



2009 Legislation Affecting Criminal Law and Procedure

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The work of the 2009 General Assembly reached into numerous aspects of criminal law and procedure. The General Assembly created and revised several criminal offenses; modified pre-trial, trial, sentencing, and postconviction procedures; made significant changes to probation terms and conditions; and addressed specialized types of cases, passing the Racial Justice Act for capital cases and adding to the laws governing sex offenders. These criminal law and procedure acts are discussed in this bulletin. Some of the acts are the subject of more in-depth treatment by School of Government (SOG) faculty, and links to their work are included in this bulletin. School faculty also have written about legislation in other areas, such as juvenile delinquency proceedings and judicial administration, that may interest readers of this bulletin, and links to those materials are included as well. A complete list of legislative summaries by SOG faculty and other information concerning 2009 legislation may be viewed at www.sog.unc.edu/dailybulletin/summaries09/.

Each ratified act discussed here is identified by its chapter number in the session laws and by the number of the original bill. When an act creates new sections in the North Carolina General Statutes (hereinafter G.S.), the section number is given; however, the codifier of statutes may change that number later. Copies of the bills may be viewed on the General Assembly's website, www.ncga.state.nc.us/.

Criminal Offenses

Drug Offenses

Trafficking in amphetamine. G.S. 90-95(h)(3b) has prohibited trafficking in methamphetamine and amphetamine, imposing the same punishments for both substances. Effective for offenses committed on or after September 1, 2009, S.L. 2009-463 (S 1091) revises that subsection to

conducted by an SBI-approved testing facility, agreed upon by the petitioner and the State and approved by the court.

In addition, amended G.S. 15A-269(c), which has required appointment of counsel for an indigent person who brings a motion for DNA testing, provides further that if the petitioner has filed pro se, the court must appoint counsel upon a showing that DNA testing may be material to the petitioner's claim of wrongful conviction. This addition appears to modify the circumstances under which the court must appoint counsel for an indigent person who makes a motion for DNA testing.

For further discussion of the procedures governing postconviction DNA testing, see Jessica Smith, "Post-Conviction Motions for DNA Testing and Early Disposal of Biological Evidence" (Oct. 2009), www.sog.unc.edu/faculty/smithjess/survival_guide.html.

Appeal. G.S. 15A-270.1 gives the defendant the right to appeal an order denying a motion for DNA testing, including by interlocutory appeal. As revised, the statute requires the court to appoint counsel for an indigent defendant.

Study committee. The act establishes the Joint Select Committee, with members appointed as provided in the act, to review matters related to the preservation of DNA and biological evidence and to report to the General Assembly by April 1, 2010.

Immunity in Innocence Commission Proceedings

Effective July 27, 2009, S.L. 2009-360 (H 937) adds new G.S. 15A-1468(a1) on immunity in proceedings before the North Carolina Innocence Commission. The title of the act states that it is "to provide that the North Carolina Innocence Commission may compel the testimony of a witness and the Commission Chair may grant limited immunity to the witness from prosecution for previous false statements made under oath in prior proceedings." The statute itself states essentially the following:

- The commission may compel the testimony of any witness.
- If a witness asserts his or her privilege against self-incrimination, the commission chair, in the chair's judicial capacity, may order the witness to testify or produce other information the chair determines is likely material to reach a correct factual determination in the case at hand.
- The commission chair may not order the witness to testify or produce other information that would incriminate the witness in the prosecution of any offense other than an offense for which the witness is granted immunity.
- The commission's order shall prevent a prosecutor from using the compelled testimony, or evidence derived therefrom, to prosecute the witness for previous false statements made under oath by the witness in prior proceedings.
- The prosecutor has a right to be heard by the commission chair before the chair issues the order.
- The immunity applies throughout all proceedings before the commission.
- The immunity shall not prohibit prosecution of statements made under oath unrelated to the commission's formal inquiry, prosecution of false statements made under oath during commission proceedings, or prosecution for any other crimes.

The scope of the immunity granted under these provisions appears limited or at least is not entirely clear, which may cause a witness before the commission, or counsel advising a witness, to proceed cautiously notwithstanding the new statute. The statute states in one place that the

commission chair may not order the witness to testify other than for “an offense for which the witness is granted immunity.” This language could be construed as granting the witness immunity for the offense under consideration—what is called “transactional” immunity. Such immunity would preclude the state altogether from prosecuting the witness for the offense under consideration. Other language, however, indicates that the General Assembly did not intend such a broad grant of immunity. The statute states elsewhere that the commission’s immunity order precludes the prosecutor from using the testimony to prosecute the witness for previous false statements in a previous proceeding. The act’s title states the same. The last clause of the statute states further that the immunity does not preclude the prosecution of other crimes. These provisions indicate that the witness does not receive immunity from prosecution for the offense under consideration (transactional immunity) or even immunity from use of the witness’s testimony in a later prosecution for the offense under consideration or other offenses—what is called “use” immunity. Rather, the new statute may only provide the witness immunity from prosecution for perjury in prior proceedings related to matters that are the subject of the commission’s inquiry. The U.S. Supreme Court has held that a person may not be compelled to relinquish his or her Fifth Amendment right against self-incrimination without at least receiving use immunity. *See Kastigar v. United States*, 406 U.S. 441 (1972).

The U.S. Supreme Court also has held that if a public authority compels a person to provide incriminating information under threat of sanction for not answering, the person receives use immunity by operation of law. *See Garrity v. New Jersey*, 385 U.S. 493 (1967). A witness who complied with a commission order to answer might be able to argue that he or she was compelled to answer and by operation of law received use immunity. The witness would be on firmer ground, however, if he or she declined to answer and the commission applied to the superior court to enforce its order. The statute does not specifically authorize the commission to seek superior court enforcement of its order, but that procedure is generally available to commissions and agencies. (The new statute states that the commission chair, in his or her judicial capacity, may order a witness to testify, but it is unclear whether the chair is authorized to hold a witness in contempt for refusing to comply with such an order.) In a proceeding before superior court, the commission and the witness could obtain clarification of the immunity the witness receives under the statute and the extent to which the witness must provide information to the commission. Alternatively, if directed to answer by the commission, the witness could initiate an application to superior court for clarification of his or her obligations.

Victims’ Rights

Forensic medical examination and benefits for victims of rape or sex offenses. G.S. 143B-480.2 has provided state funds, administered by the Assistance Program for Victims of Rape and Sex Offenses (Program), for forensic medical examinations of victims of rape or sexual offense, subject to certain limitations. The victim had to report the sexual assault to law enforcement and obtain an examination within 72 hours of the assault’s occurrence. And, payment to the examiner from state funds was limited to \$800, with the victim responsible for any additional costs. Effective July 27, 2009, S.L. 2009-354 (H 1342) repeals G.S. 143B-480.2 and rewrites G.S. 143B-480.1 to eliminate charges to the victim for these forensic medical examinations. Revised G.S. 143B-480.1 provides that a medical provider who accepts payment from the Program for a sexual assault examination may charge up to \$800 but that amount constitutes payment in full and the