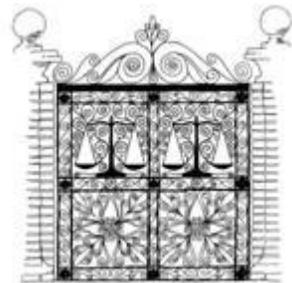


**FEDERAL LAWS
RESTRICTION ON FIREARMS
AND
ITS POTENTIAL IMPACT UPON
FAMILY COURT CLIENTS**

HOT TIPS CLE
September 23, 2005

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*Helping Individuals
Cross Thresholds
to New Lives*



Under federal law, it is illegal to purchase, possess or receive a firearm if a person is subject to a restraining order or if the person was convicted in any court of a crime of domestic violence if certain specific language is included in the actual restraining order. 18 U.S.C. 922(g)(8) & (9) (1999).¹ While family law practitioners routinely request judges to restrain parties from harming, harassing, threatening, interfering with or coming to or near the other, this restraining language will not trigger a violation of federal law unless the restraining order (1) was issued after a hearing which gave the accused party notice and an opportunity to participate; and (2) the order includes a finding that the accused party is a credible threat to the physical safety of their intimate partner or partner's child or there is a finding that the intimate partner or their partner's child reasonably expects that the other could cause them bodily injury. Id.

Attorneys whose clients are in fear for their safety and the threat of harm is real should request the court to make specific findings of fact to indicate the bases upon which the court finds the threat to be real and to make findings of fact about why the order is necessary to protect the safety of the client from bodily injury. In addition, it is also advisable for the attorney to request the court to include language in its order requiring the party to remove all firearms from his possession and control and to require the abuser to provide proof of compliance and proof

¹18 USC '922 Unlawful Acts Part 1 Crimes (g)(8) who is subject to a court order that-

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening and intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.



that such firearms will remain out of his possession and control for the duration the order is in effect. See, *The Federalization of Family Law*, Marna S. Tucker, AAML Fall Meeting: Lecture on Federalization of Family Law, 1999, p. 33.

Attorneys representing the abuser spouse should advise their client to remove all firearms from his possession and control so he does not innocently find himself in violation of federal law. This advice is important because a client who is subject to a restraining order that contains the magic language set forth in 18 U.S.C. 922(g) and who knowingly owns a firearm is guilty of violating federal law. If you do not advise the client of this potential crime, he could be sentenced up to ten years whether or not he was aware that the possession of a firearm while subject to a civil protection order is illegal. Id.

HOT TIP #1

Given that South Carolina is a state where many people possess firearms for recreational use, ask your clients whether they or their spouses own a weapon so you are aware of any risks to your client's safety (victim client) or to avoid a client's unintentional violation of federal law (falsely accused spouse).

HOT TIP #2

If a party is subject to a restraining order as part of a family court matter and the order does not contain the magic language or fit the definitions under the federal law, their failure to check the box on the federal form they are required to fill out when purchasing a firearm is not a lie.

HOT TIP #3

In an e-mail to the Charleston County Family Court Section, Michael O'Connell pointed out the following additional federal statutes family law attorneys need to be concerned about:



1. If a person under a restraining order described above buys a gun from a licensed dealer, the person is required to complete the form which asks if a person is subject to a restraining order, whether the person has been convicted of misdemeanor criminal domestic violence, and several other questions. If they lie, it is a separate criminal offense under 18 USC 922(a)(6) and carries up to ten years. The person does not need to know it is a crime to lie. The person just needs to lie.

2. It is a crime under 18 USC 922(g)(9) for a person to possess a firearm who has been convicted of a misdemeanor criminal domestic violence offense which covers such convictions in magistrates' court. The definition of a misdemeanor in federal law is any offense that carries a penalty of one year or less. Again, to be guilty the person does not need to know it's a crime to possess the firearm. The person just needs to knowingly possess the firearm.

3. It is a crime under 18 USC 922(g) for a person to possess a firearm who has been convicted of a crime the punishment for which exceeds one year in jail (regardless of the sentence actually imposed) . The penalty is up to ten years.

Michael, who is the former Federal Public Defender, concluded his comments with the following advise, I can tell you from my experience with the sentencing guidelines that a jail sentence will almost certainly be imposed for violations of 18 USC 922(a)(6) or 922(g).

HOT TIP #4

On January 1, 2006, South Carolina's new Domestic Violence bill, H.3984-Domestic Violence Bill-2005, goes into effect. (See the Summary of Relevant portions of the bill as well as the attached bill.)² Basically, the bill cleans up the former loopholes in the prior domestic violence statute that allowed offenders to avoid triggering a violation of federal law because previously, the magistrate was not required to advise them of this right and a loophole was created, which helped the accused offender get around the federal law.

² Many thanks also go to Linda Seabrook, Esquire, who is a former Ninth Circuit Assistant Solicitor and now is in private practice at Hampton Green, LLC. She can be contacted at Hampton Green, LLC, 602 Rutledge Ave., Charleston, SC 29413 or by e-mail: linda@hamptongreenllc.com



H. 3984 Domestic Violence Bill 2005
A Summary

1. Household member definition remains as;
 1. a spouse
 2. a former spouse
 3. person's who have a child in common
 4. a male and a female who are cohabitating or formerly have cohabitated

2. It is unlawful to cause physical harm or injury to a person's household member or offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril

3. Penalties
 - a. First Offense: Must be fined not less than \$1000.00 nor more than \$2500.00 or imprisoned not more than 30 days. The court may suspend the imposition or execution of all or part of the fine conditioned upon the offender completing, to the satisfaction of the court and in accordance with Section 16-25-20, a program designed to treat batterers. Not withstanding the provision of Sections 22-3-540 etc. an offense pursuant to the provisions of this subsection must be tried in summary court.
 - b. Second Offense: Must be fined not less than \$2500.00 nor more than \$5000.00 and imprisoned not less than a mandatory minimum of 30 days nor more than one year. The court may suspend the imposition or execution of all or part of the sentence except the 30-day mandatory minimum, conditioned upon the offender completing to the satisfaction of the court, a program designed to treat batterers. If a person is sentenced to a mandatory 30 day minimum sentence, the judge may provide that the sentence be served two days during the week or weekends until the sentence is complete and is eligible for early release based upon credits he is able to earn during the service of his sentence including but not limited to good-time credits.
 - c. Third Offense: A person who violates section 16-25-20 after previously having been convicted of two violations of subsection (A) within the previous ten years or is guilty of a violation of section 16-25-65 within the previous ten years, is guilty of a felony and upon conviction must be imprisoned not less than a mandatory minimum of one year but not more than five years.

4. A person who violates the terms and conditions of an Order of Protection issued in this State or another state, tribe or territory is guilty of a misdemeanor and upon conviction must be imprisoned not more than 30 days and fined not more than \$500.00.



5. Unless the case is voluntarily dismissed or the charge is dropped prior to the trial a person charged with a violation provided in this chapter must appear before a judge for disposition of the case.
6. When a person is convicted of a violation of Section 16-25-65 (CDV-HAN), the court may suspend all or part of the sentence except the mandatory minimum sentence and place the person upon probation conditioned upon the offender completing a program designed to treat batterers fulfillment of all other obligations arising under the court order pursuant to section 16-25-65 and all other reasonable terms and conditions of probations as the court may deem necessary to ensure the safety of the victim.
7. In determining whether or not to suspend the imposition of all or part of a sentence the court must consider the nature and severity of the offense, the number of times the offender has repeated the offense and the best interests and safety of the victim.
8. An offender who participates in a batterer treatment program pursuant to this section must participate in a program offered through a government agency, non-profit organization or a private provider approved by the Department of Social Services. (must pay a reasonable fee but cannot be denied to an inability to pay.)
9. A person who violates Section 16-25-65 is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs;
 - a. an assault and battery which involves the use of a deadly weapon or results in serious bodily injury or,
 - b. an assault and battery with or without an accompanying battery which would reasonably cause a person to fear imminent serious bodily injury or death.
10. A person who violates Section 16-25-65 is guilty of a felony and must be imprisoned not less than a mandatory minimum of one year. The court may suspend the imposition or execution of all or part of the sentence except the mandatory one-year minimum sentence.
11. Magistrates, municipal court judges, family court judges and circuit court judges shall receive legal education on issues concerning domestic violence. SC Court Administration shall determine the frequency and content at the direction of the Chief Justice of the SC Supreme Court.
12. In addition to the provisions of Section 17-15-30, the court may consider the factors provided in Chapter 25 Title 16 when considering release of a person on bond who is charged with a violent offense as defined in 16-1-60 when the victim of the offense is a household member and the person;
 - a. is subject to the terms of a valid Order of Protection or restraining order at he the time of the offense in this state or nay other state



- b. has a previous conviction involving a violation of a valid Order of Protection or restraining order
 - c. whether the person has a history of criminal domestic violence or a history of other violent offenses
 - d. the mental health of the person
 - e. whether the person has a history of violating other orders of the court or other governmental agency and
 - f. whether the person poses a potential threat to another person
13. When considering release of a person on bond under this section, the court must consider whether to issue a restraining order or order of protection and must consider the factors listed above and if it determines that an order of protection or restraining order is required it should issue the order to refer to matter to the appropriate court.
14. At the bond hearing pursuant to the provisions of this section, the court shall inform the person charged with the violation of his right to retain counsel and if indigent his right to court ordered counsel along with instructions on how to obtain court appointed counsel.
15. Pre-Trial Intervention: An offender who enters a pre-trial intervention program shall, if the offense is first offense criminal domestic violence, pursuant to Section 16-25-20, agree in writing to successful completion of a batterer's treatment program approved by the SC Department of social Services.
16. In a pending action for divorce or separate support and maintenance, the petition for relief shall be brought in the form of a motion for further relief and shall be served on counsel of record in any. Where no action is pending the petition shall be filed and served as an independent action. A pending motion of petition for further relief shall not be dismissed solely because the underlying action has been dismissed.
17. A certified copy of an order of protection must be forwarded by law enforcement within 24-Hours to the Federal Bureau of Investigation/National Crime Information Center for inclusion in the person's FBI/NCIC report.
18. A person charged and to be tried before a magistrate or municipal court judge for a violation of the law is entitled to deposit in lieu of entering into recognizance a sum of money not to exceed the maximum fine in the case for which the person is tried. However, an individualized hearing must be held when the person is charged with a criminal domestic violence offense and the victim must be notified pursuant to the provisions of Section 16-3-1525.
19. Following a first offense conviction of criminal domestic violence, a defendant, after five years, may apply or cause someone acting on his behalf to apply to the circuit court for an order expunging the records of the arrest and conviction. This is possible when the defendant has not other convictions during this five-year period.



20. After the expungement, SLED is required to keep a non-public record of the offense and the date of the expungement to ensure that no person takes advantage of this right more than once.
21. A person who is convicted of or pleads nolo contendere to a criminal domestic violence offense must have his law enforcement certification revoked.
22. An officer who effects an arrest by use of a uniform traffic ticket for a criminal domestic violence offense shall complete and file an incident report immediately following the issuance of the uniform traffic ticket.
23. A study committee composed of five members of the Senate, appointed by the Senate Pro Tempore and five members of the House of Representatives, appointed by the Speaker is created to study the criminal domestic violence laws of the State and the status of the states current domestic violence prevention programs and recommend appropriate changes to the General Assembly by Feb. 15, 2006.



South Carolina General Assembly
116th Session, 2005-2006

A166, R196, H3984

STATUS INFORMATION

General Bill

Sponsors: Reps. Leach, Haskins, G.M. Smith, Harrison, Wilkins, Altman, Merrill, Frye, Cotty, Chellis, Huggins, Whitmire, Brady, Clark, Duncan, Ballentine, Limehouse, Pinson, Haley, Toole, Bailey, Ceips, Hagood, Harrell, Herbkersman, J. Hines, Hinson, Kirsh, Littlejohn, Mahaffey, McGee, Perry, E.H. Pitts, Sandifer, Scarborough, Simrill, Sinclair, D.C. Smith, G.R. Smith, J.R. Smith, Talley, Taylor, Thompson, Vaughn, Viers, Walker, Umphlett, Hamilton and Clemmons

Document Path: I:\council\bill\ms\7456ahb05.doc

Companion/Similar bill(s): 3143, 3649

Introduced in the House on April 26, 2005

Introduced in the Senate on May 10, 2005

Last Amended on May 26, 2005

Passed by the General Assembly on June 1, 2005

Governor's Action: June 7, 2005, Signed

Summary: Criminal domestic violence

(A166, R196, H3984)

AN ACT TO AMEND SECTION 16-25-10, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DEFINITION OF AHOUSEHOLD MEMBER@ FOR PURPOSES OF CRIMINAL DOMESTIC VIOLENCE, SO AS TO PROVIDE A DEFINITION FOR THE TERM; TO AMEND SECTION 16-25-20, AS AMENDED, RELATING TO CRIMINAL DOMESTIC VIOLENCE OFFENSES, SO AS TO INCREASE THE FINES FOR A PERSON WHO COMMITS FIRST OFFENSE CRIMINAL DOMESTIC VIOLENCE AND TO INCREASE THE PENALTIES AND FINES FOR A PERSON WHO COMMITS CRIMINAL DOMESTIC VIOLENCE WHO HAS A PRIOR CONVICTION FOR CRIMINAL DOMESTIC VIOLENCE OR CRIMINAL DOMESTIC VIOLENCE OF A HIGH AND AGGRAVATED NATURE AND FOR A PERSON WHO COMMITS CRIMINAL DOMESTIC VIOLENCE WHO HAS TWO PRIOR CONVICTIONS FOR CRIMINAL DOMESTIC VIOLENCE OR CRIMINAL DOMESTIC VIOLENCE OF A HIGH AND AGGRAVATED NATURE WITHIN THE PREVIOUS TEN YEARS; TO AMEND SECTION 16-25-65, AS AMENDED, RELATING TO CRIMINAL DOMESTIC VIOLENCE OF A HIGH AND AGGRAVATED NATURE, SO AS TO ADD A MANDATORY MINIMUM SENTENCE OF ONE YEAR TO THE EXISTING MAXIMUM PENALTY; BY ADDING SECTION 16-25-100 SO AS TO REQUIRE MAGISTRATES, MUNICIPAL COURT JUDGES, FAMILY COURT JUDGES, AND CIRCUIT COURT JUDGES



TO RECEIVE CONTINUING LEGAL EDUCATION ON ISSUES CONCERNING DOMESTIC VIOLENCE; BY ADDING SECTION 16-25-120 SO AS TO PROVIDE ADDITIONAL FACTORS THE COURT MAY CONSIDER WHEN DETERMINING WHETHER TO RELEASE A PERSON ON BOND WHO HAS BEEN CHARGED WITH A VIOLENT OFFENSE WHEN THE VICTIM IS A HOUSEHOLD MEMBER UNDER CERTAIN CONDITIONS; TO AMEND SECTION 17-22-90, RELATING TO AGREEMENTS REQUIRED OF OFFENDERS PARTICIPATING IN THE PRETRIAL INTERVENTION PROGRAM, SO AS TO REQUIRE A PERSON TO AGREE IN WRITING TO SUCCESSFULLY COMPLETE A BATTERER=S TREATMENT PROGRAM IF THE OFFENSE IS FIRST OFFENSE CRIMINAL DOMESTIC VIOLENCE; TO AMEND SECTION 20-4-20, AS AMENDED, RELATING TO THE DEFINITION OF AHOUSEHOLD MEMBER@ FOR PURPOSES OF DOMESTIC ABUSE, SO AS TO PROVIDE A DEFINITION FOR THE TERM; TO AMEND SECTION 20-4-40, AS AMENDED, RELATING TO A PETITION FOR AN ORDER OF PROTECTION, SO AS TO PROVIDE A PENDING MOTION OR PETITION FOR RELIEF SHALL NOT BE DISMISSED SOLELY BECAUSE THE UNDERLYING ACTION IS DISMISSED; BY ADDING SECTION 20-4-65 SO AS TO PROVIDE THAT A PERSON SEEKING AN ORDER OF PROTECTION FROM DOMESTIC ABUSE IS NOT REQUIRED TO PAY A FILING FEE; TO AMEND SECTION 20-4-80, RELATING TO MAILING OR SERVICE OF A CERTIFIED COPY OF AN ORDER, SO AS TO QUALIFY THAT IT IS A CERTIFIED COPY OF AN ORDER OF PROTECTION; TO AMEND SECTION 20-4-140, AS AMENDED, RELATING TO ORDERS OF PROTECTION, SO AS TO REQUIRE LAW ENFORCEMENT TO FORWARD A CERTIFIED COPY OF THE ORDER WITHIN TWENTY-FOUR HOURS TO THE FEDERAL BUREAU OF INVESTIGATION; TO AMEND SECTION 22-5-530, AS AMENDED, RELATING TO DEPOSITS IN LIEU OF RECOGNIZANCE, SO AS TO PROVIDE FOR AN INDIVIDUALIZED HEARING AND NOTICE TO THE VICTIM WHEN A PERSON IS CHARGED WITH A CRIMINAL DOMESTIC VIOLENCE OFFENSE; TO AMEND SECTION 22-5-910, AS AMENDED, RELATING TO EXPUNGEMENT OF CRIMINAL RECORDS, SO AS TO PROVIDE THAT A FIRST OFFENSE CRIMINAL DOMESTIC VIOLENCE OFFENSE MAY BE EXPUNGED AFTER FIVE YEARS RATHER THAN THREE YEARS FROM THE DATE OF CONVICTION; TO AMEND SECTION 23-6-440, AS AMENDED, RELATING TO LAW ENFORCEMENT CERTIFICATION, SO AS TO PROVIDE FOR REVOCATION OF A LAW ENFORCEMENT CERTIFICATION IF THE PERSON IS CONVICTED OF A CRIMINAL DOMESTIC VIOLENCE OFFENSE; TO AMEND SECTION 56-7-15, AS AMENDED, RELATING TO THE USE OF THE UNIFORM TRAFFIC TICKET, SO AS TO PROVIDE THAT AN OFFICER SHALL IMMEDIATELY COMPLETE AND FILE AN INCIDENT REPORT AFTER ARRESTING A PERSON FOR A CRIMINAL DOMESTIC VIOLENCE OFFENSE; AND TO CREATE A STUDY COMMITTEE TO STUDY CRIMINAL DOMESTIC VIOLENCE ISSUES AND TO MAKE RECOMMENDATIONS TO THE GENERAL ASSEMBLY BY FEBRUARY 15, 2006.

Be it enacted by the General Assembly of the State of South Carolina:

Crimes and offenses, criminal domestic violence, definition

SECTION 1. Section 16-25-10 of the 1976 Code, as last amended by Act 92 of 2003, is further amended to read:



Section 16-25-10. As used in this article, household member means:

- (1) a spouse;
- (2) a former spouse;
- (3) persons who have a child in common; or
- (4) a male and female who are cohabiting or formerly have cohabited.

Crimes and offenses, criminal domestic violence, penalties

SECTION 2. Section 16-25-20 of the 1976 Code, as last amended by Act 92 of 2003, is further amended to read:

Section 16-25-20.

(A) It is unlawful to:

- (1) cause physical harm or injury to a person's own household member; or
- (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

(B) Except as otherwise provided in this section, a person who violates subsection (A) is guilty of the misdemeanor of criminal domestic violence and, upon conviction, must be fined not less than one thousand dollars nor more than two thousand five hundred dollars or imprisoned not more than thirty days. The court may suspend the imposition or execution of all or part of the fine conditioned upon the offender completing, to the satisfaction of the court, and in accordance with the provisions of Section 16-25-20(I), a program designed to treat batterers. Notwithstanding the provisions of Sections 22-3-540, 22-3-545, and 22-3-550, an offense pursuant to the provisions of this subsection must be tried in summary court.

(C) A person who violates subsection (A) and who has been convicted of a violation of that subsection or of Section 16-25-65 within the previous ten years is guilty of a misdemeanor and, upon conviction, must be fined not less than two thousand five hundred dollars nor more than five thousand dollars and imprisoned not less than a mandatory minimum of thirty days nor more than one year. The court may suspend the imposition or execution of all or part of the sentence, except the thirty-day mandatory minimum sentence, conditioned upon the offender completing, to the satisfaction of the court, and in accordance with the provisions of Section 16-25-20(I), a program designed to treat batterers. If a person is sentenced to a mandatory minimum of thirty days pursuant to the provisions of this section, the judge may provide that the sentence be served two days during the week or on weekends until the sentence is completed and is eligible for early release based on credits he is able to earn during the service of his sentence, including, but not limited to, good-time credits.

(D) A person who violates subsection (A) after previously having been convicted of two violations of subsection (A) within the previous ten years or two violations of Section 16-25-65 within the previous ten years or a violation of subsection (A) and a violation of Section 16-25-65 within the previous ten years is guilty of a felony and, upon conviction, must be imprisoned not less than a mandatory minimum of one year but not more than five years.

(E) A person who violates the terms and conditions of an order of protection issued in this State under Chapter 4, Title 20, the Protection from Domestic Abuse Act, or a valid protection order related to domestic or family violence issued by a court of another state, tribe, or territory is guilty of



a misdemeanor and, upon conviction, must be imprisoned not more than thirty days and fined not more than five hundred dollars.

(F) Unless the complaint is voluntarily dismissed or the charge is dropped prior to the scheduled trial date, a person charged with a violation provided in this chapter must appear before a judge for disposition of the case.

(G) When a person is convicted of a violation of Section 16-25-65 or sentenced pursuant to subsection (D), the court may suspend execution of all or part of the sentence, except for the mandatory minimum sentence, and place the offender on probation, conditioned upon:

(1) the offender completing, to the satisfaction of the court, a program designed to treat batterers;

(2) fulfillment of all the obligations arising under court order pursuant to this section and Section 16-25-65; and

(3) other reasonable terms and conditions of probation as the court may determine necessary to ensure the protection of the victim.

(H) In determining whether or not to suspend the imposition or execution of all or part of a sentence as provided in this section, the court must consider the nature and severity of the offense, the number of times the offender has repeated the offense, and the best interests and safety of the victim.

(I) An offender who participates in a batterer treatment program pursuant to this section, must participate in a program offered through a government agency, nonprofit organization, or private provider approved by the Department of Social Services. The offender must pay a reasonable fee for participation in the treatment program but no person may be denied treatment due to inability to pay. If the offender suffers from a substance abuse problem, the judge may order, or the batterer treatment program may refer, the offender to supplemental treatment coordinated through the Department of Alcohol and Other Drug Abuse Services with the local alcohol and drug treatment authorities pursuant to Section 61-12-20. The offender must pay a reasonable fee for participation in the substance abuse treatment program, but no person may be denied treatment due to inability to pay.

Crimes and offenses, criminal domestic violence of a high and aggravated nature, penalties

SECTION 3. Section 16-25-65 of the 1976 Code, as last amended by Act 92 of 2003, is further amended to read:

Section 16-25-65.(A) A person who violates Section 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits:

(1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or

(2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

(B) A person who violates subsection (A) is guilty of a felony and, upon conviction, must be imprisoned not less than a mandatory minimum of one year nor more than ten years. The court may suspend the imposition or execution of all or part of the sentence, except the one-year mandatory minimum sentence, and place the offender on probation conditioned upon the offender completing,



to the satisfaction of the court, a program designed to treat batterers offered through a government agency, nonprofit organization, or private provider approved by the Department of Social Services. The offender must pay a reasonable fee for participation in the treatment program, but no person may be denied treatment due to inability to pay. If the offender suffers from a substance abuse problem, the judge may order, or the batterer treatment program may refer, the offender to supplemental treatment coordinated through the Department of Alcohol and Other Drug Abuse Services with the local alcohol and drug treatment authorities pursuant to Section 61-12-20. The offender must pay a reasonable fee for participation in the substance abuse treatment program, but no person may be denied treatment due to inability to pay.

The provisions of subsection (A) create a statutory offense of criminal domestic violence of a high and aggravated nature and must not be construed to codify the common law crime of assault and battery of a high and aggravated nature.

Crimes and offenses, criminal domestic violence, judicial training requirements

SECTION 4. Article 1, Chapter 25, Title 16 of the 1976 Code is amended by adding:

Section 16-25-100. Magistrates, municipal court judges, family court judges, and circuit court judges shall receive continuing legal education on issues concerning domestic violence. The frequency and content of the continuing legal education is to be determined by the South Carolina Court Administration at the direction of the Chief Justice of the South Carolina Supreme Court.
Crimes and offenses, criminal domestic violence, conditions of bond

SECTION 5. Article 1, Chapter 25, Title 16 of the 1976 Code is amended by adding:

Section 16-25-120.

(A) In addition to the provisions of Section 17-15-30, the court may consider the factors provided in subsection (B) when considering release of a person on bond who is charged with a violent offense, as defined in Section 16-1-60, when the victim of the offense is a household member, as defined in Section 16-25-10, and the person:

- (1) is subject to the terms of a valid order of protection or restraining order at the time of the offense in this State or another state; or
- (2) has a previous conviction involving the violation of a valid order of protection or restraining order in this State or another state.

(B) The court may consider the following factors before release of a person on bond who is subject to the provisions of subsection (A):

- (1) whether the person has a history of criminal domestic violence, as defined in this article, or a history of other violent offenses, as defined in Section 16-1-60;
- (2) the mental health of the person;
- (3) whether the person has a history of violating the orders of a court or other governmental agency; and
- (4) whether the person poses a potential threat to another person.



(C) When considering release of a person on bond under this section, the court must consider whether to issue a restraining order or order of protection provided for in Chapter 4 of Title 20 against the person. The court must consider the factors enumerated in subsection (B) of this section, and if it determines in its discretion that a restraining order or order of protection is required, it should issue the order or forward the matter to the appropriate court.

(D) At the bond hearing pursuant to the provisions of this section or another provision of law, the court shall inform in writing the person charged with a violation of Article 1, Chapter 25, Title 16 of his right to obtain counsel and, if indigent, his right to court-appointed counsel along with instructions on how to obtain court-appointed counsel.

Criminal procedures, Pretrial Intervention Program, requirements

SECTION 6. Section 17-22-90 of the 1976 Code is amended to read:

Section 17-22-90. An offender who enters an intervention program shall:

(1) waive, in writing and contingent upon his successful completion of the program, his right to a speedy trial;

(2) agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court;

(3) agree, in writing, to the conditions of the intervention program established by the solicitor;

(4) in the event there is a victim of the crime, agree, in writing, to make restitution to the victim within a specified period of time and in an amount to be determined by the solicitor;

(5) agree, in writing, that records relating to participation in pretrial intervention or information obtained through pretrial intervention is not admissible as evidence in subsequent proceedings, criminal or civil, and communication between pretrial intervention counselors and defendants shall remain as privileged communication unless a court of competent jurisdiction determines that there is a compelling public interest that the communication be revealed. A written admission of guilt may not be required of a defendant before acceptance or completion of the pretrial intervention program;

(6) if the offense is committing or attempting to commit a lewd act upon a child under the age of sixteen years pursuant to Section 16-15-140, agree in the agreement between the solicitor's office and the offender as provided in Section 17-22-120 to allow information about the offense to be made available to day care centers, group day care homes, family day care homes, church or religious day care centers, and other facilities providing care to children and related agencies by the State Law Enforcement Division pursuant to regulations which the State Law Enforcement Division shall promulgate; and

(7) if the offense is first offense criminal domestic violence pursuant to Section 16-25-20, agree in writing to successful completion of a batterer's treatment program approved by the Department of Social Services.

Domestic relations, protection from domestic abuse, definition

SECTION 7. Section 20-4-20(b) of the 1976 Code, as last amended by Act 92 of 2003, is further amended to read:

(b) Household member means:



- (I) a spouse;
- (ii) a former spouse;
- (iii) persons who have a child in common;
- (iv) a male and female who are cohabiting or formerly have cohabited.

Domestic relations, protection from domestic abuse, order of protection

SECTION 8. Section 20-4-40(d) of the 1976 Code, as last amended by Act 396 of 1996, is further amended to read:

(d) In a pending action for divorce or separate support and maintenance, the petition for relief shall be brought in the form of a motion for further relief and shall be served on counsel of record, if any. Where no action is pending, the petition shall be filed and served as an independent action. A pending motion or petition for relief shall not be dismissed solely because the underlying action is dismissed.

Domestic relations, protection from domestic abuse, order of protection, filing fee

SECTION 9. Chapter 4, Title 20 of the 1976 Code is amended by adding:

Section 20-4-65. A person seeking an order of protection from domestic abuse pursuant to the provisions of this chapter is not required to pay the filing fee as provided in Section 8-21-310(11)(a).

Domestic relations, protection from domestic abuse, order of protection, certified copies

SECTION 10. Section 20-4-80 of the 1976 Code is amended to read:

Section 20-4-80. A certified copy of an order of protection must be mailed to or served upon the petitioner, the respondent, and local law enforcement agencies having jurisdiction in the area where the petitioner resides. No charge may be made to the petitioner for such action.

Domestic relations, protection from domestic abuse, order of protection, forwarding requirements

SECTION 11. Section 20-4-140(A) of the 1976 Code, as added by Act 312 of 1998, is amended to read:

(A) A valid protection order related to domestic or family violence, issued by a court of another state, tribe, or territory must be accorded full faith and credit by the courts of this State and enforced as if it were issued in this State even if the relief granted to the petitioner in the foreign order would not be available under the laws of this State. A valid protection order related to domestic or family violence issued by a county in this State must be accorded full faith and credit by all courts of this State but must be limited to relief available under South Carolina law. The court shall provide two certified copies of the order, free of charge, to a party receiving a protection order related to domestic or family violence in South Carolina. One of these copies must be for the party's records. The party must be directed by the court to present the other copy to law enforcement in the county in which the



order was issued for entry into the National Crime Information Center and for enforcement if necessary. A certified copy of an order of protection must be forwarded by law enforcement within twenty-four hours to the Federal Bureau of Investigation/National Crime Information Center for inclusion in the person's FBI/NCIC report.

Magistrates and constables, criminal matters, deposits in lieu of recognizances

SECTION 12. Section 22-5-530(A) of the 1976 Code, as last amended by Act 295 of 2002, is further amended to read:

(A) A person charged and to be tried before a magistrate or municipal judge for a violation of law is entitled to deposit with the magistrate or municipal judge, in lieu of entering into recognizance, a sum of money not to exceed the maximum fine in the case for which the person is to be tried. However, an individualized hearing must be held when the person is charged with a violation of the provisions of Chapter 25, Title 16 and the victim of the offense must be notified pursuant to the provisions of Section 16-3-1525(H).

Magistrates and constables, expungement of criminal records, first offense criminal domestic violence

SECTION 13. Section 22-5-910 of the 1976 Code, as last amended by Act 92 of 2003, is further amended to read:

Section 22-5-910.(A) Following a first offense conviction in a magistrates court or a municipal court, the defendant after three years from the date of the conviction may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction. However, this section does not apply to:

- (1) an offense involving the operation of a motor vehicle;
 - (2) a violation of Title 50 or the regulations promulgated pursuant to Title 50 for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses are authorized;
- or
- (3) an offense contained in Chapter 25 of Title 16, except first offense criminal domestic violence as contained in Section 16-25-20, which may be expunged five years from the date of the conviction.

(B) If the defendant has had no other conviction during the three-year period, or during the five-year period as provided in subsection (A)(3), following the first offense conviction in a magistrates court or a municipal court, the circuit court may issue an order expunging the records. No person may have his records expunged under this section more than once. A person may have his record expunged even though the conviction occurred prior to June 1, 1992.

(C) After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of the expungement to ensure that no person takes advantage of the rights of this section more than once. This nonpublic record is not subject to release under Section 34-11-95, the Freedom of Information Act, or any other provision of law except to those authorized law or court officials who need to know this information in order to prevent the rights afforded by this section from being taken advantage of more than once.



(D) As used in this section, conviction includes a guilty plea, a plea of nolo contendere, or the forfeiting of bail.

Law enforcement and public safety, Department of Public Safety, law enforcement certification revocation

SECTION 14. Section 23-6-440 of the 1976 Code, as last amended by Act 505 of 1994, is further amended by adding an appropriately numbered new lettered subsection at the end to read:

(A) A person who is convicted of or pleads guilty or nolo contendere to a criminal domestic violence offense, as defined in Chapter 25 of Title 16, must have his law enforcement certification revoked.

Motor vehicles, uniform traffic tickets, filing of incident reports involving criminal domestic violence

SECTION 15. Section 56-7-15 of the 1976 Code, as last amended by Act 92 of 2003, is further amended to read:

Section 56-7-15.

(A) The uniform traffic ticket, established pursuant to the provisions of Section 56-7-10, may be used by law enforcement officers to arrest a person for an offense committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrates court and municipal court. A law enforcement agency processing an arrest made pursuant to this section must furnish the information to the State Law Enforcement Division as required in Chapter 3, Title 23.

(B) An officer who effects an arrest, by use of a uniform traffic ticket, for a violation of Chapter 25, Title 16 shall complete and file an incident report immediately following the issuance of the uniform traffic ticket.

Study Committee on criminal domestic violence issues

SECTION 16. A study committee composed of five members of the Senate, appointed by the President Pro Tempore, and five members of the House of Representatives, appointed by the Speaker, is created to study the criminal domestic violence laws of the State, the effects of criminal domestic violence on victims, perpetrators, and the economy of the State, and the status of the state=s current domestic violence prevention programs, and recommend appropriate changes to the General Assembly by February 15, 2006.

Savings clause

SECTION 17. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as



remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Severability clause

SECTION 18. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

SECTION 19. This act takes effect January 1, 2006.

Ratified the 2nd day of June, 2005.

Approved the 7th day of June, 2005.

