

Criminal Law Update

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SCOTUS

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Counterman v. Colorado, __ U.S. __ (2023), p. 24

True threats and the First Amendment

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Counterman v. Colorado, __ U.S. __ (2023), p. 24

“Was that you in the white Jeep?”
“F--- off permanently.”
“Staying in cyber life is going to kill you.”

Billy Counterman

Coles Whalen

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Counterman v. Colorado, __ U.S. __ (2023), p. 24

Colo. Rev. Stat. 18-3-602: Unlawful to “repeatedly make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person to suffer serious emotional distress.”

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Counterman v. Colorado, __ U.S. __ (2023), p. 24

Defendant: Not a “true threat” because no proof of “subjective intent to threaten,” and therefore protected under First Amendment.

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Counterman v. Colorado, __ U.S. __ (2023), p. 24

SCOTUS (7-2, Kagan): Conviction vacated. First Amendment requires the State to show some subjective understanding of a statement's threatening character—although a recklessness standard is enough.

- Conscious disregard of a significant risk that words might cause harm

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True Threats in North Carolina

- State v. Taylor (2021)
 - Only “true threats” can be prohibited without violating the First Amendment
 - True threats are those that are both objectively threatening and made by a party with the “subjective intent to threaten a listener”

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True Threats in North Carolina

- Analysis could apply to many N.C. crimes
 - But not extortion. State v. Bowen (2022)

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Bruton v. United States, 391 U.S. 123 (1968)

Mary and John are jointly tried for robbing Bill.
John confesses: *Mary and I went out Saturday night and robbed Bill.*
John does not testify. May confession be introduced at trial against John with a limiting instruction?

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Bruton redux

What if State redacts confession?
[Deleted] and I went out Saturday night and robbed Bill.
John does not testify. May confession be introduced at trial against John with a limiting instruction?

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Bruton redux

What if State amends confession?
Another person and I went out Saturday night and robbed Bill.
John does not testify. May confession be introduced at trial against John with a limiting instruction?

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Samia v. United States, 599 U.S. ____ (2023), p. 18

Q. Did Stillwell say where the victim was when she was killed?

A. Yes. He described a time when the *other person* he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving.

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Samia v. United States, 599 U.S. ____ (2023), p. 18

Statement was testimonial.

Was it offered *against* defendant Samia?

No.

Did not directly implicate Samia and was not so obviously redacted as to be directly accusatory.

And was given with a limiting instruction.

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Pleas

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State v. Robertson, ___ N.C. App. ___ (2023), p. 13

- Defendant pled guilty to felony flee to elude
- Plea arrangement: “Suspended sentence in the presumptive range.”
- Sentence: 6-17 months, suspended, 30-day split sentence

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State v. Robertson, ___ N.C. App. ___ (2023), p. 13

- Defendant argued that the imposed sentence differed from the one in the plea arrangement
- **COA agreed:** “Active sentence of 30 days . . . deviates from the sentence that was agreed upon.”
- Defendant therefore entitled to withdraw his plea. G.S. 15A-1023(b).

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State v. Robertson, ___ N.C. App. ___ (2023), p. 13

- Due process requires “strict adherence” to the agreement of the parties.
- **If unclear, “the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate.”**

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Sentencing

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State v. McDonald, ___ N.C. App. ___ (2023), p. 13


PJC for misdemeanor death by vehicle in 2014

- At sentencing, defendant apologized.
- *“Pursuant to the transcript of plea, judgment’s continued in this matter upon payment of the costs. I hope that both sides can have some peace and resolution in this matter.”*

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State v. McDonald, ___ N.C. App. ___ (2023), p. 13

NOW THEREFORE IT IS ORDERED, THAT PRAYER FOR JUDGMENT BE CONTINUED FROM DAY TO DAY, WEEK TO WEEK, TERM TO TERM UNTIL FURTHER MOTION OF THE STATE, UPON PAYMENT OF COST.



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State v. McDonald, ___ N.C. App. ___ (2023), p. 13

- 2020 (over six years later), State prayed judgment when defendant was charged with involuntary manslaughter after another motor vehicle accident

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State v. McDonald, ___ N.C. App. ___ (2023), p. 13

- PJC was not a final judgment
 - Requirement to apologize came *before* entry of the PJC
- 6-year delay was not unreasonable
 - No shorter time specified in the order
 - Defendant’s lack of objection tantamount to consent
 - Defendant was not prejudiced by the delay

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State v. Hefner, __ N.C. App. __ (2023), p. 31

Prior felonies under Habitual Felon law

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State v. Hefner, __ N.C. App. __ (2023), p. 31

- Current offense committed in 2018; prosecuted under habitual felon law
- One prior felony on HF indictment was a 2005 offense from South Carolina
 - “Grand Larceny” committed in 2005
 - In 2010, SC raised grand larceny threshold from \$1,000 to \$2,000

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State v. Hefner, __ N.C. App. __ (2023), p. 31

“Defendant’s sentence [is] governed by statutes in effect at the time the crimes were committed. . . .”
“**[B]ecause Defendant’s South Carolina conviction for grand larceny constituted a felony during the time in which the offense was committed . . . it serves as a valid predicate conviction [for HF].**”

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State v. Hefner, __ N.C. App. __ (2023), p. 31

Remember, the prior record level rule is different: **G.S. 15A-1340.14(c)**. In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.

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State v. Calderon, __ N.C. App. __ (2023), p. 38

Multiple charges of indecent liberties

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State v. Calderon, __ N.C. App. __ (2023), p. 38

- Defendant charged with three counts of indecent liberties based on three individual kisses of a 13-year-old over 45 minutes
- Argued that it was a “continuous transaction” that supported only one charge

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State v. Calderon, __ N.C. App. __ (2023), p. 38

- Court of Appeals distinguished “sexual act” and “non-sexual act” indecent liberties cases
 - For sexual acts, each act can support a count
 - For non-sexual acts, the court adopted a four-factor test to determine the number of counts

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State v. Calderon, __ N.C. App. __ (2023), p. 38

1. Same time?
2. Same location?
3. Causal relationship/intervening acts?
4. Fresh impulse/thought process motivating additional conduct?

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State v. Calderon, __ N.C. App. __ (2023), p. 38

- Defendant's acts supported two counts
 - One count for kiss outside the van
 - One count for multiple kisses inside the van
 - Occurred within 15 minutes
 - Not separated by intervening act

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Criminal Procedure

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Absolute Impasse

- General Rule: Defendant decides whether to testify and whether to plead guilty. Counsel decides strategy issues.
- Doctrine of absolute impasse: When defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, client's wishes control.
 - When trial judge learns of absolute impasse, judge must require defense counsel to abide by defendant's wishes.

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State v. Holliday, __ N.C. App. __ (2023), p. 6

Defendant told court on first day of trial that he and his attorney disagreed over whether to call out-of-state witness.

Disagreement was not an absolute impasse.

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State v. Bridges, __ N.C. App. __ (2023), p. 7

Bridges is charged with AWDWIKISI for shooting the manager of a used car dealership during an attempted robbery.

Three people, including Williams, were involved in robbery.

Williams was to be a witness for the State.

Before Williams testified, Bridges' attorney saw her crying in the hallway. He asked if she wanted an attorney.

Trial court addressed Williams. She said she was not at the scene of the crime.

Then, after lunch, Williams testified that she **was** there after all.

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Conflict of Interest

1. Did court have notice of conflict?
2. Did court conduct adequate inquiry and find KIV waiver if there was a conflict?
3. If no, did D object?
 - If defendant objected, and no adequate inquiry, reversible error.
4. If no objection, did D show conflict of interest adversely affected counsel's performance?
 - If yes, prejudiced presumed.
5. If no showing of adverse effect, did D show prejudice?

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State v. Bridges, __ N.C. App. __ (2023), p. 7

1. Did court have notice of conflict? ✓
2. Did court conduct adequate inquiry and find KIV waiver if there was a conflict? ✓

“Defendant explicitly stated, after witnessing the entirety of Williams's testimony, including his counsel's cross-examination of her, that he did not wish for his counsel to withdraw.”

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State v. Mahatha, __ N.C. App. __ (2023), p. 5

- Trial court did not abuse its discretion in denying D's motion for mistrial for State's failure to timely disclose recorded jail calls that were not exculpatory

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State v. Mahatha, __ N.C. App. __ (2023), p. 5

This is a case where you may find that [Defendant] did something, did something terrible, did something to someone who maybe didn't deserve it. No one does.

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State v. Mahatha, __ N.C. App. __ (2023), p. 5

You can believe that he committed an assault. I'm not asking you to find him guilty of assault on a female, but you can believe that he committed a non-gun-related assault. And everything the State said still makes sense.

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State v. McAllister, 375 N.C. 455 (2020)

You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did. Jury, what I'm asking you to do is you may dislike Mr. McAllister for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did.

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State v. Mahatha, ___ N.C. App. ___ (2023)

Statements did not express or imply that D necessarily was guilty of assault on a female

Counsel did not completely omit the assault on a female count from the counts on which he asked the jury to find Defendant not guilty.

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Probation

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State v. Geter, 383 N.C. 484 (2022)

Probation violation hearings after expiration

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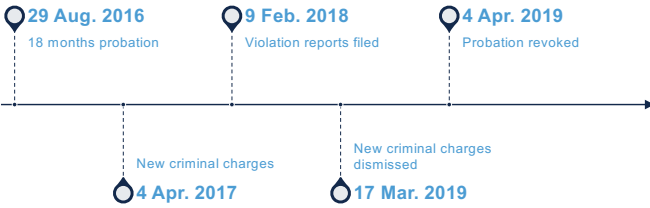
G.S. 15A-1344(f)

The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

- 1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
- 2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
- 3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

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State v. Geter, 383 N.C. 484 (2022)



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On the record:

[I]f [defendant] had been found not guilty of those offenses, or if for whatever reason the State had opted to dismiss the charges, ... it would have had a direct impact on the later hearing of the probation violation. Again, as reviewed — as shown in the transcript, as well as the knowledge by this [c]ourt having heard the Motion to Suppress, and then argument on the Motion to Suppress, having been granted after probation violation, it is clear to the [c]ourt that the State waited until disposition of the underlying offenses alleged before proceeding with the probation violation. The [c]ourt would find that this would constitute good cause.

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On the Judgment

The Court further Orders: (check all that apply)

1. The Clerk of Superior Court, under G.S. 7A-304(d), shall immediately reimburse any undisbursed monies paid by the defendant under the Judgment Suspending Sentence, as provided in that Judgment. In addition, the defendant shall pay to the Clerk the "Total Amount Due" below.

Cash Balance	Fine Balance	Probation Balance	Forcible Entry Case	Jury Fees Trial Proceeding	Appt. Fees/Video	Total Amount Due
\$ 100.00	\$ 0.00	\$ 54.10		\$ 0.00		\$ 154.10

*See attached "Restitution Update Worksheet, Notice and Findings (Revocation Or Termination Of Probation)," ACC-CR-412, which is incorporated by reference. NOTICE: ACC-CR-412 must be completed whenever recommended by a judge in a suspended case. If a case is suspended, the "Total Amount Due" must be completed in EVERY CASE in which the defendant was ordered in the original Judgment Suspending Sentence, as a condition of probation, to pay restitution in an amount in excess of \$200 to a Victim Rights Act victim.

2. The Court finds just cause to waive costs, as ordered on the attached ACC-CR-418. Other:

3. Any allegation of a violation stated in the Violation Report, Notice or otherwise which is not set forth in Finding No. 3 below is dismissed.

4. City of
07/15/2020: COURT FINDS AND CONCLUDES GOOD CAUSE EXISTS TO REVOKE DEFENDANT'S PROBATION DESPITE THE EXPIRATION OF HIS PROBATIONARY PERIOD; JUDGMENT REMANDED FROM COURT OF APPEALS FOR FURTHER FINDINGS; THIS JUDGMENT SHALL BE NUNC PRO TUNC TO 04/04/2019

The Court Recommends:

1. Substance abuse treatment. 2. Psychiatric and/or psychological counseling. 3. Work release should should not be granted.

4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.

5. Other: but the Court does not recommend restitution by paid as a condition of post-release supervision. from work release earnings.

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State v. Geter, 383 N.C. 484 (2022)

- Trial court has "broad discretionary powers" to determine good cause
- Good cause must be "shown" by the State and "stated" on the record, either in open court or within the trial court record

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State v. Geter, 383 N.C. 484 (2022)

- Trial court properly deemed delay to await outcome of pending criminal charge "good cause"
- No requirement of findings that State made "reasonable efforts" to conduct the revocation hearing earlier

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On the Judgment

The Court further Orders: (check all that apply)

1. The Clerk of Superior Court, under G.S. 7A-304(d), shall immediately reimburse any undisbursed monies paid by the defendant under the Judgment Suspending Sentence, as provided in that Judgment. In addition, the defendant shall pay to the Clerk the "Total Amount Due" below.

Cash Balance	Fine Balance	Probation Balance	For Any Other Case	Jury Fees Trial Proceeding	Appt. Fees/Video	Total Amount Due
\$ 0.00	\$ 1507.80	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 1507.80

*See attached "Restitution Update Worksheet, Notice and Findings (Revocation Or Termination Of Probation)," ACC-CR-612, which is incorporated by reference. NOTICE: ACC-CR-612 must be completed whenever Recommendation No. 4 below is entered. Court Proceedings must be filed in the case and ACC-CR-612 must be completed in EVERY CASE in which the defendant was entered in the original Judgment Suspending Sentence, as a condition of probation. To pay restitution is an amount in excess of \$250 to a Victim Rights Act victim.

2. The Court finds just cause to void costs, as ordered on the attached ACC-CR-616. Other:

3. Any allegation of a violation stated in the Violation Report, Notice or otherwise which is not set forth in Finding No. 3 below is dismissed.

4. **07/15/2020: COURT FINDS AND CONCLUDES GOOD CAUSE EXISTS TO REVOKE DEFENDANT'S PROBATION DESPITE THE EXPIRATION OF HIS PROBATIONARY PERIOD; JUDGMENT REMANDED FROM COURT OF APPEALS FOR FURTHER FINDINGS; THIS JUDGMENT SHALL BE NUNC PRO TUNC TO 04/04/2019**

The Court Recommends:

1. Substance abuse treatment. 2. Psychiatric and/or psychological counseling. 3. Work release should should not be granted.

4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.

5. Other: the Court does not recommend restitution by paid as a condition of post-release supervision. from work release earnings.

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State v. Singletary, ___ N.C. App. ___ (2023), p. 15

- Felony probationer revoked for commission of new criminal offense (UFI) based on a pending charge; supervising PPO not present at hearing
 - Proof of “commit no criminal offense” violation
 - Confrontation of supervising officer

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State v. Singletary, ___ N.C. App. ___ (2023), p. 15

- Proof of commit no criminal offense violation
 - Mere fact of charge is not enough
 - Defendant need not be convicted
 - Probation court must make independent findings
 - Here, trial court made detailed findings based on PPO testimony and ATM camera images

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State v. Singletary, __ N.C. App. __ (2023), p. 15

- Confrontation at PV hearings
 - Not a Sixth Amendment right
 - Due process and statutory:

At the hearing . . . the probationer . . . may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. G.S. 15A-1345(e).

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State v. Singletary, __ N.C. App. __ (2023), p. 15

- Original PPO was absent due to a death in the family—“clearly would have shown good cause to proceed in her absence”

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Evidence

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Corpus Delicti

- An out-of-court confession alone is not sufficient for conviction. There must also be:
 - Independent evidence of the crime; or
 - Substantial independent evidence of the trustworthiness of the confession, such as
 - Voluntariness of confession
 - Opportunity to commit crime
 - Strong corroboration of essential facts in confession

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State v. Colt, ___ N.C. App. ___ (2023), p. 11

Concealment of death of a child:

- (1) failure to notify law enforcement of the death of a child;
- (2) intent to conceal the death of a child;
- (3) the victim was a child who is less than sixteen years of age; and
- (4) knowing or having reason to know the child did not die of natural causes

59

State v. Colt, ___ N.C. App. ___ (2023), p. 11

Testimony that child's mother was imprisoned for second-degree murder was relevant and not unfairly prejudicial.

Concurrence: It was error to admit testimony, but error was not prejudicial.

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State v. Reber, ___ N.C. App. ___ (2023), p. 17

Trial court erred, in child sex case, in admitting evidence of defendant’s text messages with a previous adult girlfriend. No similarity in circumstances (other than sexual intercourse) and evidence was highly prejudicial.

Dissent: D did not meet burden to show verdict probably would have been different without this evidence.

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State v. McKoy, ___ N.C. ___ (2023), p. 20

Father of shooting victim testified that victim was “always a happy guy.”

Defense counsel sought to question father about whether he had seen photographs on the victim’s phone of the victim holding guns and text messages referencing violence.

Permissible?

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State v. McKoy, ___ N.C. ___ (2023), p. 20

The party appealing a trial court’s decision to admit or exclude otherwise irrelevant or inadmissible evidence under Rule 403 “faces a steep uphill climb.”

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Search and Seizure

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State v. Moua, ___ N.C. App. ___ (2023), p. 26

D stopped for speeding.
Officers tells D to get out of car, reaches into car,
unlocks and opens door.
At back of car officer hands documents back
Officers warns D not to speed.
Officer asks for consent to search.

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State v. Moua, ___ N.C. App. ___ (2023), p. 26

Was this a voluntary encounter or an
unlawfully extended stop?
Would a reasonable have felt free to leave?

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State v. Moua, ___ N.C. App. ___ (2023), p. 26

Return of documents not a bright line.
D removed from car on dark road in middle of night. Asked about probation status.
Reasonable person would not have felt free to leave.

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State v. Wright, ___ N.C. App. ___ (2023), p. 28

Officers stopped D based on informant tip.
Asked to search backpack.
D said yes, then said no.
Officers asked four more times. D said no.
Officer then asked D to open backpack.
D did so. Gun inside.

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