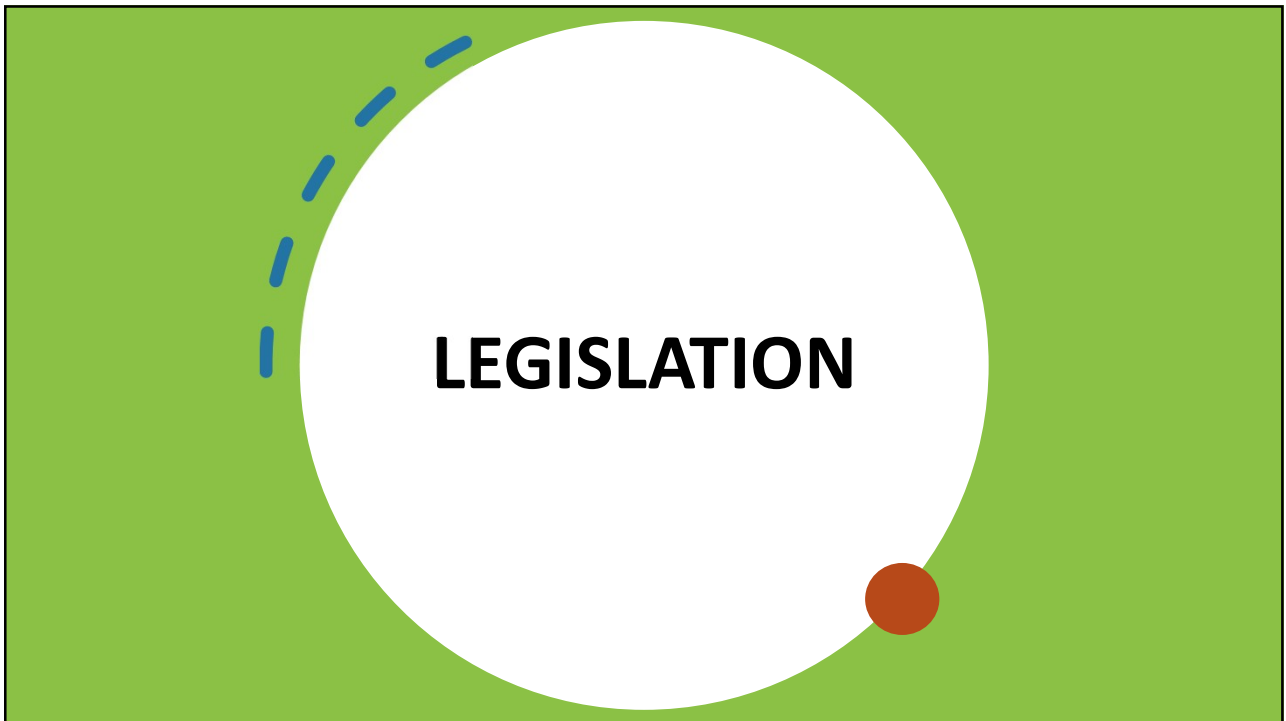




Criminal Law Update

Brittany Bromell, UNC School of Government
John Rubin, UNC School of Government
Judge Michael Stading, NC Court of Appeals

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PRETRIAL RELEASE

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S.L. 2023-75, *p.12-13*
Pretrial Integrity Act

- Effective October 1, 2023
- Two distinct statutes affecting pretrial release
 - Right to pretrial release for defendants charged with high level felonies
 - 48-hour defendants



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Right to pretrial release for defendants charged with high level felonies

- Previously: Only offense for which a magistrate could not set pretrial release under any circumstance was first-degree murder.
- Judge had discretion to determine whether a defendant charged with first degree murder may be afforded pretrial release.

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Expanded list:

- First and second-degree murder, G.S. 14-17, and attempts to commit those offenses.
- First and second-degree kidnapping, G.S. 14-39.
- First-degree forcible rape and sexual offense, G.S. 14-27.21; G.S. 14-27.26.
- Second-degree forcible rape and sexual offense, G.S. 14-27.22; G.S. 14-27.27.
- Statutory rape of and sexual offense with a child by an adult, G.S. 14-27.23; G.S. 14-27.28.
- First-degree statutory rape and sexual offense, G.S. 14-27.24; G.S. 14-27.29.
- Statutory rape of and sexual offense with a person 15 years old or younger, G.S. 14-27.25; G.S. 14-27.30.
- Human trafficking, G.S. 14-43.11.
- Assault with a deadly weapon with intent to kill inflicting serious injury, G.S. 14-32(a).
- Discharging barreled weapons or a firearm into occupied property, G.S. 14-34.1.
- First-degree burglary, G.S. 14-51.
- First-degree arson, G.S. 14-58.
- Armed robbery, G.S. 14-87

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48-hour defendants

GENERAL RULE:

- If a defendant is arrested for a new offense allegedly committed while the defendant was on pretrial release, a judge must set PTR conditions within 48 hours of arrest

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48-hour defendants

EXCEPTION:

- If the new offense is a violation of G.S. Chapter 20 EXCEPT
 - impaired driving, G.S. 20-138.1;
 - habitual impaired driving, G.S. 20-138.5;
 - impaired driving in a commercial vehicle, G.S. 20-138.2;
 - operating a commercial vehicle after consuming alcohol, G.S. 20-138.2A;
 - operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol, G.S. 20-138.2B; and
 - death or injury by vehicle, G.S. 20-141.4.
- Then, a magistrate may set conditions at any time

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48-hour defendants

If a judge does not set conditions within 48 hours after arrest of a defendant who is arrested for a new offense allegedly committed while the defendant was on pretrial release, then a magistrate may set conditions.


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Important notes

- Applies for offenses committed on or after October 1
 - If offense occurred before then, magistrates set conditions as normal
 - Does apply to defendants who were on PTR before October 1
 - Not looking at date of PTR, looking at date of offense
 - Magistrate may set conditions if D on PTR is arrested for failing to appear
- 

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Issues for judges:


A violation of procedural due process could occur if:

- A judge was available to set conditions within the first 48 hours for defendants in custody pursuant to new G.S. 15A-533(h) but did not.
- Defendants in custody pursuant to G.S. 15A-533(b) are not afforded a timely first appearance.

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S.L. 2023-6, p. 1-2 PTR for rioting/looting

- New G.S. 15A-534.8, effective December 1, 2023
- PTR conditions must be determined by judge within first 24 hours
- After 24 hours, set by magistrate



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OFFENSES

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S.L. 2023-14, p. 5 **Misdemeanor crime of domestic violence**

- Effective December 1, 2023
- Codified as G.S. 14-32.5
- Class A1 misdemeanor
- Use or attempt to use physical force, or threaten the use of a deadly weapon, against another person...

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Misdemeanor crime of domestic violence

The person who commits the offense must have one of the following relationships with the victim:

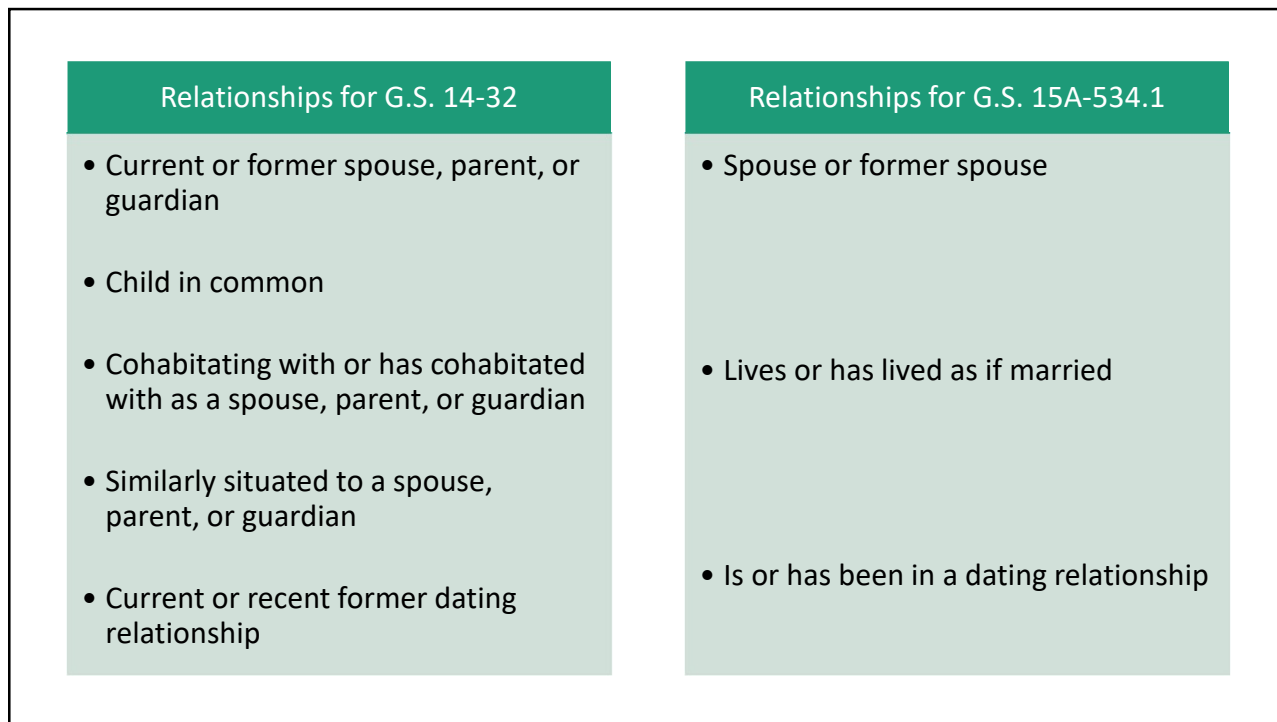
- A current or former spouse, parent, or guardian of the victim.
- A person with whom the victim shares a child in common.
- A person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian.
- A person similarly situated to a spouse, parent, or guardian of the victim.
- A person who has a current or recent former dating relationship with the victim.

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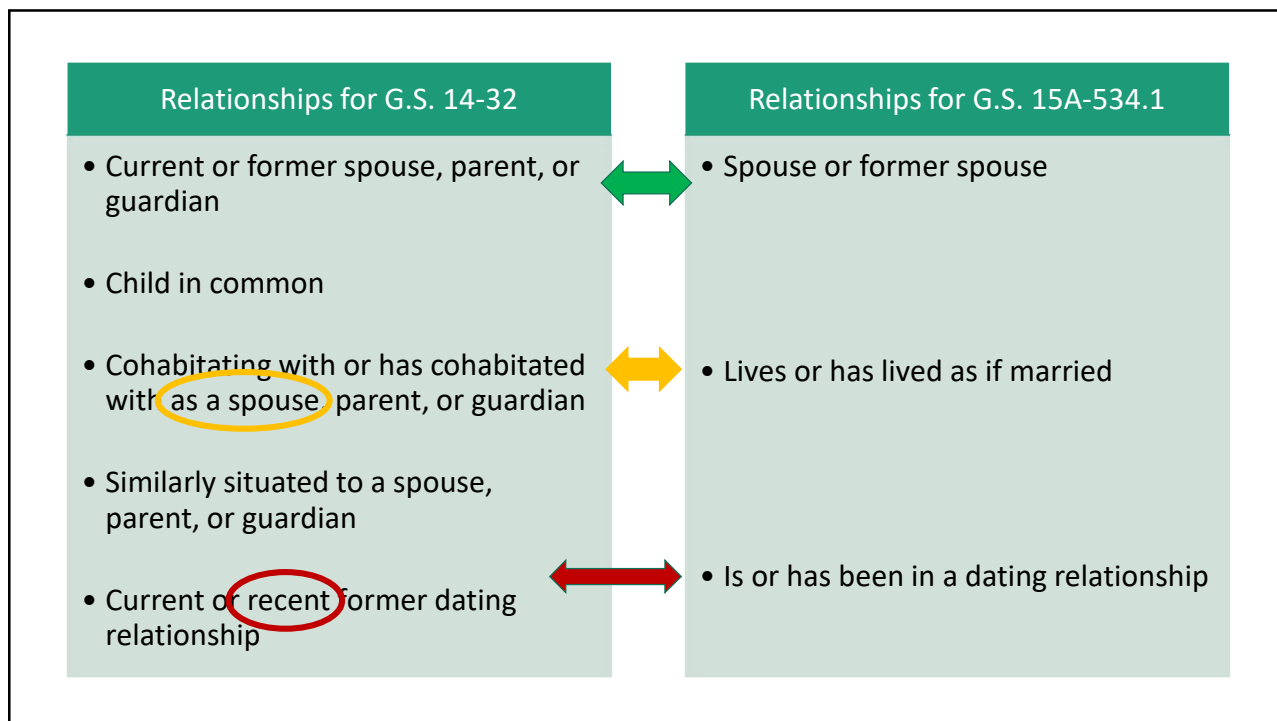
Offenses under G.S. 15A-534.1 (pretrial release in DV cases)

Assaults Article 8	Stalking	Communicating threats	Domestic criminal trespass
Rape and other sex offenses Article 7B	Kidnapping and abduction Article 10	Arson and other burnings Article 15	Violation of a 50B order

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Why does it matter?

- Expands the list of people who could be charged with Class A1 misdemeanors for acts of simple assault
- The only NC misdemeanor assault offense that would count for the federal gun disqualification under 18 U.S.C. 922(g)(9)

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S.L. 2023-14, p. 5

Assault on a pregnant woman

- New Class A1 misdemeanor under 14-33(c)(2a), eff. Dec. 1, 2023
- Can a person be punished for multiple offenses for same act?
 - Assault on female, 14-33(c)(2)
 - Battery on unborn child, 14-23.6
- Is knowledge required for the new assault offense?
 - Compare 14-23.8, which says that knowledge is not a requirement for battery on unborn child and other offenses under that article

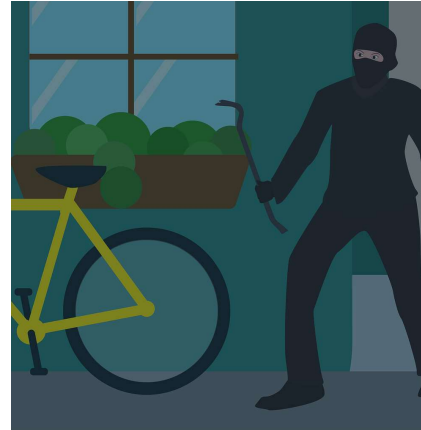


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S.L. 2023-85, p. 15

Second degree trespass

- New Class 2 misdemeanor under 14-159.13(c), eff. Dec. 1, 2023
- Currently, person must enter or remain without authorization
 - on another's premises after notice not to enter or remain, or
 - on posted property
- A person commits the new offense if they
 - enter or remain
 - without authorization
 - on the curtilage of a dwelling of another
 - between the hours of midnight and 6 am



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S.L. 2023-97, p. 15

Street takeovers

- Eff. Dec. 1, 2023, it is a Class A1 misdemeanor under subsection 20-141.10(b) for a person to
 - knowingly
 - without authorization
 - operate a motor vehicle
 - in a street takeover, defined as
 - blocking or impeding the regular flow of traffic with a motor vehicle
 - to perform an exhibition, contest, or stunt, defined as a burnout, doughnut, wheelie, drifting, or other dangerous motor vehicle activity
 - It is a Class H felony to violate subsection (b) and assault or knowingly and willfully threaten a law enforcement officer
-

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S.L. 2023-97

Street takeovers (cont'd)

- It is a Class A1 misdemeanor under 20-141.10(c) for a person to
 - knowingly
 - participate in, coordinate through social media or otherwise, commit an overt act in furtherance of, or facilitate
 - a street takeover
 - “Mere presence alone without an intentional act is not sufficient to sustain a conviction”
-

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A large white circle with a thick grey border is centered on a dark grey background. The words "CRIMINAL PROCEDURE" are written in a white, sans-serif font across the center of the circle.

CRIMINAL PROCEDURE

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S.L. 2023-97, p. 16 Felony pleas in district court

- H and I felony pleas under 7A-272(c), eff. for pleas Dec. 1, 2023
 - Consent of presiding judge no longer required for jurisdiction
 - Chief district court judge may schedule sessions for taking of H and I pleas
- <https://nccriminallaw.sog.unc.edu/legislature-tweaks-jurisdictional-rules-for-district-and-superior-courts/>

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S.L. 2023-97 Probation hearings

- Violations of probation after felony plea in district court
 - Currently, superior court holds violation hearing unless State and defendant consent to hearing in district court
 - Eff. for hearings Dec. 1, 2023, superior court proceeds after violation hearing without remanding to district court under 7A-271(e)
- Same for conditional discharges under 15A-1341(a6)

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S.L. 2023-103, p. 16

Expunction of felony B & E

- 15A-145.5 allows expunction of H and I felony convictions unless excluded as a violent offense
 - Felony B & E in violation of 14-54(a) has been designated as a violent offense
- Effective for petitions filed on or after Dec. 1, 2023, felony B & E is no longer excluded
 - Waiting period is 15 years (instead of the usual 10 years)
 - For multiple felony convictions, waiting period is 20 years as in other cases

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SEARCHES AND SEIZURES

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State v. Furtch (Henderson), p. 1

- Narcotics tip re: silver minivan, deputy observed a silver minivan following too closely and weaving within lane
- Conducted stop, did the paperwork, and upon returning to defendant's vehicle, asked defendant out of the vehicle to frisk and "explain the citation" → K9 hit at this time
- Drug trafficking and usual drug charges follow
- MTS – defendant challenged scope and length of stop
- Affirmed - traffic stop not "measurably extend[ed]" to "require [additional independent] reasonable suspicion."
- OK if "diligently pursuing the investigation," "conducting ordinary inquiries incident to the... stop," or "taking necessary precautions... to complete [the] mission safely."



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State v. Moua (Mecklenburg), p. 2

- Defendant paced 50/35 mph zone
- Upon checking for warrants officer learned defendant was on probation, asked to step out and “talk... real quick” and requested to search him and car
- Officer opened door through window, defendant stepped out, license and registration returned
- Defendant agreed to pat down and car search → nothing on person, but a bag of drugs under his seat
- Drug trafficking and usual charges follow
- MTS – defendant argued he was unlawfully seized when consent given, therefore “his consent is invalid”
- Citing *Florida v. Royer*, this panel sided with defendant and reversed “[b]ased upon the totality of the circumstances... the seizure was unlawfully extended, and [defendant] was not engaged in a consensual conversation.”
- **NC Supreme Court granted a temporary stay**



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State v. San (Randolph), p. 1

- Informant provided information that defendant had a large quantity of meth. Drug detectives later saw defendant as passenger in a car that crossed a double yellow line. Radioed another officer in a marked vehicle to stop the car.
- Stopping officer ran records, and then returned to ask driver to exit her car so he could “explain the warning citation to her” and returned her documents → K9 sniff happened contemporaneously
- Drugs found at the front passenger door – near defendant
- Drug trafficking and usual drug charges follow
- MTS - defendant challenged search citing *U.S. v. Rodriguez*
- Affirmed – “the dog-sniff was undertaken prior to the completion of the mission of the traffic stop.”



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State v. Wright (Mecklenburg), p. 3

- Tip from informant giving physical description of defendant who was on a bike carrying an “illegal firearm”
- Officers encountered defendant and requested to search him and his bag, after several (5) denials by defendant, he eventually permitted inspection → led to arrest as well as discovery of drugs and stolen gun
- Charged for above crimes plus habitual felon
- MTS – defendant argued the officers lacked RS to stop him and there was no PC or consent to search
- This particular COA panel decided the informant’s tip provided sufficient RS to stop defendant and that he was armed so they could complete a “protective search of [his person] for weapons”
- However, the panel decided that scope is limited to “outer clothing” and “any search of the backpack was beyond the scope of a *Terry* frisk”
- Further, the panel found there was not consent after several “no[s],” and while the tip was sufficient for RS, it lacked both “reliability and basis of knowledge” to support PC
- **NC Supreme Court granted a temporary stay**



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State v. Jacobs (New Hanover), p. 5

- Officer behind defendant driving, smells odor of marijuana “very strongly” while 2.5 car lengths behind
- Follows defendant 5-6 blocks and stops “solely because of the [very strong] unburned marijuana smell”
- Conducted stop, asked defendant out of car, sees a “small plastic bag of white powder” at his feet → arrested
- Drug trafficking and usual drug charges follow
- MTS – defendant challenged RS for the stop
- Affirmed - citing *State v. Stover*, 200 N.C. App. 506, 685 S.E.2d 127 (2009) (finding PC to search upon smelling unburned marijuana), smell of unburned marijuana to find RS was not “inherently incredible” so long as the trial court found the officer’s testimony to be credible – which the trial court did in this case



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State v. Burris (Buncombe), p. 6

- Single-car accident, defendant lying outside of the truck with severe injuries and was taken to the hospital in an unconscious state
- The trooper opined defendant was the driver and requested a warrantless blood draw at the hospital
- At trial, convicted of DWI (BAC only) and reckless driving
- Defendant argued (1) error to allow testimony he was driving (and should've granted MTD), and (2) error to deny his MTS blood
- This panel unanimously agreed that the trial court's curative instruction on opinion testimony of driving was appropriate, and sufficient circumstantial evidence was available to survive a MTD
- However, the majority affirmed admission of the blood alcohol concentration evidence while the dissent (J. Tyson) believed the blood results should be suppressed (vacate conviction)
- The majority citing *Mitchell v. Wisonsin*, 139 S. Ct. 2525 (2019), found exigency - defendant had injuries likely requiring surgery
- The dissent found exigency did not exist to dispense of warrant requirement – not delay by surgery or possible death by defendant, nor because there might be a delay or line to wait on the magistrate
- **This one is with the NC Supreme Court now**



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CRIMINAL PROCEDURE

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PJCs after *McDonald* (p. 10)

Case history

- In October 2014, the defendant pled guilty in superior court to misdemeanor death by motor vehicle, and the trial judge imposed a PJC with costs
- In August 2020, after the defendant was charged with involuntary manslaughter for another motor vehicle accident, the State prays judgment on the 2014 PJC
- The trial judge entered judgment on the 2014 PJC and sentenced the defendant to supervised probation

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PJCs (cont'd)

The PJC was not a final judgment

- The PJC did not include conditions amounting to punishment
- The trial judge's statements suggesting that the judgment was final were
"not statements of binding legal effect"

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PJCs (cont'd)

Delay was not unreasonable

- Reason for delay
- Length of delay
- Whether defendant consented to delay
- Actual prejudice to the defendant

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What now for PJCs?

- Under different circumstances, could the analysis of the four factors come out differently?
- Can the State and defendant negotiate an end date to a PJC? Can the judge impose an end date?
- Can a PJC, which is effectively treated as a conviction except under Ch. 20, be expunged?
- If the answers are all no, will people still want PJCs in Ch. 20 cases?

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CRIMINAL OFFENSES

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Not constructive possession in *Sharpe* (p. 21)

- Evidence supporting possession
 - Defendant was riding in car
 - Mother loaned car to defendant
 - Defendant had earlier looked at firearms online
 - Defendant was a retaliatory shooting concern
- Evidence negating possession
 - Four people were in car (two in front, two in back)
 - Defendant was front-seat passenger, not driver
 - Rifle was across center console at angle facing toward backseat
 - No fingerprints or DNA on rifle
 - Defendant denied owning gun, and passenger admitted owning it

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Constructive possession in *Livingston* (p. 22)

- Evidence supporting possession
 - Bag with gun was behind defendant's seat
 - Bag contained smaller bag touching gun, with defendant's identification and credit cards
- Evidence negating possession
 - Another person was in car
 - Defendant was passenger, not driver
 - Defendant was not owner or driver of car (so not "custodian")
 - No forensic evidence on gun
 - Defendant denied owning gun

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Counterman v. Colorado, p. 14

- The State must prove in true threats cases that the defendant had some subjective understanding of the threatening nature of his statements.
- Concluded that recklessness was the most appropriate mens rea in the true threats context.

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Does our communicating threats statute comport with *Counterman*?

G.S. 14-277.1: Communicating threats:

- Willfully threatens to physically injure the person;
- The threat is communicated to the other person ...;
- The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
- The person threatened believes that the threat will be carried out.

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State v. Guice, p. 15

G.S. 14-277.1: Communicating threats.

- **Willfully threatens** to physically injure the person;
- The threat is communicated to the other person ...;
- The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
- The person threatened believes that the threat will be carried out.

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State v. Patton, p. 19

Bribery of a witness is criminalized by G.S. 14-226, covered by the language “any other manner”.

