleading information or make a materially false promise or representation.

(2) Furnish anything of value to a student-athlete before the student-athlete enters into the agency contract.

(3) Furnish anything of value to any individual other than the student-athlete or another registered athlete agent.

(b) An athlete agent shall not intentionally:

(1) Initiate contact with a student-athlete unless the athlete agent is registered under this Article.
(2) Refuse or fail to retain or permit inspection of the records required to be retained by G.S. 78C-97.
(3) Fail to register as required by G.S. 78C-88.
(4) Provide materially false or misleading information in an application for registration or renewal of registration.
(5) Predate or postdate an agency contract.
(6) Fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that the signing or authentication may make the student-athlete ineligible to participate as a student-athlete in that sport.

"**§ 78C-99. Criminal penalties.**

An athlete agent who violates any provision under G.S. 78C-98(a) is guilty of a Class I felony.

"**§ 78C-100. Civil remedies.**

(a) An educational institution has a right of action against an athlete agent or a former student-athlete for damages caused by a violation of this Article. In an action under this section, the court may award costs and reasonable attorneys' fees to the prevailing party.

(b) Damages suffered by an educational institution under subsection (a) of this section include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Article or was penalized, disqualified, or suspended from participation in athletics by: (i) a national association for the promotion and regulation of athletics; (ii) an athletic conference; or (iii) reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by an athletic organization.

(c) A right of action under this section does not accrue until the educational institution discovers, or by the exercise of reasonable diligence would have discovered, the violation by the athlete agent or former student-athlete.

(d) Any liability of the athlete agent or the former student-athlete under this section is several and not joint.

(e) This Article does not restrict rights, remedies, or defenses of any person under law or equity.

"**§ 78C-101. Administrative penalty.**

The Secretary of State may assess a civil penalty against an athlete agent not to exceed twenty-five thousand dollars ($25,000) for a violation of this Article.

"**§ 78C-102. Uniformity of application and construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 78C-103. Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of

those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

"**§ 78C-104. Severability.**

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable.

"**§ 78C-105. Rules.**

The Secretary of State may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out the provisions of this Article."

SECTION 3. G.S. 78C-99 becomes effective December 1, 2003, and applies to acts committed on and after that date. The rest of the act is effective when it becomes law.

SENATE BILL 722:
Display of American Flag.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	June 17, 2003	**Summary by:**	Drupti Chauhan*
Version:	S722-CSRQ-40 [v.1]		Committee Co-Counsel

PCS SUMMARY: ***The PCS removes references to homeowners association and condominium association and states that "no private restriction" on the use of land can be construed to regulate or prohibit the US flag if it is displayed in accordance with the patriotic customs set forth in federal law. Restrictions that are registered prior to October 1, 2003 must specifically use the terms: (i) flag of the United States of America, (ii) American flag, or (iii) United States flag in order to be construed to regulate the US flag. For restrictions registered after October 1, 2003, the restriction has to be written on the first page of the instrument and it must specifically state that the document regulates or prohibits the display of the United States flag in order to be construed as regulating or prohibiting the display of the flag. In addition, the bill applies only to owners of property and does not apply to common areas, easements, rights of way or property owned by others.***

Local governments also cannot prohibit the US flag from being flown or displayed if it is done in accordance with the federal statutes and if the person who has lawful control of the property consents. Local governments may provide reasonable restrictions on flag size, number of flags, location and height of flagpoles for the purposes of protecting the public's health, safety, and welfare as long as the restrictions do not discriminate against the flag.

The PCS changes the effective date to October 1, 2003 but applies to construction of instruments and conveyances prior to that date.

BILL ANALYSIS: The bill would create a new **G.S. 144-7, Display of American Flag**, which provides that no covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners, neighborhood, civic, condominium, or other association may prohibit the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibit the display of the United States flag on any property, if the flag is displayed with the consent of the real property's owner or person having lawful control of the property and in accordance with any of the following conditions:

- Customs set forth 4 U.S.C.A. §§ 5-10 governing the display of the American flag.
- Flagpole standards set forth in S.C.R. 61, 105th Congress.
- Any federal law or proclamation of the President or Governor, or local ordinance or resolution.

S722-SMRQ-003: Tim Hovis and Robin Johnson, Staff Attorneys, contributed to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 722

Judiciary II Committee Substitute Adopted 4/23/03
Third Edition Engrossed 4/28/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S722-PCS85258-RQ-40

Short Title: Display of American Flag. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of the American flag; private restrictions.**

No private restriction on the use of land shall be construed to regulate or prohibit the display of the flag of the United States, of a size no greater than four feet by six feet, which is displayed in accordance with the patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States unless:

(1) For restrictions registered prior to October 1, 2003, the restriction specifically uses the following terms:

a. Flag of the United States of America;

b. American flag; or

c. United States flag.

(2) For restrictions registered on or after October 1, 2003, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States flag only if the restriction specifically states: '**THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA**'.

This section shall apply to owners of property who display the flag of the United States on their property and does not apply to common areas, easements, rights-of-way, or other areas owned by others.

SECTION 2. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7.1. Display of the American flag; public restrictions.**

(a) A unit of local government shall not prohibit the flag of the United States from being flown or displayed if the flag is flown or displayed:

(1) In accordance with the patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States, and

(2) Upon private or public property with the consent of either the owner of the property or of any person having lawful control of the property.

(b) Notwithstanding subsection (a) of this section, for the purpose of protecting the public health, safety, and welfare, reasonable restrictions on flag size, number of flags, location, and height of flagpoles are not prohibited provided that such restrictions shall not discriminate against the flag in any manner."

SECTION 3. The title of Chapter 144 of the General Statutes reads as rewritten:

"**State Flag, American Flag, ~~Motto~~ Motto, And Colors.**"

SECTION 4. This act becomes effective October 1, 2003, but it applies to the construction of instruments or ordinances adopted or registered prior to its effective date.

SENATE BILL 963:
Prevent Price Gouging During Disasters.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Swindell
Date:	June 17, 2003	**Summary by:**	Drupti Chauhan*
Version:	S963-CSRQ-41 [v.4]		Committee Co-Counsel

The PCS makes the following changes to the bill:

Subsections (a) and (b):

- ***Changes "excessive pricing" to "unconscionable pricing"***
- ***Defines unconscionable pricing for services as a 10% markup on pricing for the services as compared to what the price had been for the services before the disaster***
- ***Includes transient business by using the price generally used in the trade area as the standard to determine whether the price is unconscionable***

Subsection (c):

- ***Defines whether or not a contract for the sale of goods, a contract for the lease of goods, and an agreement for a consumer credit sale is for an unconscionable amount by determining if those contracts were unconscionable pursuant to the unconscionable standards in G.S. 25-2-302, G.S. 25-2A-108, and G.S. 25A-43. If the contract was executed during a state of disaster and was found to be unconscionable under the UCC, then there would be a violation of unfair and deceptive trade practices as well.***

Subsection (d):

- ***Allows the Governor to exempt certain services from the price restrictions***

Subsections (e), (f), and (g):

- ***Provides that the Attorney General will issue a press release stating that the provisions of the bill have not been violated only if the service provider or seller so requests***
- ***Requires the Governor's Office to notify registered agents of trade associations, corporations, or partnerships when a disaster is declared and terminated***
- ***Limits the time that the law would be in effect to 45 days or the termination of the disaster, whichever occurs first***

Generally:

- ***Keeps the statutory penalty of $5000.00 per violation which is currently in G.S. 75-15.2***
- ***Violation of this bill would be considered an unfair trade practice under Chapter 75 and would subject the violator to fines, treble damages and attorneys fees.***

CURRENT LAW: Current law does not control or restrict prices that may be charged for goods during disasters. The Governor and General Assembly are authorized to declare states of disaster under G.S. 166A-6, which can include a determination of the length of the disaster period and the geographic

location to which the state of disaster applies. Local governments are allowed to declare local states of emergency.

BILL ANALYSIS: Senate Bill 963 would make it unlawful for a person, during a declared state of disaster to sell any merchandise or service that is consumed or used as a direct result of an emergency, or which is consumed or used to preserve, protect or to sustain life, health, safety or comfort of people or their property during a state of disaster at an excessive price.

The bill defines "excessive price" as the price at which the service is sold or offered during the disaster period as compared to the price the service was sold for immediately prior to the disaster, that exceeds the original price by more than 10%. If the cost of the service is higher because of higher prices imposed by the seller's supplier or additional costs of providing the service during the disaster, the price may not be more than a 10% markup above the normal markup for the service immediately prior to the disaster.

The bill defines a state of disaster as one declared by the Governor or General Assembly under G.S. 160A-6 or a local emergency declaration under G.S. 160A-8.

By being codified as part of Article 1 of Chapter 75, a violation of this bill would be treated as an unfair trade practice. As such an action could be brought by the Attorney General to stop the violation and to collect a fine of up to $5000 for each violation. Individuals injured by the violation can sue for treble damages and recovery of reasonable attorneys fees.

EFFECTIVE DATE: The bill becomes effective July 1, 2003.

Walker Reagan, Committee Counsel to Senate Commerce, contributed significantly to this summary.

PART 3.

General Obligation and Construction of Contract.

§ 25-2-301. General obligations of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract. (1965, c. 700, s. 1.)

OFFICIAL COMMENT

Prior Uniform Statutory Provision: Sections 11 and 41, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes:

This section uses the term "obligation" in contrast to the term "duty" in order to provide for the "condition" aspects of delivery and payment insofar as they are not modified by other sections of this Article such as those on cure of tender. It thus replaces not only the general provisions of the Uniform Sales Act on the parties' duties, but also the general provisions of that Act on the effect of conditions. In order to determine what is "in accordance with the contract" under this Article usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties.

Cross References:

Section 1-106. See also Sections 1-205, 2-208, 2-209, 2-508 and 2-612.

Definitional Cross References:

"Buyer". Section 2-103.
"Contract". Section 1-201.
"Party". Section 1-201.
"Seller". Section 2-103.

NORTH CAROLINA COMMENT

This section reflects the prior law of North Carolina and would seem to require no comment. See and compare McAden v. Craig, 222 N.C. 497, 24 S.E.2d 1 (1942).

CASE NOTES

Prima Facie Case Presents Jury Question. — Seller's allegation of the sale and delivery of goods at an agreed price and buyer's admission that he purchased the goods, executed the note and security agreement and refused to pay a portion of the purchase price agreed upon makes out a prima facie case entitling seller to go to the jury and, nothing else appearing, to recover the balance due on the note. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in Southern Utils., Inc. v. Jerry Mandel Mach. Corp., 71 N.C. App. 188, 321 S.E.2d 508 (1984).

Cited in American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

§ 25-2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. (1971, c. 1055, s. 1.)

OFFICIAL COMMENT

Prior Uniform Statutory Provision:
None

Purposes:

1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; Hardy v. General Motors Acceptance Corporation, 38 Ga.App. 463, 144 S.E.2d 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; Andrews Bros. v. Singer & Co. (1934 CA) 1 K.B. 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act called such an implied warranty; New Prague Flouring Mill Co. v. G. A. Spears, 194 Iowa 417, 189 N.W. 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; and Kansas Flour Mills Co. v. Dirks, 100 Kan. 376, 164 P. 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for nondelivery at the end of only one 30 day postponement; Green v. Arcos, Ltd. (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; Austin Co. v. J. H. Tillman Co., 104 Or. 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; Robert A. Munroe & Co. v. Meyer (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

Definitional Cross Reference:
"Contract". Section 1-201.

Legal Periodicals. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

the Uniform Statutory Source included in the section; these changes range from one extreme, e.g., a significant difference in practice (a warranty as to merchantability is not implied in a finance lease (Section 2A-212)) to the other extreme, e.g., a modest difference in style or terminology (the transaction governed is a lease not a sale (Section 2A-203)).

Cross References:
Sections 2A203 and 2A-212.

Definitional Cross References:
"Aggrieved party". Section 1-201(2).
"Delivery". Section 1-201(14).
"Rights". Section 1-201(36).
"Signed". Section 1-201(39).
"Written". Section 1-201(46).

§ 25-2A-108. Unconscionability.

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2) of this section, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) if the court finds unconscionability under subsection (1) or (2) of this section, the court shall award reasonable attorneys' fees to the lessee.

(b) if the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable attorneys' fees to the party against whom the claim is made.

(c) in determining attorneys' fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) of this section is not controlling. (1993, c. 463, s. 1.)

OFFICIAL COMMENT

Uniform Statutory Source: Section 2-302 and Unif. Consumer Credit Code § 5.108, 7A U.L.A. 167-69 (1974).

Changes: Subsection (1) is taken almost verbatim from the provisions of Section 2-302(1). Subsection (2) is suggested by the provisions of Unif. Consumer Credit Code § 5.108(1), (2), 7A U.L.A. 167 (1974). Subsection (3), taken from the provisions of Section 2-302(2), has been expanded to cover unconscionable conduct. Unif. Consumer Credit Code § 5.108(3), 7A U.L.A. 167 (1974). The provision for the award of attorney's fees to consumers, subsection (4), covers unconscionability under subsection (1) as well as (2). Subsection (4) is modeled on the provisions of Unif. Consumer Credit Code § 5.108(6), 7A U.L.A. 169 (1974).

Purposes:
Subsections (1) and (3) of this section apply the concept of unconscionability reflected in the provisions of Section 2-302 to leases. See Dillman & Assocs. v. Capitol Leasing Co., 110 Ill.App.3d 335, 342, 442 N.E.2d 311, 316 (App.Ct. 1982). Subsection (3) omits the adjective "commercial" found in subsection 2-302(2) because subsection (3) is concerned with all leases and the relevant standard of conduct is determined by the context.

The balance of the section is modeled on the provisions of Unif. Consumer Credit Code § 5.108, 7A U.L.A. 167-69 (1974). Thus subsection (2) recognizes that a consumer lease or a clause in a consumer lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable

means had not been employed to induce the consumer to agree. To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable. Subsection (2) also provides a consumer remedy for unconscionable conduct, such as using or threatening to use force or violence, in the collection of a claim arising from a lease contract. These provisions are not exclusive. The remedies of this section are in addition to remedies otherwise available for the same conduct under other law, for example, an action in tort for abusive debt collection or under another statute of this State for such conduct. The reference to appropriate relief in subsection (2) is intended to foster liberal administration of this remedy. Sections 2A-103(4) and 1-106(1).

Subsection (4) authorizes an award of reasonable attorney's fees if the court finds unconscionability with respect to a consumer lease under subsections (1) or (2). Provision is also made for recovery by the party against whom the claim was made if the court does not find unconscionability and does find that the consumer knew the action to be groundless. Further, subsection (4)(b) is independent of, and thus will not override, a term in the lease agreement that provides for the payment of attorney's fees.

Cross References:
Sections 1106(1), 2-302 and 2A-103(4).

Definitional Cross Reference:
"Action". Section 1-201(1).
"Consumer lease". Section 2A103(1)(e).
"Lease contract". Section 2A-103(1)(*l*).
"Lessee". Section 2A-103(1)(n).
"Party". Section 1-201(29).

§ 25-2A-109. Option to accelerate at will.

(1) A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import must be construed to mean that he has power to do so only if he in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing good faith under subsection (1) of this section is on the party who exercised the power; otherwise, the burden of establishing lack of good faith is on the party against whom the power has been exercised. (1993, c. 463, s. 1.)

OFFICIAL COMMENT

Uniform Statutory Source: Section 1-208 and Unif. Consumer Credit Code § 5.109(2), 7A U.L.A. 171 (1974).

Purposes:
Subsection (1) reflects modest changes in style to the provisions of the first sentence of Section 1-208.

Subsection (2), however, reflects a significant change in the provisions of the second sentence of Section 1-208 by creating a new rule with respect to a consumer lease. A lease provision allowing acceleration at the will of the lessor or when the lessor deems itself insecure is of critical importance to the lessee. In a consumer lease it is a provision that is not usually agreed to by the parties but is usually mandated by the lessor. Therefore, where its invocation depends not on specific criteria but on the discretion of the lessor, its use should be regulated to prevent abuse. Subsection (1) imposes a duty of good faith upon its exercises. Subsection (2) shifts the burden of establishing good faith to the lessor in the case of a consumer lease, but not otherwise.

Cross Reference:
Section 1-208.

Definitional Cross Reference:
"Burden of establishing". Section 1-201(8).
"Consumer lease". Section 2A103(1)(e).
"Good faith". Sections 1-201(19) and 2-103(1)(b).
"Party". Section 1-201(29).
"Term". Section 1-201(42).

§ 25A-42. Duties as to care and return of goods; no compensation for services prior to cancellation.

(a) Except as provided by the provisions on retention of goods by the buyer (G.S. 25A-41(d)), within a reasonable time after a home-solicitation sale has been canceled, the buyer must make available to the seller at the buyer's residence in substantially as good condition as received, any goods delivered under the contract or sale, or in the alternative, the buyer may comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. The seller shall within 10 business days of receipt of the buyer's notice of cancellation notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods. If the buyer makes the goods available to the seller and the seller does not pick them up within 20 days of the date of the notice of cancellation, the buyer may retain or dispose of the goods without any further obligation. If the buyer fails to make the goods available to the seller, or agrees to return the goods to the seller and fails to do so, then the buyer shall remain liable for performance of all obligations under the contract.

(b) The buyer has the duty of a bailee to take reasonable care of the goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk.

(c) If the seller has performed any services pursuant to a home-solicitation sale prior to its cancellation, the seller is entitled to no compensation therefor.

(d) The seller shall not negotiate, transfer, sell, or assign any note, contract, or other evidence of indebtedness arising out of a home-solicitation sale to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased. (1971, c. 796, s. 1; 1975, c. 805, s. 4.)

§ 25A-43. Unconscionability.

(a) With respect to a consumer credit sale, if the court finds the agreement or any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable, all parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making its determination.

(c) As used in this section, "unconscionable" shall mean totally unreasonable under all of the circumstances. (1971, c. 796, s. 1.)

CASE NOTES

Quoted in Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975).

Stated in Sears, Roebuck & Co. v. Vandeusen, 155 Bankr. 358 (E.D.N.C. 1993).

Cited in Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 274 S.E.2d 206 (1981).

§ 25A-44. Remedies and penalties.

In addition to remedies hereinbefore provided, the following remedies shall apply to consumer credit sales:

re SB 963

Attachment II

AN ECONOMIST'S INTERPRETATION OF "PRICE GOUGING"

Dr. Mike Walden

After natural disasters and similar circumstances, there are often complaints about "price gouging" by sellers. The prices of bottled water, chain saws, lumber, and tree removal services may skyrocket. Many people claim this is unfair and say government should do something to stop the higher prices.

From an economist's perspective, there's no mystery why prices of certain products and services jump following a natural disaster. As is often said, it's a simple matter of "demand and supply". Following a natural disaster, demand for products related to coping with the disaster and removing the debris increases. However, unless the timing and scope of the disaster was precisely predicted, supply of those products and services was not comparably increased. In economic markets, when demand increases faster than supply, the price of the products and services will naturally increase.

The increased price of the products and services actually serves two useful purposes. First, it signals to buyers that the products and services are now more valuable, and it allows buyers who place the highest value on those products and services to obtain them.

For example, the price of chain saws may jump following a tornado or hurricane. Everyone now wants a chain saw, but there aren't enough chain saws for everyone. The higher price for chain saws will deter many people from buying saws now, whereas those who are willing to pay the higher price can purchase a saw immediately. In other words, the highest bidders get the saws.

Some say this isn't fair - that "money talks" in this case. Yet money talks in all economic markets. The alternative is to have some entity (like government) other than the marketplace to determine who gets the limited number of saws. But this would require an enormous amount of subjective evaluation and judgment by the entity.

The second purpose of the higher prices is to signal to suppliers to bring in more product (chain saws in our example). Sellers of the now more popular products and services will scramble to deliver more supply to meet the greater demand. As this happens, the high prices will fall back to "normal" levels.

Imposition of government price controls on popular post-disaster products and services will do nothing to bring supply in balance with demand. In fact, such controls will intensify the imbalance. Continuing our chain saw example, limiting the increase in saw prices will just mean the limited supplies will disappear sooner. And, keeping the saw prices at "normal or near normal" levels won't motivate patient consumers from delaying their clean-up until supplies are more available.

Also, limiting the price increases will decrease the incentive to sellers to rush in more supply. This will extend recovery time in the affected area.

Is there anything government can do? There are two things government can do, and they both involve information. Government can work with forecasters and other experts to widely publicize the expected timing and intensity of natural disasters. Not only will this motivate protective actions by households, it will also prompt sellers to stockpile extra supplies of products related to coping with the natural disaster and cleaning up in the aftermath.

Government can also warn consumers to be wary of potential fraudulent sales of products and, in particular, services following a natural disaster. Although the vast majority of business persons are honest, there always exist some dishonest business persons. In their haste to recover from a natural disaster, consumers may lower their natural defenses against fraud. Government can remind consumers to exercise all the normal cautions in purchasing a product or service following a natural disaster. Government can also advise consumers to wait on making these purchases, with the expectation a lower price will be forthcoming.

Natural disasters disrupt our lives and economies. Higher prices of disaster related products and services are one common outcome from natural disasters. Fortunately, the higher prices are short-lived. But trying to prevent the higher prices may prolong, rather than shorten, the return to normalcy.

Walden is a William Neal Reynolds Distinguished Professor and Extension Economist in the Department of Agricultural and Resource Economics at North Carolina State University.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 963
Second Edition Engrossed 4/28/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S963-CSRQ-41 [v.4]

6/17/2003 9:04:54 AM

Short Title: Prevent Price Gouging During Disasters. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT SELLERS AND SERVICE PROVIDERS FROM EXCESSIVELY RAISING PRICES ON THEIR MERCHANDISE OR SERVICES DURING DECLARED STATES OF DISASTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 75 of the General Statutes is amended by adding a new section to read:

"**§ 75-36. Prohibit unconscionable pricing during states of disaster.**

(a) It shall be a violation of G.S. 75-1.1 for any person to provide or offer to provide during a state of disaster, in the area for which the state of disaster has been declared, any services which are used as a direct result of an emergency or which are used to preserve, protect, or sustain life, health, safety, or comfort of persons or their property with the knowledge and intent to charge an unconscionable price for the service.

(b) As used in subsection (a), an unconscionable price is a price that exceeds by more than ten percent (10%) the price at which the service was provided or offered by the service provider in the usual course of business immediately prior to the state of disaster, unless one of the following applies:

(1) The price charged by the service provider is attributable to additional costs imposed by the service provider's supplier or other costs of providing the service during the state of disaster. In this case, the price shall deemed unconscionable if the price represents an increase of more than ten percent (10%) in the amount of the markup from cost, compared to the markup customarily applied by the service provider in the usual course of business immediately prior to the state of disaster.

(2) The service provider offered to provide the service at a price that was below the service provider's average price in the preceding sixty days.

In those situations where the service provider did not provide or offer to provide the service in question prior to the time the state of disaster was declared, the price at which the service was generally available in the trade area shall be used to determine if the service provider is charging an unconscionable price.

(c) It shall be a violation of G.S. 75-1.1 if, during a state of disaster in the area for which the state of disaster has been declared:

(1) A contract or any clause of a contract for the sale of goods was executed and is unconscionable pursuant to G.S. 25-2-302;

(2) A lease contract or any clause of a lease contract for the lease of goods was executed and is unconscionable pursuant to G.S. 25-2A-108; or

(3) An agreement or any clause of an agreement for a consumer credit sale was executed and is unconscionable pursuant to G.S. 25A-43.

(d) The Governor, in consultation with the Council of State, may exempt by proclamation certain categories of services from the price restrictions set forth in subsection (b).

(e) In the event the Attorney General investigates a complaint for a violation of this section and determines that the seller or service provider has not violated the provisions of this section and the seller or service provider so requests, the Attorney General shall, promptly issue a press release to a television station and newspaper of general circulation in the county or counties where the seller is located stating that the seller has not charged unconscionable prices during a state of disaster.

(f) A trade association, corporation, or partnership may register an agent for the purposes of being notified when the Governor declares and terminates a state of disaster. A trade association, corporation, or partnership may designate up to three persons to be notified on behalf of the organization's members and is responsible from maintaining current information for the designated agent or agents. The Office of the Governor is responsible for notifying the registered agents simultaneously with the declaration and termination of the state of disaster.

(g) For the purposes of this section, a state of disaster is the earlier of forty-five days or the termination of a natural or man-made disaster or emergency as declared in accordance with G.S. 166A-6 or G.S. 166A-8.

SECTION 2. This act becomes effective July 1, 2003.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

TUES. JUNE 17, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
	NASW
Mike Bertics	Sen Swindell Intern
	NCPMA
	NCPMA
Steed Griffin	Nationwide Ins Co.
Pam White	Nationwide Ins. Co.
Greg Wyrick	Nationwide Ins Co.
Jeff Boles	Nationwide Ins Co.
	NCSNA
Jonathan Jones	Carolina Journal
John O'Hale	Governor's Office
John Mattox	GOV OFFICE

Name	Firm or Agency and Address
John Bowdish	Aetna Zeneca
Elena Nan	
Karina Chapman	PHS intern
BRIAN LEWIS	Planned Parenthood Health Sys.

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

TUES. JUNE 17, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Fran Cockman	NCstatewatch
Paul F. Zimmerman	NCLEG
John Lotus	Nationwide Insurance
Rushane Jones	Nationwide Insurance
John Cyrus	nc state Grange
Amy Hobbs	NCHLA
Jim Blackburn	NC Association of County Commissioners
Andy Romanet	NCLM
Tom Sri	NCRMA / FTC
Andy Ellen	NCRMA / FTC
Fran Preston	NCRMA / FTC
Stephanie Simpson	NC Assn. of Realtors
Daniel Thigpen	News & Observer

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

TUES. JUNE 17, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Scott Completo	State Dept
Clyde Hott	Bar Association
Susan Smith	Nationwide Insurance
Dilip B. Vyas	Nationwide Insurance.
Michelle Frazier	NC Bar Ass'n
Amy Darden	NC Bar Assn.
Lynn Collar	Nationwide
Susan Valaam	Nationwide
Molly Ryan	NCSBA
Ann Ansley	Rep. Saul's intern
Adam Fitzwater	Intern - Gorman, Williams Sauls, Justice, Lalogue
John Kurtis	NCFPC

House Pages

1. Name: Stephen Sigmon
   County: Randolph
   Sponsor: Arlie Culp
2. Name: Lauren Bollinger
   County: Mecklenburg
   Sponsor: James Black
3. Name: Lauren Boyd
   County: Mecklenburg
   Sponsor: Speaker Black
4. Name: Jake Foley
   County: Randolph
   Sponsor: Rep. Brubaker
5. Name:
   County:
   Sponsor:

Sgt-At-Arms

1. Name: JAMES WORTH
2. Name: CHARLIE GRADY
3. Name: Philip Schreibman
4. Name:

House Judiciary II

Committee

Minutes

June 19, 2003

After Session – 2:45 p.m.

The House Judiciary II Committee met in Room 421 of the Legislative Office Building, Raleigh, NC. A quorum was present.

Rep. Nesbitt called the meeting to order and recognized Rep. Culp to discuss **HB 1128** (Grandparent Visitation).

A proposed committee substitute was distributed to the Committee and Rep. Bonner moved that it be adopted for consideration. The motion passed.

Rep. Bonner moved to give the proposed Committee Substitute a favorable report with a re-referral to the Rules Committee, unfavorable as to the original bill. The motion passed.

A proposed committee substitute for **SB 721** was before the Committee. Rep. Bordsen moved that it be adopted and the motion passed. The bill was displaced.

A new proposed committee substitute **SB 963** was before the Committee.

Drupti Chauhan explained the changes in the new PCS. (*See bill Analysis – S963-CSRQ-37 [v.6]. – Attachment I).*

Rep. Ellis moved that the PCS be adopted for consideration and the motion passed. He then proposed to amend the bill, but the motion failed.

Rep. Stam moved to give the proposed committee substitute a favorable report, unfavorable to original bill. The motion passed.

Rep. Nesbitt thanked the Committee members and staff for the work done this Session.

There being no further business, the meeting was adjourned at 4:00 p.m.

Rep. Martin L. Nesbitt
Chairman

Janette W. Lee
Committee Assistant

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Name of Committee**

Thurs. JUNE 19, 2003 — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Phelps	NCLM
Sen Sindell	
Mike Bertics	~~Sen~~ Sen Sindell Intern
Paul F. Zimmerman	NCLEG
Amanda Reider	Rep Goodwin Intern
S. Brian Walker	Bill Drafting
Jennifer Williston	Bill Drafting
Andy Ellen	NCRMA
Tom Sri	NCRMA
Doug Howey	NCPMA
Gary Harris	NCPMA

VISITOR REGISTRATION SHEET

House Committee on Judiciary II — **Thurs. JUNE 19, 2003**

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Julie Allen	NC Statewatch
John Holbert	Gov Office
John Kane	NCFPC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1128
PROPOSED COMMITTEE SUBSTITUTE H1128-CSRQ-42 [v.1]

6/18/2003 3:16:17 PM

Short Title: Grandparent Visitation. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE LEGISLATIVE RESEARCH COMMISSION TO STUDY THE ISSUE OF GRANDPARENT VISITATION.

The General Assembly of North Carolina enacts:

SECTION 1. The Legislative Research Commission may study the issue of grandparent visitation rights. In conducting this study, the Commission may consider the following:

(1) Whether grandparents should have a right of action for court ordered visitation with grandchildren independent of whether a divorce or custody action has been filed;

(2) Whether there should be a rebuttable presumption in the law that visitation with grandparents promotes the best interest of the grandchild;

(3) What remedies other than contempt should be established to ensure that court ordered grandparent visitation is enforced;

(4) Whether there should be established in each judicial district an expedited process for enforcing visitation orders; and

(5) Any other issues related to grandparent visitation matters.

SECTION 2. This act is effective when it becomes law.

DRAFT

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 721

Judiciary II Committee Substitute Adopted 4/30/03

PROPOSED HOUSE COMMITTEE SUBSTITUTE S721-CSRO-28 [v.1]

6/16/2003 4:29:09 PM

Short Title: Post-Adoption Privileges. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW AN ADOPTIVE PARENT AND A BIRTH RELATIVE TO ENTER INTO A WRITTEN AGREEMENT TO PROVIDE FOR POST-ADOPTION CONTACT AND COMMUNICATION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 48 of the General Statutes is amended by adding a new Part to read:

"Part 8. Post-Adoption Privileges.

"**§ 48-3-800. Definitions.**

For purposes of this Article, the following definitions apply:

(1) Birth relative. – The biological parent, grandparent, sibling, or any other member of an adoptee's biological family related to the adoptee by blood or marriage.

(2) Post-adoption privileges agreement. – A written agreement that allows specifically described post-adoption privileges.

(3) Post-adoption privileges. – Visitation, communication, or any other contact or conveyance of information regarding an adoptee.

"**§ 48-3-801. Post-adoption privileges agreement; terms; conditions.**

(a) In cases involving juveniles who immediately prior to adoption are in the custody of the department of social services, an adoptive parent and a birth relative may enter into a post-adoption privileges agreement before or at the time a decree of adoption is granted.

(b) A post-adoption privileges agreement may include the following:

(1) Provisions for visitation between the adoptee and a birth relative.

(2) Provisions for other forms of communication including the exchange of letters and telephone contact between the adoptee and a birth relative.

(3) Provisions for sharing information about the adoptee by parties to the agreement.

(4) The following warnings in bold type:

a. After the court grants the adoption petition, the adoption shall not be set aside due to the failure of an adoptive parent, birth relative, or the adoptee to follow the terms of this agreement or modifications to the agreement.

b. A disagreement between the parties or litigation brought to enforce, modify, or terminate this agreement shall not affect the validity of the adoption or serve as a basis for orders affecting the custody of the adoptee.

c. A court will not act on a petition to modify, enforce, or terminate this agreement unless the petitioner has participated or attempted to participate in good faith in mediation or other appropriate dispute resolution proceedings to resolve any dispute.

(c) The court may approve a post-adoption privileges agreement only if all of the following conditions are satisfied:

(1) The court finds that there is a significant emotional attachment between the adoptee and the birth relative to whom the agreement gives post-adoption privileges.

(2) The adoptee, if the adoptee is 12 years of age or older, consents to the post-adoption privileges agreement. However, the court may waive the requirement for the adoptee's consent if the court finds that the adoptee is not capable of consenting or that the adoptee should not be required to consent because consenting would not be in the adoptee's best interest.

(3) The county department of social services recommends the granting of post-adoption privileges.

(4) The adoptee is represented by a court-appointed guardian ad litem and the guardian recommends the granting of post-adoption privileges unless the court finds that the appointment of a guardian ad litem is not necessary to protect the adoptee's best interest.

(5) Each adoptive parent consents to the granting of post-adoption privileges.

(6) The adoptive parent and the birth relative execute a post-adoption privileges agreement and file the agreement with the court.

(7) The post-adoption privileges agreement includes an acknowledgment by the birth relative that the adoption is irrevocable regardless of whether the adoptive parent fails to abide by the post-adoption privileges agreement.

(8) The post-adoption privileges agreement includes an acknowledgment by the adoptive parent that the agreement, when approved by the court,

grants the birth relative the right to seek enforcement in court of the post-adoption privileges specified in the agreement.

(9) The adoptee is at least two years of age.

(10) Any other factors the court deems appropriate in determining whether the adoptee's best interests would be served by granting post-adoption privileges.

(d) A post-adoption privileges agreement is enforceable only if it is approved by the court and signed by a district court judge.

"**§ 48-3-802. Modification, enforcement, and termination.**

(a) An adoptive parent may file a new civil action in district court for the purpose of modifying, enforcing, or terminating a post-adoption privileges agreement.

(b) A birth relative may file a new civil action in district court to enforce a post adoption privileges agreement.

(c) In an action under this section, the court may modify, enforce, or terminate a post-adoption privileges agreement if the court finds that the party seeking relief has participated or attempted to participate in good faith in mediating the dispute giving rise to the action or the court determines that the modification or termination is necessary to serve the best interests of the adoptee.

(c) The court shall not award monetary damages.

"**§ 48-3-803. Effect of failure to comply.**

The court shall not set aside a decree of adoption, revoke a written consent to an adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order for failure of a birth relative, an adoptive parent, or an adoptee to comply with any or all of the original terms of or subsequent modifications to the post-adoption privileges agreement."

SECTION 2. G.S. 48-1-100 reads as rewritten:

"**§ 48-1-100. Legislative findings and intent; construction of Chapter.**

(a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

(b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:

(1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption; and

(2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's

adoption, (ii) to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, (iii) to protect the privacy of the parties to the adoption, and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

(c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(e) Nothing in this Chapter shall be construed to prevent an adoptive parent and a birth relative from entering into a post-adoption privileges agreement as provided in Part 8 of Article 3 of this Chapter."

SECTION 3. G.S. 7B-1100 reads as rewritten:

"**§ 7B-1100. Legislative intent; construction of Article.**

(a) The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) Nothing in this Article shall be construed to prevent the court in a proceeding under this Article for termination of parental rights from approving a post-adoption privileges agreement as provided in Part 8 of Article 3 of Chapter 48 of the General Statutes."

SECTION 4. This act is effective when it becomes law.

SENATE BILL 963:
Prevent Price Gouging During Disasters.

BILL ANALYSIS

Committee:	House Judiciary II	**Introduced by:**	Senator Swindell
Date:	June 19, 2003	**Summary by:**	Drupti Chauhan*
Version:	S963-CSRQ-37[v.6]		Committee Co-Counsel

PCS Summary: ***The PCS adds a declaration of State public policy which recognizes the need to protect citizens from price gouging and balancing that need with the difficulty in engaging in price controls to prevent adverse effects. The PCS makes it unlawful to sell or rent during a state of disaster goods and services at prices that are "unreasonably excessive". Violation of this bill would be considered an unfair trade practice under Chapter 75 and would subject the violator to fines, treble damages and attorneys fees.***

In determining whether a price is "unreasonably excessive", the 10% markup threshold is eliminated and instead the following would be considered:

- ***Whether the price charged is attributable to additional costs***
- ***Whether the seller offered to sell or rent the good or service at a price that was below the seller's average price in the preceding 60 days***

If the seller did not sell or rent the good or service before the state of disaster, then the price at which the good or service was generally available would be used as a factor in determining whether the price was unreasonably excessive.

Subsection (b)

- ***Provides that the Attorney General will issue a press release stating that the provisions of the bill have not been violated only if the service provider or seller so requests***

Subsection (c)

- ***Requires the Governor's Office to notify registered agents of trade associations, corporations, or partnerships when a disaster is declared and terminated***

Subsection (d)

- ***Limits the time that the law would be in effect to 45 days or the termination of the disaster, whichever occurs first***

The bill would become effective when it becomes law or July 1, 2003, whichever is later.

CURRENT LAW: Current law does not control or restrict prices that may be charged for goods during disasters. The Governor and General Assembly are authorized to declare states of disaster under G.S. 166A-6, which can include a determination of the length of the disaster period and the geographic location to which the state of disaster applies. Local governments are allowed to declare local states of emergency.

BILL ANALYSIS of the Second Edition of the Bill: Senate Bill 963 would make it unlawful for a person, during a declared state of disaster, to sell any merchandise that is consumed or used as a direct result of an emergency, or which is consumed or used to preserve, protect or to sustain life, health, safety or comfort of people or their property during a state of disaster at an excessive price.

The bill defines "excessive price" as the price at which the good or service is sold or offered during the disaster period as compared to the price the good or service was sold for immediately prior to the disaster, that exceeds the original price by more than 10%. If the cost of the good or service is higher because of higher prices imposed by the seller's supplier or additional costs of providing the good or service during the disaster, the price may not be more than a 10% markup above the normal markup for the good or service immediately prior to the disaster.

The bill defines a state of disaster as one declared by the Governor or General Assembly under G.S. 160A-6 or a local emergency declaration under G.S. 160A-8.

By being codified as part of Article 1 of Chapter 75, a violation of this bill would be treated as an unfair trade practice. As such an action could be brought by the Attorney General to stop the violation and to collect a fine of up to $5000 for each violation. Individuals injured by the violation can sue for treble damages and recovery of reasonable attorneys fees.

EFFECTIVE DATE: The bill becomes effective July 1, 2003.

Walker Reagan, Committee Counsel to Senate Commerce, contributed significantly to this summary.

S963-SMRQ-002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 963
Second Edition Engrossed 4/28/03
PROPOSED HOUSE COMMITTEE SUBSTITUTE S963-CSRQ-37 [v.6]

6/18/2003 10:30:07 AM

Short Title: Prevent Price Gouging During Disasters. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT SELLERS FROM CHARGING EXCESSIVE PRICES ON THEIR MERCHANDISE AND SERVICES DURING DECLARED STATES OF DISASTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 75 of the General Statutes is amended by adding new sections to read:

"**§75-36. Declaration of State public policy.**

It is the public policy of this State to protect its citizens from price gouging during states of disaster. The State also realizes the difficulty in regulating prices while not defeating the ability of the market in goods and services from bringing supply back in balance with demand and not defeating the function of price in allocating scarce resources.

"**§ 75-36.1. Prohibit excessive pricing during states of disaster.**

(a) It shall be a violation of G.S. 75-1.1 for any person to sell or rent or offer to sell or rent at retail during a state of disaster, in the area for which the state of disaster has been declared, any merchandise or services which are consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or comfort of persons or their property with the knowledge and intent to charge a price that is unreasonably excessive under the circumstances. In determining whether a price is unreasonably excessive, it shall be considered whether:

(1) The price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the state of disaster; and

(2) The seller offered to sell or rent the merchandise or service at a price that was below the seller's average price in the preceding sixty days before the state of disaster.

If the seller did not sell or rent or offer to sell or rent the merchandise or service in question prior to the time the state of disaster was declared, the price at which the merchandise or service was generally available in the trade area shall be used as a factor in determining if the seller is charging an unreasonably excessive price.

(b) In the event the Attorney General investigates a complaint for a violation of this section and determines that the seller has not violated the provisions of this section and if the seller so requests, the Attorney General shall promptly issue a press release to a television station and newspaper of general circulation in the county or counties where the seller is located stating that the seller has not charged unreasonably excessive prices during a state of disaster.

(c) A trade association, corporation, or partnership may register an agent for the purposes of being notified when the Governor declares and terminates a state of disaster. A trade association, corporation, or partnership may designate up to three persons to be notified on behalf of the organization's members and is responsible for maintaining current information for the designated agent or agents. The Office of the Governor is responsible for notifying the registered agents simultaneously with the declaration and termination of the state of disaster.

(d) For the purposes of this section, the end of a state of disaster is the earlier of forty-five days or the termination of a natural or man-made disaster or emergency as declared in accordance with G.S. 166A-6 or G.S. 166A-8.

SECTION 2. This act becomes effective on the later of July 1, 2003, or the date it becomes law.

NORTH CAROLINA HOUSE OF REPRESENTATIVES
COMMITTEE MEETING NOTICE
AND BILL SPONSOR NOTIFICATION
2003-2004 SESSION

CORRECTION
CHANGE IN ROOM NUMBER

You are hereby notified that the Committee on Judiciary II will meet as follows:

DAY & DATE: **Thursday, May 27, 2004**

TIME: **9:30 a.m.**

LOCATION: **Room 1425**

The following bills will be considered (Bill# & Short Title & Bill Sponsor):

HJR 1544 -- A JOINT RESOLUTION AUTHORIZING THE 2003 GENERAL ASSEMBLY, REGULAR SESSION 2004, TO CONSIDER A BILL TO BE ENTITLED AN ACT TERMINATING THE PARENTAL RIGHTS OF A PARENT WHO MURDERS THE OTHER PARENT OF THE CHILD – Representative Tim Moore

Respectfully,

Representative Wayne Goodwin
Vice-Chairman

I hereby certify that this notice was filed by the committee assistant at the following offices at **4:15** pm on **May 26, 2004**

__X_Principal Clerk
__X_Reading Clerk - House Chamber

Charlotte Graham (Committee Assistant)

MINUTES
HOUSE COMMITTEE ON
Judiciary II

May 27, 2004

The House Committee on Judiciary II met on May 27, 2004 in Room 1425 of the Legislative Building at 9:30 a.m. The following members were present: Bonner, Bordsen, Goodwin, Gulley, Moore, Stam and Walend.

Committee Chair Representative Goodwin called the meeting to order and recognized Representative Moore to explain HB 1544 -- A JOINT RESOLUTION AUTHORIZING THE 2003 GENERAL ASSEMBLY, REGULAR SESSION 2004, TO CONSIDER A BILL TO BE ENTITLED AN ACT TERMINATING THE PARENTAL RIGHTS OF A PARENT WHO MURDERS THE OTHER PARENT OF THE CHILD.

The Chair recognized Representative Stam to move for a favorable report. Upon voice vote the motion passed.

There being no further business before the committee, the Chair recognized Representative Gulley to motion for adjournment; seconded by Representative Bordsen. The motion carried and the meeting adjourned at 9:48 am.

Respectfully submitted,

Representative Wayne Goodwin
Co-Chair

Charlotte Graham
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE JOINT RESOLUTION 1544

Sponsors: Representatives Moore; Lewis and Gorman.

Referred to: Judiciary II.

May 20, 2004

A JOINT RESOLUTION AUTHORIZING THE 2003 GENERAL ASSEMBLY, REGULAR SESSION 2004, TO CONSIDER A BILL TO BE ENTITLED AN ACT TERMINATING THE PARENTAL RIGHTS OF A PARENT WHO MURDERS THE OTHER PARENT OF THE CHILD.

Be it resolved by the House of Representatives, the Senate concurring:

SECTION 1. The 2003 General Assembly, Regular Session 2004, may consider "A BILL TO BE ENTITLED AN ACT TERMINATING THE PARENTAL RIGHTS OF A PARENT WHO MURDERS THE OTHER PARENT OF THE CHILD."

SECTION 2. This resolution is effective upon ratification.

2003 COMMITTEE REPORT
HOUSE OF REPRESENTATIVES

The following report(s) from standing committee(s) is/are presented:
By Representative **Goodwin Co-Vice** (Chair) for the Committee on **Judiciary II**.

☐ Committee Substitute for
H.J.R. 1544 A HOUSE RESOLUTION AUTHORIZING THE 2003 GENERAL ASSEMBLY, REGULAR SESSION 2004, TO CONSIDER A BILL TO BE ENTITLED AN ACT TERMINATING THE PARENTAL RIGHTS OF A PARENT WHO MURDERS THE OTHER PARENT OF THE CHILD.

☐ With a favorable report.

☐ With a favorable report and recommendation that the bill be re-referred to the Committee on Appropriations ☐ Finance ☐ ☐.

☐ With a favorable report, as amended.

☐ With a favorable report, as amended, and recommendation that the bill be re-referred to the Committee on Appropriations ☐ Finance ☐ ☐.

☐ With a favorable report as to the committee substitute bill (#), ☐ which changes the title, unfavorable as to (the original bill) (Committee Substitute Bill #), (and recommendation that the committee substitute bill #) be re-referred to the Committee on .)

☐ With a favorable report as to House committee substitute bill (#), ☐ which changes the title, unfavorable as to Senate committee substitute bill.

☐ With an unfavorable report.

☐ With recommendation that the House concur.

☐ With recommendation that the House do not concur.

☐ With recommendation that the House do not concur; request conferees.

☐ With recommendation that the House concur; committee believes bill to be material.

☐ With an unfavorable report, with a Minority Report attached.

☐ Without prejudice.

☐ With an indefinite postponement report.

☐ With an indefinite postponement report, with a Minority Report attached.

☒ With recommendation that it be adopted. (HOUSE RESOLUTION ONLY)

03/19/03

FOR JOURNAL USE ONLY

____ Pursuant to Rule 36(b), the bill/resolution is placed on the Calendar of _____.

____ The (committee substitute) bill/resolution (, as amended,) is (ordered engrossed and) re-referred to the Committee on _____.

____ The bill/resolution is re-referred to the Committee on _____.

____ On motion of (Rep. _____,) (the Chair,) the (committee substitute) bill/resolution is (ordered engrossed and) re-referred to the Committee on _____.

____ Pursuant to Rule 36(b), the (House)committee substitute bill (No. ____)/resolution is placed on the Calendar of _____. (The original bill) (House Committee Substitute Bill No. ____)/resolution is placed on the Unfavorable Calendar.

____ On motion of Rep. _____, (the rules are suspended) (Rule ____ is suspended) and the bill/resolution is placed on today's calendar. (for immediate consideration.)

____ On motion of Rep. _____, Committee Amendment No.(s) _____ is/are adopted (by EV____ ____).

____ On motion of Rep. _____, Committee Amendment No.(s) _____ is/are adopted (by EV____ ____).

____ Rep. _____ offers Amendment No. _____ which (is adopted.) (fails of adoption.) (by EV ____ ____.) ( ) This amendment changes the title.

____ The bill/resolution (, as amended,) passes its second reading (by following vote, ____ ____ RC) (, by EV ____ ____,) and (remains on the Calendar,) (and there being no objection is read a third time).

____ The bill/resolution (, as amended,) passes its third reading (by the following vote, ____ ____ RC) (, by EV ____ ____,) and is ordered
____ sent to the Senate.
____ without engrossment. ____ by Special message.
____ sent to the Senate for concurrence in
_____ the House amendment (s).
_____the House committee substitute bill.
____ enrolled.

____ On motion of Rep. _____, the House concurs in the (material) Senate _____ (by the following vote, ____ ____ RC) (, by EV ____ ____,) and the bill is ordered enrolled.

VISITOR REGISTRATION SHEET

J. IL — 5-26-04

Name of Committee — Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE ASSISTANT

NAME	FIRM OR AGENCY
Anne Winner	Atty
Pat Yancey	ACLU
Brian Lewis	Planned Parenthood North Sys, Inc.
Steve Hartzog	AP
Matt Willoughby	NCNN
John McHugh	GOV OFFICE
Vikki Hanks	House intern

North Carolina House of Representatives

Committee on Judiciary II

Legislative Office Building, Room 421

Agenda

July 8, 2004

10:00 a.m.

Call to Order — Representative Jim Harrell, Chair

HB 109 Unauthorized Administration Meds. by Child Care Fac. – Rep. Clary
HB 1148 No Secret Medical Malpractice Settlements – Rep. Nesbitt
HB 1172 Medical Malpractice Witnesses/Discovery – Rep. Nesbitt

Adjourn

MINUTES
HOUSE COMMITTEE ON
Judiciary II

July 8, 2004

The House Committee on Judiciary II met on July 8, 2004 in Room 421 of the Legislative Office Building at 10:00 a.m. The following members were present: Bonner, Bordsen, Farmer-Butterfield, Gulley, Harrell, Moore, Stam and Walend.

Committee Chair Representative Jim Harrell called the meeting to order at 10:07 am and introduced the Sergeant at Arms: Bill Sullivan and Frank Prero and the Pages: Luke George (Wake), Brad McPherson (Randolph) and Cole Phillips (Wake).

The Chair recognized Representative Tim Moore who moved to postpone indefinitely HB 109 – UNAUTHORIZED ADMINISTRATION MEDS BY CHILD CARE FAC., HB 1148 – NO SECRET MEDICAL MALPRACTICE SETTLEMENTS AND HB 1172 MEDICAL MALPRACTICE WITNESSES/DISCOVERY. Representative Walend seconded the motion. Representative Stam was recognized by the chair and moved that a role call vote be taken. Seven having voted in the positive; none in the negative, the motion carried.

There being no further business before the Committee, the Chair recognized Representative Moore to motion for adjournment; seconded by Representative Stam. The motion carried and the Committee adjourned at 10:20 am.

Respectfully submitted,

Representative Jim Harrell
Chair

Charlotte Graham
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 109*

Short Title:	Unauthorized Admin. Meds. by Child Care Fac.	(Public)
Sponsors:	Representatives Goodwin, Coates, Clary, Earle (Primary Sponsors); Alexander, Bell, Bonner, Bordsen, Gibson, Glazier, Gorman, Insko, Jeffus, Lucas, Luebke, Michaux, Moore, Nye, Parmon, Sherrill, Warner, Warren, Weiss, A. Williams, and Wright.	
Referred to:	Judiciary II.	

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN OR A BONA FIDE MEDICAL CARE PROVIDER.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

It is unlawful for an employee, owner, or operator of a licensed or unlicensed child care facility to administer any type of medication to a child attending the child care facility without first obtaining written or oral authorization from the child's parent or guardian or a bona fide medical care provider. Any person who violates this section is guilty of a Class H felony. For purposes of this section, the term 'bona fide medical care provider' is limited to medical doctors, physician's assistants, registered nurses, or licensed practical nurses, emergency medical technicians, and paramedics."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1148

Short Title:	No Secret Medical Malpractice Settlements.	(Public)
Sponsors:	Representative Nesbitt.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT CONFIDENTIAL SETTLEMENTS OF MEDICAL MALPRACTICE ACTIONS ARE VOID.

The General Assembly of North Carolina enacts:

SECTION 1. The General Assembly makes the following findings:

(1) National studies indicate that a small number of physicians are responsible for the majority of occurrences of medical malpractice, and North Carolina consumers have no way to access information about physicians' performance.

(2) Health care providers can now settle medical malpractice lawsuits on a confidential basis, and injured patients have no leverage to insist that settlements be open so as to advise the public of continuing public safety risk from practices and procedures at facilities or from repeat malpractice offenders.

(3) It is in the public interest that the resolution of medical malpractice actions filed in the courts of North Carolina be open.

SECTION 2. Article 1B of Chapter 90 of the General Statutes is amended by adding a new section to read:

"**§ 90-21.18. Settlements of medical malpractice actions; confidentiality agreements void.**

In a medical malpractice action, any agreement to settle claims against any party on a confidential basis is void and unenforceable."

SECTION 3. This act becomes effective October 1, 2003, and applies to actions filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1172

Short Title:	Medical Malpractice Witnesses/Discovery.	(Public)
Sponsors:	Representatives Nesbitt; and Goodwin.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO REDUCE THE COSTS OF MEDICAL MALPRACTICE ACTIONS BY LIMITING THE NUMBER OF EXPERT MEDICAL WITNESSES AND BY LIMITING DISCOVERY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1A-1, Rule 26(f1) reads as rewritten:

"(f1) Medical malpractice discovery conference. – ~~In~~ For a medical malpractice action as defined in G.S. 90-21.11, ~~upon~~ to the extent that any provision of this subsection conflicts with any other provision of this rule or Rule 16, this subsection applies. Upon the case in the medical malpractice action coming at issue or the filing of a responsive pleading or motion requiring a determination by the court, the judge shall, within 30 days, direct the attorneys for the parties to appear for a discovery conference. At the conference the court may consider the matters set out in Rule 16, and shall:

...

(2) Limit the number of expert witnesses each party expects to present at trial to not more than two per medical specialty unless exceptional circumstances are found by the court to justify additional experts. Establish an appropriate schedule for designating expert witnesses, consistent with a discovery schedule pursuant to subdivision ~~(3), to be complied with by all parties to the action such that there is a deadline for designating all expert witnesses within an appropriate time for all parties to implement discovery mechanisms with regard to the designated expert witnesses;~~(3). As to each expert designated, the designation shall be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; the qualifications of the witness, including a list of all publications authorized by the witness within the preceding 10 years;

the compensation the witness is to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. The party shall supplement the expert's report if the party learns that in some material respect the report is incomplete or incorrect. The expert's direct testimony shall not be inconsistent with or go beyond the fair scope of the expert report as supplemented. The parties shall not depose expert witnesses, unless exceptional circumstances are found by the court.

..."

SECTION 2. G.S. 1A-1, Rule 16(a), reads as rewritten:

"(a) In any ~~action,~~ action other than a medical malpractice action as defined in G.S. 90-21.11, the judge may in his discretion direct the attorneys for the parties to appear before him for a conference to ~~consider~~consider:

(1) The simplification and formulation of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents ~~which~~ that will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability or necessity of a reference of the case, either in whole or in part;
(6) Matters of which the court is to be asked to take judicial notice;
(7) Such other matters as may aid in the disposition of the action.

If a conference is held, the judge may make an order ~~which~~ that recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and ~~which~~ that limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance with the provisions of Rule 8, upon motion of any party, the order shall require amendment of the pleadings."

SECTION 3. This act becomes effective October 1, 2003, and applies to actions filed on or after that date.

.

The General Assembly of North Carolina enacts:

VISITOR REGISTRATION SHEET

Judiciary II — Name of Committee

July 8, '04 — Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE ASSISTANT

NAME	FIRM OR AGENCY
J.- Blackburn	NC Assoc. County Commissioners
Bill Wilkes	Dept. of Revenue
John Preston	NC FPC
Brian Schmidt	Covenant w/ NC's Children
Karen T Georg	NC ACDSS
Sherry Bradsher	DHHS/DSS
JoAnn Lamm	DHHS/DSS
Chris Z. Sinha	DHHS/DSS/NC DOJ
Mary Gurganus	NC Bar Association
Joe Dehr	Gov Office
Andy Romanet	NCLM
Jerry Schill	NCFA
Rick Zechini	NCAR
Andy Anderson	Wayne Co. Commissioner

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s)Coates, Goodwin, Moore**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 527, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Coates, Goodwin, Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 527, Adjust Workers' Comp. Award**(Short Title)

I request that the Committee on Judiciary II. not consider HB 527

Sponsor(s) Signature

7-6-04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) C. Wilson**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 1041, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) C. Wilson**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 1041, APA Rules/Small Bus. Economic Impact** (Short Title)

I request that the Committee on Judiciary II. not consider HB 1041

Connie Wilson
Sponsor(s) Signature

7/5/04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Gibson**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 1109, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Gibson**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 1109, Prohibit Workers' Comp. Subrogation Waivers** (Short Title)

I request that the Committee on Judiciary II. not consider HB 1109

Sponsor(s) Signature

7/7/04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Brubaker**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 915, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 915, Manufactured Home Leasehold Estate Financing** (Short Title)

I request that the Committee on Judiciary II. not consider HB 915

Sponsor(s) Signature

07·07·04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s)Capps**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 402, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Capps**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 402,** HBDSS Worker/Right of Entry (Short Title)

I request that the Committee on Judiciary II. not consider HB 402

J. Russell Capps
Sponsor(s) Signature

July 7, 2004 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s)Capps**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 404, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Capps**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 404, Flag Freedom Bill**(Short Title)

I request that the Committee on Judiciary II. not consider HB 404

/s/ Russell Capps
Sponsor(s) Signature

July 1 2004 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s)Capps**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 403, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Capps**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 403,** Religious Freedom Restoration Act (Short Title)

I request that the Committee on Judiciary II. not consider HB 403

J. Russell Coggs
Sponsor(s) Signature

July 7, 2004 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s)Coates, Goodwin, Moore**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 527, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Coates, Goodwin, Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 527, Adjust Workers' Comp. Award**(Short Title)

I request that the Committee on Judiciary II. not consider HB 527

Sponsor(s) Signature

7-6-04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Clary, Coates, Earle, Goodwin**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 109, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room.1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Clary, Coates, Earle, Goodwin**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore____**
Bill Sponsor(s)

SUBJECT: **HB 109, Unauthorized Admin. Meds. By Child Care Fac.** (Short Title)

I request that the Committee on J II. not consider HB 109

Sponsor(s) Signature

7-7-04 Date

1305

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Clary, Coates, Earle, Goodwin**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 109, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room.1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Clary, Coates, Earle, Goodwin**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore____**
Bill Sponsor(s)

SUBJECT: **HB 109, Unauthorized Admin. Meds. By Child Care Fac.** (Short Title)

I request that the Committee on J II. not consider HB 109

Beverly Earle
Sponsor(s) Signature

7-6-04
Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

To: Melva McNeil
Return to Room 1305 or Room 502.
Thanks,
Jean F-B

DATE: **July 1, 2004**

TO: **Representative(s) Farmer-Butterfield**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 1122, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Farmer-Butterfield**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 1122, Guardianship Training Requirements** (Short Title)

I request that the Committee on Judiciary II. not consider HB 1122

Jean Farmer-Butterfield
Sponsor(s) Signature

July 7, 2004 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Wright**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 1190, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

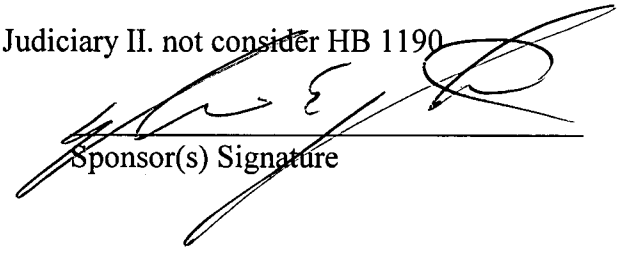
MEMORANDUM

TO: **Representative(s) Gibson**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 1190, First Offender/Expunge Criminal Record** (Short Title)

I request that the Committee on Judiciary II. not consider HB 1190.



Sponsor(s) Signature

7/2/04
Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s)Coates, Goodwin, Moore**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 527, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Coates, Goodwin, Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 527, Adjust Workers' Comp. Award**(Short Title)

I request that the Committee on Judiciary II. not consider HB 527

Wayne Goodwin
Sponsor(s) Signature

7/6/04
Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Goodwin, Moore**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 1096, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Goodwin and Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 1096, Medical Malpractice Witnesses/Discovery** (Short Title)

I request that the Committee on Judiciary II. not consider HB 1096

Wayne Goodwin
Sponsor(s) Signature

7/6/04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Goodwin, Moore**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 1096, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

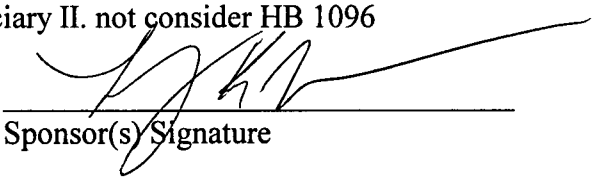
MEMORANDUM

TO: **Representative(s) Goodwin and Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 1096, Medical Malpractice Witnesses/Discovery** (Short Title)

I request that the Committee on Judiciary II. not consider HB 1096



Sponsor(s) Signature

7-6-04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Moore**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 1017, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 1017, Burglary/Delete Nighttime Requirement** (Short Title)

I request that the Committee on Judiciary II. not consider HB 1017

Sponsor(s) Signature

7-6-04 Date

(Rule 36(a) Bill Sponsor Form)

MEMORANDUM

DATE: **July 1, 2004**

TO: **Representative(s) Moore**
Bill Sponsor(s)

FROM: **Representative(s) Goodwin and Moore**
Committee Chair(s)

SUBJECT: **House Bill Pending in the Committee on Judiciary II**

Pursuant to House Rule 36(a) all House bills and resolutions shall be reported from the standing committee or permanent subcommittee to which referred with such recommendations as the standing committee or permanent subcommittee may desire to make **except in the case where the primary sponsor(s) requests in writing to the Chair(s) of the standing committee or permanent subcommittee that the House bill not be considered.**

If you would like to request that the Committee on Judiciary II not consider HB 578, a form is included at the bottom of this page for that purpose. Please sign, date and return the form to Room 1305 or Room 502. This form may not be returned by e-mail because it requires the original signature of the bill sponsor(s).

MEMORANDUM

TO: **Representative(s) Moore**
Committee Chair(s)

FROM: **Representative(s) Goodwin and Moore**
Bill Sponsor(s)

SUBJECT: **HB 578, Eliminate Mandatory Retirement for Judges** (Short Title)

I request that the Committee on Judiciary II. not consider HB 578

Sponsor(s) Signature

7-6-04 Date