

# Juvenile Interrogation

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## CONTENTS

### Part I: Juvenile Rights Related to Custodial Interrogation . . . 1

- Miranda* Rights . . . 1
- Additional Statutory Right to Parent, Guardian, or Custodian Presence . . . 2
- Rights Apply to Everyone under Age 18 . . . 2
- Obligation to Electronically Record Interrogations in Places of Detention . . . 2

### Part II: What Constitutes a Custodial Interrogation of a Juvenile? . . . 3

- Custody . . . 4
  - Schoolhouse Custody Analysis* . . . 6
- Interrogation . . . 7
  - The Functional Equivalent of Express Questioning* . . . 7
  - Spontaneous Statements* . . . 8
  - Schoolhouse Interrogation Analysis* . . . 8

### Part III: Who Counts as a Guardian or Custodian? . . . 10

### Part IV: Juvenile Invocation and Waiver of Rights . . . 10

- Rights That Cannot Be Waived by Youth under Age 16 . . . 10
- Invocation of Rights . . . 11
  - Unambiguous Invocation Required* . . . 11
  - Questioning Must Stop if Juvenile Invokes Rights After Interrogation Begins* . . . 12
- Waiver of Rights . . . 12
  - Only the Juvenile Can Waive Their Rights* . . . 12
  - Waiver Must Be Knowing, Willing, and Understanding* . . . 13

The law that governs custodial interrogation of juveniles encompasses the Fifth Amendment privilege against self-incrimination as well as enhanced statutory protections contained in North Carolina’s Juvenile Code. This bulletin describes these rights, including their meaning, scope, and application in North Carolina appellate caselaw.

## Part I: Juvenile Rights Related to Custodial Interrogation

### *Miranda* Rights

The constitutional privilege against self-incrimination applies to juveniles.<sup>1</sup> Therefore, the legal framework that attaches to the custodial interrogation of adults under *Miranda v. Arizona*<sup>2</sup> also applies to the custodial interrogation of juveniles. In order to assess whether a juvenile

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1. *In re Gault*, 387 U.S. 1, 55 (1967); see also *In re K.D.L.*, 207 N.C. App. 453, 458 (2010).  
2. 384 U.S. 436 (1966).

was subjected to a custodial interrogation under the *Miranda* framework, one must determine whether the juvenile was (1) in custody and (2) subject to an interrogation. The meaning and application of these terms to juveniles are explored in Part II of this bulletin.

### **Additional Statutory Right to Parent, Guardian, or Custodian Presence**

Section 2101(a) of Chapter 7B of the North Carolina General Statutes (hereinafter G.S.) codifies these constitutional protections and adds the right for a juvenile to have a parent, guardian, or custodian present during questioning. G.S. 7B-2101(a) states that any juvenile in custody must be advised of the following rights prior to questioning:

1. that the juvenile has a right to remain silent;
2. that any statement the juvenile does make may be used against the juvenile;
3. that the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
4. that the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

### **Rights Apply to Everyone under Age 18**

The rights afforded to juveniles under G.S. 7B-2101 are part of Subchapter II of Chapter 7B of the General Statutes. Generally, the statutes in that section of the Juvenile Code apply only to undisciplined and delinquency matters. However, the North Carolina Supreme Court held that the rights contained in G.S. 7B-2101 apply to all youth under the age of 18, regardless of whether the matter falls under the original jurisdiction of the juvenile court or the criminal court.<sup>3</sup> This was a significant ruling when it was issued, since at that time all offenses committed at ages 16 and 17 were under the original jurisdiction of the criminal court.

Beginning on December 1, 2019, nearly all offenses alleged to have been committed at ages 16 and 17 were shifted to the original jurisdiction of the juvenile court.<sup>4</sup> However, original criminal jurisdiction remains in place for G.S. Chapter 20 offenses (motor vehicle offenses) committed at ages 16 and 17 and for any juvenile who has a previous qualifying conviction in criminal court and who subsequently commits any new offense after that conviction. All prior criminal convictions are considered qualifying convictions for purposes of preventing original juvenile jurisdiction, except misdemeanors or infractions under G.S. Chapter 20 that do not involve impaired driving.<sup>5</sup> The enhanced interrogation rights for juveniles found in G.S. 7B-2101 continue to apply in these matters even though they are not subject to juvenile jurisdiction.

### **Obligation to Electronically Record Interrogations in Places of Detention**

The North Carolina Criminal Procedure Act contains a provision that mandates electronic recording of all custodial interrogations of juveniles in criminal investigations conducted at any *place of detention*.<sup>6</sup>

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3. State v. Fincher, 309 N.C. 1 (1983).

4. S.L. 2017-57, §§ 16D.4.(a)–(tt).

5. G.S. 7B-1501(7)b., -1604(b).

6. G.S. 15A-211(b); *see also id.* § 15A-211(c)(3) (defining “place of detention” as “a jail, police . . . station, correctional or detention facility, holding facility for prisoners, or other facility where persons are held in custody in connection with criminal charges”).

A plain reading of the statute indicates that (1) custodial interrogations of juveniles who are subject to criminal prosecution (2) that take place in criminal detention settings (3) must be electronically recorded.

A question remains regarding whether the mandatory electronic recording requirement in the Criminal Procedure Act applies to interrogations occurring during investigations of all offenses involving juvenile suspects or only those offenses that can result in criminal prosecution. Some have suggested that the statute likely means that custodial interrogation of all juveniles—including those subject to juvenile jurisdiction for allegations of delinquency who are interrogated in places of detention—must be electronically recorded.<sup>7</sup> This question has never been addressed by the North Carolina appellate courts.

Because the statute states that it applies “to all custodial interrogations of juveniles in criminal investigations conducted at any place of detention,”<sup>8</sup> it appears clear that the mandate applies at least to juvenile cases that could result in criminal prosecution. This includes any felony offenses committed by a juvenile at age 13 or older as well as any G.S. Chapter 20 offenses committed by a 16- or 17-year-old youth.<sup>9</sup>

Whether or not the obligation to electronically record all custodial interrogations applies to juveniles when their cases could not result in transfer to criminal court also remains an open question. However, the exact charges in a matter may not be clear to law enforcement prior to the custodial interrogation of a juvenile. A case that appears to involve only lower-level misdemeanor charges may not remain that way following a more complete investigation. Given the evolving nature of charges during the investigatory stage, the most prudent practice would be to electronically record all custodial interrogations of youth under 18 in places of detention.

## Part II: What Constitutes a Custodial Interrogation of a Juvenile?

The rights contained in G.S. 7B-2101 apply only when a juvenile is subjected to a custodial interrogation.<sup>10</sup> The analysis of whether a juvenile is being questioned as part of a custodial interrogation requires an assessment of whether the juvenile is in custody and, if so, whether the questioning amounted to an interrogation.

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7. See generally Janet Mason, *2011 Legislation Enacted: Juvenile Law*, “Abuse, Neglect, Dependency, and Termination of Parental Rights” 5 (UNC School of Government, Oct. 2011), [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course\\_materials/Mason%20Juvenile%20Legislation\\_0.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Mason%20Juvenile%20Legislation_0.pdf) (noting that most other statutes in G.S. Chapter 15A do not use the term “juvenile” but instead refer to a defendant’s age range, making it “possible, if not likely, that the intent was to make the recording of custodial interrogations mandatory when an investigation involves an offense committed before a juvenile reaches age 16—that is, to delinquency cases, not criminal cases involving young people”).

8. G.S. 15A-211(b).

9. See G.S. 7B-1501(7), -2200, -2200.5.

10. *State v. Gaines*, 345 N.C. 647, 661, *cert. denied*, 522 U.S. 900 (1997).

## Custody

The first question to ask is whether the juvenile is in custody.<sup>11</sup> That determination is based on an objective assessment of whether, given the totality of the circumstances, there was a formal arrest or a restraint on the juvenile's freedom of movement to the degree associated with a formal arrest.<sup>12</sup> This is the same standard used for the determination of whether an adult is in custody.

However, the custody analysis for a juvenile differs from the custody analysis for an adult in one significant way. The adult analysis requires an objective assessment of how a reasonable person in the suspect's situation would assess their freedom to terminate the encounter.<sup>13</sup> The juvenile analysis requires the child's age, if it was known or would have been objectively apparent to a reasonable officer, to be included in the objective custody analysis.<sup>14</sup> The analysis is based on how a reasonable child who is the age of the juvenile would feel in the situation and not how a reasonable adult would feel.<sup>15</sup>

North Carolina's appellate courts have held that there are many factors to consider when determining whether a juvenile is in custody during questioning. Those factors include

- whether the juvenile is told they are under arrest or free to leave,
- the location of the questioning,
- the voluntary nature of the juvenile's participation in questioning,
- the length of questioning,
- whether the juvenile is offered breaks, and
- the presence of uniformed officers and their weapons.

The following circumstances were found not to have been custodial:

- Questioning by a detective in the juvenile's home and in the presence of his mother and brother. The detective prefaced the interview by telling the juvenile that he did not have to talk with her and that she was not going to arrest him or take him with her. Proceedings had not been initiated, and the purpose of the visit was solely to investigate allegations.<sup>16</sup>
- Questioning of a 16-year-old by two unarmed, plain-clothes officers in a comfortably furnished office. The juvenile voluntarily went with the investigators for questioning and was told that he was not under arrest, did not have to talk to the investigators, and was free

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11. *In re Butts*, 157 N.C. App. 609, 612 (2003).

12. *Gaines*, 345 N.C. at 662.

13. *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004).

14. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

15. The court noted in *J.D.B.* that "[t]his is not to say that a child's age will be a determinative, or even a significant factor in every case. . . . It is, however, a reality that courts cannot simply ignore." 564 U.S. at 277 (citations omitted). For more analysis of the *J.D.B.* decision, see LaToya B. Powell, *Applying the Reasonable Child Standard to Juvenile Interrogations After J.D.B. v. North Carolina*, JUV. L. BULL. No. 2016/01 (UNC School of Government, Feb. 2016), [https://www.sog.unc.edu/sites/default/files/reports/2016-02-24\\_20160045\\_Reasonable%20Child%20Standard.pdf](https://www.sog.unc.edu/sites/default/files/reports/2016-02-24_20160045_Reasonable%20Child%20Standard.pdf).

16. *In re Hodge*, 153 N.C. App. 102 (2002). This case was decided before *J.D.B.* was decided. Therefore, the objective standard applied was a reasonable person standard and not a reasonable child standard.

to leave at any time. The juvenile was offered bathroom breaks, was left unattended in the office when the interviewing officers took a break, and was not shackled or handcuffed. No threats or promises were made, and no pressure was exerted during the interview.<sup>17</sup>

- Questioning of a 17-year-old who confessed to two plain-clothes detectives in their unmarked car after voluntarily agreeing to ride with them to discuss several breaking and entering cases. The juvenile voluntarily spoke with the detectives, was told that he was free to leave the vehicle at any time, sat in the front seat, and the encounter lasted under two hours. The juvenile was 17 years and 10 months old, and his proximity to age 18 was taken into consideration as part of the custody analysis.<sup>18</sup>
- Questioning of a 13-year-old found walking briskly away from the scene of a car crash. A responding officer questioned the juvenile at the scene. There was no evidence that the juvenile was subjected to even a minimal amount of restraint on his freedom of movement or ability to act as he chose. The court noted that an officer may ask a moderate number of questions during a routine traffic stop to determine identity and obtain information confirming or dispelling the officer's suspicions without requiring *Miranda* warnings.<sup>19</sup>
- Questioning of a 14-year-old, by two armed officers, 10 feet outside of the juvenile's home after the juvenile's parents told him to cooperate with the officers. The juvenile was asked to step outside and was not subjected to formal restraint. All three people stood at arm's length and one of the officers wore plain clothes. The conversation took place in the juvenile's yard during daylight and his parents were nearby. Questioning lasted about five minutes. There was no indication of any coercion, no indicia of formal arrest, and the parents were not acting as agents of law enforcement.<sup>20</sup>

The North Carolina Court of Appeals has tended to find that juveniles are in custody when questioning occurs in an interview room of a law enforcement office and when the juvenile has been formally taken into custody. For example, juveniles were found to have been in custody in the following circumstances:

- Questioning of a 17-year-old in an interview room at a jail when the juvenile was incarcerated at the jail on other charges.<sup>21</sup>
- Questioning of a 15-year-old in an interview room at a sheriff's department after law enforcement called to request that the juvenile's family come to the sheriff's office and the family complied.<sup>22</sup>
- Questioning of a 16-year-old at a sheriff's department after he was taken into custody at his home, handcuffed by an officer, and transported to the sheriff's department by the officer.<sup>23</sup>

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17. *State v. Jones*, 153 N.C. App. 358 (2002). This case was decided before *J.D.B.* was decided. Therefore, the objective standard applied was a reasonable person standard and not a reasonable child standard.

18. *State v. Yancey*, 221 N.C. App. 397 (2012).

19. *In re A.N.C., Jr.*, 225 N.C. App. 315 (2013).

20. *In re D.A.C.*, 225 N.C. App. 547 (2013).

21. *State v. Williams*, 209 N.C. App. 441 (2011). The parties in this case agreed, and the court noted that the evidence supported, that the juvenile was already in custody at the jail when he was brought into the interview room. *But see* *Howes v. Fields*, 565 U.S. 499 (2012) (holding that there is no categorical rule that a person is in custody when that person is a prisoner who has been removed from the prison's general population and questioned about events that occurred outside of the prison).

22. *In re M.L.T.H.*, 200 N.C. App. 476 (2009).

23. *State v. Branham*, 153 N.C. App. 91 (2002).

- Questioning of a 16-year-old at a police station after he was arrested on a city bus, taken to the station, handcuffed, and shackled to the floor.<sup>24</sup>
- Placing a juvenile in the back seat of a patrol car after putting her in investigative detention and handcuffing her.<sup>25</sup>

### ***Schoolhouse Custody Analysis***

The custody analysis regarding questioning that occurs at school can become complicated, especially when questioning occurs in the presence of school administrators as well as law enforcement officers. It is clear that questioning done only in the presence of a school administrator who is not acting as an agent of law enforcement is never custodial.<sup>26</sup> However, when law enforcement and school administrators are both involved in questioning, the circumstances may rise to the level of custody. This is true even when the officer does not participate in asking the questions.<sup>27</sup>

The North Carolina Court of Appeals provided the following seven factors that are most relevant in determining whether a juvenile is in custody during an interview that occurs at school:<sup>28</sup>

1. Traditional indicia of arrest. Use of handcuffs, transport in a police car, search of a student or their belongings, and use of other bodily restraints are strong indications that the student was in custody.
2. Location of the interview. A location that a reasonable child might consider confining tends to show that the student was in custody. The size of the room, whether the door was closed or locked, and the student's familiarity with the location are also relevant considerations.
3. Interview length. Long, drawn-out questioning tends to show that a student was in custody, while very brief questioning does not. Whether the student was offered a place to sit and common courtesies like bathroom breaks, food, and water is also relevant.
4. Age. The younger the student, the more sensitive they will be to circumstances that could be coercive.
5. What a student is told about the interview. Telling the student that they are free to leave and are not required to answer questions or offering them the opportunity to call a parent or guardian tends to reflect that the student is not in custody. Failing to tell the student about the nature of the interview or whether they must stay or are free to leave weighs in favor of the student being in custody. Expressly telling a student that they cannot leave renders the encounter custodial.
6. People present during the interview. Custody tends to be shown when questioning occurs in the presence of multiple law enforcement officers, or even by numerous school officials. The presence of a parent, guardian, or other advocate for a student weighs against custody.
7. Purpose of questioning. Questioning that is the result of and is conducted in the investigation of specific criminal suspicion toward a student tends to show custody. Questioning done with a school disciplinary purpose and that is unlikely to involve the

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24. *State v. Watson*, 250 N.C. App. 173 (2016).

25. *In re L.I.*, 205 N.C. App. 155 (2010).

26. *In re Phillips*, 128 N.C. App. 732 (1998), *In re D.A.H.*, 277 N.C. App. 16, 28 (2021).

27. *D.A.H.*, 277 N.C. App. at 29.

28. *Id.* at 30.



justice system is not considered custody. Purpose can be revealed by the degree and nature of cooperation between school officials and law enforcement (including school resource officers).

The court used these factors to hold that the juvenile in *In re D.A.H.* was in custody when he was questioned at school. The court emphasized that the juvenile came to school knowing that his peer had been caught with marijuana sold to him by the juvenile, that the juvenile had been so worried about it that he had not attended school for the previous two days, and that he knew he was in trouble.<sup>29</sup> The court also noted that the two authority figures involved in this case (the school principal and a school resource officer) sat next to one another and opposite the juvenile, that the officer was in uniform, and that the interview appeared to be for the purpose of a criminal investigation and not a mere school disciplinary matter.<sup>30</sup> Finally, the court emphasized that the juvenile was not told that he was free to leave, that he did not have to answer questions, or that he could call his guardian.<sup>31</sup>

### Interrogation

If a juvenile is in custody, then it is essential to determine if the questioning of that juvenile amounts to interrogation. The law that governs whether questioning of an adult constitutes interrogation applies in the same way to juveniles. Interrogation includes express questioning as well as words or actions by law enforcement that they should have known were reasonably likely to elicit an incriminating response—known as the *functional equivalent* of express questioning.<sup>32</sup>

#### *The Functional Equivalent of Express Questioning*

Several factors are relevant to the determination of whether a law enforcement officer should have known that their words or actions were reasonably likely to elicit an incriminating response, including

1. the intent of the officer,
2. whether the practice was designed to elicit an incriminating response, and
3. knowledge that the officer may have had regarding the juvenile's unusual susceptibility to a specific form of persuasion.<sup>33</sup>

The Supreme Court of North Carolina held in *State v. Smith* that a juvenile can be subjected to the functional equivalent of questioning even when few express questions are asked of the juvenile.<sup>34</sup> The 16-year-old juvenile in this case was picked up by law enforcement at his home, brought to the police station, and placed in the police chief's office for questioning. The juvenile was read his *Miranda* rights on the way to the police station and again in the police chief's office. He requested his mother's presence after he was read his rights the second time. Officers then began to look for his mother. After about fifteen or twenty minutes, an officer returned to the room, asked the juvenile not to speak, and told him he wanted to tell him some things about the statement of another suspect. The police chief also entered the room and asked the

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29. *Id.* at 36.

30. *Id.*

31. *Id.*

32. *In re L.I.*, 205 N.C. App. 155, 160 (2010).

33. *Id.* at 160–61.

34. 317 N.C. 100, 108 (1986), *abrogated on other grounds by* *State v. Buchanan*, 353 N.C. 332 (2001).

juvenile if he wanted to straighten it out. The officer informed the juvenile that (1) another suspect stated that the juvenile was primarily responsible for the injuries to the victim and that he would testify against the juvenile at trial, (2) the alleged crimes were serious and could result in murder charges if the victim died, and (3) the trial court could consider a confession a mitigating circumstance. The court held that these statements, while not direct questions posed to the juvenile, constituted behavior that the officer should have known was likely to elicit a response from the juvenile. The court emphasized that the conversation focused on the juvenile's participation in, and the serious nature of, the crimes.

The North Carolina Court of Appeals held that a juvenile was subjected to the functional equivalent of questioning when an officer placed a juvenile in his car in investigative detention following a roadside stop, asked her where the marijuana was that he knew she had, and told the juvenile that he was taking her downtown and that if she took drugs into the jail, it would be an additional charge.<sup>35</sup> In holding that these circumstances constituted interrogation, the court relied on the officer's testimony that his objective purpose was to obtain the juvenile's admission that she possessed marijuana. The court concluded that the officer knew or should have known that his statement to the juvenile was reasonably likely to elicit an incriminating response.

### ***Spontaneous Statements***

Spontaneous statements made by a juvenile are not protected by the Fifth Amendment and are therefore admissible when *Miranda* warnings are not provided and when the statements are made without a parent, guardian, custodian, or attorney being present. The North Carolina Court of Appeals applied this rule in *In re D.L.D.*<sup>36</sup> There, an officer saw the juvenile put something in his pants in a school bathroom, frisked him, and found individually wrapped bags of a green leafy material in a container on his person. After the officer handcuffed the juvenile and escorted him to a conference room, the school's assistant principal, who had accompanied the officer to the bathroom, spoke with the juvenile. No one informed the juvenile of his rights. The officer did not ask any questions and more fully searched the juvenile, finding \$59 in his pocket. The juvenile immediately stated that the money "was not from selling drugs."<sup>37</sup> Although the totality of the circumstances suggested that the juvenile was in custody, the juvenile's statement was not provoked by questioning or the functional equivalent of questioning. The court therefore held that this statement was admissible because it was unsolicited and spontaneous.

### ***Schoolhouse Interrogation Analysis***

Much like the custody analysis, the interrogation analysis in the context of the schoolhouse can be complicated. Questioning at school often involves both school personnel and law enforcement (who may or may not be a school resource officer). When law enforcement officers are present and the juvenile is in custody, it is possible that questioning by administrators can rise to the level of interrogation, even when the law enforcement officer does not ask any questions.

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35. *L.I.*, 205 N.C. App. 155.

36. 203 N.C. App. 434 (2010).

37. *Id.* at 443.



The North Carolina Court of Appeals highlighted the following factors as most relevant to the analysis of whether questioning at school constitutes an interrogation:<sup>38</sup>

1. The nature of the questions asked. Mostly open-ended questioning is less likely to constitute interrogation than is questioning presented in the context of imperative statements that suggest mandatory compliance. The tone of voice, volume, and body language of the person asking the questions is also relevant. The court cited a case holding that questioning did not constitute custodial interrogation when the conversation was calm and cordial in tone and the detectives involved offered the suspect food or drink.<sup>39</sup>
2. The willingness of the juvenile's responses. As discussed above, a wholly unsolicited or spontaneous statement does not constitute interrogation. Situations in which a juvenile is reluctant or hesitant to answer, claims ignorance, or must be coaxed into answering are more likely to be considered interrogation.
3. The extent of school resource officer involvement. Situations in which both a school resource officer and a school official are present can rise to the level of interrogation, even when the officer does not ask any questions. An officer's absence during parts of the questioning can weigh against the questioning being an interrogation. Law enforcement direction of or heavy participation in the questioning weighs in support of the questioning being an interrogation.

The court applied these factors in *In re D.A.H.* to determine that the questioning of a 13-year-old by a school principal, while the school's resource officer sat beside the principal and observed, constituted an interrogation. The court emphasized that the juvenile was asked multiple questions before his guardian was notified and that the questions were intended to elicit a confession.<sup>40</sup> The court also pointed to the differential treatment that the juvenile received compared to a peer who was found in possession of the marijuana that the questioned juvenile was suspected of providing. The father of this peer was contacted immediately. The peer asked if he could speak freely, and the resource officer told him to wait until his father arrived. In contrast, the juvenile's guardian was not called until after he confessed, and he was never advised not to answer questions. The court found that these facts weighed heavily toward the criminal purpose of the interview.<sup>41</sup> The court also discussed how the resource officer's intimate involvement in the investigation from its outset made him an officer investigating a crime while he was present for the questioning, rather than a mere observer of a school disciplinary conversation.<sup>42</sup>

If, given the totality of the circumstances, questioning rises to the level of a custodial interrogation, then all the rights set out in G.S. 7B-2101 apply to everyone under the age of 18.

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38. *In re D.A.H.*, 277 N.C. App. 16 (2021).

39. *Id.* at 34 (citing *State v. Hammonds*, 370 N.C. 158, 164 (2017)).

40. *Id.* at 37.

41. *Id.* at 38.

42. *Id.*

### Part III: Who Counts as a Guardian or Custodian?

Because G.S. 7B-2101(a) gives all minors the right to have a parent, guardian, or custodian present during a custodial interrogation, it is essential to understand who qualifies as a guardian or custodian under this statute. Only people who have established a legal relationship with the child are considered guardians and custodians for purposes of this statute.<sup>43</sup> North Carolina's appellate courts have held that adults who have a relationship with the juvenile, and who may even have enrolled the child in school, do not count as a guardian or custodian for purposes of this statute if they have not established a relationship with the child through a legal process. Consider the following examples:

- A 16-year-old asked to call his aunt before making a statement. The juvenile occasionally stayed with the aunt, and she testified that she was a mother figure to him. The court held that the juvenile did not have a right to the aunt's presence during custodial interrogation because she had no legal relationship to the juvenile and therefore did not qualify as a guardian or custodian under the statute.<sup>44</sup>
- An uncle, who had been housing his 13-year-old nephew for a year and a half, was the child's sole support, had enrolled the child in school, and was considered by the Department of Health to be the child's guardian, was found not to be the child's guardian or custodian under the statute because he and the child never had any legal relationship established through a court proceeding.<sup>45</sup> The juvenile in this case had no parent, guardian, or custodian who lived in the United States.

Because a sibling is not a parent, guardian, or custodian, juveniles do not have a right to have a sibling present during interrogation. In addition, the presence of a sibling will not fulfill the statutory requirement of the presence of a parent, guardian, custodian, or attorney.<sup>46</sup>

### Part IV: Juvenile Invocation and Waiver of Rights

Juveniles must be advised of their rights under G.S. 7B-2101 prior to any custodial interrogation. In most circumstances, it is then up to the juvenile to determine whether they want to invoke or waive their rights. For instance, juveniles always have the discretion to waive their right to remain silent. However, as described below, the right to the presence of a parent, guardian, custodian, or attorney cannot be waived by juveniles under the age of 16.

#### Rights That Cannot Be Waived by Youth under Age 16

The Juvenile Code provides that in-custody admissions or confessions made by juveniles who are under the age of 16 are never admissible into evidence unless the juvenile's parent, guardian, or custodian or an attorney is present at the time the admission or confession is made.<sup>47</sup> A juvenile under the age of 16 therefore cannot waive their right to have either (1) a parent, guardian, custodian or (2) an attorney present during a custodial interrogation. Because the relevant

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43. State v. Oglesby, 361 N.C. 550 (2007).

44. *Id.*

45. State v. Benitez (*Benitez I*), 258 N.C. App. 491 (2018).

46. *In re M.L.T.H.*, 200 N.C. App. 476 (2009).

47. G.S. 7B-2101(b).

statute refers to either a parent, guardian, or custodian or an attorney, otherwise admissible statements made by juveniles under 16 are admissible when their attorney is present and the parent, guardian, or custodian is not and when the parent, guardian, or custodian is present and an attorney is not.

Practical barriers sometimes arise when a parent, guardian, or custodian cannot possibly be present for a custodial interrogation of a juvenile, as occurred in *State v. Benitez*, referenced in the last bulleted item in Part III, above. In that case, the juvenile's parents did not live in the United States and no legal guardian or custodian had been established by court order. There are two potential ways that a custodial interrogation could be lawfully conducted under these circumstances, depending on the age of the juvenile.

1. A juvenile who is age 16 or 17 can execute a valid waiver of the right to have a parent present.
2. A juvenile under the age of 16 can execute a valid waiver of the right to have a parent present and the custodial interrogation can continue only if an attorney is present.

There is no legal path to continue with a custodial interrogation of a juvenile if the juvenile does not waive their right to the presence of a parent, guardian, or custodian and if the parent, guardian, or custodian cannot be present.

## Invocation of Rights

### *Unambiguous Invocation Required*

If a juvenile is fully advised of their rights and subsequently answers questions without clearly invoking their rights, that will be deemed a waiver of the juvenile's rights.<sup>48</sup> The issue of the invocation of the right to parental presence during a custodial interrogation of a 16-year-old was central to the ruling in *State v. Saldierna (Saldierna I)*.<sup>49</sup> The juvenile in this case was interrogated at a police station. A law enforcement officer provided him English and Spanish versions of a juvenile waiver-of-rights form, read the rights on the form to him, and paused after each right was read aloud to ask if he understood. The juvenile initialed each right on the English form. Next to the waiver of the right to have a parent present, the words "I do wish to answer questions now" was circled and the juvenile signed the form. The officer noted the time and date for the audio recording and then the juvenile asked to call his mother. He was allowed to place the call and reached someone other than his mother. Questioning resumed when he returned from placing his call and he confessed.

To answer the question of whether the juvenile in this case invoked his right to have a parent present, the court applied the objective test for a defendant's invocation of the right to counsel—whether a reasonable officer under the circumstances would have understood the defendant's statement to be an invocation of their right to have an attorney present.<sup>50</sup> The court held that the juvenile did not clearly and unambiguously invoke his right to have a parent present because

- he never gave any indication that he wanted his mother present;
- he did not condition his interview on first speaking with his mother;

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48. The need for a juvenile to invoke their rights applies only to rights that the juvenile can waive. Because a juvenile under the age of 16 must have a parent, guardian, or custodian or an attorney present during a custodial interrogation, this right does not need to be invoked.

49. 369 N.C. 401 (2016).

50. *Id.* at 407 (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)).

- his purpose for making the telephone call was never established; and
- he did not articulate his desire to have a parent present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for a parent, especially given that he had just signed a waiver-of-rights form.<sup>51</sup>

The court also held that law enforcement did not have a duty to ask clarifying questions or to stop questioning, given the ambiguous nature of the youth's request to call his mother.<sup>52</sup>

In addition, mistakenly indicating on a juvenile rights waiver form that a parent is present does not constitute invocation of the right to have a parent present when the juvenile being questioned never made a statement invoking this right.<sup>53</sup>

#### ***Questioning Must Stop if Juvenile Invokes Rights After Interrogation Begins***

According to G.S. 7B-2101(c), questioning of a juvenile must stop if the juvenile indicates in any manner and at any stage of the interrogation that they do not want to be questioned further. This includes any statement made by a juvenile, after interrogation begins, that they would like to have a parent, guardian, or custodian present. Once the juvenile requests the presence of their parent, questioning must stop and cannot resume until the parent is present or the juvenile initiates further communication.<sup>54</sup>

#### **Waiver of Rights**

##### ***Only the Juvenile Can Waive Their Rights***

G.S. 7B-2101(b) states that “a parent, guardian, or custodian may not waive any right on behalf of the juvenile.” Therefore, none of the rights that a juvenile has during a custodial interrogation can be waived by anyone other than the juvenile.

This is true even when the juvenile is very young. The first appellate court decision upholding this statute involved a 10-year-old who was adjudicated delinquent for unlawfully and willfully taking and carrying away toys from a department store.<sup>55</sup> The court held that the juvenile's mother could not waive any of the rights that the juvenile had during the interrogation, including the right against self-incrimination.<sup>56</sup>

A parent's refusal to be present after a juvenile invokes their right to have their parent present during interrogation does not constitute waiver of parental presence on the part of the juvenile. This is true when a parent refuses to enter the interrogation room<sup>57</sup> and when a parent leaves the interrogation room before the interrogation is over.<sup>58</sup> The juvenile is the only person who can waive their right to have a parent present, regardless of the parent's willingness to be part of the interrogation.

51. *Id.* at 408–09.

52. *Id.* at 409.

53. *State v. Watson*, 250 N.C. App. 173 (2016).

54. *State v. Hunt*, 64 N.C. App. 81 (1983), *State v. Smith*, 317 N.C. 100 (1986). *See also State v. Branham*, 153 N.C. App. 91 (2002) (holding that the juvenile did not initiate further communication after he requested his mother's presence). *But see State v. Williams*, 209 N.C. App. 441 (2011) (holding that the juvenile did initiate the resumption of questioning without any further interrogation by law enforcement).

55. *In re Ewing*, 83 N.C. App. 535 (1986).

56. *Id.*

57. *Branham*, 153 N.C. App. 91.

58. *In re Butts*, 157 N.C. App. 609 (2003).

***Waiver Must Be Knowing, Willing, and Understanding***

Juveniles can waive any of their rights that attach during an interrogation, with the exception of the requirement that any juvenile age 15 or younger must have a parent, guardian, or custodian or an attorney present during any custodial interrogation.<sup>59</sup> In order for a waiver to be valid, it must be made knowingly, willingly, and understandingly.<sup>60</sup>

The U.S. Supreme Court held that the analysis of whether a juvenile's waiver is knowing and voluntary requires consideration of the totality of the circumstances, including

- the juvenile's age, experience, education, background, and intelligence and
- whether the juvenile has the capacity to understand
  - the warnings given,
  - the nature of the juvenile's Fifth Amendment rights, and
  - the consequences of waiving those rights.<sup>61</sup>

The Court applied those factors to its analysis of the interrogation of a 16-year-old who requested the presence of his probation officer. The Court held that the request for the probation officer was not tantamount to a request for an attorney and that the juvenile executed a knowing and voluntary waiver of his Fifth Amendment rights.<sup>62</sup> The Court emphasized that police took care to ensure that the juvenile understood his rights, that they fully explained to him that he was being questioned in connection with a murder, and that there was no indication that he did not understand what was said to him. The Court also emphasized that the juvenile clearly expressed his willingness to waive his Fifth Amendment rights and continue with the interrogation after he requested the presence of his probation officer and that there were no special factors to indicate that he was unable to understand the nature of his actions. Finally, the Court pointed to the juvenile's considerable experience with the justice system; that there was no indication he was of insufficient intelligence to understand his rights or the consequences of waiver; and that the questioning did not involve improper tactics that wore him down, lengthy questioning, or trickery or deceit.<sup>63</sup>

When the validity of a juvenile waiver is challenged, the State is required to show by a preponderance of the evidence that the waiver was knowingly and intelligently made, given the totality of the circumstances.<sup>64</sup> Expert testimony is not required to establish that the juvenile understood their rights.<sup>65</sup> Instead, the juvenile's understanding is a question of law to be decided by the trial court based on the evidence presented by both sides.<sup>66</sup>

An express written waiver of rights is strong proof that the waiver was valid. However, it is not necessarily sufficient evidence of a valid waiver on its own.<sup>67</sup> It is not possible for a juvenile to execute a valid waiver when the juvenile has not been fully informed of all of their rights, including the right to have a parent, guardian, or custodian present.<sup>68</sup> It is also not possible for

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59. See discussion *supra* "Rights That Cannot Be Waived by Youth under Age 16."

60. G.S. 7B-2101(d).

61. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

62. *Id.* at 727.

63. *Id.* at 726–27.

64. *State v. Saldierna (Saldierna II)*, 371 N.C. 407, 422 (2018).

65. *State v. Benitez (Benitez II)*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 2022-NCCOA-261, § 15.

66. *Id.*

67. *Saldierna II*, 371 N.C. at 422.

68. *State v. Fincher*, 309 N.C. 1, 11 (1983).



a juvenile to execute a valid waiver when they have been erroneously informed of their rights. For example, signing a juvenile rights form that erroneously states that the juvenile could have a parent, guardian, custodian, or any other person present during questioning does not constitute a knowing, willing, and understanding waiver.<sup>69</sup>

North Carolina appellate courts have found knowing, willing, and understanding waivers in the following circumstances.

- A 17-year-old signed a form with the adult *Miranda* warnings on it. A law enforcement officer handwrote “do you wish to answer questions without your parents/parent present” on the form. The juvenile stated that he wanted his mother present, and questioning stopped until the mother arrived. After again being advised of his rights, again stating that he wanted his mother there, and acknowledging that she was now present, the juvenile signed the form. During the ensuing questioning, the officer told the juvenile that he knew he was lying because his mother told officers something different about where he had been. The juvenile began to look uncomfortable, and the officer asked him if he wanted his mother to step out of the room. The juvenile said that his mother might as well leave, and she moved to a bench outside the door of the interrogation room. The door remained open, the juvenile could see his mother if he leaned forward, and he heard officers tell his mother that she could come back into the room whenever she wanted. The juvenile then confessed. The court held that this was a knowing and intelligent waiver of the juvenile’s right to have his mother present because (1) he understood his rights, (2) he knew what he was doing when he said she could leave, and (3) he knew where she was if he wanted her to return to the room.<sup>70</sup>
- A 16-year-old with a low IQ was interrogated by investigators in an office at the police department. The central holding in this case was that the juvenile was not in custody.<sup>71</sup> However, the court continued to discuss the validity of a waiver of rights by the juvenile, assuming, arguendo, that the juvenile was in custody. The juvenile was read his rights and indicated verbally and by writing his initials on a form that he understood them. The officer read the waiver portion of the form to the juvenile, who then stated that he understood and wanted to talk with officers. He then signed the waiver. After a two-hour interview he confessed. The court found that the circumstances did not result in the juvenile’s will being overborne or in critical impairment of his capacity for self-determination. While there was conflicting evidence regarding the juvenile’s true mental capacity, the defendant’s own expert testified that the juvenile’s verbal and performance IQ scores placed him two points above the threshold for mental retardation and that his full-scale IQ was one point below that threshold. The court found that there was ample evidence that the juvenile knowingly and intelligently waived his rights. There was also no evidence that the juvenile was mistreated or coerced by the police in any way.<sup>72</sup>
- A 16-year-old was provided a juvenile rights waiver form in English and in Spanish, was advised of his rights in English, and signed the English waiver form. The transcript from the juvenile’s trial on charges related to breaking or entering indicated that, in all but two instances, the juvenile affirmatively responded when asked that he understood each right

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69. *In re M.L.T.H.*, 200 N.C. App. 476 (2009).

70. *State v. Miller*, 344 N.C. 658 (1996).

71. See *State v. Jones*, 153 N.C. App. 358 (2002), discussed in Part II of this bulletin, *supra* note 17.

72. *Jones*, 153 N.C. App. 358.



of which he was advised. The remaining two responses were not audible. The detective who explained the rights to the juvenile testified that the juvenile understood English and that he understood his rights. There was no evidence that the juvenile ever expressed a lack of willingness to speak, that he was unable to communicate with officers, or that he sought to invoke his rights. There were also no allegations of coercive police conduct or improper interrogation techniques.<sup>73</sup>

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73. *Saldierna II*, 371 N.C. 407.



# Juvenile Law Related to the Investigation of Delinquent Acts

Jacquelyn Greene

## CONTENTS

<p><b>I. Search, Seizure, and Juveniles ... 2</b></p> <p>A. Youth and Fourth Amendment Excessive Force Analysis ... 2 <i>Excessive Force in Schools ... 4</i></p> <p>B. Search and Seizure in Schools: The Reasonableness Standard and Individualized Suspicion ... 6 <i>School Searches by School Personnel ... 6</i> <i>School Searches Involving Law Enforcement ... 7</i> <i>Strip Searches at School ... 11</i> <i>Student Cell Phone Searches ... 12</i> <i>Seizure of Students ... 14</i></p> <p><b>II. Nontestimonial Identification Orders in Juvenile Cases ... 18</b></p> <p>A. When is a Nontestimonial Identification Order (NTO) Required? ... 18 <i>The Procedure Must Be for Identification ... 19</i> <i>The Procedure Must Require the Presence of the Juvenile ... 19</i> <i>Almost All Nontestimonial Identification Procedures in Juvenile Cases Require a Court Order ... 20</i> <i>No Exception for Juveniles in Custody ... 20</i> <i>When Fingerprinting and Photographing Are Authorized without a Nontestimonial Identification Order ... 20</i></p>	<p>B. Procedure to Obtain a Nontestimonial Identification Order ... 21</p> <p>C. Willful Violation Is a Crime ... 22</p> <p><b>III. Impaired Driving Investigations ... 23</b></p> <p>A. Implied-Consent Procedures Do Not Apply in Delinquency Matters ... 23 <i>Alcohol Screening Tests ... 23</i> <i>Chemical Analysis ... 24</i></p> <p>B. Dispositions for Driving While Impaired Are Governed by the Juvenile Code ... 25</p> <p>C. DMV Notification and Impact on Driving Privileges ... 25</p> <p><b>IV. Juvenile Investigations and Confidentiality ... 25</b></p> <p>A. Law Enforcement Records ... 25</p> <p>B. School Notification ... 26 <i>When School Notification Is Authorized ... 26</i> <i>School Notification Procedure ... 27</i></p>
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Investigations of offenses that are subject to juvenile jurisdiction often require an understanding of both criminal law and juvenile law. Because juveniles have constitutional due process rights in the context of delinquency proceedings,<sup>1</sup> much of the criminal law related to search and seizure also applies in juvenile matters. In addition, juvenile law contains some legal requirements that are unique to juvenile investigations. This bulletin details several of these juvenile law requirements, including:

- components of search and seizure law that are unique to juveniles,
- nontestimonial identification orders,
- investigation of impaired driving when the suspect is under the age of 16, and
- confidentiality that applies to juvenile investigations.<sup>2</sup>

## I. Search, Seizure, and Juveniles

The Fourth Amendment's protection against unreasonable search and seizure applies in investigations that involve juveniles in largely the same way that it applies in criminal investigations of adults. The requirement for probable cause and the usual exceptions to that requirement, such as investigative stops based on the lesser standard of reasonable suspicion and searches incident to arrest, generally apply in investigations that involve juveniles.<sup>3</sup> However, there are two areas where juvenile involvement has meaningful impact in the law.

1. Youth is an important factor when evaluating the amount of force used during a seizure.
2. The law governing search and seizure in a school setting is unique, generally requiring only "reasonableness."

### A. Youth and Fourth Amendment Excessive Force Analysis

The Supreme Court of the United States established, in *Graham v. Connor*, that an analysis of whether an officer used excessive force during the seizure of a person requires the application of the objective reasonableness standard contained in the Fourth Amendment.<sup>4</sup> Reasonableness is determined by balancing the nature and quality of the intrusion on an individual's Fourth Amendment rights against the countervailing governmental interests.<sup>5</sup> The facts of each case must be weighed, including the severity of the crime, whether the suspect poses an immediate

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1. *In re Gault*, 387 U.S. 1 (1967).

2. Juveniles also have enhanced rights during a custodial interrogation. For an analysis of juvenile law that applies during a custodial interrogation, see Jacquelyn Greene, *Juvenile Interrogation*, JUV. L. BULL. No. 2022/02 (UNC School of Government, Sept. 2022), [https://www.sog.unc.edu/sites/default/files/reports/2022-09-22%2020220187%20JLB2022-02%20Interrogation\\_Greene.pdf](https://www.sog.unc.edu/sites/default/files/reports/2022-09-22%2020220187%20JLB2022-02%20Interrogation_Greene.pdf).

3. See *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (applying the body of law requiring reasonable suspicion for an investigative stop in holding that there was no reasonable and articulable suspicion of criminal activity). A complete summary of the law that applies to search and seizure in criminal investigations can be found in ROBERT L. FARB AND CHRISTOPHER TYNER, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* (UNC School of Government, 2021).

4. 490 U.S. 386, 388 (1989).

5. *Id.* at 396.

threat to safety, and whether the suspect is actively resisting or trying to evade arrest.<sup>6</sup> In addition, the reasonableness analysis must be based on the perspective of a reasonable officer at the scene and account for the reality that officers must often make quick decisions in circumstances that are tense, uncertain, and rapidly evolving.<sup>7</sup>

In applying this standard to seizures of children, several federal appellate courts, outside of the Fourth Circuit, have noted that **the young age of a child is an important factor to consider when determining objective reasonableness.**<sup>8</sup> The Seventh Circuit held that an officer holding a gun to the head of a nine-year-old, and threatening to pull the trigger, during a search of the child's home "was objectively unreasonable given the alleged absence of any danger to [the officer] or other officers at the scene and the fact that the victim, a child, was neither a suspect nor attempting to evade the officers or posing any other threat."<sup>9</sup> The court noted that the age of the child was among the most salient facts in the excessive force inquiry.<sup>10</sup>

The Fifth Circuit also held that a jury could find that an officer used objectively unreasonable force when he violently jerked a ten-year-old out of a chair by her arm and dragged her into another room.<sup>11</sup> The officer, who was at the girl's house to arrest her father for sexual abuse of his children, was trying to find out why she and her brother were not in school. He testified that he weighed close to 300 pounds and that there was never a need to use force against the child. The court emphasized the discrepancy between the size of the officer and the young age of the child in its analysis.<sup>12</sup> The court also found it significant that the child was not under arrest and did not pose a threat to anyone.<sup>13</sup>

The Ninth Circuit similarly held that age was a salient factor in the unreasonable detention of and use of force against an 11-year-old child.<sup>14</sup> This case also involved a child who was at home when law enforcement arrived to execute a search warrant and arrest his father. As twenty-three agents descended on the home, the child came out of the garage in bare feet. Confused, he started to run back to the house but then complied with law enforcement's command to turn around with his hands up. An officer had the child lie face down on the driveway, held a gun to his head, searched him, and handcuffed him. Then the officer pulled him up using the chain of the handcuffs, which was behind his back, and sat him on the sidewalk with his feet in the gutter until they removed the father from the house. Law enforcement then took off the child's handcuffs and sat him on a stool in the driveway while fifteen to twenty officers pointed their guns at him. The child was on the sidewalk for ten to fifteen minutes and on the stool for another fifteen to twenty minutes.

Applying the factors established in *Graham*, the court reasoned that the use of force was a substantial invasion of the child's personal security and there was minimal need for force. The court emphasized that the child was not the suspect, "[h]e was cooperative and unarmed, and most importantly, he was eleven years old."<sup>15</sup> The court held that a jury could find that the use

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6. *Id.*

7. *Id.* at 396–97.

8. There are no cases from the Fourth Circuit that address this issue.

9. McDonald by McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992).

10. *Id.* at 294.

11. Ikerd v. Blair, 101 F.3d 430 (5th Cir. 1996).

12. *Id.* at 435.

13. *Id.*

14. Tekle v. United States, 511 F.3d 839 (9th Cir. 2007).

15. *Id.* at 846.

of force was greater than what was reasonable under the circumstances and that a reasonable officer should have known there was no need to use a gun or handcuffs. The court also held that the detention was unreasonable, noting that a reasonable officer would have known that an unarmed 11-year-old child who was “barefoot, vastly outnumbered, and was not resisting arrest or attempting to flee should not have been kept in handcuffs for fifteen to twenty additional minutes.”<sup>16</sup>

Finally, the Third Circuit suggested that youth was a factor in its excessive force analysis in a case that involved three teenagers.<sup>17</sup> The analysis centered on the use of handcuffs and guns to detain a mother and her three teenage children, who happened to be approaching the home of her oldest son at the same time that officers were executing a drug raid there. Some officers ran into the apartment while others forced the mother and teenagers to the ground at gunpoint and handcuffed them. After the apartment was secured, the officers brought the mother and teens inside. The females were held in the kitchen and remained in handcuffs. A gun was pointed at the mother’s head. The teenage boy was searched in a bedroom, and he also remained in handcuffs during the search. The family was released after they were identified, and nothing was found in the search.

While the court held that the initial direction to get down and the length of detention (about twenty-five minutes total) were not unreasonable, it found that the use of handcuffs and guns was not justified under these circumstances. The court noted that law enforcement used these intrusive methods despite having no reason to feel threatened by the family and no fear that anyone would escape. The court emphasized the age of the children in coming to this conclusion, stating, “It was dusk but still daylight as Mrs. Baker, Corey and Jacquine, both age 17, and Tiffany, age 15, approached the apartment. Considering the facts in the light most favorable to the Bakers, the appearances were those of a family paying a social visit, and while it may have been a visit to a wayward son, there is simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used.”<sup>18</sup>

Though the legal standards applied in these cases are the same standards used to analyze claims of excessive force against adults, the fact that these cases involved youths was salient to each court’s analysis. There are some additional common themes that run throughout these cases: None of the children involved were suspected of any crime. In fact, they all just happened to be present at a time when law enforcement arrived to execute a warrant unrelated to them. None of the children resisted law enforcement, nor did any of them attempt to flee. It may therefore be especially important for law enforcement to exercise caution in using force against children who happen to be present at the execution of a search or arrest warrant, especially when those children are not suspected of committing any offense.

### ***Excessive Force in Schools***

Courts have applied the *Graham v. Connor* reasonableness analysis even when the use of force takes place in a school setting. In the Fourth Circuit, claims of excessive force by law enforcement in the school setting are analyzed under the reasonableness criteria established in *Graham v. Connor*,<sup>19</sup> described above. The Fourth Circuit applied those criteria in *E.W. by*

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16. *Id.* at 850.

17. *Baker v. Monroe Twp.*, 50 F.3d 1186 (3rd Cir. 1995).

18. *Id.* at 1193.

19. 490 U.S. 386, 388 (1989).



and through *T.W. v. Dolgos*.<sup>20</sup> E.W., a 10-year-old student, got into a fight with another student on the school bus on a Tuesday. The school contacted the sheriff on Friday about the fight. An officer went to the school, reviewed the video of the incident on the bus, and spoke with the other student who was involved. E.W. was then removed from her classroom and taken to a closed office with the officer and two school administrators. The officer spoke with E.W. about the incident and felt that E.W. did not seem to care about the fight or think it was significant. The officer placed E.W. in handcuffs for about two minutes, and E.W. cried and apologized. The officer then removed the handcuffs and released E.W. to her parents.

The officer asserted that she was concerned for her own physical safety and the safety of the administrators because of what she saw on the video of the school bus incident and because of E.W.'s apparent apathy. Analyzing the reasonableness of the use of force under the totality of the circumstances, the court held that the decision to handcuff E.W. was unreasonable. The court weighed several factors to support its conclusion, including that:

- the severity of the offense was tempered by the fact that the offense was at most a misdemeanor assault;
- the officer could not have believed that E.W. posed any immediate risk of harm since she did not make any threats or have any weapons. She was calm and compliant. She was a foot shorter and 60 pounds lighter than the officer. She was in a closed office, surrounded by the administrators and the officer, and posed little threat even if she did become aggressive. The incident had occurred several days prior to the use of handcuffs and there was no reason to believe it was anything other than an isolated incident. E.W. did not have any previous behavioral issues or involvement with law enforcement;
- there were no allegations that E.W. was resisting or attempting to evade arrest;
- E.W. was young. According to the court, “E.W. was only ten years old at the time of the arrest. She therefore falls squarely within the tender age range for which the use of handcuffs is excessive absent exceptional circumstances”,<sup>21</sup>
- the use of force occurred at school. The location weighs against reasonableness because “the use of handcuffs and force is not reasonably expected in the school context because it is counterproductive to the mission of schools and school personnel. For these reasons, the school setting—especially an elementary school—weighs against the reasonableness of using handcuffs”,<sup>22</sup> and
- the circumstances were not tense, uncertain, or rapidly evolving.

The court did find that the officer was entitled to qualified immunity because E.W.'s right to be free from the use of excessive force was not clearly established when the officer handcuffed her. The court emphasized that “our excessive force holding is clearly established for any future qualified immunity cases involving similar circumstances.”<sup>23</sup>

A child's level of resistance has been central to excessive force analyses conducted by other courts as well. In *C.B. v. City of Sonora*,<sup>24</sup> the court held that the case could proceed on the excessive force claim for using handcuffs on a calm and compliant 11-year-old student. The

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20. 884 F.3d 172 (4th Cir. 2018).

21. *Id.* at 182.

22. *Id.* at 184.

23. *Id.* at 187.

24. 769 F.3d 1005 (9th Cir. 2014).

court also held that keeping the student in handcuffs during a thirty-minute ride in a vehicle equipped with safety locks was also clearly unreasonable. However, in *J.I.W. by and through T.W. v. Dorminey*,<sup>25</sup> the court did not conclude that a school resource officer's use of force on a 13-year-old middle-school student, which broke the student's arm, violated a clearly established constitutional right. J.I.W. resisted the school staff who tried to calm him down. He also resisted the school resource officer (SRO) who attempted to escort him to the office. The SRO used increasingly forceful wristlock maneuvers, which J.I.W. resisted, and the two eventually went to the floor. The court held that, given the resistance of the student, every reasonable officer in those circumstances may not have believed that the use of force was unreasonable.

#### **B. Search and Seizure in Schools: The Reasonableness Standard and Individualized Suspicion**

The one aspect of search and seizure law where the legal standard is substantially different for juveniles than for adults is the search and seizure of students at school. **Generally, search and seizure of students in the school context can occur on the basis of reasonable suspicion alone** instead of probable cause.

##### *School Searches by School Personnel*

The United States Supreme Court initially established a reasonableness standard for searches conducted by school officials in a public-school setting in *New Jersey v. T.L.O.*<sup>26</sup> The student in *T.L.O.* was found smoking in the bathroom and a teacher brought her to the principal's office. After the student denied that she had been smoking, the vice principal demanded to see her purse. When he opened it, he discovered a pack of cigarettes and rolling papers. He searched the purse more thoroughly and found a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial amount of one-dollar bills, an index card with what appeared to be the names of other students who owed this student money, and two letters that implicated the student in marijuana dealing.

The Court held that public-school officials function as representatives of the state in carrying out a search and the Fourth Amendment's prohibition on unreasonable searches and seizures therefore applies. At the same time, the Court held that balancing the privacy interests of schoolchildren against the substantial need of school personnel to maintain order in schools does not result in a need for probable cause to conduct a search. Instead, **a twofold reasonableness test applies**. The search must be

- 1. justified at its inception and**
- 2. reasonably related in its scope to the circumstances that initially justified the interference.**<sup>27</sup>

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25. No. 21-12330, 2022 WL 17351654 (11th Cir. December 1, 2022).

26. 469 U.S. 325 (1985).

27. *Id.* at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). While the Court cited *Terry* in explaining the reasonableness standard, it is not completely clear whether the reasonableness standard established in *T.L.O.* is exactly the same as the reasonableness standard established in *Terry*. *T.L.O.* and its progeny place a strong emphasis on the uniqueness of the schoolhouse setting. How that factor relates to the reasonableness standard established in *Terry* is beyond the scope of this bulletin.)

The Court went on to explain that a search of a student by a school official is usually justified at its inception when there are **reasonable grounds for suspecting that the search will turn up evidence that the student has violated rules of the school or the law**. Such a search is “permissible in its scope when the **measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.**”<sup>28</sup> Applying this standard, the Court found that the initial search of the purse and the second, more thorough search were both reasonable.

The United States Supreme Court took up the question of the need for individualized suspicion to support a school search a decade later in the context of a school policy that required student athletes to comply with random urinalysis drug testing.<sup>29</sup> The Court relied on the special needs that exist in the school setting and the decision in *T.L.O.* to find that a warrant and probable cause requirement was not necessary in this situation. In analyzing the nature of the privacy interest of the students, the Court noted that students have a lesser expectation of privacy than the general population and that the public school’s power is “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”<sup>30</sup> The Court also found that the invasion of privacy required by the urinalysis was not significant.

The Court weighed this lower expectation of privacy and insignificant invasion of privacy against the nature and immediacy of the governmental interest and the efficacy of the random urinalysis policy for addressing that interest. The Court characterized the government’s interest in deterring drug use by children as “important—indeed, perhaps compelling.”<sup>31</sup> It reasoned that this governmental interest is magnified in the school context because the state has “undertaken a special responsibility of care and direction” of public schoolchildren.<sup>32</sup> The Court also noted that the policy was narrowly directed at student athletes—a group for whom risk of harm to themselves and their opponents was particularly high. Finally, the Court stated that the Fourth Amendment does not require the least intrusive search practicable. The Court held that the random urinalysis policy for student athletes was reasonable given the balance of interests. Individualized suspicion was not required.

The analysis in these two cases shaped the bedrock for analyzing the reasonableness of school searches under the Fourth Amendment. However, questions remained regarding the application of the reasonableness standard to searches conducted in schools by law enforcement. A series of North Carolina and federal cases have answered many of those questions.

### ***School Searches Involving Law Enforcement***

The North Carolina Court of Appeals has consistently applied the reasonableness standard established in *T.L.O.* to searches conducted by law enforcement officers who are acting in conjunction with school officials to maintain a safe educational environment. **The application of the reasonableness standard that began as a standard for school officials now includes**

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28. *Id.* at 342 (emphasis added).

29. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

30. *Id.* at 655.

31. *Id.* at 661.

32. *Id.* at 662.

**searches conducted by school resource officers (SROs) on their own, or at the direction of a school official, and in furtherance of well-established educational and safety goals.** The cases include:

- *In re Murray*.<sup>33</sup> The assistant principal of a middle school was notified by a student that Murray had something in his book bag that should not be there. The assistant principal found Murray alone in a room, and he initially denied that he had a book bag. However, when the assistant principal saw a red book bag near Murray and questioned him about it, Murray admitted the bag was his. The assistant principal took Murray to her office, where the student refused to consent to a search of the bag. The assistant principal then contacted the dean of students and the SRO, who came to the office. Murray tightened his grip on the bag when the assistant principal tried to take it from him. The SRO grabbed Murray, and after a brief struggle, he put Murray in handcuffs. The assistant principal opened the bag while Murray was in handcuffs and found a pellet gun. The SRO then removed the handcuffs and called Murray's father.

The court characterized this as a search by a school official. The SRO placed Murray in handcuffs so that the assistant principal could conduct the search, but he did not conduct the search himself nor did he conduct any other investigation. Applying the *T.L.O.* standard, the court held that the search was reasonable at its inception based on the tip from a classmate and Murray's initial lie about not having a book bag. The court also concluded that the search was reasonable in scope because it was confined to the bag. The use of handcuffs allowed the assistant principal to safely search the bag and helped the SRO control a potentially dangerous situation. In addition, the handcuffs were removed as soon as the pellet gun was found and any danger of disruption dissipated.

- *In re D.D.*<sup>34</sup> A substitute teacher warned the school principal that she'd overheard students discussing a fight that was going to occur on the campus (Hillside) at the end of the day. When the principal saw a group of four girls in the school parking lot just before dismissal, he gathered the SRO and two additional school security officers (who were off-duty police officers employed by the school). The group of law enforcement officers and the principal approached the girls. The officers were armed and in their uniforms. The principal asked the girls who they were and where they went to school. Only one of the students was a student at Hillside. The girls' behavior escalated, and they used vulgarities and tried to walk away. The officers told the girls to hold on. One of the officers searched the purse of one of the girls, and he found a box cutter. The girls were taken to the principal's office, and the principal told the officers that since he had information the girls were coming to fight, he believed he had reason to ask them what they had on their persons. The officers agreed and the principal asked the girls to empty their pockets. D.D., who was not a student at Hillside, took a knife from her pocket and placed it on the principal's desk. The principal and the officer made the decision to charge D.D.

The court first determined that it was appropriate to apply the *T.L.O.* standard to D.D., even though she was not a student at Hillside, since prohibiting the principal from taking further action because the student was enrolled in a different school would lead to an

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33. 136 N.C. App. 648 (2000).

34. 146 N.C. App. 309 (2001).

absurd result. The court also held that the *T.L.O.* standard should apply in this instance because the officers were acting in conjunction with the school official. The court looked to several factors in making this determination, including the following:

- The officer involvement was minimal relative to the actions of the principal.
- At most, the officers acted in conjunction with the principal to further his obligation to maintain a safe and educational environment and to report truants from other schools.
- None of the officers initiated any investigation and the officers were not directing the principal in an investigation to collect evidence of a crime.
- The principal requested the assistance of the officers.
- The officers telling the girls to “hold on” in the parking lot was not an unauthorized detention by the officers. It simply enabled the principal to further investigate his suspicions.
- There was no basis for thinking the principal’s action was a subterfuge to avoid the need for a warrant and probable cause requirements.
- This was not an effort to mask an investigation by outside officers.
- It was reasonable to infer that the duties of the SRO were to assist in maintaining a safe and proper educational environment and the principal testified that he understood this to be the role of all the officers involved.

In applying the *T.L.O.* reasonableness standard to the facts of this case, the court found that the principal had sufficient grounds to believe that taking further action would reveal a violation of school rules or of the law. This included the information he had about a pending fight; his knowledge, based on experience, that students often brought weapons to a fight; his obligation to confront anyone trespassing on campus and to report any students from other schools who were on campus; the evasive behavior and profane remarks of these particular students; and the weapon that was found on one of the girls in the parking lot. The court held that the search was not unnecessarily intrusive in light of the circumstances.

- *In re S.W.*<sup>35</sup> A high-school SRO smelled a strong odor of marijuana coming from S.W. The SRO asked two assistant principals and two unidentified students to go with him and S.W. to the school’s weight room. Once in the weight room, the SRO asked S.W. if he had anything on him. S.W. said no. The SRO then asked if S.W. would mind if the SRO searched him. S.W. said he did not mind, and the SRO conducted a pat-down search and asked S.W. to empty his pockets. S.W. produced a plastic bag containing ten small plastic bags of marijuana.

The court reasoned that the *T.L.O.* reasonableness standard applied to this SRO-initiated search because the SRO was assigned to the high school in a full-time capacity, assisted school officials with school-discipline matters and taught law-enforcement-related subjects, was present in school hallways during school hours, and was furthering the school’s education-related goals when he stopped S.W. The court distinguished this role from that of (1) a law enforcement officer, who works outside the school, conducting an investigation at the school or (2) an investigation of a non-school-related offense by someone internal to the school and at the behest of law enforcement external to the school. The court emphasized that employment as an SRO requires the SRO to help maintain a drug-free environment at the school.

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35. 171 N.C. App. 335 (2005).



In applying the *T.L.O.* reasonableness standard, the court found that the strong odor initially gave the SRO reasonable suspicion that S.W. possessed marijuana in violation of state law and school rules. In addition, the search was reasonably related to that initial suspicion and was not excessively intrusive in light of the age and gender of S.W. and the nature of the suspicion. Though the evidence suggested that S.W. consented to the search, the court held that the search could have been performed without S.W.'s consent.

- *In re D.L.D.*<sup>36</sup> A sheriff's officer assigned to Hillside High School and the assistant principal observed suspicious behavior outside a school bathroom via a camera. The officer had previously arrested more than a dozen suspects for drug activity in that bathroom. The officer and assistant principal went to check on the situation, and they saw one student standing outside the boys' bathroom and another standing outside the girls' bathroom. D.L.D. came out of the boys' bathroom with two other students. When D.L.D. saw the men, he ran back into the bathroom. The officer followed him and saw him put something in his pants. The assistant principal brought the other two students into the bathroom and the officer told the assistant principal what he'd seen. The assistant principal said they needed to check D.L.D., and the officer frisked him. The frisk revealed a BB gun pellet container holding three individually wrapped bags of green leafy material. The officer identified the contents of the bag as marijuana, handcuffed the juvenile, and took him to a conference room. The assistant principal said they needed to check D.L.D. to make sure he didn't have anything else on him. The officer then searched D.L.D. and found \$59 in his pockets.

The court explained that the *T.L.O.* reasonableness standard applies when (1) school officials initiate a search on their own, (2) law enforcement involvement is minimal, (3) law enforcement acts in conjunction with school officials, and (4) SROs conduct investigations on their own or at the direction of school officials and in furtherance of well-established educational and safety goals. According to the court, the facts of this case showed that the officer was working in conjunction with and at the direction of the assistant principal to maintain a safe and educational environment. The court explicitly noted that "keeping schools drug free is vital in maintaining a safe and educational environment."<sup>37</sup>

Applying the reasonableness standard, the court held that the behavior of the students justified the first search at its inception. Additionally, the scope of the frisk around the waistband was not unnecessarily intrusive given (1) the age and gender of the student, (2) his placement of something in his pants, and (3) the nature of the infraction. The court also held that the second search was reasonable and justified at its inception because the officer had already found drugs on D.L.D. The search was not excessively intrusive in light of the age and gender of the juvenile and the nature of the suspicion.

The Fourth Circuit addressed the need for individualized suspicion under the reasonableness standard in *DesRoches by DesRoches v. Caprio*.<sup>38</sup> This case involved an initial search of all of the backpacks left in a classroom after a pair of tennis shoes went missing during the lunch period. The school had a policy of imposing a ten-day suspension if any student refused to consent to a search. DesRoches, a student who refused to consent to the search of his backpack, was suspended for ten days. He alleged that the search was not constitutional because there was no individualized suspicion underlying the search.

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36. 203 N.C. App. 434 (2010).

37. *In re D.L.D.*, 203 N.C. App. 434, 439 (2010).

38. 156 F.3d 571 (4th Cir. 1998).



The court explained that the *T.L.O.* decision did not emphasize individualized suspicion as an essential element in school searches because it was easily found under the facts of that case. However, in order for a search to be reasonable, it must be based on individualized suspicion at the inception of the search or be justified by “special needs” beyond the normal need for law enforcement. The court held that the inception of the search of DesRoches’s backpack did not occur when the other backpacks in the classroom were searched. Instead, it occurred when DesRoches was punished for not consenting to the search, after being given three opportunities to consent. At that point, eighteen other bags had been searched, and the evidence suggested that only DesRoches and one other student had been in the classroom with access to the shoes. Based on this individualized suspicion, the search was reasonable.

Considering these cases together, it is clear that a search conducted by an SRO in order to maintain a safe and educational environment in a school is subject to the reasonableness standard established in *T.L.O.* The cases do note that probable cause is needed to justify a search conducted by an outside law enforcement officer for a non-school-related offense or done at the behest of an outside law enforcement officer. However, there are no North Carolina cases that illustrate such scenarios.

### ***Strip Searches at School***

The United States Supreme Court held that a school search that rises to the level of a strip search requires **a level of suspicion that matches the high degree of intrusion involved in a strip search.**<sup>39</sup> Given the meaning of an intrusive strip search, and the sense of degradation it may cause, this kind of search is in its own category and requires a specific kind of suspicion. In this case, the school nurse and an assistant principal conducted a search of a 13-year-old middle-school girl for prescription-strength ibuprofen and over-the-counter naproxen. After the student was told to remove her jacket, socks, shoes, stretch pants, and T-shirt, she was asked to pull open and shake her bra and to pull open the waistband of her underpants—partially exposing her breasts and pelvic area. The Court held that this kind of search required a reasonable suspicion of danger or a reasonable suspicion that the prohibited medications were hidden in the girl’s underwear to “make the quantum leap from outer clothes and backpacks to exposure of intimate parts.”<sup>40</sup> The Court did not find any such reasonable suspicion under the facts of the case and held that the search was therefore not justified.

Two Eleventh Circuit decisions provide examples of strip searches in schools that were deemed to be excessive in scope under the reasonableness standard. In *D.H. by Dawson v. Clayton County School District*,<sup>41</sup> the court held that a strip search of a seventh-grade boy was justified at its inception due to the discovery of concealed marijuana on other students. However, the strip search was excessive in scope because it required the boy to stand fully nude in front of his peers.

The court also found the strip search in *T.R. by & through Brock v. Lamar County Board of Education*<sup>42</sup> both unreasonable at its inception and excessive in scope. In this case, a 14-year-old girl was strip-searched by the principal and a counselor after a teacher smelled marijuana smoke in her class and a search of T.R.’s backpack revealed stems and seeds, rolling papers, two lighters,

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39. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).

40. *Id.* at 377.

41. 830 F.3d 1306 (11th Cir. 2016).

42. 25 F.4th 877 (11th Cir. 2022).

and various pills. T.R. was strip-searched twice, both times in front of the window on a door to a public hallway. The court held that the search was not justified at its inception because there was no reason to suspect that T.R. was concealing drugs in her underwear. The court also found that conducting two strip searches in front of an open window was unnecessarily intrusive, making them excessive in scope. Finally, the court held that the school officials who conducted the searches should not be granted qualified immunity because both *Safford* and *D.H.* were materially similar cases.

These cases illustrate that a strip search requires a specific suspicion that contraband is hidden in a student's undergarments and that, during any such search, a student's privacy must be protected in order for the search to be reasonable under constitutional requirements.

### ***Student Cell Phone Searches***

Courts have also applied the *T.L.O.* reasonableness standard to searches of student cell phones at school. While North Carolina courts have not directly addressed this issue, several federal courts have.

Searches of students' cell phones at school were found to be reasonable under the *T.L.O.* standard in the following cases:

- *J.W. v. Desoto County School District*.<sup>43</sup> A middle-school student was seen checking his phone at school for a text message from his father. A school rule prohibited the possession and use of cell phones at school. A school employee took the cell phone from the student and looked at the student's personal photos on it. The student was escorted to the principal's office after the employee discovered a photo, taken at the student's home, of another student holding a BB gun. The principal and a law enforcement officer then reviewed the other pictures on the phone. They accused the student of having gang pictures and issued a suspension notice based on the violation of a school rule that prohibited the display on school property of any clothing, accessories, drawings, or messages associated with a gang. The court found that the search was reasonable at its inception because possession of the phone at school violated a school rule, and it was therefore reasonable for the school official to then determine the extent to which the student was using the prohibited phone. The court also found the search to be reasonably related in scope to this initial justification.
- *Jackson v. McCurry*.<sup>44</sup> Two school administrators searched the text messages on the cell phone of a high-school senior after other students accused her of sending text messages making fun of another student for not making the volleyball team. The search included text messages to one of the students who made the accusation and to family members, the student's best friend, and her boyfriend. The court held that the search was reasonable at its inception because the text messages may have shown that the student engaged in harassment of another student, a violation of school rules. The search was also reasonable in scope because the school administrator knew that the student could choose how to identify her contacts and she could have disguised messages to other students. The court also noted

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43. *Id.*

44. 303 F. Supp. 3d 1367 (M.D. Ga. 2017), *aff'd*, 762 F. App'x 919 (11th Cir. 2019) (unpublished per curiam opinion).

that “[t]hrough technology has changed since T.L.O. was handed down, a school official’s search of a student’s cell phone on school property and during the school day still fits within the framework announced in T.L.O.”<sup>45</sup>

- *Simpson, Next Friend of J.S. v. Tri-Valley Community Unit School District No. 3*.<sup>46</sup> A school administrator searched the camera roll of a 15-year-old student’s (J.S.) phone as part of an investigation into the creation of a gun meme involving W.J., another student at the high school. W.J. allowed the administrator to see a photo he had posted to Snapchat of himself wearing a black trench coat. He also showed the administrator that two students had taken screenshots of the photo. One of those students (S.D.) was interviewed and reported that J.S. asked him to take a screenshot of the photo and send it to him. S.D. also reported that J.S. had a history of making memes about and bullying W.J. The administrator subsequently searched the camera roll on J.S.’s phone, finding several photos of W.J. The photo used in the gun meme was not found on J.S.’s phone. The search of the photos was reasonable at its inception because the administrator had reasonable suspicion to search for the gun meme and for evidence of bullying. The search was reasonable in scope because it was reasonable to believe that a search of the photos would uncover evidence of the creation of the gun meme or other memes that targeted students. The search was limited to the camera roll, and did not include emails, web-browser history, text messages, or phone calls.

Searches of students’ cell phones were found unreasonable under the *T.L.O.* standard in the following cases:

- *Klump v. Nazareth Area School District*.<sup>47</sup> A teacher confiscated a high-school student’s cell phone after the phone fell out of the student’s pocket. The school had a rule that cell phones could not be used or displayed during school hours. The teacher and an assistant principal then used the cell phone to access the student’s text messages and voicemail and to call nine other students to find out whether those students were breaking the rule as well. They also pretended to be the student and sent messages to his younger brother. The court refused to grant a motion to dismiss on the claim that this search violated the student’s Fourth Amendment rights. The court found that the initial seizure of the phone was justified because of the violation of a school rule. However, the subsequent search of the phone was not reasonable at its inception because school personnel had no reason to believe the search would reveal that the student was violating another school policy.
- *G.C. v. Owensboro Public Schools*.<sup>48</sup> A student with a history of rule violations and mental health and substance use needs was seen texting on a cell phone during class in violation of a school rule. His teacher confiscated the phone, and the assistant principal read some of the student’s text messages because she was concerned that having his phone taken away might cause him to hurt himself or someone else. The court declined to adopt the blanket rule in *Desoto*<sup>49</sup> that it is reasonable to search a cell phone found at school to determine the extent to which the phone is being used to violate school rules. Instead, the court looked to

45. *Id.* at 1378.

46. 470 F. Supp. 3d 863 (C.D. Ill. 2020).

47. 425 F. Supp. 2d 622 (E.D. Pa. 2006).

48. 711 F.3d 623 (6th Cir. 2013).

49. *J.W. v. Desoto County School District, No. 2:09-CV-00155-MPM-DAS*, 2010 WL 4394059 (N.D. Miss. Nov. 1, 2010).

the fact-specific analysis of reasonableness that was relied on in *Klump*. The court held that the search was not reasonable at its inception because only the general knowledge of the student's background, including his drug abuse and depressive tendencies, did not justify the search of his cell phone at school. School personnel did not have any specific reason to believe that the student was engaging in unlawful activity, that he was about to break more school rules, or that he was thinking of hurting anyone when the search began.

### ***Seizure of Students***

Both the North Carolina Court of Appeals and the Fourth Circuit have held that **the reasonableness standard also applies to detention of students at school by school officials and law enforcement**. The Fourth Circuit first took up this question in *Wofford v. Evans*.<sup>50</sup> The 10-year-old student in *Wofford* was detained in connection with allegations that she brought a gun to school. The first incident occurred the day before Thanksgiving break, after several classmates alleged that the student brought a gun to school. The assistant principal escorted the student to her office, where the student allowed her bag to be searched. A gun was not found, and the student took the bus home. The following Monday, when school reopened, school administrators continued their investigation of the gun allegation, and a classmate reported that he saw the student throw the gun into the woods next to the school. School administrators called the police, brought the student to the office, and questioned her again. Later, three detectives arrived and questioned her. A gun was never found.

The court analyzed the initial seizure of the student before Thanksgiving and the second seizure on the Monday after Thanksgiving using the *T.L.O.* reasonableness standard. In applying this standard to both the school administrators and the law enforcement officers, the court held that the reasonableness standard applies to law enforcement seizure of a student when a student is suspected of breaching a criminal law.<sup>51</sup> The court reasoned that the first seizure was reasonable at its inception because of the allegation by classmates. It was reasonable in scope because the student was not held longer than necessary to address the allegation and determine that she did not have a gun on her person or in her desk. The court also found that the second seizure, which eventually involved law enforcement, was reasonable. Disciplinary interests and the need to assure safety at the school justified the initiation of the second seizure. The scope of the second seizure was also reasonable, as it was reasonable to call law enforcement about the new allegation of a gun in the woods and for police officers to detain the student no longer than necessary to complete their investigation.

The North Carolina Court of Appeals relied on the holding in *Wofford* when applying the reasonableness standard to the detention of a student on school grounds by an SRO. In *In re J.F.M. and T.J.B.*,<sup>52</sup> an SRO was investigating an affray that occurred at the school. When the officer saw T.B. leaving campus, he asked her to stop three times, but she refused. The assistant principal then informed the officer that T.B. had been involved in the affray and had left school. Later, when the officer saw T.B. and her sister at a bus stop on campus, he approached T.B. and told her he needed to take her back to school to talk with the school administrator about whether she would be suspended. T.B. refused to go with the officer, the officer attempted to grab

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50. 390 F. 3d 318 (4th Cir. 2004).

51. *Id.* at 327.

52. 168 N.C. App. 143 (2005).

T.B., and T.B.'s sister scuffled with the SRO in an effort to set T.B. free. At some point, the sister bit the officer and T.B. hit him with an umbrella. Both sisters were adjudicated delinquent for resisting a public officer and for assault on a public officer.

The court determined that the **reasonableness standard applies to the detention of a student on school grounds by an SRO who is working in conjunction with a school official.** The court held that, in this case, the SRO was working in conjunction with a school official. The court relied on the facts that the detainment occurred while the officer was on duty, on school premises, and that it was close in time to his investigation of the affray. The court noted that the officer clearly intended to immediately present the student to the administrator to discuss the ramifications of her actions under school rules and policies and not as a violation of North Carolina law. Finally, the court stated that practicality demands that SROs who conduct investigations at schools need to have some autonomy, which includes the ability to detain a student when a school administrator is not present in order to bring that student to an administrator.

The court also held that the seizure of T.B. under these circumstances was reasonable. It was justified at its inception because (1) an affray is a violation of law and school policy, (2) the officer was acting as an SRO and was known to T.B., (3) the officer saw T.B. on school grounds after seeing a group of students circled around what appeared to be an affray, (4) the officer told T.B. to stop three times and she ignored him, (5) the officer spoke with the school administrator who told him T.B. was involved in the affray, and (6) the officer saw T.B. soon after speaking with the administrator and detained her.

The court also found that the seizure was reasonably related in scope to the circumstances that justified the initial seizure: there was evidence that tied T.B. to involvement in the affray and there was a danger in allowing the matter to be carried over to another school day. In addition, T.B. was aware of her own culpability. The court held that the Fourth Amendment was not implicated in the escalated measures the officer took to overcome T.B.'s resistance.

Several federal circuit courts have applied the reasonableness standard to the seizure of a student in a school setting. The significant factors in these decisions include the age of the student, the student's level of resistance, the student's threat to safety, the extent of SRO involvement, and the school's interest in protecting students and deterring potentially violent behavior.

Cases in which federal circuit courts have found the seizure of a student to be reasonable include:

- *Milligan v. City of Slidell*.<sup>53</sup> A law enforcement officer was told by a parent that a fight was planned for after school the next day. The officer, the parent, and the football coach went to the high school with a list of the students involved. Several of the students were gathered and questioned for ten to fifteen minutes. They were warned that their parents would be called if a fight occurred and they were associated with it. Milligan was among the detained students. He testified that he felt physically intimidated and not free to leave. The court relied on the standard used in *Vernonia*,<sup>54</sup> noting the need for reasonableness to account for the custodial and tutelary responsibility of schools and the lesser expectation of privacy that students have in school. The court held that the privacy right asserted under these facts did not outweigh the school's interest in student protection, fostering self-discipline, and

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53. 226 F.3d 652 (5th Cir. 2000).

54. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).



detering possibly violent misconduct. Use of the least restrictive means is not required. Here, the means used was an effective response to an immediate threat, law enforcement did no more than what a school official could have done, and no more was done than was necessary to deter the fight. The officer's actions were reasonable.

- *K.W.P. v. Kansas City Public Schools*.<sup>55</sup> A teacher asked a law enforcement officer to come to her classroom when the behavior of K.W.P., a seven-year-old second-grade student, escalated after a classmate picked on him. The officer had K.W.P. come with him into the hallway and attempted to walk him to the front office. K.W.P. did not want to go with the officer and tried to walk away. The officer grabbed the child's wrist and the child got upset, crying loudly and trying more forcefully to get away. The officer placed the child in handcuffs and, when they arrived at the office, sat the child in a chair with the handcuffs on. K.W.P. stayed on the chair in handcuffs for about fifteen minutes until his father arrived. The handcuffs made his wrists tender and red and he alleged that he suffered mental and emotional distress as a result of the seizure. The court held that there was no violation of K.W.P.'s rights under these circumstances. K.W.P. admitted that he tried to flee and that those attempts could have posed a safety risk to himself. The court concluded that a reasonable officer could have thought that K.W.P.'s behavior constituted an act of violent resistance. Additionally, the fifteen-minute period of time during which the child remained in handcuffs in the office was not long, was related to the behavior that led to the initial use of handcuffs, and was reasonable and necessary to prevent K.W.P. from trying to leave and potentially harming himself.
- *T.S.H. v. Green*.<sup>56</sup> A high-school football coach gathered seven of his players, whom he was supervising at a football camp on a college campus, at the direction of university police who received a report that a cheerleading coach had been photographed through a window while she undressed. The coach kept the players in a room for hours, questioning them and asking to see the photographs on their cell phones. When none of the players confessed, they were expelled from the camp. The court assumed that the coach was acting as an agent of the university police officers and the students were therefore seized within the meaning of the Fourth Amendment. The court also noted that the reasonableness standard has been applied outside of "traditional school grounds" because of school administrator responsibilities for the students entrusted to their care at school events off school grounds.<sup>57</sup> Applying the reasonableness standard to the coach's detainment of the students, the court found that a reasonable officer could have thought that the initial seizure was justified because of possible violations of Title IX or state law. The scope of the detainment was also reasonable, as precedent established that a seizure for a period of hours was reasonable.

Cases in which federal circuit courts have found the seizure of a student to be unreasonable include:

- *Gray ex rel. Alexander v. Bostic*.<sup>58</sup> A 9-year-old student was not doing jumping jacks as required in her PE class. When a teacher told her to go to the wall, the student said something threatening to him. A second teacher then told the student to come over to

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55. 931 F.3d 813 (8th Cir. 2019).

56. 996 F.3d 915 (8th Cir. 2021).

57. *Shade v. City of Farmington*, 309 F.3d (8th Cir. 2002).

58. 458 F.3d 1295 (11th Cir. 2006).



her. The SRO observed these interactions and stepped in before the student got to the second teacher. The SRO escorted the student into the lobby and handcuffed her behind her back, causing her pain. The SRO told the student that being in handcuffs is how it feels when you break the law and go to jail. The student began to cry, and the SRO left her standing in handcuffs for not less than five minutes. He then removed the handcuffs, and the student spent the rest of the PE class in the teachers' office. During discovery, the SRO explained that he placed the student in handcuffs to impress upon her the serious nature of committing crimes that can lead to arrest and to help persuade her to lose her disrespectful attitude. The court held that the use of handcuffs in this situation was objectively unreasonable under the Fourth Amendment. There was no indication that the student was a threat to safety, she complied with the direction given by the teachers, the teachers told the SRO they would handle the situation, the student did not continue to be disruptive, and the SRO admitted that he used handcuffs to punish her. The use of handcuffs under these circumstances was excessively intrusive given that the student was so young and that it was not done to protect people's safety. The officer was not entitled to qualified immunity because using handcuffs on a compliant 9-year-old for the sole purpose of punishment was an obvious violation of her Fourth Amendment rights.

- *C.B. v. City of Sonora*.<sup>59</sup> A coach at a middle school called the police regarding an 11-year-old sixth-grade student who was diagnosed with ADHD and was known to experience unresponsiveness during the day. The child, C.B., had “shut down” on the playground and was not responding to the coach’s direction to go to her office. C.B. was sitting calmly when the first police officer arrived. The coach told the officer that the child was a “runner” and was not on his medication. When the second officer arrived, he tried to engage C.B., but the child was unresponsive. C.B. immediately complied when that officer told him to stand up and put his hands behind his back. The officer handcuffed the child and put him in the back of a police car, where he remained while the officer drove him thirty minutes to his uncle’s place of business. No one ever told the child that he was not under arrest or where he was being taken. It was the police department’s policy that officers could handcuff any person they were transporting in the back of their vehicles, and officers routinely handcuffed any student they transported from a school campus, regardless of the reason for transport. After this incident, C.B. experienced psychological and emotional problems. The court held that the seizure of C.B. was unreasonable because the officers did not know of any wrongdoing by the child, the child did not appear to pose a threat to self or others, and the child did not resist while officers were present.
- *Scott v. County of San Bernardino*.<sup>60</sup> The assistant principal at a middle school asked the SRO to counsel a group of girls who were involved in ongoing incidents of bullying and fighting. The officer determined that the girls were behaving disrespectfully and told them he was taking them to jail to prove a point. The SRO handcuffed all seven girls and transported six of them to the sheriff’s department in police vehicles. The girls were then separated, interviewed, and released to their parents. No school disciplinary actions or charges followed. The court held that the seizure was not justified at its inception and was therefore unreasonable because an arrest cannot be justified as a scare tactic. But even if the arrests had been justified at their inception, the court noted, they were not reasonable

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59. 769 F.3d 1005 (9th Cir. 2014).

60. 903 F.3d 943 (9th Cir. 2018).

in scope: arresting and handcuffing middle-school students and transporting them to the police station was disproportionate to the school's need to dissipate an ongoing feud. The full-scale arrests were excessively intrusive given the young age of the girls, and they were not reasonably related to the school's expressed need. The officers were not entitled to qualified immunity because no reasonable officer could have reasonably believed that the law authorized the arrest of a group of middle schoolers to prove a point.

- *Ziegler v. Martin County School District*.<sup>61</sup> A party bus carrying about forty students was searched by a uniformed SRO after arriving at the prom. He discovered an empty champagne bottle and some cups, which the bus driver stated belonged to the students and which the students alleged were already on the bus when they boarded. The students were then detained outside for almost an hour while they waited to complete breathalyzer tests. Since the party bus was late, the person authorized to administer the tests had gone home and needed to be called back; in addition, there weren't enough mouthpieces, so more had to be retrieved. The students were not permitted to enter the prom, leave on their own, or leave with their parents until every student had taken the breathalyzer test. Because the prom was a school-organized and -supervised event, the court applied the *T.L.O.* reasonableness standard and concluded that the search of the bus and the initial detention of the students while they waited for their breathalyzer tests were reasonable. However, the court held that "when government officials need to conduct breathalyzer or urine tests on students, the testing must be accomplished in a reasonably expeditious time period; once exonerated by the test, the student must be free to go."<sup>62</sup> Detaining students after they passed the breathalyzer tests was excessive in scope.<sup>63</sup>

## II. Nontestimonial Identification Orders in Juvenile Cases

### A. When Is a Nontestimonial Identification Order (NTO) Required?

Nontestimonial identification "means *identification* by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar *identification procedures requiring the presence of a juvenile*."<sup>64</sup> These procedures are **(1) for identification of the juvenile as the perpetrator and (2) require the presence of the juvenile to be performed.**

#### *The Procedure Must Be for Identification*

The North Carolina Court of Appeals described what a procedure for the purpose of identification means in *State v. Whaley*.<sup>65</sup> The court explained that "[m]anifestly, the focus of these statutes is identification of the suspect as the perpetrator, not a determination of whether

61. 831 F.3d 1309 (11th Cir. 2016).

62. *Id.* at 1324.

63. For more details on the legal basis for conducting breath tests at proms, see Shea Denning, *Proms and PBTs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 10, 2020), <https://nccriminallaw.sog.unc.edu/proms-and-pbts/>.

64. Chapter 7B, Section 2103 of the North Carolina General Statutes (hereinafter G.S.) (emphasis added).

65. 58 N.C. App. 233 (1982).

the crime has been committed.”<sup>66</sup> In *Whaley*, a visual acuity test for a driver accused of involuntary manslaughter and death by vehicle was held not to be a nontestimonial identification procedure. The test was not administered to determine whether the driver was the person who committed the offense. Instead, the results of the test were sought to determine whether an element of the offense—gross negligence—existed.

This issue sometimes arises when juveniles are suspected of driving while impaired. A breath test administered to determine whether the juvenile is impaired is done to determine whether an element of the offense—impairment—is present. It is not done to identify the juvenile as the person who was driving the vehicle. Therefore, the breath test is not a nontestimonial identification procedure and an NTO is not required. Many procedures that involve the collection of evidence from a juvenile’s body to establish an element of a crime may still require a search warrant.<sup>67</sup> Criminal law governing search and seizure should be consulted to determine if a search warrant is required.<sup>68</sup>

### ***The Procedure Must Require the Presence of the Juvenile***

A nontestimonial identification order is needed only when the procedure requires the presence of a juvenile. Questions sometime arise when one of the items or procedures listed in Chapter 7B, Section 2103 of the North Carolina General Statutes (hereinafter G.S.) can be obtained or accomplished without the presence of a juvenile. For example, a photo lineup might be conducted using a publicly available photo, such as a yearbook photo. A fingerprint legally obtained in the past could be used for comparison purposes related to a new offense.<sup>69</sup> These situations would not require an NTO because they do not require the presence of the juvenile. Other legal considerations regarding these procedures, such as nonsuggestiveness in photo lineups, apply even though an NTO is not needed.<sup>70</sup>

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66. *Id.* at 235.

67. The Juvenile Code does not refer to the use of search warrants in juvenile cases. However, the line of constitutional case law beginning with *In re Gault*, 387 U.S. 1 (1967), makes clear that juveniles accused of acts of delinquency have almost all the same constitutional rights as any criminal defendant. The Juvenile Code codifies these rights, including “[a]ll rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.” G.S. 7B-2405. Accordingly, juveniles must be afforded protection against unreasonable search and seizure, including the need for a search warrant. Aside from the reasonableness standard that applies in the school context, as described in Part I of this bulletin, there is no law that establishes a different standard for search and seizure in juvenile matters. Therefore, while the Juvenile Code does not reference search warrants, constitutional criminal law principles require their use under the same circumstances in which they are needed in criminal matters.

68. See ROBERT L. FARB AND CHRISTOPHER TYNER, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* (UNC School of Government, 2021).

69. G.S. 7B-2102(c) allows for the use of certain legally retained juvenile fingerprints for investigative or comparison purposes.

70. For more information on these requirements, see ROBERT L. FARB AND CHRISTOPHER TYNER, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA*, Chapter 5 (UNC School of Government, 2021).

***Almost All Nontestimonial Identification Procedures in Juvenile Cases Require a Court Order***

The Juvenile Code contains a mandate to obtain an NTO to conduct almost all nontestimonial identification procedures in juvenile matters. The statute includes a **mandatory prohibition on conducting nontestimonial identification procedures on a juvenile without a court order unless one of the exceptions applies.**<sup>71</sup> Juveniles therefore cannot consent to participate in a nontestimonial identification proceeding.

***No Exception for Juveniles in Custody***

The criminal NTO process “applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused.”<sup>72</sup> Some nontestimonial identification procedures such as fingerprinting, photographing, and lineups are allowed in criminal matters following an arrest. A search warrant is generally required to compel an adult who is in custody to participate in more intrusive nontestimonial identification procedures, such as taking a blood sample.<sup>73</sup> There are no analogous in-custody exceptions to the requirement for a nontestimonial identification order in juvenile matters. Instead, G.S. 7B-2103 strictly prohibits the use of nontestimonial identification procedures without an NTO in juvenile matters unless one of the above-referenced exceptions applies. This includes nontestimonial identification procedures conducted when the juvenile is in custody.

***When Fingerprinting and Photographing Are Authorized without a Nontestimonial Identification Order***

The Juvenile Code explicitly authorizes the fingerprinting and photographing of juveniles in some circumstances. Most of these circumstances are not related to the identification of the juvenile and therefore would not fall under the definition of nontestimonial identification. At the same time, these are the circumstances in which fingerprinting and photographing should occur in the context of a juvenile proceeding.

**Show-Ups**

While the show-up is a procedure that requires the presence of the juvenile for the purpose of identifying them as the perpetrator of an offense, the Supreme Court of North Carolina established an exception to the juvenile NTO requirement for show-ups.<sup>74</sup> The court held that as long as the show-up is not conducted in a manner that is so suggestive as to deem it unreliable, the important law enforcement objective of efficiency and protection of the juvenile from more intrusive identification procedures renders this use of nontestimonial identification of a juvenile permissible without a court order. G.S. 15A-284.52(c1)(4) was subsequently enacted to create a requirement to photograph juveniles at the time and place of a show-up when the juvenile is age 10 or older and is reported to have committed a nondivertible offense or common law robbery.<sup>75</sup> Photographing a juvenile at the time and place of any show-up outside of this limited circumstance is not allowed without an NTO.

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71. G.S. 7B-2103.

72. *State v. Irick*, 291 N.C. 480, 490 (1977).

73. A thorough explanation of this criminal law can be found in ROBERT L. FARB AND CHRISTOPHER TYNER, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA*, Chapter 4 (UNC School of Government, 2021).

74. *In re Stallings*, 318 N.C. 565 (1986).

75. S.L. 2019-47.

**Fingerprinting and Photographing Certain Juveniles When a Complaint Is Prepared for Filing as a Petition**

A juvenile must be fingerprinted and photographed if they are age 10 or older at the time of allegedly committing a nondivertible offense,<sup>76</sup> a complaint has been prepared for filing as a petition, and the juvenile is in the custody of law enforcement or the Division of Juvenile Justice.<sup>77</sup>

**Photographing Any Juvenile Committed to a County Juvenile Detention Facility**

Every juvenile who is committed to a county juvenile detention facility must be photographed by that facility.<sup>78</sup>

**Juveniles Charged as Adults or Transferred to Superior Court for Trial as Adults**

Juveniles who are charged with committing motor vehicle offenses under Chapter 20 of the General Statutes at ages 16 and 17 are under original criminal jurisdiction.<sup>79</sup> In addition, any person under the age of 18 who commits an offense and who has previously been convicted in adult criminal court of an offense, other than a misdemeanor violation of Chapter 20 of the General Statutes that did not involve impaired driving, will be processed under the criminal law from the beginning of their case.<sup>80</sup> Any juvenile fitting one of these categories is “charged as an adult” and the juvenile NTO statute does not apply to them.<sup>81</sup> Criminal procedure applies in these cases. Additionally, criminal procedure applies following the transfer of any case that begins as a juvenile matter and is subsequently transferred to superior court for trial as an adult.<sup>82</sup>

**Fingerprinting and Photographing Any Juvenile Adjudicated Delinquent for Committing a Felony Offense at Age 10 or Older**

If a juvenile (1) is adjudicated delinquent for committing an offense that would be a felony if committed by an adult, (2) was age 10 or older at the time of the offense, and (3) has either not been previously fingerprinted or photographed or previous fingerprints and photographs have been destroyed, then that juvenile must be fingerprinted and photographed.<sup>83</sup>

**B. Procedure to Obtain a Nontestimonial Identification Order**

A district or superior court judge may issue a juvenile NTO at the prosecutor’s request.<sup>84</sup> A request for an NTO can be made before a juvenile is taken into custody or after a juvenile has been taken into custody and before the adjudicatory hearing.<sup>85</sup>

A juvenile nontestimonial identification order can only be issued on a sworn affidavit or affidavits that establish all of the statutorily listed grounds.<sup>86</sup> For everything other than an order to obtain a blood specimen, these grounds include (1) probable cause to believe that an offense

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76. G.S. 7B-1701(a).

77. G.S. 7B-2102(a).

78. G.S. 7B-2102(a1).

79. G.S. 7B-1501(7)b.

80. G.S. 7B-1604(b).

81. G.S. 7B-2103.

82. *Id.*

83. G.S. 7B-2102(b).

84. G.S. 7B-2103.

85. G.S. 7B-2104.

86. G.S. 7B-2105.



that would have been a felony if committed by an adult was committed, (2) reasonable grounds to suspect that the named juvenile committed the offense, and (3) that the results of the ordered procedure will be of material aid in determining whether the named juvenile committed the offense.

The grounds for a nontestimonial identification order to obtain a blood specimen from a juvenile are enhanced, requiring (1) probable cause to believe that an offense that would have been a felony if committed by an adult was committed, (2) **probable cause** (not just “reasonable grounds”) to suspect that the named juvenile committed the offense, and (3) probable cause to believe that obtaining the blood specimen will be of material aid in determining whether the named juvenile committed the offense.

If the court finds that the statutory grounds have been shown, the judge may issue an NTO following the procedure for issuing NTOs contained in G.S. 15A-274 through 280 and G.S. 15A-282—the criminal procedures for the NTO process.<sup>87</sup> This includes the right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel for that purpose.<sup>88</sup>

Juveniles also have a statutory right to request an NTO if they are in custody for an offense that would be a felony if committed by an adult.<sup>89</sup> Courts are required to issue an order at the juvenile’s request if it appears that the results of the procedure will be of material aid in the juvenile’s defense.

The Juvenile Code includes specific requirements regarding the destruction of records resulting from nontestimonial identification procedures in juvenile cases.<sup>90</sup> These records must be destroyed by the law enforcement agency having possession of the records if (1) a petition is not filed, (2) the juvenile is not adjudicated delinquent or convicted following transfer to superior court, or (3) the juvenile was adjudicated for an offense that would be less than a felony if committed by an adult and the juvenile is under the age of 13. Records can be retained in the court file when a juvenile over the age of 13 is adjudicated delinquent for an act that would be a felony if committed by an adult. These retained records have limited use. They can only be inspected by law enforcement officers for comparison purposes in the investigation of a crime. Any records related to a nontestimonial identification order in a case that results in conviction following transfer to superior court are to be processed the same way as records in other criminal cases.

### C. Willful Violation Is a Crime

G.S. 7B-2109 makes the willful violation of the Juvenile Code provisions prohibiting use of nontestimonial identification procedures without an NTO a Class 1 misdemeanor.

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87. G.S. 7B-2106.

88. G.S. 15A-279(d).

89. G.S. 7B-2107.

90. G.S. 7B-2108.



### III. Impaired Driving Investigations

All Chapter 20 offenses committed when a juvenile is 16 or 17 years old are excluded from juvenile jurisdiction.<sup>91</sup> This includes offenses that involve impaired driving. All of these motor vehicle offenses are criminal matters from their inception. Therefore, criminal procedure regarding the investigation of suspected impaired driving applies. However, if the juvenile is under the age of 16 at the time of the offense, the case is subject to juvenile jurisdiction and is therefore a delinquency matter from its inception.

#### A. Implied-Consent Procedures Do Not Apply in Delinquency Matters

G.S. 20-16.2(a) states that “[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.” Application of the implied-consent law therefore turns on whether a person is “charged” with an implied-consent offense. G.S. 20-16.2(a1) defines a person “charged” as someone who is “*arrested for it* [an implied-consent offense] or if *criminal process* for the offense has been issued” (emphasis added).

Arrest and criminal process are not part of the Juvenile Code. G.S. 7B-1900 directs that a law enforcement officer may take a juvenile into “temporary custody” if grounds exist for the “arrest of an adult in identical circumstances under G.S. 15A-401(b).” While the Juvenile Code refers only to taking juveniles into temporary custody, the criminal law in G.S. 15A-401 is explicit about arrest. This is one of the many distinctions between juvenile law and criminal law—juveniles are “taken into custody” while adults are “arrested.”

It is also long-established in North Carolina law that a delinquency proceeding is a civil proceeding.<sup>92</sup> Therefore, the pleading in a delinquency matter is a petition.<sup>93</sup> Criminal process is not issued. Juveniles who are suspected of impaired driving while under the age of 16, and subject to juvenile jurisdiction, can therefore never meet the definition of being “charged” with an implied-consent offense. They are not arrested nor will criminal process be issued in the matter. Because they are not considered “charged,” **the law of implied consent does not apply.**

#### *Alcohol Screening Tests*

The statute that allows for alcohol screening test administration when a person is suspected of driving while less than 21 years old after consuming alcohol or drugs has different language than the law that dictates when implied-consent procedure applies. G.S. 20-138.3(a) establishes that it is unlawful for a person under the age of 21 to drive a motor vehicle on a highway or public vehicular area while consuming alcohol or at any time while previously consumed alcohol or a controlled substance (not lawfully obtained and taken in therapeutically appropriate amounts) remains in their body. Subsection (b2) of this statute states that an alcohol screening test may be administered to a driver who is “suspected of” violating this statute.

This permission to conduct an alcohol screening test sits outside the law of implied consent and does not explicitly connect only to criminal procedure. It is structured to “notwithstanding” any other provision of law. In addition, juvenile petitions must allege a criminal offense, even

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91. G.S. 7B-1501(7)b.

92. *In re Burrus*, 275 N.C. 517 (1969); *see also* G.S. 7B-2412.

93. G.S. 7B-1801.

though the proceeding is civil in nature.<sup>94</sup> Juveniles under the age of 16 can therefore be “suspected of violating” G.S. 20-138.3(a), even though they cannot be criminally prosecuted for that violation. Reading these statutes together, it appears that there is authority to conduct an alcohol screening test on anyone suspected of driving while less than 21 years old after consuming alcohol or drugs, including juveniles who are under the age of 16.

### **Chemical Analysis**

While the law of implied consent does not apply to juveniles under the age of 16, the law governing search of a juvenile’s person does apply. Juveniles have the ability to consent to a search, including the type of search carried out by a chemical analysis. As with searches of adults, consent must be voluntary.

If a juvenile does not consent, then there are three potential pathways to obtain chemical analysis.

1. A search warrant can be issued to require chemical analysis. Chemical analysis in this circumstance is done in order to prove the elements of impaired driving, not to identify the juvenile as the perpetrator. Therefore, as described in Part II of this bulletin, a nontestimonial identification order is not needed. Instead, as a search of the juvenile’s person for evidence that an offense was committed, a search warrant is needed.
2. It is likely that a breath test may be legally administered as a search incident to taking a juvenile into custody. The Supreme Court held that warrantless breath tests incident to arrest are permitted under the Fourth Amendment in *Birchfield v. North Dakota*.<sup>95</sup> While the language of this decision relates to arrest, there is generally no distinction in Fourth Amendment jurisprudence (outside of the schoolhouse) that distinguishes the legal standards in juvenile matters from those that apply in criminal matters. It is therefore likely that this holding applies in juvenile matters.<sup>96</sup>
3. It is also likely that blood can be drawn when the juvenile is unconscious and suspected of driving while impaired under the exigency standard established by the Supreme Court in *Mitchell v. Wisconsin*.<sup>97</sup> Because the decision in *Mitchell* was based on Fourth Amendment jurisprudence, and there is little distinction in the application of Fourth Amendment law to juveniles (outside of the schoolhouse), it is again likely that the standard applies in a juvenile matter.

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94. G.S. 7B-1802.

95. 579 U.S. 438 (2016).

96. For more information on this case, see Shea Denning, *Breath Tests Incident to Arrest Are Reasonable but Prosecution for Refusing a Blood Test Goes Too Far*, N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (June 29, 2016), <https://nccriminallaw.sog.unc.edu/breath-tests-incident-arrest-reasonable-prosecution-refusing-blood-test-goes-far/>.

97. 139 S. Ct. 2525 (2019). You can read more about this standard in Shea Denning, *Supreme Court Announces New Exigency Test for Blood Draws from Unconscious DWI Suspects*, N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (JULY 9, 2019), <https://nccriminallaw.sog.unc.edu/supreme-court-announces-new-exigency-test-for-blood-draws-from-unconscious-dwi-suspects/>.

### B. Dispositions for Driving While Impaired Are Governed by the Juvenile Code

Because these cases are delinquency matters under juvenile jurisdiction, the procedure is governed by the usual Juvenile Code process of adjudication followed by disposition. The **criminal sentencing and punishment provisions in G.S. 20-179 do not apply**. Instead, the juvenile court must conduct a dispositional hearing and follow the law in G.S. Chapter 7B, Article 25, governing dispositional levels and alternatives for juveniles who have been adjudicated delinquent. Juveniles adjudicated delinquent for driving while impaired are subject to the same range of dispositional alternatives as juveniles adjudicated delinquent for other offenses. The available options are governed by the juvenile's dispositional level. The court has the authority to select from the statutorily available options for the applicable disposition level.

### C. DMV Notification and Impact on Driving Privileges

The revocation process for people charged with implied-consent offenses<sup>98</sup> does not apply in juvenile matters because, as explained above, the law of implied consent does not apply to drivers who are under the age of 16. Therefore, **revocation reports should not be completed in delinquency cases and there is no associated report of revocation to the DMV**.

The question of whether an adjudication for impaired driving will impact a juvenile's driving privileges is answered by the disposition ordered in the case. One of the dispositional alternatives available to the court for any juvenile who is ordered to a Level 1 or Level 2 disposition is that the court may "[o]rder that the juvenile shall not be licensed to operate a motor vehicle in the State of North Carolina for as long as the court retains jurisdiction over the juvenile or for any shorter period of time. The clerk of court shall notify the Division of Motor Vehicles of that order."<sup>99</sup> If the court includes such an order in the disposition, then the DMV receives notice. If such an order is not included as part of the disposition, there is no impact on the juvenile's driving privileges and there is no notice to the DMV.

## IV. Juvenile Investigations and Confidentiality

### A. Law Enforcement Records

The Juvenile Code requires that "all law enforcement records and files concerning a juvenile" must be

- kept separate from adult law enforcement records and files and
- withheld from public inspection.<sup>100</sup>

**Juvenile law enforcement records can only be examined or copied by people who are specifically listed in the statute or pursuant to a court order.**<sup>101</sup> The people who can examine and obtain copies of juvenile law enforcement records without a court order include

- the juvenile or their attorney,
- the parent, guardian, or custodian of the juvenile or that person's authorized representative,
- the prosecutor,

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98. G.S. 20-16.5.

99. G.S. 7B-2506(9).

100. G.S. 7B-3001(b).

101. *Id.*

- juvenile court counselors, and
- law enforcement officers who are sworn in North Carolina.<sup>102</sup>

All other access to juvenile law enforcement records is only allowed if a court orders that access. There are no criteria in the statute regarding the circumstances under which the court can order such access.

This confidentiality applies to juvenile law enforcement records as long as the matter remains a juvenile matter. If the case begins under juvenile jurisdiction and is subsequently transferred to superior court for the juvenile to be tried as an adult, **these confidentiality provisions apply during the time that the case is under juvenile jurisdiction. Once the case is transferred to superior court, the juvenile confidentiality provisions no longer apply.**<sup>103</sup> The law enforcement records then become subject to the public records law related to law enforcement records in criminal investigations.<sup>104</sup>

## B. School Notification

The Juvenile Code includes specific authority for school notification of pending delinquency charges under certain circumstances and following a specific procedure. **There is no authority to provide information about a juvenile investigation to a school outside of these provisions.**

### *When School Notification Is Authorized*

G.S. 7B-3101 provides explicit authority for school notification about certain delinquency matters. School notification is allowed only when

- a delinquency petition alleging a felony offense is filed,
- the case ceases to be a delinquency matter, either because the case is transferred to superior court (making it a criminal proceeding) or the petition alleging a felony is dismissed, or
- the court issues, modifies, or vacates a dispositional order concerning a juvenile alleged to be or found delinquent for a felony offense.

Motor vehicle offenses, which are included in G.S. Chapter 20, are not included in this statutory authorization for school notification.<sup>105</sup> Because these offenses are excluded, school notifications regarding motor vehicle offenses that originate as delinquency proceedings, including impaired driving offenses, are not permitted.<sup>106</sup>

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102. *Id.*

103. *Id.*

104. G.S. 132-1.4.

105. G.S. 7B-3101(a).

106. G.S. Chapter 20 motor vehicle offenses that are alleged to have been committed by a juvenile who is 16 or 17 years old are not subject to juvenile court jurisdiction and are treated as criminal charges. School notification of criminal charges is governed by G.S. 15A-505. That statute also excludes G.S. Chapter 20 offenses from school notification of criminal matters.

### ***School Notification Procedure***

School notification pursuant to G.S. 7B-3101 **can only be done by a juvenile court counselor and can only be made to the principal of the school.**<sup>107</sup> There is no statutory authority for law enforcement to make the notification. Notification must be made both verbally and in writing.<sup>108</sup> Verbal notification must occur in person or by telephone before the beginning of the next school day. Delivery of written notice must be made in person or by certified mail and must occur as soon as practicable and at least within five days of the action that triggered the notification.

G.S. 7B-3101(a) describes the information that is required to be part of the notification. A notification that a felony delinquency petition has been filed must describe the nature of the offense. Notification of an initial order of disposition, a modified or vacated order of disposition, or transfer of the case to superior court must describe the court's action and any applicable disposition requirements. The statute is silent as to the contents of a notification of the dismissal of a felony petition.

Education law<sup>109</sup> provides the following **very specific rules for how information obtained by a school as a result of a school notification** made pursuant to G.S. 7B-3101 can be stored and used.

- Written notifications and information obtained are confidential and are not public records.
- The principal must maintain any documents in a safe, locked record storage that is separate from the student's other school records.
- The principal may not make copies of the documents.
- Any documents received by the principal can only be used "to protect the safety of or to improve the education opportunities for the student or others."<sup>110</sup>
- The principal is directed to share each document only with those individuals who have (1) direct guidance, teaching, or supervisory responsibility for the student and (2) a specific need to know in order to protect the safety of the student or others.
- Each person who is given access to the document must indicate in writing that they have read it and that they will maintain its confidentiality.
- Information gained through G.S. 7B-3100 (information sharing) cannot be the sole basis for a decision to suspend or expel the student.

The education statute provides serious consequences for failure to maintain the confidentiality of a school notification or other juvenile justice document received as part of information sharing. **Failure to maintain the confidentiality of the documents is grounds for the dismissal of employees.**<sup>111</sup>

**Schools are not authorized to retain school notification documents indefinitely.** If the student graduates, withdraws from school, is suspended for the remainder of the school year, is expelled, or transfers to another school, then the documents must be returned to the juvenile court counselor. If the student transfers, the principal must also provide the juvenile court

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107. G.S. 7B-3101(a).

108. *Id.*

109. G.S. 115C-404.

110. G.S. 115C-404(b).

111. *Id.*

counselor with contact information for the new school. The juvenile court counselor must then deliver the notification to the new school as soon as practicable, either in person or by certified mail.<sup>112</sup>

The principal is also required to shred, burn, or otherwise destroy documents received pursuant to G.S. 7B-3100 (information sharing) when the principal

- receives notification that the case was dismissed, transferred to superior court, or the student's petition for expunction was granted, or
- when the principal finds that the school no longer needs the information to protect the safety of or to improve educational opportunities for the student or others.<sup>113</sup>

The school notification provisions of G.S. 7B-3101 apply to public and private schools authorized under G.S. Chapter 115C (Elementary and Secondary Education).<sup>114</sup> Because these statutes apply only to the elementary- and secondary-education system, community colleges are not included. While most youths who are subject to juvenile jurisdiction are not enrolled in the community college system, it is possible that some may be enrolled in adult education GED programs or other programs at a community college. There is no law that allows for school notification of delinquency proceedings in these circumstances.<sup>115</sup>

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112. G.S. 7B-3101(b).

113. G.S. 115C-404(a).

114. G.S. 7B-3101(d).

115. G.S. 7B-3100 also allows for information sharing between local agencies, including local law enforcement agencies, after a petition is filed alleging that a juvenile is delinquent. Information can be shared only for the protection of the juvenile and others or to improve educational opportunities of the juvenile. Because this provision applies only after a petition is filed, it is largely outside the scope of this bulletin.