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District Court Judges 2023 Fall Conference
Criminal Case Update
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Cases covered include published criminal and related decisions from the North Carolina appellate courts decided between May 12, 2023 and September 22, 2023. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Arrest, Search, and Investigation

Asking defendant to exit vehicle and patting him down did not unconstitutionally extend traffic stop, and K-9 free air sniff was permitted as it did not prolong stop's duration.

State v. Furtch, COA22-643, ___ N.C. App. ___ (June 20, 2023). In this Henderson County case, defendant appealed his convictions for trafficking methamphetamine, possession with intent to manufacture, sell and/or deliver, and maintaining a vehicle used for keeping and selling a controlled substance, arguing error in the denial of his motion to suppress the results obtained from an unconstitutionally extended traffic stop. The Court of Appeals found no error.

In February of 2019, two officers from the Henderson County Sheriff's Office performing drug interdiction pulled over defendant for weaving and following another vehicle too closely. The officers had received a tip from the narcotics unit to be on the lookout for a silver minivan similar to the vehicle defendant was driving. The officers decided to issue a warning citation to defendant for traveling left of the centerline and following too closely. One officer asked defendant to step out of the vehicle, frisked him for weapons, then explained the warning to him outside the vehicle. While the officer was explaining the warning citation, a K-9 unit performed a free air sniff around the vehicle and alerted, leading to a search that discovered methamphetamine.

Rejecting defendant's argument that the officers deviated from the mission of the stop and unconstitutionally extended it, the Court of Appeals turned to precedent supporting an officer's ability to perform ordinary inquiries related to a stop as long as they do not measurably extend the duration. The court also noted that a K-9 free air sniff could be conducted without reasonable suspicion if it did not prolong the stop. Here, the court explained that the officers were permitted to order defendant out of his car and pat him down to ensure their safety during the stop, and these steps did not measurably extend the stop's duration or convert it into an unlawful seizure. Likewise, "[a]lthough the K-9 free air sniff was unrelated to the reasons for the traffic stop, it did not prolong the traffic stop and was therefore permissible." Slip Op. at 16. Finding no error, the court affirmed the denial of defendant's motion to suppress.

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Open-air dog sniff did not unreasonably extend traffic stop and was permissible under the circumstances.

State v. San, COA22-664, ___ N.C. App. ___ (July 18, 2023). In this Randolph County case, defendant appealed judgment entered after his *Alford* plea to charges of trafficking in methamphetamine, selling or delivering a controlled substance, and possession of a firearm by a felon, arguing error in the denial of his motion to suppress evidence obtained after a search of his vehicle. The Court of Appeals affirmed the denial of defendant's motion and the judgment.

In May of 2018, officers from the Randolph County Sheriff's Department narcotics unit received a tip that defendant was in possession of a large amount of methamphetamine. They located defendant, who was a passenger in an SUV with a female driver. The officers observed the SUV cross the centerline of the road and called for a marked car to initiate a traffic stop. While one officer discussed the traffic violation and warning ticket with the driver outside the vehicle, a canine unit conducted an open-air sniff and the dog alerted, leading to the search of the vehicle. At trial, defendant challenged the search, arguing the officers had improperly prolonged the traffic stop to conduct the dog sniff. The trial court denied defendant's motion, finding the open-air dog sniff started simultaneously with the officer's discussion with the driver about her warning ticket. Defendant entered an *Alford* plea and appealed.

Taking up defendant's arguments, the Court of Appeals first noted that the challenged finding of fact related to the dog sniff beginning simultaneously with the discussion of the traffic violation was supported by competent evidence in the record. The court explained that defendant's appeal focused solely on the report of one officer, but testimony from another officer supported the timeline of events in the finding of fact. The court then looked at defendant's challenged conclusion of law, explaining the ultimate issue was whether the open-air dog sniff was conducted prior to the completion of the traffic stop's mission. Here defendant relied on *Rodriguez v. United States*, 575 U.S. 348 (2015), to argue the dog sniff was not related to the mission of the stop and was conducted after the mission of the stop had concluded. The court found that "the trial court's Findings support a determination the dog-sniff which led to the search of the vehicle was validly conducted during the time reasonably required to complete the mission of the traffic stop." Slip Op. at 19. As a result, the trial court properly denied defendant's motion.

Officer's actions during traffic stop represented unlawful seizure negating defendant's consent to the search of his vehicle.

State v. Moua, COA22-839, ___ N.C. App. ___ (July 18, 2023). In this Mecklenburg County case, defendant appealed his judgment for trafficking methamphetamine and maintaining a vehicle for keeping or selling methamphetamine, arguing that his motion to suppress the evidence obtained from a search of his vehicle was improperly denied. The Court of Appeals agreed, reversing the denial of his motion and vacating the judgment.

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In December of 2019, defendant was pulled over by officers of the Charlotte-Mecklenburg Police Department for speeding. During the stop, one officer determined defendant was on active probation while checking his license. The officer asked defendant to step out of the car and speak with him, and during their discussion, the officer asked for defendant's consent to search the vehicle. Defendant told the officer he could go ahead and search the vehicle, resulting in the discovery of a bag of methamphetamine under the driver's seat. At trial, defendant moved to suppress the results of the search, and the trial court denied the motion after conducting a hearing. Defendant subsequently pleaded guilty to the charges without negotiating a plea agreement. Defendant did not give notice of his intent to appeal prior to entering a plea but made oral notice of appeal during the sentencing hearing.

The Court of Appeals first discussed whether defendant had a right of appeal after pleading guilty without giving notice of his intent, explaining that the recent precedent in *State v. Jonas*, 280 N.C. App. 511 (2021), held that notice of intent to appeal is not required when a defendant did not negotiate a plea agreement. However, the court also noted that *Jonas* was stayed by the North Carolina Supreme Court. As a result, the court granted defendant's petition for *writ of certiorari* to consider his arguments on appeal. Judge Murphy dissented from the grant of *certiorari* and would have found jurisdiction under *Jonas*. Slip Op. at 11, n.1.

On appeal, defendant argued that when he consented to the search of his vehicle, he was unlawfully seized. The Court of Appeals agreed, explaining "[b]ased upon the totality of the circumstances, a reasonable person would not have felt free to terminate this encounter and a search of the car was not within the scope of the original stop." *Id*. at 11. Here, after the officer returned defendant's license and registration documents, the purpose for the traffic stop had ended. When the officer reached inside defendant's vehicle to unlock the door, instructed him to "come out and talk to me real quick" behind the vehicle, and began asking questions about defendant's probation status, the officer improperly extended the stop and engaged in a show of authority. *Id*. at 19. At trial, the officer testified that he used the technique of separating operators from their vehicles "because people are more likely to consent to a search when they are separated from their vehicle." *Id*. After reviewing the totality of the circumstances, the court concluded "the seizure was not rendered consensual by the return of the documents, the request to search was during an unlawful extension of the traffic stop, and [defendant]'s consent to search was invalid." *Id*. at 20.

Defendant's consent to search backpack was not freely given and voluntary due to coercion from officers surrounding him and repeatedly asking him for consent after his refusal.

State v. Wright, COA22-996, ___ N.C. App. ___ (Sept. 12, 2023). In this Mecklenburg County case, defendant appealed denial of his motion to suppress, arguing that (1) police did not have reasonable suspicion to stop him, and (2) he did not consent to the search of his backpack. The Court of Appeals found reasonable suspicion supported the stop but that defendant did not consent to the search, and reversed the denial of defendant's motion.

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In January of 2020, defendant, a homeless man, was walking with a bicycle on a dirt path in Charlotte when two officers of the Charlotte-Mecklenburg Police Department approached him. The officers had previously received a tip that a person matching defendant's description and riding a bike was carrying an illegal firearm. When the officers approached defendant, they gave conflicting reasons for the approach, with one officer referencing trespass and the other officer noting it was a street-level drug sales area. Defendant consented to a pat-down of his person and removed his backpack. At that point, one officer asked for permission to search the backpack; defendant initially consented to the search, but quickly told officers he did not want them to search the backpack. After an exchange with the officers where defendant told them he was cold and scared of the police, defendant eventually opened the backpack and allowed a search, resulting in the officers finding a stolen firearm. The officers arrested defendant, and in the search incident to arrest, discovered cocaine and marijuana in his pockets. At trial, defendant objected to admission of the results of the search, and the trial court denied the motion, finding that the initial contact was voluntary and defendant consented to the search of his backpack. Defendant entered an *Alford* plea and appealed. When defendant's appeal was first taken up by the Court of Appeals, the court remanded for further findings of fact and conclusions of law regarding law enforcement's belief that defendant was trespassing. The trial court entered an amended order denying the motion with new findings of fact and conclusions of law, which defendant again appealed.

Taking up defendant's arguments in the current opinion, the Court of Appeals first looked to the findings of fact and conclusions of law challenged by defendant, finding that three findings related to trespassing and one related to the return of defendant's identification prior to the search were not supported by evidence in the record. After striking four findings of fact, the court turned to (1) the reasonable suspicion analysis, determining that "the officers had reasonable suspicion to stop, question, and perform a protective search of [defendant] based on the informant's tip." Slip Op. at 12. The court noted that evidence in the record provided adequate justification for the reasonable suspicion that defendant was armed, justifying a protective search after stopping him.

Turning to (2), the court found that defendant did not voluntarily consent to the search of his backpack. Explaining the standard for voluntary consent, the court explained that "[t]o be voluntary, consent must be free from coercion, express or implied," and when making this determination "the court must consider the possibility of subtly coercive questions from those with authority, as well as the possibly vulnerable subjective state of the person who consents." *Id*. at 17-18. Here, the officers asked defendant "five times within a period of about one and a half minutes" for permission, even though defendant continued to refuse. *Id*. at 18. The court went on to explain that:

> The combination of multiple uniformed police officers surrounding an older homeless man and making repeated requests to search his backpack on a cold, dark night after he repeatedly asserted his right not to be searched leads us to

> the conclusion that Mr. Wright's consent was the result of coercion and duress and therefore was not freely given.

Id. at 18-19. After establishing the officers did not have consent, the court also established that they did not have probable cause to search the backpack based on the tip. The court explained that while the tip was sufficient to create reasonable suspicion for a frisk of defendant, it did not create sufficient probable cause for a search of the backpack. The informant "did not provide any basis for his knowledge about the criminal activity," and "did not predict any future behavior," elements that would have demonstrated sufficient reliability for probable cause. *Id*. at 21. Because the officers did not have consent or probable cause to conduct the search, the court reversed the denial of the motion to dismiss and vacated defendant's *Alford* plea.

Testimony from police officer that he smelled marijuana in defendant's vehicle was not "inherently incredible" and supported reasonable suspicion for traffic stop.

State v. Jacobs, COA22-997, ___ N.C. App. ___ (Sept. 19, 2023). In this New Hanover County case, defendant appealed the denial of his motion to suppress the results of a search of his vehicle, arguing error in finding reasonable suspicion for the traffic stop leading to the search. The Court of Appeals found no error.

In March of 2019, a Wilmington police officer was following defendant on a city street when he smelled the strong odor of marijuana coming from defendant's vehicle. The officer eventually pulled defendant over, based solely on the smell coming from the vehicle. During the stop, the officer continued to smell marijuana, and asked defendant to step out of the vehicle; when defendant stepped out, the officer saw white powder and an open alcohol container. A search of the vehicle found heroin, MDNA, cocaine, and marijuana. At trial for possession and trafficking charges, defendant moved to suppress the results of the search, arguing he was not smoking marijuana while driving, and all the windows of his vehicle were closed, suggesting the officer could not have smelled marijuana coming from his vehicle and had no reasonable suspicion to initiate a stop. The trial court denied the motion, defendant pleaded guilty and appealed.

Taking up defendant's arguments, the Court of Appeals first noted that normally the appeals court defers to the trial court's determination of witness credibility when looking at testimony establishing reasonable suspicion. However, when the physical circumstances are "inherently incredible" the deference to a trial court's determination will not apply. Slip Op. at 8, quoting *State v. Miller*, 270 N.C. 726, 731 (1967). Relevant to the current matter, applicable precedent held that "an officer's smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure, and that an officer's smelling of such is not inherently incredible." *Id*. Because the circumstances here were not "inherently incredible," the court deferred to the trial court's finding that the officer's testimony was credible, which in turn supported the finding that the officer had reasonable suspicion to initiate the traffic stop.

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Trial court provided curative instruction to disregard improperly admitted lay opinion testimony; warrantless blood draw was justified by exigent circumstances where defendant was unconscious and taken to a hospital after accident.

State v. Burris, COA22-408, ___ N.C. App. ___ (July 5, 2023). In this Buncombe County case, defendant appealed his convictions for driving while impaired and reckless driving, arguing (1) there was insufficient evidence that he was driving the vehicle, and (2) error in denying his motion to suppress the results of a warrantless blood draw. The Court of Appeals majority found no error.

In November of 2014, a trooper responded to a single vehicle accident and found a heavily damaged pickup truck against a steel fence off the side of the road. Defendant was inside the vehicle, unconscious and seriously injured. The trooper noticed the smell of alcohol and open beer cans in the vehicle. Defendant was the owner of the wrecked vehicle and there were no other people at the scene of the accident. At the hospital, the trooper ordered a warrantless blood draw. The results of this blood draw were that defendant was intoxicated, and these results were admitted at trial. The jury subsequently convicted defendant of drunk driving solely on the grounds that his blood alcohol level was above the legal limit under G.S. 20-138.1(a)(2).

The Court of Appeals first considered (1), noting that admitting opinion testimony from the trooper that defendant was operating the vehicle was improper, as the trooper did not observe defendant actually drive the pickup truck. The court explained this was not reversible error because the trial court provided a curative instruction to the jury, directing them to disregard the trooper's testimony that defendant was the driver. The court found that sufficient evidence beyond the trooper's testimony supported finding that defendant was the driver, justifying denial of defendant's motion to dismiss.

Considering (2), the court explained that exigent circumstances supporting a warrantless blood draw almost always exist where a defendant is unconscious and being taken to a hospital. In *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), the Supreme Court's plurality held that normally law enforcement may order a warrantless blood draw when the suspect is unconscious and taken to a hospital for treatment, but that the defendant must have an opportunity to argue the lack of exigency and show an "unusual case" that would require a warrant. Slip Op. at 8. Here, the court found that defendant had such an opportunity, and found no error in admitting the results of the blood draw.

Judge Tyson concurred in the judgment on (1), but dissented by separate opinion regarding (2), disagreeing with the majority's application of *Mitchell* and the admission of the results obtained through the warrantless blood draw.

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Criminal Procedure

Capacity to Proceed & Related Issues

No substantial evidence before trial court indicating defendant's lack of capacity; ineffective assistance of counsel claim required development of the record through motion for appropriate relief; handwritten changes to wavier of defendant's right to indictment required remand to trial court.

State v. George, COA23-62, ___ N.C. App. ___ (July 18, 2023). In this Wayne County case, defendant appealed judgments for possession of heroin and cocaine and resisting a public officer, arguing error in failing to order a competency hearing *sua sponte* and ineffective assistance of counsel. Defendant's appellate counsel also filed a brief under *Anders v. California*, 386 U.S. 738 (1967), requesting the Court of Appeals conduct an independent review of the record. After review, the court found no error with the lack of a competency hearing, dismissed the ineffective assistance of counsel argument without prejudice, and remanded the matter to the trial court for review of whether defendant validly waived indictment.

Defendant's convictions arose from separate incidents in December 2018 and April 2021, where defendant was found with heroin and cocaine, respectively. In May of 2022 defendant pleaded guilty to the charges. Defendant's appellate counsel then filed an *Anders* brief and defendant filed arguments on his own.

Examining defendant's first argument, the Court of Appeals disagreed that the trial court committed error by failing to order a competency hearing. The court noted that no party raised the issue of defendant's capacity, and "the trial court extensively inquired as to Defendant's mental capacity and understanding of the proceedings." Slip Op. at 4. The applicable standard from *State v. Heptinstall*, 309 N.C. 231 (1983), only requires a trial court to order a hearing *sua sponte* if substantial evidence before the court indicates the defendant is incompetent. Because there was no substantial evidence of defendant's lack of capacity before the trial court here, there was no error.

Considering the ineffective assistance of counsel argument, the court explained that generally these claims "should be considered through motions for appropriate relief and not on direct appeal." Slip Op. at 7. Because the record here was not fully developed to consider defendant's argument regarding his representation, the court dismissed the claim without prejudice so that defendant could file a motion for appropriate relief with the trial court.

Conducting the independent review requested by defense counsel's *Anders* brief, the court identified one possible error with the information related to the April 2021 charges. On the last page of the information, a file number was crossed out and replaced with a partially illegible handwritten number. The court explained "[w]hile this may be a scrivener's error, our independent review of the Record at least reveals this potential issue of whether Defendant

validly waived his right to indictment by a grand jury specifically in file number 18 CRS 55019." *Id*. at 9. Based on this issue, the court remanded to the trial court to ensure the waiver of indictment was valid.

Counsel Issues

Trial court adequately inquired into potential conflict before denying defense counsel's motion to withdraw, and defendant knowingly waived any potential conflict.

State v. Bridges, COA22-208, ___ N.C. App. ___ (August 1, 2023). In this Johnston County case, defendant appealed his convictions for assault with a deadly weapon and attempted robbery, arguing error in the denial of defense counsel's motion to withdraw, and ineffective assistance of counsel. The Court of Appeals found no error and dismissed the ineffective assistance of counsel claim without prejudice.

In October of 2018, defendant went to a car lot in Garner with another man and a woman. While the woman discussed purchasing a car with the manager, defendant and his accomplice entered with handguns and asked for the manager's money. The manager was subsequently shot through the neck, and the group fled the lot. When the matter came for trial, the woman testified for the State that defendant was the shooter. Prior to the witness's testimony, defense counsel encountered her in the hallway crying, and had a conversation with her where she allegedly told him that she was not present at the scene of the crime. Defense counsel alerted the trial court, and an inquiry was held outside the presence of the jury. The State was also permitted to meet with the witness during lunch recess. After all these events, defense counsel made a motion to withdraw and a motion for a mistrial, arguing that he had a conflict of interest based upon the discussion with the witness, and he had become a necessary witness in defendant's case. The trial court denied this motion, and defendant was subsequently convicted.

The Court of Appeals first looked at defendant's argument that defense counsel became a necessary witness for defendant, depriving him of his Sixth Amendment right to conflict-free and effective counsel. The court explained that a trial court must conduct an adequate inquiry when it is aware of a possible conflict with defense counsel; to be adequate, the inquiry must determine whether the conflict will deprive the defendant of his constitutional rights. Here, the trial court discussed the conflict and its implications with the parties at length before denying defense counsel's motion to withdraw. The court also noted that defendant made a voluntary, knowing, and intelligent waiver of any conflict, as he "explicitly stated, after witnessing the entirety of [the witness's] testimony, including his counsel's cross-examination of her, that he did not wish for his counsel to withdraw." Slip Op. at 13. The court concluded that no error occurred based on the adequate inquiry and defendant's waiver.

Taking up defendant's ineffective assistance of counsel claim, the court explained that normally these issues are not taken up on direct appeal, and the appropriate remedy is a motion for

appropriate relief (MAR) so that the trial court can conduct further investigation as necessary. Here, the court dismissed defendant's claim without prejudice to allow him to file an MAR.

Pleas

Trial court failed to strictly adhere to plea agreement when imposing a 30-day split sentence not mentioned in the agreement.

State v. Robertson, COA23-24, ___ N.C. App. ___ (Sept. 5, 2023). In this Cabarrus County case, defendant appealed judgment entered on his guilty plea, arguing that the trial court refused to allow him to withdraw his plea after imposing a sentence differing from the plea agreement. The Court of Appeals agreed, vacating the judgment and remanding for further proceedings.

In August of 2022, defendant entered a plea agreement for felony fleeing to elude arrest. The agreement specified that defendant would receive a suspended sentence in the presumptive range. However, at defendant's plea hearing, the trial court imposed an additional "split sentence of 30 days" in jail as a special condition of probation. Slip Op. at 2. Defense counsel moved to strike the plea, but the trial court denied the motion.

After reviewing the applicable case law and statutes, the Court of Appeals held that the trial court erred by failing to strictly adhere to the terms of the plea agreement. Based upon the transcript, it appeared that the trial court felt the addition was permitted because the plea agreement did not mention special conditions related to probation. The court explained:

> Our courts have held that strict adherence to plea arrangements means giving the defendant what they bargained for. . . [t]o the extent the terms of the arrangement—including whether the parties had agreed to the imposition of a special condition of probation—were unclear, the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate.

Id. at 6-7.

Sentencing

Witness's testimony represented additional competent evidence for the revocation of defendant's probation.

State v. Bradley, 105A22, ___ N.C. ___ (June 16, 2023). In this Moore County case, the Supreme Court per curiam affirmed and modified *State v. Bradley*, 282 N.C. App. 292 (2022), a case where the Court of Appeals majority concluded the trial court did not err by revoking defendant's probation after finding substantial evidence showed defendant had possessed controlled substances. The Supreme Court noted there was additional competent evidence through the testimony of one witness to support the trial court's findings of fact and

conclusions of law. The court modified the opinion of the Court of Appeals to the extent that "the lower appellate court may have mistakenly misconstrued [the witness's] statements as incompetent evidence upon which the trial court could not and did not rely." Slip Op. at 2.

Sentence entered seven years after prayer for judgment continued did not represent unreasonable delay; prayer for judgment continued was not final judgment as it did not impose conditions amounting to punishment.

State v. McDonald, COA22-672, ___ N.C. App. ___ (August 1, 2023). In this Robeson County case, defendant appealed his conviction for misdemeanor death by vehicle, arguing error as (1) the prayer for judgment continued (PJC) was intended to be a final judgment in the matter, and (2) the almost seven-year delay in entering judgment was unreasonable. The Court of Appeals affirmed the trial court's judgment.

In October of 2011, defendant crossed the center line of a roadway when attempting to turn left, causing a collision with a motorcyclist who died of injuries sustained in the collision. Defendant pleaded guilty to misdemeanor death by vehicle in October of 2014. Defendant's plea agreement required him to plead guilty and acknowledge responsibility in open court, and stated the trial court would then enter a prayer for judgment in the matter. In August of 2020, defendant was charged with involuntary manslaughter due to another motor vehicle accident, and the State moved to pray judgment in the misdemeanor death by vehicle case. Over defendant's opposition, the trial court granted the State's motion and entered a judgment imposing a sentence of imprisonment that was suspended for supervised probation.

Considering issue (1), the Court of Appeals noted that applicable precedent has made a distinction between PJCs that impose conditions "amounting to punishment" versus PJCs that do not. Slip Op. at 5. Conditions amounting to punishment include fines and imprisonment terms, whereas orders such as requiring defendant to obey the law or pay court costs do not represent punishment for this distinction. Here the court found no conditions amounting to punishment and rejected defendant's argument that the trial court's statement "that he hoped 'both sides can have some peace and resolution in the matter'" represented an intention for the judgment to be final. *Id*. at 7.

Turning to (2), the court noted that a sentence from a PJC must be entered "within a reasonable time" after the conviction, and looked to *State v. Marino*, 265 N.C. App. 546 (2019) for the considerations applicable to determining whether the sentence was entered in a reasonable time. Slip Op at 8-9. Here, the court noted the circumstances supported a finding of reasonableness, as (1) the State delayed its motion to pray judgment until defendant committed a second motor vehicle offense, (2) defendant tacitly consented to the delay by not objecting to the PJC and not asking for judgment to be entered, and (3) defendant could not show actual prejudice by the delay of entering a sentence.

Judge Riggs dissented by separate opinion and would have held that the delay divested the trial court of jurisdiction to enter the sentence.

Trial court erroneously checked box 4 on form AOC-CR-343 when revoking defendant's probation, but error did not justify reversal of judgment revoking probation.

State v. Daniels, COA22-756, ___ N.C. App. ___ (Sept. 12, 2023). In this Pitt County case, defendant appealed the revocation of her probation, arguing the trial court improperly considered all of defendant's probation violations as bases to revoke her probation in violation of G.S. 15A-1344(a). The Court of Appeals found that the trial court committed error in one of its findings but affirmed the revocation of defendant's probation.

In June of 2021, while defendant was on probation for a driving while intoxicated offense, the probation officer filed a violation report with the trial court identifying (1) positive drug screens for marijuana, (2) failure to pay court costs, and (3) commission of a new criminal offense. At the revocation hearing, defendant admitted to the violations and requested confinement rather than revocation. The trial court declined this request and revoked her probation due to willful and intentional violations. When filling out form AOC-CR-343 after the judgment, the trial court checked box 4, which represented a finding that "each violation is, in and of itself, a sufficient basis upon which [the trial court] should revoke probation and activate the suspended sentence." Slip Op. at 4.

Reviewing defendant's argument, the Court of Appeals first explained that G.S. 15A-1344(a) only permitted revocation of defendant's probation after the new criminal offense, not the other two violations in the report. To revoke defendant's probation under this provision, the trial court was required to exercise discretion in determining that there was a willful violation of the terms of probation when defendant committed the new criminal offense. Here the trial court made just such a finding by checking box 5(a) on form AOC-CR-343. The court determined that checking box 4 was error, but that "[the trial court] properly considered and understood the statutory basis for revoking Defendant's probation and properly exercised its discretion." Slip Op. at 8. As a result, the court reversed the finding represented by checking box 4 but affirmed the judgment revoking probation.

Evidence

Character Evidence

Admission of defendant's text message conversations with a prior girlfriend represented improper character evidence and was plain error.

State v. Reber, COA22-130, ___ N.C. App. ___ (May 16, 2023). In this Ashe County case, defendant appealed his convictions for rape and sex offense with a child, arguing plain error in

the admission of two text message conversations with a woman that were improper character evidence. The Court of Appeals agreed, reversing and remanding for a new trial.

In August of 2021, defendant came to trial for four counts of rape and six counts of sex offense with a child based upon conduct that allegedly occurred between him and the daughter of a couple he knew well. At trial, defendant was questioned about his prior sexual relationships with adult women and several text message conversations during cross-examination. In particular, the prosecutor asked about a text message exchange where defendant's adult girlfriend admitted to being too drunk to remember a sexual encounter. Defendant was also questioned about another exchange where defendant and his girlfriend were attempting to find a place to engage in sexual activity as defendant lived with his grandparents and could not have girlfriends spend the night. Defendant texted his girlfriend that he hoped his daughter (who was not the child allegedly abused) would not tell his grandparents, but that she had a big mouth.

On appeal, the Court of Appeals agreed with defendant's argument that the admission of these text message exchanges was plain error. The court explained that this evidence showing defendant's past sexual relationship was unrelated to his alleged abuse of the child in question, and inadmissible for any Rule of Evidence 404(b) purpose. The court noted there was no similarity in how the crimes and the Rule 404(b) offenses occurred other than they both involved sexual intercourse. The events took place in dissimilar locations, and the charges did not involve the consumption of alcohol or drugs with the child. The court also noted the exchange regarding defendant's daughter was not sufficiently similar to defendant allegedly asking the victim not to reveal sexual abuse. The court explained:

> Here, the evidence portraying Defendant as manipulative by (1) engaging in sexual intercourse with a woman who had been drinking alcohol, and (2) for contemplating asking his daughter to not share his plans to meet a girlfriend at a motel so they could engage in sexual intercourse is highly prejudicial and impermissibly attacked Defendant's character.

Slip Op. at 18. Examining the other evidence in the case, the court concluded that due to the disputed nature of the allegations, the outcome depended on the perception of truthfulness for each witness, and the improperly admitted evidence had a probable impact on the jury's finding of guilty. The court also found that closing argument remarks by the prosecutor regarding defendant's sexual history were highly prejudicial and "the trial court erred by failing to intervene *ex mero motu* in response to the grossly improper and prejudicial statements." *Id*. at 25.

Judge Dillon dissented by separate opinion and would have held that defendant failed to show reversible error.

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Prior Acts--404(b) Evidence

Expert opinion testimony regarding vehicle's speed was properly admitted under Rule 702(a); evidence of prior DWI charge was properly admitted under Rule 404(b) to show malice; fatally defective indictment and sentencing errors justified vacating and remanding for resentencing.

State v. Taylor, COA22-788, ___ N.C. App. ___ (July 5, 2023). In this Vance County case, defendant appealed his convictions for second-degree murder, felony hit and run, DWI, reckless driving, failure to reduce speed, and failure to comply with license restrictions, arguing improperly admitted expert testimony and evidence of a prior DWI charge, a fatally defective indictment for the license restriction charge, and sentencing errors. The Court of Appeals found no error for the evidence issues but agreed that the indictment for the license restriction charge was defective and the sentencing issues were valid, remanding the matter for resentencing.

In May of 2018, highway patrol troopers responded to the scene of an accident in Henderson where an SUV ran into the back of a sedan and seriously injured the passengers. The SUV was found several yards away from the sedan, wrecked into a fence, with a cold six-pack in the front seat and no driver inside. After a canine search, defendant was found hiding under a boxcar nearby, with the keys to the SUV in his pocket. When defendant's blood alcohol level was sampled it was 0.15. At trial, a state trooper who was not one of the investigating officers testified as an expert regarding the speed of the SUV and whether it exceeded the speed limit. The trial court also admitted evidence of a pending 2017 DWI charge against defendant under Rule of Evidence 404(b). Defendant's objections to both were overruled.

The Court of Appeals first took up the expert testimony issue, turning to *State v. McGrady*, 368 N.C. 880 (2016), to explain the wide discretion granted to a trial court under Rule of Evidence 702(a) when determining whether to admit expert testimony. Slip Op. at 7-8. Here, the trooper was unable to use a scientific method for determining speed due to the circumstances of the crash, so he testified using his experience and specialized training. The Court found no issue with the testimony and noted defendant was able to fully cross-examine and challenge the expert testimony.

Turning to the Rule 404(b) issue, the court noted that evidence of the 2017 DWI charge was admitted "to show his intent, knowledge, or absence of mistake to support malice, an essential element of second-degree murder." *Id*. at 11. Finding that the admission was not error, the court pointed to a N.C. Supreme Court decision, *State v. Jones*, 353 N.C. 159 (2000), where evidence of a previous DWI charge was admitted for just such a purpose.

For the license restriction charge, the court explained "[t]he State concedes the license restriction violation indictment was facially invalid," and likewise conceded issues with prior record level and DWI level sentencing. Slip Op. at 13. As a result, the court found no error for all

charges except the license restriction violation, which it vacated, and remanded the judgments for resentencing.

Criminal Offenses

Threats & Related Offenses

The State must prove in true threats cases that the defendant had some subjective understanding of the threatening nature of his statements.

Counterman v. Colorado, 600 U.S. ___ (June 27, 2023). For about two years, Counterman, the petitioner in this case, sent hundreds of Facebook messages to a local artist. The two had never met, and the woman never responded. A number of the messages expressed anger at the artist and envisaged harm upon her. The messages put the artist in fear and upended her daily life. Counterman was charged under a Colorado stalking statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Slip Op. at 2.

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and thus could not form the basis of a criminal prosecution. In line with Colorado law, the State had to show that a reasonable person would have viewed the Facebook messages as threatening but did not have to prove that Counterman had any subjective intent to threaten. The trial court decided that Counterman's statements rose to the level of a true threat, and the Colorado Court of Appeals Affirmed. The United States Supreme Court granted certiorari to consider (1) whether the First Amendment requires proof of a defendant's subjective mindset in true threats cases and (2) if so, what *mens rea* is sufficient.

In an opinion by Justice Kagan, the Supreme Court concluded that in order to prevent a chilling effect on speech, the State must show a culpable mental state. The Court reasoned that although this requirement makes prosecution of some otherwise prohibited speech more difficult, it reduces the prospect of chilling fully protected expression.

The Court further concluded that recklessness was the most appropriate *mens rea* in the true threats context. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another. In the threats context, it means that the speaker is aware that others could regard his statements as threatening violence and delivers them anyway. Slip Op. at 11. The Court concluded that the recklessness standard "offers enough breathing space for protected speech without sacrificing too many of the benefits of enforcing laws against true threats." Slip Op. at 14.

The State had to show only that a reasonable person would have understood Counterman's statements as threats but did not have to show any awareness on his part that the statements could be understood that way. The Court held that this was a violation of the First Amendment, vacated the judgment, and remanded the case for further proceedings.

Justice Sotomayor, joined partly by Justice Gorsuch, concurred in the conclusion that some subjective *mens rea* is required in true-threats cases and that in this particular case, a *mens rea* of recklessness is sufficient, but noting that she would not reach the distinct conclusion that a *mens rea* of recklessness is sufficient for true threats prosecutions generally and that requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent and history.

Justice Barrett dissented in an opinion joined by Justice Thomas. The dissent reasoned that the requirement of a subjective element unjustifiably grants true threats preferential treatment as compared to other contexts involving unprotected speech, and the result may sweep much further than the opinion lets on.

Subjective element of "true threat" for communicating threats charge was satisfied by charging document and jury instructions tracking language of G.S. 14-277.1, including "willfully threaten."

State v. Guice, 2022-NCCOA-682, 286 N.C. App. 106 (Oct. 18, 2022). In this Buncombe County case, defendant appealed his conviction for communicating threats, arguing that his words did not constitute a true threat and the trial court erred by denying his motion to dismiss and request for a jury instruction on true threats. The Court of Appeals found no error by the trial court.

In May of 2020, a resident at an Asheville apartment complex called security because she heard a disturbance in the neighboring apartment. When security arrived to investigate, defendant opened the apartment door and was aggressively hostile to the security officer, getting into the officer's face and threatening to beat him. At trial, the security officer testified that he believed defendant was going to carry out the threat due to his body language and anger during the interaction. Defendant was subsequently convicted by a jury of the communicating threats charge.

The Court of Appeals first considered whether the charging document contained sufficient facts to allege a "true threat" unprotected by the First Amendment, explaining that there are "objective and subjective" elements to the true threat analysis. Slip Op. at 6. Because the charging document tracked the text of G.S. 14-277.1 and contained "willfully threaten," the court found the subjective element present and sufficient to support the offense charged. *Id*. at 8. The court then turned to the motion to dismiss, finding that the testimony in the record was sufficient to support the conclusion that defendant had the specific intent to make a threat against the security guard. The court last turned to the requested jury instruction and applied a

similar analysis from the charging document. The court concluded that the jury instruction contained all elements of the offense, noting "[t]he subjective component, or specific intent, of true threats is covered by defining the phrase of willfully threaten as 'intentionally or knowingly' 'expressi[ng] . . . an intent or a determination to physically injure another person.'" *Id*. at 12.

Larceny, Embezzlement & Related Offenses

Single taking rule did not bar conviction for both larceny and obtaining property by false pretenses, and the offenses were not mutually exclusive.

State v. White, COA22-369, ___ N.C. App. ___ (May 16, 2023). In this Union County case, defendant appealed his convictions, arguing error in denying his motion to dismiss either the larceny or obtaining property by false pretenses charge under the single taking rule. The Court of Appeals found no error.

In December of 2018, Defendant and two associates were captured on surveillance video at a Wal-Mart, using an empty child car seat box and a plastic bin to remove several thousand dollars' worth of electronics from a display case. As a part of the scheme to remove the property, defendant and his associates purchased the car seat through a self-checkout line for $89, instead of the true value of the electronics hidden inside. At trial, defendant moved to dismiss the charges against him, a motion the trial court denied. The trial court instructed the jury on felony larceny, conspiracy to commit felony larceny, and obtaining property by false pretenses, and the jury convicted defendant of all three, as well as habitual felony status.

The Court of Appeals first explained that the single taking rule prevents a defendant from being charged multiple times in a single transaction. However, the court noted that "in each of the cases upon which Defendant relies. . . the defendant was charged with either larceny offenses or obtaining property by false pretenses, but not both." Slip Op. at 7. Previous decisions established that larceny and obtaining property by false pretenses are separate offenses with different elements; in particular, false and deceptive representation is not an element of larceny. As a result, defendant's apparent purchase of a car seat, when he was actually hiding thousands of dollars of electronics inside, represented a distinguishable offense from larceny, and was not a duplicative charge.

The court also considered defendant's argument under *State v. Speckman*, 326 N.C. 576 (1990), that G.S. 14-100(a) requires the trial court to present larceny and obtaining property by false pretenses as mutually exclusive options for conviction. The court rejected this argument, noting that the crime in question for *Speckman* was embezzlement, which requires first obtaining property lawfully before wrongfully converting it, making it mutually exclusive from obtaining property by false pretenses. Unlike embezzlement, the court explained that "[t]he offenses of larceny and obtaining property by false pretenses are not mutually exclusive, neither in their elements. . . nor as alleged in the instant indictments." Slip Op. at 11-12.

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Curative instruction coupled with testimony of second witness justified denial of motion for mistrial based on witness's improper testimony; defendant's actions did not represent intent to permanently deprive the victim of his vehicle, justifying dismissal of the charge and remand for judgment on unauthorized use of a motor vehicle.

State v. Spera, COA22-814, ___ N.C. App. ___ (August 15, 2023). In this Union County case, defendant appealed his convictions for misdemeanor larceny of a vehicle and robbery with a dangerous weapon, arguing error in (1) denying his motion for a mistrial after the victim's testimony identifying him was ruled inadmissible, (2) denying his motion to dismiss the charge of larceny of a motor vehicle for insufficient evidence of intent to permanently deprive the victim, and (3) failure to instruct the jury on the concept of temporary deprivation. The Court of Appeals found no error in (1) but found merit in (2) and vacated defendant's conviction for larceny, remanding the case for entry of judgment on unauthorized use of a motor vehicle.

In April of 2017, defendant and several associates burst into a mobile home and robbed several friends who had gathered in the living room. Defendant, armed with a hammer, went through the pockets of the people gathered in the living room, and took the keys of one victim and went on a joyride in his truck, returning the truck 30 minutes later. The owner of the truck was allowed to leave unharmed, although some documentation in the truck was destroyed and a roadside safety kit had been taken out of the vehicle. When the matter reached trial, the victim testified that defendant was the man with the hammer who had robbed him. However, the testifying victim had initially identified defendant through a picture that was not disclosed to the defense, leading to an objection from defense counsel to his testimony. After voir dire and argument from both sides, the trial court struck the victim's identification of defendant and gave a curative instruction to the jury but denied defendant's motion for a mistrial. The trial court also dismissed several charges against defendant but denied defendant's motion for the robbery and larceny of a motor vehicle charges.

Taking up (1), the Court of Appeals noted that review of the trial court's denial of a mistrial is highly deferential, and that a mistrial is only appropriate in situations where improprieties in the trial were so serious defendant could not receive a fair trial. Here, the court agreed that the victim's testimony was improper and that the trial court's curative instruction was likely too vague to remove the prejudice of the improper testimony. However, because the State offered a second witness that also identified defendant, and defense counsel conducted adequate cross-examination after the improper testimony, the court found that "albeit inadequate standing alone," the cumulative effect of these factors "defeats [defendant's] claim of a gross abuse of discretion by the trial judge." Slip Op. at 8. The court also rejected defendant's attempt to apply *State v. Aldridge*, 254 N.C. 297 (1961) to call into question the second witness's credibility.

Turning to (2), the court agreed with defendant that the State did not present evidence showing intent to permanently deprive the victim of his vehicle. Explaining the elements of larceny, the court noted that intent to permanently deprive the owner of possession must be

shown to sustain a conviction, and this intent is typically shown by circumstantial evidence. However, "apart from the act of taking itself, additional facts must be present to support an inference of the requisite criminal intent, including both the intent to wrongfully take and the intent to permanently deprive the owner of possession." Slip Op. at 15. Here, the State pointed to defendant's use of force as evidence of intent, but the court rejected this argument, exploring precedent to show that force alone does not represent evidence of intent to permanently deprive the victim of their property. Defendant returned the truck to the victim willingly after 30 minutes, representing only a temporary deprivation. The court concluded that the appropriate remedy here was the lesser-included offense of unauthorized use of a motor vehicle and remanded for entry of judgment for that offense. This remand negated defendant's argument (3), which the court did not consider.

Motor Vehicle Offenses

Evidence showing defendant drove away from officers for several miles, exceeded speed limit, disregarded stop signs, and threw items from the vehicle supported finding specific intent to evade arrest.

State v. Jackson, COA 22-922, ___ N.C. App. ___ (June 20, 2023). In this Johnston County case, defendant appealed her conviction for misdemeanor fleeing to elude arrest, arguing insufficient evidence of her specific intent to evade arrest. The Court of Appeals found no error.

In October of 2020, officers attempted to pull over defendant for driving through a stop sign at an apartment complex. Defendant initially did not stop, and instead sped up in a residential area, turned on her hazard lights, and called 911 to inquire if the vehicle attempting to pull her over was actually a police vehicle. Even after being advised that the car attempting to pull her over was a police vehicle, defendant kept driving, ignoring several stop signs and exceeding the speed limit. Defendant eventually returned to the apartment complex and stopped, where she was arrested. She was eventually convicted of misdemeanor possession of marijuana and misdemeanor fleeing to elude arrest.

Considering defendant's argument of insufficient evidence of her intent to evade arrest, the Court of Appeals disagreed, pointing to the substantial evidence of defendant's flight from officers. Defendant drove for several miles, passing many safe areas to pull over, at a rate of speed above the posted speed limit. She also threw marijuana out of the vehicle as she drove away from officers, and initially refused to comply when she stopped at the apartment complex. The court explained "[t]his is not a case of a nervous motorist taking a moment longer than necessary to stop for an officer in order to pull into a well-lit or populated parking lot." Slip Op. at 7, quoting *State v. Cameron*, 223 N.C. App. 72 (2012).

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Obstruction of Justice and Related Offenses

Attempt to bribe witness represented intimidation or interference with a witness for purposes of G.S. 14-226; disjunctive jury instruction was not error where the statute did not specifically enumerate criminal acts constituting an offense.

State v. Patton, COA22-994, ___ N.C. App. ___ (August 1, 2023). In this Buncombe County case, defendant appealed his convictions for second-degree forcible sexual offense, intimidating or interfering with a witness, and habitual felon status, arguing (1) the trial court lacked jurisdiction over the interfering with a witness charge, (2) error in denying his motion to dismiss the interfering charge due to insufficient evidence, and (3) error in the jury instruction related to the interfering charge. The Court of Appeals found the trial court did have sufficient jurisdiction and committed no error.

The charges against defendant arose from a 2019 incident where he forced himself upon a woman after a night of drinking and smoking marijuana. While defendant was in the Buncombe County Jail prior to trial, he made a call to the victim using a fake name. When the victim answered, defendant told her "[i]f you're still in Asheville, I'm gonna try and send you some money," and "I got $1,000 for ya." Slip Op. at 4-5. The victim informed law enforcement of the call, leading to the additional charge of intimidating or interfering with a witness. At trial, the victim testified about the phone call and the recording was published to the jury. Defense counsel's motions to dismiss the charges were denied by the trial court.

The Court of Appeals first explained the basis of defendant's argument (1), that the trial court lacked jurisdiction because the alleged conduct from the indictment, bribing the witness/victim not to testify, was not criminalized by G.S. 14-226. Defendant argued that bribery was not an act to intimidate the witness under the language of the statute, and that only threatening or menacing a witness represented a violation of the statute. The court rejected this interpretation, explaining that G.S. 14-226 "prohibits intimidation of witnesses or attempts to deter or interfere with their testimony 'by threats, menaces or in any other manner,'" and that this language "given its plain and ordinary meaning, straightforwardly expands the scope of prohibited conduct beyond 'threats' and 'menaces' to include any other act that intimidates a witness or attempts to deter or interfere with their testimony." *Id*. at 9-10.

The court likewise rejected (2), defendant's motion to dismiss argument. Here the court explained that direct evidence was not required to prove intent, and that circumstantial evidence was sufficient to support a finding that defendant intended to dissuade the witness from testifying. The court held that "the circumstantial evidence that the State did introduce in this case supports a reasonable inference that [defendant] acted with just that intent given the context in which he made the offer." *Id*. at 13.

Taking up (3), defendant's objections to the jury instructions, the court explained that defendant objected to four elements of the instructions. First, defendant objected that the

instruction did not require the jury to find that defendant threatened the witness/victim; the court explained this was precluded by its holding discuss above on bribery in G.S. 14-226. Second, defendant argued that the instruction did not convey the required intent to the jury; the court rejected this argument as the instruction was based on a pattern jury instruction previously held to be consistent with the statute. Third, defendant argued that the structure of the instruction allowed the jury to convict him for simply offering the witness/victim $1,000, which is not illegal conduct; again, the court pointed to the context and circumstances around the conduct and bribery to dissuade the testimony.

Defendant's final argument regarding the jury instruction was that the disjunctive structure of the instruction allowed a jury verdict that was not unanimous, as he asserted that various jury members may have found him guilty under separate parts of the instruction. The court explained that some disjunctive instructions are unconstitutional, particularly where a jury can choose from one of two underlying acts to find a defendant guilty of a crime such as in *State v. Lyons*, 330 N.C. 298 (1991). Slip Op. at 18. However, the crime of intimidating or interfering with a witness does not consist of a list of specific criminal acts, and the court pointed to the example of *State v. Hartness*, 326 N.C. 561 (1990), where indecent liberties was identified as a similar statute where any of several disjunctive acts can constitute the elements of the offense for purposes of a jury's guilty verdict. Slip Op. at 19. As there was no danger of jurors convicting defendant of separate offenses under G.S. 14-226, the court found no issue with the disjunctive nature of the jury instruction in the current case. The court further noted that the evidence and verdict rested solely on the attempt to bribe the witness/victim and did not provide other possible behaviors that could create ambiguity.

Sexual Assaults & Related Offenses

Court applied four-factor analysis to determine two of defendant's convictions for indecent liberties were actually one continuous transaction.

State v. Calderon, COA22-822, ___ N.C. App. ___ (Sept. 5, 2023). In this Wake County case, defendant appealed his three indecent liberties with a child convictions, arguing his actions represented only one continuous act rather than three separate incidents. The Court of Appeals majority held that the evidence only supported two convictions, not three, and remanded the case so that the trial court could arrest judgment on one of the convictions and resentence defendant accordingly.

In 2019, defendant met the thirteen-year-old victim after a church service at the home where he rented a room in Raleigh. After a second conversation with the victim at a pool party, defendant became friends with her on social media platforms. On July 5, 2019, defendant showed up at the house where the victim lived while her grandmother was away. Testimony about the events after this varied, as the victim testified that defendant forcibly pulled her into his van and made sexual contact with her, while neighbors observed the two inside defendant's van kissing without any apparent coercion. Defendant testified that the victim messaged him

asking him to come over and that she came willingly into his van where they kissed but did not engage in other sexual conduct. After a trial, defendant was convicted of three counts for (1) kissing the victim outside his van, (2) kissing the victim on the mouth inside his van, and (3) a second count of kissing the victim on the mouth inside his van. Defendant was found not guilty of other charges related to sexual conduct with the victim.

Taking up defendant's appeal, the majority agreed that the evidence did not support three distinct charges of indecent liberties. The court first determined that defendant's actions represented "touching" not "sexual acts" for purposes of the indecent liberties charges. After establishing the acts were touching, the court considered relevant case law on continuous transactions as opposed to separate and distinct acts. Because no North Carolina case was directly on point, the court turned to a Kansas Supreme Court decision, *State v. Sellers*, 292 Kan. 346 (2011), to adopt a four-factor analysis applicable to "indecent liberties offenses involving multiple, non-sexual acts." Slip Op. at 18. The four factors are:

> (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.

Id. at 17, quoting *Sellers*.

Applying the factors to the current case, the court concluded that the acts of kissing outside the van and inside the van were distinct, as they were in different locations and there was an intervening event of getting into defendant's van before engaging in a second episode of kissing. The same framework led the court to conclude the kissing inside the van was one continuous transaction as the kisses took place close in time and were not separated by any intervening act. This supported arresting judgment on the third conviction, and resentencing defendant accordingly.

Judge Stading concurred in part and dissented in part by separate opinion, concurring with the majority's adoption of the test from *Sellers* but dissenting from the conclusion that it called for dismissal of one of the three convictions.

Weapons Offenses

State presented insufficient evidence that passenger in the front seat of a vehicle with other occupants had constructive possession of firearm found in the back seat.

State v. Sharpe, COA22-491, ___ N.C. App. ___ (May 16, 2023). In this Nash County case, defendant appealed his conviction for possession of a firearm by a felon, arguing insufficient evidence to establish his constructive possession of the firearm. The Court of Appeals agreed, reversing and remanding for resentencing.

In May of 2020, a problem oriented policing team was attempting to prevent retaliatory shootings by locating individuals that may have been involved in the incidents, and defendant was identified as one person possibly involved. Officers located a vehicle with defendant inside and initiated a traffic stop; defendant was in the front passenger seat of the vehicle. After the stop, defendant exited the vehicle and went inside a gas station, where he resisted being frisked, leading to the officers tasing him and detaining him in the police car. Searching the vehicle, the officers found a rifle in the backseat and ammunition between the driver and passenger seats. No DNA or fingerprints were taken from the firearm. At trial, defendant testified that the vehicle was his mothers, and he was not allowed to drive it because he did not have a license. Defendant also called a witness who testified that he was another passenger in the vehicle and the firearm was his. Despite the testimony, defendant was convicted of resisting a public officer and possession of a firearm by a felon, and he appealed the firearm charge.

On appeal, the Court of Appeals first noted that to establish constructive possession, the prosecutor was required to prove that defendant had the "'power and intent to control' the disposition or use of the firearm." Slip Op. at 6, quoting *State v. Taylor*, 203 N.C. App. 448 (2010). Here, the state attempted to show this by first arguing that defendant was the custodian of the vehicle, pointing to *State v. Mitchell*, 224 N.C. App 171 (2012). The court did not agree with this analysis, examining the relevant case law and concluding that "under our existing case law, the driver was *also* a custodian of the vehicle. As such, the evidence fails to show Defendant was in *exclusive* possession of the vehicle at the time the rifle was found." Slip Op. at 9. The court looked for additional incriminating circumstances that could link defendant to constructive possession of the firearm, but found none, concluding "the evidence, without more, is not sufficient to support a finding Defendant, while seated in the front passenger seat and one of four occupants, was in constructive possession of a firearm found in the rear passenger compartment of a vehicle not owned or operated by Defendant." *Id*. at 12.

Proximity and indica of control supported finding that defendant constructively possessed firearm for possession of a firearm by a felon conviction.

State v. Livingston, COA22-678, ___ N.C. App. ___ (Sept. 19, 2023). In this Brunswick County case, defendant appealed his conviction for possession of a firearm by a felon, arguing error in the denial of his motion to dismiss for insufficient evidence. The Court of Appeals found no error.

In June of 2020, deputies with the Brunswick County Sheriff's Office began observing a vehicle that entered a known drug area. After the vehicle ran a stop sign and went 70 mph in a 55 mph zone, they pulled the vehicle over. Defendant was in the passenger seat when the deputies approached, and they observed marijuana on both the driver and defendant, leading to a search of the vehicle. The search found a bag containing a gun and a smaller crown royal bag containing three identification cards with defendant's name and picture on them. Defendant admitted to the police he was a felon, and he was arrested for possessing a gun. At trial,

defendant moved to dismiss, arguing the evidence had not established the gun was his. The trial court denied the motion and defendant was subsequently convicted.

The Court of Appeals first explained that "possession" for purposes of defendant's conviction could be actual or constructive; here defendant was not in actual possession, so the caselaw regarding constructive possession in a vehicle applied to defendant's appeal. To show constructive possession in this situation, the State is required to show "other incriminating circumstances" to allow a finding of constructive possession. Slip Op. at 7. The court noted that two common factors used to satisfy the "incriminating circumstances" inquiry were (1) proximity, and (2) indicia of control. *Id*. Here, (1) the bag containing the gun was located behind the passenger seat where defendant was sitting, and (2) the gun was touching a crown royal bag containing a wallet with defendant's identification cards in it. The combination of these two factors supported the finding that defendant constructively possessed the gun.

2023 Legislation Affecting Criminal Law and Procedure

Brittany Bromell

(Last updated October 2, 2023)

Below are summaries of 2023 legislation affecting criminal law, criminal procedure, and motor vehicle law. To obtain the text of the legislation, click on the link provided below or go to the General Assembly's website, www.ncleg.gov. Be careful to note the effective date of each piece of legislation.

1) **S.L. 2023-6 (H 40), as amended by section 4 of S.L. 2023-71 (S 626): Rioting.** Effective for offenses committed on or after December 1, 2023, section 1 of this act increases the penalties and adds new offenses for rioting and inciting to riot under G.S. 14-288.2. This section makes the following changes to G.S. 14-288.2:
    - Amends subsection (c) to provide that any person who willfully engages in a riot is guilty of a Class H felony if in the course of the riot the person brandishes any dangerous weapon or uses a dangerous substance.
    - Adds new subsection (c1), which provides that any person who willfully engages in a riot is guilty of a Class F felony if in the course of the riot the person causes property damage in excess of $2,500 or causes serious bodily injury.
    - Adds new subsection (c2), which provides that any person who willfully engages in a riot is guilty of a Class E felony if in the course of the riot the person causes a death.
    - Amends the language of subsection (d) to punish willfully inciting another to engage in a riot and that inciting results in a riot or is directly and imminently likely to produce a riot. Increases the punishment under this subsection from a Class 1 misdemeanor to a Class A1 misdemeanor.
    - Amends subsection (e) to increase the threshold of property damage that occurs as a result of inciting to riot from $1,500 to $2,500 and to increase the punishment from a Class F felony to a Class E felony.
    - Adds new subsection (e1), which provides that any person who willfully incites another to engage in a riot, and that inciting is a contributing cause of a riot in which there is a death, shall be guilty of a Class D felony.
    - Adds new subsection (f), which provides that any person whose person or property is injured by reason of rioting may sue for and recover from the violator three times the actual damages sustained, as well as court costs and attorneys' fees.
    - Adds new subsection (g), which provides that mere presence alone without an overt act is not sufficient to sustain a conviction pursuant to this statute.

    Civil remedies. Section 2 of this act amends G.S. 14-288.6 to add new subsection (c), which provides that any person whose person or property is injured by reason of looting may sue for and recover from the violator three times the actual damages sustained, as well as court costs and attorneys' fees.

Assault on emergency personnel. Section 3 of this act increases the punishment and adds new offenses for assault on emergency personnel under G.S. 14-288.9. This section of the act: (1) increases the punishment for committing an assault causing physical injury upon emergency personnel from a Class I felony to a Class H felony; (2) adds new subsection (e), which provides that any person who commits an assault upon emergency personnel causing serious bodily injury to the emergency personnel is guilty of a Class E felony; and (3) adds new subsection (f), which provides that any person who commits an assault upon emergency personnel causing death to the emergency personnel is guilty of a Class D felony.

Pretrial release. Effective for offenses committed on or after December 1, 2023, section 4 of this act adds new G.S. 15A-534.8 which requires pretrial release conditions for rioting and looting offenses to be determined by a judge. Pursuant to the new statute, the judge must consider the defendant's criminal history when setting the conditions of release but must not unreasonably delay the determination of conditions of pretrial release for the purpose of reviewing the defendant's criminal history report. The judge must act within 24 hours of arrest of the defendant, and if a judge has not acted, then a magistrate must act. In addition to the pretrial release provisions of G.S. 15A-534, the following provisions apply:

(1) If the judge determines that the immediate release of the defendant will pose a danger of injury to others and that the execution of an appearance bond will not reasonably assure that the injury will not occur, the judge may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.
(2) A judge may order the defendant to stay away from specific locations or property where the offense occurred. This condition may be imposed in addition to requiring that the defendant execute a secured appearance bond.
(3) In the event that the defendant is mentally ill or a substance abuser and dangerous to himself or herself or others, the provisions of Article 5 of Chapter 122C of the General Statutes apply.

2) S.L. 2023-8 (S 41): Concealed carry. Effective for offenses committed on or after December 1, 2023, this act creates new subsection (1c) to G.S. 14-269.2(a) to define "school operating hours." Under this new subsection, school operating hours is defined as any time when the premises are being used for: (1) curricular or extracurricular activities; (2) educational, instructional, or school-sponsored activities; or (3) programs for minors by entities not affiliated with the religious institution.

This act also creates new subsection (k1) to G.S. 14-269.2, to provide that the laws prohibiting weapons on campus or other educational property will not apply to a person who has a valid concealed handgun permit or who is exempt from obtaining a permit, if all of the following conditions apply:

(1) The person possesses and carries a handgun on educational property other than an institution of higher education as defined by G.S. 116-143.1 or a nonpublic, postsecondary educational institution.
(2) The educational property is the location of both a school and a building that is a place of religious worship as defined in G.S. 14-54.1.
(3) The weapon is a handgun.

(4) The handgun is only possessed and carried on educational property outside of the school operating hours.
(5) The person or persons in legal possession or control of the premises have not posted a conspicuous notice prohibiting the carrying of a concealed handgun on the premises in accordance with G.S. 14-415.11(c).

Under this subsection, property owned by a local board of education or county commission is not considered a building that is a place of religious worship as defined in G.S. 14-54.1.

Effective for offenses committed on or after July 1, 2023, section 2 of this act amends G.S. 14-415.27 to expand the list of people with a valid concealed handgun permit who may carry a concealed handgun in the areas listed in G.S. 14-415.11(c) unless otherwise prohibited by federal law. Under this expansion, new subsection (10) includes—for only a law enforcement facility—a person employed by a law enforcement agency who (i) is not a law enforcement officer sworn and certified, (ii) has been designated in writing by the head of the law enforcement agency in charge of the facility, (iii) has in the person's possession written proof of the designation, and (iv) has not had the designation rescinded by the head of the law enforcement agency in charge of the facility. The new subdivision (10) clarifies that nothing in the subsection prohibits the head of the law enforcement agency in charge of a facility from rescinding any written designation described in the subdivision.

Repeal of pistol purchase permits. Effective for pistols sold, given away, transferred, purchased, or received on or after March 29, 2023, section 2 of this act repeals G.S. 14-402 through G.S. 14-405, G.S. 14-407.1, and G.S. 14-315(b1)(1) regarding pistol purchase permits. This section clarifies that prosecutions for offenses committed before March 29, 2023 are not abated or affected by the repeal, and the statutes that would be applicable but for the repeal remain applicable to those prosecutions.

3) **S.L. 2023-13 (S 157): DMV licensing requirements.** Effective for applications for licenses submitted on or after May 24, 2021, S.L. 2021-24 amended G.S. 20-11 to require a person who is at least 16 years old but less than 18 years old to have held a limited learner's permit for at least six months in order to obtain a limited provisional license. Previously, the requirement was twelve months. S.L. 2021-134 extended the expiration of this provision to December 31, 2022. Effective May 6, 2023, section 1 of this act further extends the expiration of this provision to December 31, 2023.

Effective for applications for licenses submitted on or after January 1, 2024, section 2 of this act amends G.S. 20-11(d)(1) to allow a person who is at least 16 years old but less than 18 years old to obtain a limited provisional license if the person has held a limited learner's permit for at least nine months. Previously, the requirement was twelve months.

Effective for offenses committed on or after August 1, 2023, section 3 of this act expands G.S. 20-11(e)(4) to allow a limited provisional licensee to drive an additional passenger under 21 years of age who is not a member of the license holder's immediate family or member of the license holder's household when that passenger is a student being driven directly to or from school. This provision applies even if a family member or member of the same household as the license holder who is younger than 21 years of age is already a passenger in the vehicle.

For further discussion, see Shea Denning, *General Assembly Loosens Requirements for Teen Licensure*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 25, 2023).

4) S.L. 2023-14 (S 20), as amended by section 14 of S.L. 2023-65 (H 190): Changes to health care laws. This act makes various changes to health care laws, revises the laws pertaining to the safe surrender of infants, and creates new offenses surrounding assault and domestic violence.

Abortion. Under G.S. 14-45.1, it is lawful to advise, procure, or cause a miscarriage or abortion during the first 20 weeks of a woman's pregnancy so long as the procedure is performed by a licensed, qualified physician in a certified, suitable hospital or clinic. Existing law also permits miscarriage or abortion procedures after the 20th week if there is a medical emergency. Effective July 1, 2023, section 1.1 of this act repeals G.S. 14-45.1. Section 1.2 of this act significantly revises the abortion laws under Article 1I of Chapter 90 of the General Statutes. Under the amended article, it is unlawful after the twelfth week of a woman's pregnancy to procure or cause a miscarriage or abortion in the State of North Carolina, except under certain circumstances. For further discussion, see Jill Moore, *North Carolina's Pending Abortion Legislation*, COATES' CANONS N.C. LOCAL GOV'T LAW (May 8, 2023).

Effective for offenses committed on or after July 1, 2023, section 1.3 of this act adds new G.S. 14-44.1 which prohibits providing or advertising abortion-inducing drugs to pregnant women. An individual or organization who violates this new law commits an infraction and is subject to a fine of five thousand dollars ($5,000) per violation.

Effective October 1, 2023, section 2.2 of this act adds new Part 4A regarding Abortion Clinic Licensure to Article 6 of Chapter 131E of the General Statutes. Under the new law, G.S. 131E-153.7 provides that a person who owns in whole or in part or operates an abortion clinic without a license is guilty of a Class 3 misdemeanor and upon conviction will be subject only to a fine of up to fifty dollars ($50.00) for the first offense and up to five hundred dollars ($500.00) for each subsequent offense. Each day of continuing violation after conviction is considered a separate offense.

Effective July 1, 2023, section 3 of this act adds new Article 1M titled "Born-Alive Abortion Survivors Protection Act" to Chapter 90 of the General Statutes. Under the new law, unless the conduct is covered under some other provision of law providing greater punishment, a person who violates new G.S. 90-21.142 (requirements for health care practitioners) or new G.S. 90-21.143 (mandatory reporting of noncompliance) is guilty of a Class D felony, which also includes a fine of up to two hundred fifty thousand dollars ($250,000). Any person who intentionally performs or attempts to perform an overt act that kills a child born alive shall be punished as under G.S. 14-17(c) for murder.

Under current law, any person who practices, offers to practice, or holds oneself out to practice midwifery without approval in violation of G.S. 90-178.3(a) is guilty of a Class 3 misdemeanor. Effective July 1, 2023, section 4.3 of this act amends G.S. 90-178.7 to provide that any person who practices midwifery without being duly approved is guilty of a Class 3 misdemeanor. Any person who practices midwifery without being duly approved and who is falsely representing himself or herself in a manner as being approved is guilty of a Class I felony.

Infant protections. Effective for offenses committed on or after December 1, 2023, section 6.4 of this act amends G.S. 14-322.3 to permit lawful abandonment of an infant that is not more than 30 days of age by voluntarily delivering the infant as provided in Article 5A of Chapter 7B of the General Statutes. This statute previously provided the lawful abandonment for infants up to seven days of age.

Effective December 1, 2023, section 8.2 amends G.S. 14-33(c) to add assault on a pregnant woman to the list of misdemeanor assault offenses.

Satellite-based monitoring. Effective for court orders for enrollment in satellite-based monitoring programs issued on or after October 1, 2023, section 8.1 of this act makes substantial revisions to the North Carolina's satellite -based monitoring (SBM) scheme. The act amends G.S. 14-208.40A(c1) to remove the ten-year cap on SBM for all offenders. Under the amended law, defendants in the following categories must be placed on SBM for life if the court determines that the highest level of supervision and monitoring is required: (1) those convicted of aggravated offenses, (2) those who qualify as reoffenders or as sexually violent predators, and (3) those convicted of statutory rape or sex offense of a child by an adult. For defendants convicted of offenses involving abuse of a minor, the court must choose a term in its discretion not to exceed fifty years. For further discussion, see Phil Dixon, *2023 Satellite-Based Monitoring Revisions*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jun. 14, 2023).

Domestic violence. Effective for offenses committed on or after December 1, 2023, section 8.3 adds new G.S. 14-32.5 proscribing the misdemeanor crime of domestic violence. Under this new law, a person is guilty of a Class A1 misdemeanor if that person uses or attempts to use physical force, or threatens the use of a deadly weapon, against another person and the person who commits the offense is: (1) a current or former spouse, parent, or guardian of the victim; (2) a person with whom the victim shares a child in common; (3) a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian; (4) a person similarly situated to a spouse, parent, or guardian of the victim; or (5) a person who has a current or recent former dating relationship with the victim. The statute further clarifies that the term "dating relationship" is as defined in 18 U.S.C. § 921. For further discussion, see Brittany Bromell, *New Misdemeanor Crime of Domestic Violence*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jun. 6, 2023).

5) **S.L. 2023-15 (S 206): Counterfeit pills**. Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 90-108(a)(12) to prohibit the possession, manufacture, distribution, export, or import of any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to create a counterfeit controlled substance, knowing, intending, or having reasonable cause to believe that it will be used to create a counterfeit controlled substance.
The act also adds new G.S. 90-108(a)(12a), which prohibits the possession, manufacture, distribution, export, or import of any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe that it will be used to manufacture a controlled substance or listed chemical. This prohibition does not apply to a pharmacy, a pharmacist, a pharmacy technician,

or a pharmacy intern licensed or permitted under Article 4A of Chapter 90 of the General Statutes possessing any item included in this statute utilized in the compounding, dispensing, delivering, or administering of a controlled substance pursuant to a prescription. Violation of this subsection is a Class E felony.

6) **S.L. 2023-42 (H 347): Sports wagering.** Effective January 8, 2024, section 1 of this act enacts new Article 9 to Chapter 18C of the General Statutes. The new article authorizes and regulates wagering on professional, college, and amateur sports. The following criminal penalties are included in the article as G.S. 18C-918:

(a) Any person who knowingly offers or engages in sports wagering in violation of this Article is guilty of a Class 2 misdemeanor.
(b) Any person under the age of 21 who engages in sports wagering is guilty of a Class 2 misdemeanor.
(c) Any person who knowingly attempts to suborn, collude, or otherwise conspire to influence the outcome of any competition or aspect of any competition that is the subject of sports wagering is guilty of a Class G felony.
(d) Any applicant for an interactive sports wagering license, a service provider license, or sports wagering supplier license who willfully furnishes, supplies, or otherwise gives false information on the license application shall be guilty of a Class I felony.

An interactive sports wagering operator or its service providers will not be charged with a violation of subsection (a) or (c) of G.S. 18C-918 absent actual notice and knowledge that a person is underage or giving false information.

Horse racing. Effective January 8, 2024, section 3 of this act enacts new Article 10 to Chapter 18C of the General Statutes. This new article and regulates wagering on pari-mutuel wagering (horse racing). The following criminal penalties are included in the article as G.S. 18C-1020:

(a) Any person who knowingly offers or engages in pari-mutuel wagering in violation of this Article is guilty of a Class 2 misdemeanor.
(b) Any person under the age of 21 who engages in pari-mutuel wagering is guilty of a Class 2 misdemeanor.
(c) Any person who knowingly attempts to suborn, collude, or otherwise conspire to influence the outcome of any competition or aspect of any competition that is the subject of pari-mutuel wagering is guilty of a Class G felony.
(d) Any person applying to become an ADW (advanced-deposit wagering) licensee who willfully furnishes, supplies, or otherwise gives false information on the license application is guilty of a Class I felony.

The ADW licensee will not be charged with a violation of subsection (a) or (c) of G.S. 18C-1020 absent actual notice and knowledge that a person is underage or giving false information.

7) **S.L. 2023-45 (H 87): Probation modification.** Effective for petitions filed on or after June 16, 2023, section 1 of this act adds new subsection (b2) to G.S. 15A-1344, allowing a district attorney to file a petition to reduce, terminate, extend, modify, or revoke probation in the district court or superior court district where probation was imposed. The petition must be based on the violation of a condition of probation. Any petition filed by a district attorney must be served on the probationer

by the supervising probation officer. If a motion to extend is filed, a probationer determined to be indigent is entitled to services of counsel under G.S. 7A-451.

Effective for delegations of court authority entered on or after December 1, 2023, section 2 of this act enacts new G.S. 15A-1344.2, regarding the delegation of authority to reduce a term of supervised probation. Under this new statute, a court may delegate its authority to reduce a term of supervised probation when a probation officer finds that an offender (i) is currently in compliance with the terms of the offender's probation and (ii) has made diligent progress regarding the offender's probation. The delegation of the court's authority may be revoked by the court at any time by a written order filed with the clerk of superior court as soon as practicable following the revocation, and the clerk must notify the probation officer of this revocation of delegated authority as soon as practicably possible. Any order entered must require that no term of supervision be reduced unless all restitution ordered as part of the sentence has been paid in full.

Proof of any one or more of the following, demonstrated to the satisfaction of the probation officer, constitutes diligent progress:

(1) The successful completion of a validated drug or mental health treatment program, evidenced-based program, or any other vocational or life skills program.
(2) The successful completion of at least six months of active enrollment in an education program in which the offender is seeking a trade certification, high school diploma, General Educational Development (GED) degree, associate degree, bachelor's degree, or graduate degree.
(3) The successful completion of at least six months of employment, demonstrated by proof of wages.

A reduction of a term of supervision does not become effective until all of the following occur:

(1) The probation officer files a written affidavit with the clerk of superior court seeking a final order of the court confirming the probation officer's decision to reduce the offender's term.
(2) Notification is given to the district attorney and the victim pursuant to G.S. 15A-837 and, if requested by either the district attorney or the victim, a hearing and an opportunity to be heard is granted.
(3) The court approves the reduction.

A probation officer may not reduce an offender's term of supervised probation by more than one-fourth the amount of time the offender was originally required to serve on supervised probation. If a probation officer reduces an offender's term of supervised probation on more than one occasion, the total reduction of the offender's term of supervised probation may not exceed one-fourth the amount of time the offender was originally required to serve on supervised probation.

8) **S.L. 2023-47 (S 58): Property crimes against utilities.** Effective for offenses committed on or after December 1, 2023, section 1 of this act adds new G.S. 14-150.2, making it unlawful to knowingly and willfully (i) destroy, injure, or otherwise damage, or attempt to destroy, injure, or otherwise damage, an energy facility or (ii) obstruct, impede, or impair the services or transmissions of an energy facility, or attempt to obstruct, impede, or impair the services or transmissions of an energy facility. Commission of this offense is a Class C felony, and if the commission results in the death of

another, it is a Class B2 felony. Under either circumstance, a person who commits this offense must be ordered to pay a fine of two hundred fifty thousand dollars ($250,000). Each violation of this statute constitutes a separate offense and does not merge with any other offense.

Section 2 of this act amends G.S. 14-159.12(c) to increase the punishment for first degree trespass from a Class A1 misdemeanor to a Class I felony under certain circumstances. The statute is further amended to clarify and add to the existing list of circumstances under which the increased punishment applies. These newly added circumstances include when the offense is committed on (i) an energy facility as defined by G.S. 14-150.2, or (ii) a facility owned by a public utility, as defined under G.S. 62-3, or a unit of local government, used for the treatment of wastewater, including sewage, industrial waste, or other wastes of a liquid nature. Section 2 of this act also amends G.S. 14-159.12(d) to increase the punishment for first degree trespass from a Class H felony to a Class G felony under another discrete set of circumstances.

Section 3 of this act amends G.S. 14-154 to punish injury to wires and other fixtures of telephone, broadband, broadcast, or cable telecommunications companies (previously injury to wires and other fixtures of telephone, telegraph, and electric-power companies). The punishment for this offense is increased from a Class I felony to a Class C felony.

9) **S.L. 2023-63 (S 582): North Carolina Farm Act.** This act makes various changes to the agricultural and wastewater laws of the state.

Property-hauling vehicle. Effective June 27, 2023, section 3 of this act amends G.S. 20-4.01(31) to clarify that a fifth-wheel trailer, recreational vehicle, semitrailer, or trailer used exclusively or primarily to transport vehicles in connection with motorsports competition events is not a property-hauling vehicle.

Animal waste spills. Effective for offenses committed on or after December 1, 2023, section 4 of this act enacts new G.S. 14-399.3, creating a class 3 misdemeanor offense for leaving the scene of an animal waste spill. Under this new statute, the driver of any vehicle who knows or reasonably should know that (i) animal waste except for livestock or poultry excreta generated by live animals being transported on the vehicle, (ii) dead animals or animal parts except for feathers from live birds being transported on the vehicle, or (iii) animal by-products have been blown, scattered, spilled, thrown, or placed from the vehicle shall immediately stop his or her vehicle at the scene of the incident.

The driver must remain with the vehicle at the scene of the incident until a law enforcement officer completes the investigation of the incident or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury. Prior to the completion of the investigation or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than the following:

- to call for a law enforcement officer;
- to call for assistance in removing the materials that were blown, scattered, thrown, spilled, or placed from the vehicle; or
- to remove oneself or others from significant risk of injury.

If the driver does leave for a reason permitted by the statute, then the driver must return with the vehicle to the scene of the incident within a reasonable period of time, unless otherwise instructed by a law enforcement officer.

Unmanned aircraft systems. Effective for offenses committed on or after December 1, 2023, section 10 of this act creates new G.S. 15A-300.4 to prohibit the use of an unmanned aircraft system near a forest fire. Under the new statute, no person, entity, or State agency shall use an unmanned aircraft system within either a horizontal distance of 3,000 feet or a vertical distance of 3,000 feet from any forest fire within the jurisdiction of the North Carolina Forest Service. Unless the use of the unmanned aircraft system is otherwise prohibited under State or federal law, the prohibitions under this statute do not apply to:

(1) A person operating an unmanned aircraft system with the consent of the official in responsible charge of management of the forest fire.
(2) A law enforcement officer using an unmanned aircraft system in accordance with G.S. 15A-300.1(c).
(3) A North Carolina Forest Service employee or a person acting under the direction of a North Carolina Forest Service employee.

The penalties for using an unmanned aircraft system in violation of this statute are as follows:

1. When such use is the proximate cause of the death of another person, the offender is guilty of a Class D felony and must be fined at least one thousand dollars ($1,000).
2. When such use is the proximate cause of serious bodily injury to another person, the offender is guilty of a Class E felony and must be fined at least one thousand dollars ($1,000).
3. When such use is the proximate cause of serious physical or mental injury to another person, the offender is guilty of a Class F felony and must be fined at least one thousand dollars ($1,000).
4. When such use interferes with emergency operations and such interference proximately causes damage to any real or personal property or any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being on the land, the offender is guilty of a Class G felony and must be fined at least one thousand dollars ($1,000).
5. When such use interferes with emergency operations, the offender is guilty of a Class H felony and must be fined at least one thousand dollars ($1,000).
6. When such use is the proximate cause of physical or mental injury to another person, the offender is guilty of a Class I felony and must be fined at least one thousand dollars ($1,000).
7. When such use is not covered under another provision of law providing greater punishment, the offender is guilty of a Class A1 misdemeanor and must be fined at least one thousand dollars ($1,000).

Larceny of timber. Effective for offenses committed on or after December 1, 2023, section 11 of this act amends G.S. 14-135(a) to include new subsections (3) and (4) as two additional methods by which a person can commit the offense of larceny of timber. Under new G.S. 14-135(a)(3), a person commits the offense of larceny of timber if the person knowingly and willfully aids, hires, or counsels an individual to cut down, injure, or remove any timber owned by another person without the

consent of the owner of the land or the owner of the timber, or without a lawful easement running with the land. Under new G.S. 14-135(a)(4), a person commits the offense of larceny of timber if the person knowingly and willfully transports forest products that have been cut down, removed, obtained, or acquired from the property of a landowner without the consent of the owner of the land or the owner of the timber, or without a lawful easement running with the land.

Section 11 of this act also adds new G.S. 14-135(b)(3) to provide that a person is not guilty of an offense under G.S. 14-135(a)(3) if the person is an electric power supplier and either: (a) the person believed in good faith that consent of the owner had been obtained prior to aiding, hiring, or counseling the individual to cut down, injure, or remove the timber; or (b) the person believed in good faith that the cutting down, injuring, or removing of the timber was permitted by a utility easement or was necessary to remove a tree hazard.

10) S.L. 2023-69 (H 192): **Unmanned aircraft systems in fishing.** Effective for activities occurring on or after July 1, 2023, section 2.6 of this act amends G.S. 14-401.24 to clarify that "to fish" is defined as in G.S. 113-130, except when an unmanned aircraft or unmanned aircraft system is used during, immediately preparatory to, or immediately subsequent to the taking of fish for (i) spotting; locating; recording, broadcasting, or streaming video of fish; or (ii) deploying bait.

11) S.L. 2023-71 (S 626): **Human trafficking.** Effective for offenses committed on or after December 1, 2023, section 3 of this act amends G.S. 14-43.11 to include patronage and solicitation as methods by which a person can commit the offense of human trafficking.

12) S.L. 2023-74 (H 790): **Innocence Inquiry Commission; Interrogations; Informant statements.** Effective for proceedings held on or after July 7, 2023, section 1 of this act modifies laws relation to the North Carolina Innocence Inquiry Commission. The act amends G.S. 15A-1465 to remove the requirement that the Director of the North Carolina Innocence Inquiry Commission report on all funds received through private gifts, donations, or devises from any source other than the State. The act also amends G.S. 15A-1475 to require that the Commission's annual report include a record of the receipt and expenditure of all private donations, gifts, and devises for the reporting period.

The act also amends the Commission's proceedings under G.S. 15A-1468 as follows:

- Extends the time a prehearing conference must be held from 10 days to 30 days before any proceedings of the full Commission.
- Adds that the Commission may call for a prehearing conference at any time the Commission has developed credible evidence to support a claim of factual innocence. If a Commission hearing is continued for any reason, that at least 10 days before the newly scheduled hearing a subsequent prehearing conference be held to discuss any newly developed evidence was not previously provided.
- Gives the district attorney, or designee, and the claimant's counsel the ability to access, review, and inspect the Commission's entire case file at least 60 days prior to the Commission hearing. The Commission must present and make the information available in a reasonably organized manner that it not to be overly burdensome to the Commission, the district attorney, or the claimant's counsel.

- Extends the window during which a district attorney may provide the Commission with a written statement, from at least 72 hours before a Commission proceeding to at least 10 days before a Commission hearing.
- Adds that the Commission has an ongoing duty to provide any newly discovered evidence to the district attorney and the claimant's counsel until the hearing begins. Requires that evidence not provided to the district attorney and the claimant's counsel in the initial release of information to be provided at least 10 days prior to the Commission hearing. Requires the Commission to keep a clear record of which materials have been previously made available for review and inspection.
- Requires the victim to be notified at least 10 days (previously 30 days) before initial prehearing conference. Adds that the Director is allowed to notify the victim at an earlier date in the proceedings.
- Adds that favorable to the convicted person disclosed through formal inquiry or Commission proceedings must be disclosed to include the district attorney, or the district attorney's designee, of the district where the claimant was convicted of the felony upon which the claim of factual innocence is based.

The act expands the information that must be disclosed to the postcommission three-judge panel under G.S. 15A-1469 to include all information required by G.S. Chapter 15A, Article 48 as if the parties have requested in writing that the other party comply with a discovery request. The amending statute further deems the Commission file disclosed and provides that the statute does not prevent the three-judge panel from setting an earlier disclosure deadline or the parties from agreeing to provide earlier disclosure. The amended statute also clarifies that evidence not timely disclosed is inadmissible at the hearing, absent good cause shown.

Electronic recording of juvenile interrogations. Effective for all custodial interrogations occurring on or after October 1, 2023, section 2 of this act amends G.S. 15A-211 to make laws governing electronic recording of juvenile interrogations applicable to any custodial interrogation of any person in a felony criminal investigation conducted at any place of detention.

The act revises the definition of “in its entirety” under G.S. 15A-211(b) to include an uninterrupted record that begins at the start of the interview of custodial interrogation and ends when the custodial interrogation has completely finished. It also eliminates the requirement for the record to clearly show both the interrogator and the person in custody and instead requires any visual recording of a custodial interrogation to film both the interrogator and suspect. The revised definition further adds that the record must reflect all starting and ending times and dates, as well as the starting time and date of the recess and resumption of the interrogation.

New subsection G.S. 15A-211(e1) requires recordings of non-defendant custodial interrogations to be provided to the juvenile or criminal defendant as part of discovery requirements under G.S. Chapters 7B and 15A. Amened G.S. 15A-211(h) adds that electronic recordings of non-defendant custodial interrogations can be destroyed at the conclusion of the State appeal process.

CODIS hits. Effective October 1, 2023, section 3 of this act amends G.S. 15A-266.7(a) to require The Crime Laboratory to notify the office of the district attorney for all CODIS matches.

In-custody informant statements. Effective for offenses committed on or after October 1, 2023, section 4 of this act enacts new Article 54 of Chapter 15A of the General Statutes, regarding the corroboration of in-custody informant statements. Codified as G.S. 15A-981, the Article defines "in-custody informant" to mean a person, other than a codefendant, accomplice, or coconspirator, whose testimony is based on statements allegedly made by the defendant while both the defendant and the informant were held within a city or county jail or a State correctional institution or otherwise confined, where statements relate to offenses that occurred outside of the confinement.

Under the statute, all interviews of in-custody informants by a law enforcement officer must be recorded using a visual recording device that provides an authentic, accurate, unaltered, and uninterrupted record of the interview that clearly shows both the interviewer and the in-custody informant. However, this requirement does not apply to attorneys for the State or defense conducting an interview as part of trial preparation.

The State must not destroy or alter any electronic recording of an in-custody informant interview until one year after the completion of all State and federal appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief or habeas corpus proceedings. Every electronic recording shall be clearly identified and catalogued by law enforcement personnel.

13) S.L. 2023-75 (H 813): Pretrial Integrity Act. Effective for offenses committed on or after October 1, 2023, section 1 of this act amends G.S. 7B-1906(b1) to provide that further hearings to determine the need for secure custody shall be held at intervals of no more than 30 calendar days for a juvenile who satisfies either of the following criteria: (1) was 16 years of age or older at the time the juvenile allegedly committed an offense that would be a Class A, B1, B2, C, D, E, F, or G felony if committed by an adult; or (2) was 13, 14, or 15 years of age at the time the juvenile allegedly committed an offense that would be a Class A felony if committed by an adult.

Section 2 of this act expands G.S. 15A-533(b) regarding right to pretrial release to provide that a judge must determine in the judge's discretion whether a defendant charged with any of the following crimes may be released before trial:

(1) G.S. 14-17 (First or second degree murder) or an attempt to commit first or second degree murder.
(2) G.S. 14-39 (First or second degree kidnapping).
(3) G.S. 14-27.21 (First degree forcible rape).
(4) G.S. 14-27.22 (Second degree forcible rape).
(5) G.S. 14-27.23 (Statutory rape of a child by an adult).
(6) G.S. 14-27.24 (First degree statutory rape).
(7) G.S. 14-27.25 (Statutory rape of person who is 15 years of age or younger).
(8) G.S. 14-27.26 (First degree forcible sexual offense).
(9) G.S. 14-27.27 (Second degree forcible sexual offense).
(10) G.S. 14-27.28 (Statutory sexual offense with a child by an adult).
(11) G.S. 14-27.29 (First degree statutory sexual offense).
(12) G.S. 14-27.30 (Statutory sexual offense with a person who is 15 years of age or younger).
(13) G.S. 14-43.11 (Human trafficking).
(14) G.S. 14-32(a) (Assault with a deadly weapon with intent to kill inflicting serious injury).
(15) G.S. 14-34.1 (Discharging certain barreled weapons or a firearm into occupied property).

(16) First degree burglary pursuant to G.S. 14-51.
(17) First degree arson pursuant to G.S. 14-58.
(18) G.S. 14-87 (Robbery with firearms or other dangerous weapons).

If the judge determines that release is warranted for a defendant charged with any of the crimes listed above, the judge shall set conditions of pretrial release in accordance with G.S. 15A-534. A defendant charged with a noncapital offense that is not listed above must otherwise have conditions of pretrial release determined in accordance with G.S. 15A-534.

The act also enacts new G.S. 15A-533(h) to provide that if a defendant is arrested for a new offense allegedly committed while the defendant was on pretrial release for another pending proceeding, the judicial official who determines the conditions of pretrial release for the new offense must be a judge. The judge must consider the defendant's criminal history when setting conditions of pretrial release but must not unreasonably delay the determination of conditions of pretrial release for the purpose of reviewing the defendant's criminal history report. A magistrate may set the conditions of pretrial release at any time if the new offense is a violation of Chapter 20 of the General Statutes, other than a violation of G.S. 20-138.1, 20-138.2, 20-138.2A, 20-138.2B, 20-138.5, or 20-141.4. Under this statute, a defendant may be retained in custody not more than 48 hours from the time of arrest without a judge making a determination of conditions of pretrial release. If a judge has not acted within 48 hours from the time of arrest of the defendant, the magistrate shall set conditions of pretrial release in accordance with G.S. 15A-534.

For further discussion, see M. Jeanette Pitts, *North Carolina's new Pretrial Integrity Act*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 23, 2023). See also Brittany Bromell, *More on the New Pretrial Integrity Act*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sep. 13, 2023).

14) S.L. 2023-76 (H 34): Assaults on emergency personnel. Effective for offenses committed on or after December 1, 2023, this act creates a new offense for and modifies several offenses regarding assault on emergency personnel.

Section 2 of this act enacts new G.S. 14-34.1A prohibiting the willful or wanton discharge or attempted discharge of any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second at or into any unoccupied emergency vehicle. The statute defines "emergency vehicle" to include:

(1) A law enforcement vehicle.
(2) A fire department vehicle.
(3) A public or private ambulance.
(4) A rescue squad emergency service vehicle.
(5) A State or local emergency management vehicle.
(6) A vehicle owned or operated by the North Carolina National Guard.
(7) A vehicle owned or operated by any branch of the Armed Forces of the United States.
(8) A vehicle owned or operated by the Department of Adult Correction.
(9) A vehicle owned or operated by the Division of Juvenile Justice of the Department of Public Safety.

Unless the conduct is covered under some other provision of law providing greater punishment, the offense is a Class H felony.

Section 3 of this act amends G.S. 14-34.8 regarding the criminal use of a laser device. Under the amended statute, it is a Class I felony to intentionally point a laser device while the device is emitting a laser beam at any of the following while the person is in the performance of his or her duties:

a. A law enforcement officer.
b. A probation or parole officer.
c. A person whose employment duties include the custody, transportation, or management of persons who are detained or confined to a detention facility, youth development center, or correctional institution operated under the jurisdiction of the State or a local government.
d. A firefighter.
e. An emergency medical technician or other emergency health care provider.
f. A member of the North Carolina National Guard.
g. A member of any branch of the Armed Forces of the United States.
h. Court counselors whose employment duties include intake, probation, post-release supervision, and court supervision services of juveniles.

The amended statute further prohibits intentionally point a laser device while the device is emitting a laser beam at a law enforcement agency animal or a search and rescue animal while the animal is in the performance of its duty. This offense is a Class A1 misdemeanor if the law enforcement agency animal or the search and rescue animal is caused "harm" as that term is defined by G.S. 14-163.1. The statute makes it an infraction to intentionally point a laser device while the device is emitting a laser beam at (i) the head or face of any person not mentioned above.

Section 4 of this act increases the punishment for assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers under G.S. 14-34.2 from a Class F felony to a Class E felony.

Section 5 of this act increases the punishment for assault with a firearm upon a member of the North Carolina National Guard while the member is in the performance of his or her duties under G.S. 14-34.5(a1) from a Class E felony to a Class D felony.

Section 6 of this act increases the punishment for several offense under G.S. 14-34.7. Assault on a law enforcement officer, probation officer, or parole officer that causes serious bodily injury on the officer is increased from a Class F felony to a Class E felony. Assault on a member of the North Carolina National Guard that causes serious bodily injury on the member is increased from a Class F felony to a Class E felony. Assault on a person who is employed at a detention facility operated under the jurisdiction of the State or a local government that causes serious bodily injury on the employee is increased from a Class F felony to a Class E felony. An assault on any of the aforementioned people that results in physical injury of that person is increased from a Class I felony to a Class H felony.

Section 7 of this act expands G.S. 14-32 regarding felonious assault with a deadly weapon. The amended statute (i) punishes assault on an emergency worker with a deadly weapon inflicting

serious injury as a Class D felony, (ii) punishes assault an emergency worker with a deadly weapon with intent to kill as a Class D felony, and (iii) defines "emergency worker" as a law enforcement officer, firefighter, emergency medical technician, or medical responder.

15) S.L. 2023-85 (S 246): **Second degree trespass.** Effective for offenses committed on or after December 1, 2023, this act amends G.S. 14-159.13 to include that the offense of second degree trespass may be committed if, without authorization, a person enters or remains on the curtilage of a dwelling of another between the hours of midnight and 6:00 A.M. Commission of the offense by way of this action is a Class 2 misdemeanor. Second degree trespass is otherwise a Class 3 misdemeanor.

16) S.L. 2023-86 (S 171): **Public safety.** Effective for convictions occurring on or after October 1, 2023, section 7 of this act expands the definition of "reportable conviction" under G.S. 14-208.6(4) to include a final conviction in a State court-martial proceeding imposing confinement under G.S. 127A-48 or G.S. 127A-49 for an offense which is substantially similar to an offense against a minor or a sexually violent offense.

Effective for wood residual (i) transported, (ii) stored, or (iii) otherwise interacted with on or after July 10, 2023, section 2 of this act enacts new G.S. 20-4.01(49a), defining wood residual in reference to logging, manufacturing, or milling processes, as woody waste that is generated by the cutting, chipping, grinding, shaping, or smoothing of wood or wood products. Wood residual includes bark, chips, edging, sawdust, shavings, leaves, wood chips, or wood pellets manufactured primarily from wood and may include small amounts of glue, binder, or resin from wood products. Wood residual does not include woody waste mixed with soil or other non-wood materials like plastic, metal, cement, or mineral fibers, and it must be transported in bulk form.

17) S.L. 2023-97 (S 91): **Street takeovers.** Effective for offenses committed on or after December 1, 2023, section 2 of this act enacts new G.S. 20-141.10, prohibiting street takeovers. The statute defines street takeover and other related terms including burnout, doughnut, drifting, stunt, and wheelie.

Any person who operates a motor vehicle in a street takeover is guilty of a Class A1 misdemeanor and must pay a fine of at least one thousand dollars ($1,000). A subsequent violation within a 24-month period is a Class H felony, including a minimum fine equal to twice the value of the vehicle involved in the offense but no less than one thousand dollars ($1,000). Any person who operates a motor vehicle in a street takeover and assaults a law enforcement officer or knowingly and willfully threatens a law enforcement officer is guilty of a Class H felony.

The new statute also makes it a Class A1 misdemeanor to (i) knowingly participate in, (ii) coordinate through social media or otherwise, (iii) commit an overt act in furtherance of, or (iv) facilitate a street takeover. Mere presence alone without an intentional act is not sufficient to sustain a conviction.

Section 2 of this act amends G.S. 20-141.3(g) to add that when any officer of the law discovers that any person has operated or is operating a motor vehicle in violation of G.S. 20-141.10, the officer may seize the vehicle.

For further discussion, see Shea Denning, *Recent Legislation Outlaws Street Takeovers*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 10, 2023).

H & I felony pleas. Effective for pleas accepted on or after December 1, 2023, section 3 of this act amends G.S. 7A-272(c) to remove the requirement that a presiding district court judge consent to a defendant's plea of guilty or no contest to a Class H or I felony for the court to have jurisdiction to accept the plea. The act also amends the statute to add that the chief district court judge may schedule and assign sessions of court to accept guilty pleas or no contest pleas, and that the district attorney calendar agreed-upon pleas for those sessions. For further discussion, see Shea Denning, *Legislature Tweaks Jurisdictional Rules for District and Superior Courts*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sep. 5, 2023).

Probation revocation hearings. Effective for revocation hearings held on or after December 1, 2023, section 4 of this act amends G.S. 15A-1341(a6) to add that if a probation revocation hearing for violation of a condition of a conditional discharge is heard in superior court, the superior court must enter an adjudication of guilt and shall not remand the matter to district court, unless covered by G.S. 7A-271(f). Section 4 also amends G.S. 7A-271(e) to add that once the superior court has concluded a probation revocation hearing, the superior court must proceed without remanding or sending the matter back to district court unless covered by G.S. 7A-271(f).

18) S.L. 2023-103 (H 193): Expunctions. Effective for petitions filed on or after December 1, 2023, section 14 of this act amends expunction eligibility under G.S. 15A-145.5(a) by removing offenses under G.S. 14-54(a) as offenses exempt from the meaning of "nonviolent misdemeanor" or "nonviolent felony."

The act also amends the time periods for expunctions of up to three nonviolent felony convictions by enacting new G.S. 15-145.5(c)(2)(a1), allowing a person convicted of one nonviolent felony under G.S. 14-54(a) to file petition for expunction 15 years after the date of the conviction or 15 years after any active sentence, period of probation, or post-release supervision related to the conviction listed in the petition has been served, whichever occurs later.

The amended law expands the scope of what the court must find in order to grant a petition for expunction of one or more nonviolent misdemeanors or one to three nonviolent felonies to include findings that (1) in addition to having no outstanding warrants or pending criminal cases, the petitioner is not under indictment, and no finding of probable cause exists against the petitioner for a felony, in any federal court or state court in the United States and (2) the petitioner is not free on bond or personal recognizance pending trial, appeal, or sentencing in any federal court or state court in the United States for a crime which would prohibit the person from having his or her petition for expunction under this section granted.

19) S.L. 2023-114 (H 186): Juveniles. This act makes several changes to laws related to juvenile delinquency.

Transfer process. Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 7B-2200.5(a)(1) to remove the requirement that the court make a finding that a bill of indictment has been returned against a juvenile charging the commission of a Class A – G felony before ordering the matter transferred to superior court for trial as an adult. The amended statute

requires that the court transfer the case to superior court, unless the prosecutor declines to transfer the case as allowed by statute, when a juvenile is charged with committing a Class A – G felony at age 16 or 17 and the juvenile is provided notice of the return of a true bill of indictment as provided in G.S. 15A-630.

Section 1 of the act also amends G.S. 7B-2200 to require the district court to transfer a case in which a Class A felony is alleged to have been committed by a juvenile at age 13, 14, or 15 and there is either (1) a finding of probable cause or (2) notice of the return of a true bill of indictment as provided in G.S. 15A-630. Previously, these cases could only be transferred following a finding of probable cause. The act also amends G.S. 7B-2202(a) to exempt cases transferred to superior court, based on a returned indictment alleging a Class A felony was committed at age 13, 14, or 15, from the requirement to hold a probable cause hearing.

Confidentiality, "Lyric and Devin's Law." Effective for offenses committed on or after December 1, 2023, section 2 of this act adds a new G.S. 7B-3103 to allow disclosure of identifying information about a juvenile when:

- The court finds, in a written order, that (1) a petition has been filed alleging that the juvenile committed a felony at age 13 or older, and (2) based on the juvenile's record or alleged offense(s), that the juvenile presents a danger to self or others, and (3) good cause exists for the disclosure, or
- It is determined that exigent circumstances exist and the Division of Juvenile Justice (the "Division") or a law enforcement agency within NC releases the information. If information is released as a result of a determination that exigent circumstances exist, the entity that released the information must seek a court order for the release of the information as soon as reasonably practicable, but no later than the first available session of a court in the county after the release of the information. If the court does not order release of the information, all previously released information mut be removed from any publicly available website or social media account controlled by the Division or law enforcement agency.

When disclosure is allowed, the Division or any law enforcement agency in NC may publicly release:

- The juvenile's first and last name and photograph,
- Any offense alleged in the petition filed against the juvenile,
- Whether a secure custody order has been issued for the juvenile,
- A statement as to the juvenile's threat to self or others, based on the juvenile's record or the nature of the alleged offense and the level of concern of the Division or law enforcement agency.

The Division or law enforcement agency must make a reasonable effort to notify a parent, legal guardian, or custodian of the juvenile before publicly releasing the information about the juvenile. If the court orders disclosure and the juvenile is taken into custody before information is publicly disclosed, the information shall not be publicly disclosed. If the juvenile is taken into custody after information is publicly disclosed, whether by court order or as the result of exigent circumstances, all released information must be removed from any publicly available website or social media account controlled by the Division or law enforcement agency.

Interrogation procedures. Effective for offenses committed on or after December 1, 2023, section 3 of this act amends G.S. 7B-2101 to add a new subdivision (a1) outlining the rights that juveniles age 16 and 17 have during a custodial interrogation. The right to have a caretaker present during a custodial interrogation is added to the existing list of rights.

G.S. 7B-2101 is further amended to add a new subdivision (a2), stating the if a juvenile who is 16 or 17 invokes their right to have a parent, guardian, or custodian present during questioning, law enforcement must make a reasonable effort to contact that person. If the parent, guardian, or custodian is not available, a caretaker can be present during questioning.

The act also adds new subdivision (e) to G.S. 7B-2101, defining who is a caretaker for the purpose of new subdivision (a1). This definition is the same definition of caretaker contained in G.S. 7B-101(3) and includes: "any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, a foster parent, an adult member of the juvenile's household, an adult entrusted with the juvenile's care, a potential adoptive parent during a visit or trial placement with a juvenile in the custody of a department, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

Other juvenile justice modifications. Effective for offenses committed on or after December 1, 2023, section 4 of this act amends G.S. 7B-1806 to clarify that a juvenile summons may be served by a law enforcement officer or a juvenile court counselor and to add that a defense of lack of personal jurisdiction or insufficiency of service is waived if a parent, guardian, or custodian and the juvenile avail themselves to the court and do not raise an objection at the initial court appearance.

Section 4 of the act also amends G.S. 7B-2502 to make the following changes to the option to order evaluation and treatment prior to disposition, to the requirements that the court order a comprehensive clinical assessment (CCA) in certain cases, and to the mandate that the court consider whether a care review team must be convened in certain cases:

- Adds language to authorize the court to hold a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological or other evaluation or treatment after completion of a court-ordered examination to determine the needs of the juvenile. The court may order the juvenile to comply with any evaluation or treatment recommended by the examination.
- Adds language to clarify that the obligation to order DJJ to make a referral for a CCA applies to a juvenile who has been identified with a suspected mental illness through the use of a validated screening instrument or other evidence presented to the court. The statute also continues to apply to a juvenile with a suspected developmental disability or intellectual disability.
- Changes the mandate that the court order DJJ to make a referral for a CCA from within 45 days before the adjudication hearing to within 90 days before the disposition hearing.
- Requires the court to review all CCA's (or their equivalent) to determine if the statutory criteria for ordering DJJ to convene a care review team exist. This includes all CCA's ordered

by the court and all CCA's that were completed within 90 days of the disposition hearing (and therefore not ordered by the court).

The act further amends G.S. 7B-2204 to allow a juvenile who has been convicted and sentenced to an active sentence, following transfer of their case to superior court for trial as an adult, to be held in a juvenile detention facility pending transfer to the Division of Prisons.

Juvenile capacity to proceed. Effective for offenses committed on or after January 1, 2025, section 5 of this act replaces current G.S. 7B-2401 and adds new G.S. 7B-2401.1 – 2401.5 to establish a juvenile standard and procedure for determining capacity to proceed. In short:

- New G.S. 7B-2401.1 defines relevant terms including "developmental immaturity" and "incapacity to proceed".
- New G.S. 7B-2401.2 details the procedure to determine capacity and the hearing procedure.
- New G.S. 7B-2401.3 establishes a new credentialing process for juvenile forensic evaluators, details information that must be released to the forensic evaluator, addresses what must be considered during the forensic evaluation and included in the report, and tasks the North Carolina Administrative Office of the Courts with establishing reasonable reimbursement guidelines for the forensic evaluation and any related court appearances.
- New G.S. 7B-2401.4 establishes a remediation process that may be used when the court finds that the juvenile lacks capacity to proceed and is substantially likely to attain capacity in the foreseeable future. The purpose of remediation is for the juvenile to attain capacity to proceed.
- New G.S. 7B-2401.5 provides statutory authority for the court to conduct a hearing to determine if the juvenile meets the criteria for involuntary commitment when the court finds that the juvenile does not have capacity to proceed and is not likely to attain capacity in the foreseeable future. It also requires that the court dismiss the petition after finding that the juvenile lacks capacity to proceed and is not likely to attain capacity in the foreseeable future. The prosecutor may voluntarily dismiss any allegations in the petition with leave as long as the juvenile is within the age limit for juvenile jurisdiction. Records regarding the juvenile's capacity must be sealed after the conclusion of the capacity hearing or after the juvenile is found not to be substantially likely to restored to or attain capacity on the foreseeable future.

Section 5 of this act also amends G.S. 7B-1906 is amended to add a new subdivision (b3) establishing that secure custody hearings must be held every 30 days after the question of capacity is raised. Ongoing hearings can be held every 10 days on the juvenile's request and for good cause shown. Ongoing secure custody hearings can be waived with the consent of the juvenile.

Secure custody order modifications. Effective for offenses committed on or after December 1, 2023, section 6 of this act amends G.S. 7B-1904 to (1) add a juvenile court counselor as a person who can assume custody of a juvenile as the result of the issuance of a secure custody order, and (2) authorize issuance of an initial secure custody order after filing of a petition and before the juvenile has been served with that petition. The petition must be served on the juvenile within 72 hours after the juvenile is detained.

Section 6 of this act also adds a new G.S. 7B-1904.5 to include language, previously contained in G.S. 7B-1904, regarding law enforcement exemption from liability for executing a secure custody order that is complete and regular on its face. The new statute adds language detailing when law enforcement can enter a private premises or vehicle, and use force during such entry, in order to take a juvenile into custody pursuant to a secure custody order. The language mirrors language in G.S. 15A-401(e), applicable when law enforcement is arresting an adult.

Note: This summary was provided by faculty member Jacquelyn Greene. For further discussion, see Jacquelyn Greene, *Changes Coming to Delinquency Procedure: Transfer and Mental Health Evaluations*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 26, 2023).

20) S.L. 2023-121 (S 492): Adult correction and law enforcement. Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 15A-1343(b) to include as a regular condition of probation submission to drug and alcohol screening rather than supplying a breath, urine, or blood specimen. Section 2 of this act amends G.S. 15A-1343(b), -1368.4(e), and -1374(b) to include prohibition of firearm ammunition as a regular condition of probation, post-release supervision, and parole.

Early transfers. Effective for transfers occurring on or after October 1, 2023, section 3 of this act adds new subsection (g) to G.S. 15A-1352, providing that a person serving a sentence in the Department of Adult Correction who is subject to an outstanding sentence, detainer, or other lawful process authorizing detention may be transferred up to five days before the expiration of the person's current sentence, and the remainder of the person's current sentence may be served in the custody of the requesting local confinement facility or the requesting federal agency. Early transfers conducted under this section must only be conducted at the request and expense of the receiving local confinement facility or the receiving federal agency. The provision further specifies that it does not authorize holding a person beyond the release date of the current sentence absent an outstanding sentence to be served, detainer, or service of other lawful process authorizing detention.

Carrying concealed weapons. Effective for designations made on or after September 22, 2023, section 7 of this act amends G.S. 14-269(b) to designate Department of Adult Correction (DAC) employees as persons authorized to carry concealed weapons. The DAC employees must (i) have been designated in writing by the Secretary of the Department, (ii) have a valid concealed handgun permit, and (iii) have in their possession written proof of the designation by the Secretary of the Department. The provision also specifies that the DAC employees must not carry a concealed weapon at any time while consuming alcohol or an unlawful controlled substance or while alcohol or an unlawful controlled substance remains in the person's body.

Firearms training exemption. Effective for permit applications submitted on or after September 22, 2023, section 11 of this act amends G.S. 14-415.12A to include qualified correctional officers and qualified State probation or parole certified officers as officials exempt from the firearms safety and training course required under G.S. 14-415.12(a)(4). The section also amends G.S. 14-415.10 to define "qualified correctional officer" and "qualified State probation or parole certified officer."

Probation officers' delegated authority in DWI cases. Effective for offenses committed on or after December 1, 2023, section 13 of this act amends G.S. 20-179 to enact new subsection (k5). The new

subsection authorizes the Division of Community Supervision and Reentry of the Department of Adult Correction to require an offender sentenced to Aggravated Level One or to Level One, Two, Three, Four, of Five punishment for impaired driving violations and placed on supervised probation to do any of the following:

(1) Perform up to 20 hours of community service and pay the applicable fee.
(2) Report to a probation officer on a frequency determined by the officer.
(3) Submit to substance abuse assessment, monitoring, or treatment.
(4) Submit to house arrest with electronic monitoring.
(5) Submit to period of confinement in a local confinement facility for up to six days per month during a period of three months, as specified.
(6) Submit to a curfew.
(7) Participate in an educational or vocational skills development program.

The amended statute further authorizes the Division to reduce or remove requirements it imposes, allows probation officers to exercise authority delegated by the court after administrative review and approval by a chief probation officer, and provides for offenders to motion the court to review probation officers' actions. Offenders must be given notice of this right, but the offender has no right of review if the offender has signed a written waiver of rights.

Prior to exercising delegated authority, the Division must determine that the offender has failed to comply with a condition of probation or is high-risk based on a validated instrument to assess risks of reoffending. The Division may only impose the confinement condition if the Division determines the offender has violated a condition of probation. The amended statute clarifies that it does not affect the arrest and hearing procedures authorized under G.S. 15A-1345 for probation violations.

Fingerprinting for misdemeanor crime of domestic violence. Effective for offenses committed on or after December 1, 2023, section 15 amends G.S. 15A-502(a2) to include G.S. 14-32.5 (misdemeanor crime of domestic violence) as an offense requiring fingerprinting by the arresting law enforcement agency and forwarding of those fingerprints to the State Bureau of Investigation.

21) S.L. 2023-123 (S 189): Drug trafficking. Effective for offenses committed on or after December 1, 2023, section 1 of this act amends G.S. 90-95(h)(4) to increase the fines for trafficking in opium, opiate, opioid, or heroin. Where the controlled substance is heroin, fentanyl, or carfentanil, or any salt, compound, derivative, or preparation thereof, or any mixture containing any of these substances, the amended statute provides:

- If the amount is between 4 and 14 grams (a Class F felony), the fine is $500,000. The fine remains no less than $50,000 for any other controlled substance violations under G.S. 90-95 that would be classified as a Class F felony.
- If the amount is more than 14 grams but less than 28 grams (a Class E felony), the fine is $750,000. The fine remains no less than $100,000 for any other controlled substance violations under G.S. 90-95 that would be classified as a Class E felony.
- If the amount is 28 grams or more (a Class C felony), the fine is $1 million. The fine remains no less than $500,000 for any other controlled substance violations under G.S. 90-95 that would be classified as a Class C felony.

Death by distribution. Effective for offenses committed on or after December 1, 2023, section 2 of this act amends G.S. 14-17 by removing subsection (b)(2) which punished as second degree murder and a Class B2 felony any murder by unlawful distribution of certain drug that causes death of the user. The act amends G.S. 14-18.4 to create new offenses for death by distribution through unlawful delivery of certain controlled substances. Under new G.S. 14-18.4(a1), a person is guilty of death by distribution through unlawful delivery of certain controlled substances if: (1) the person unlawfully delivers at least one certain controlled substance; (2) the ingestion of the certain controlled substance or substances causes the death of the user; and (3) the commission of the offense was the proximate cause of the victim's death. The offense is a Class C felony. Under new G.S. 14-18.4(a2), A person is guilty of death by distribution through unlawful delivery with malice of certain controlled substances if: (1) the person unlawfully delivers at least one certain controlled substance; (2) the person acted with malice; (3) the ingestion of the certain controlled substance or substances causes the death of the user; and (4) the commission of the offense was the proximate cause of the victim's death. The offense is a Class B2 felony.

The amended statute also increases the penalty for a violation of G.S. 14-18.4(b) to a Class B2 felony, increases the penalty for a violation of G.S. 14-18.4(c) to a Class B1 felony, and removes the requirement that a person did not act with malice as an element of each offense. For G.S. 14-18.4(c), the amended statute increases the lookback time for previous identical or similar convictions from 7 years to 10 years.

For further discussion, see Jeff Welty, *Changes to the Death by Distribution Law*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 28, 2023).

North Carolina Criminal Law Blog

New Misdemeanor Crime of Domestic Violence

June 6, 2023 by **Brittany Bromell**

<https://nccriminallaw.sog.unc.edu/author/bwilliams/>

Last month, the North Carolina General Assembly passed **S.L. 2023-14** <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-14.pdf> (S 20) which largely covers changes to abortion laws. Within this bill is also a newly defined "misdemeanor crime of domestic violence," which takes effect for offenses committed on or after December 1, 2023. This post discusses the utility of the new offense and the implications that it may have on a defendant's gun rights.

What is the new law?

S 20 enacts a new misdemeanor crime of domestic violence, codified as G.S. 14-32.5. Under this new law, a person is guilty of a Class A1 misdemeanor if that person uses or attempts to use physical force, or threatens the use of a deadly weapon, against another person. The person who commits the offense must have one of the following relationships with the victim:

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

This language tracks that of the federal law defining a misdemeanor crime of domestic violence. 18 U.S.C. 921(a)(33).

The relationships listed under G.S. 14-32.5 vary from and may be treated differently than those in and G.S. 15A-534.1 and G.S. 50B. I will explore this topic more in a future post.

Isn't there already a law for that?

There has been some question as to the utility of the new law, especially because the conduct it prohibits seem to be already covered by existing and frequently charged statutes. For example, assault with a deadly weapon under G.S. 14-33(c)(1) would cover the conduct contemplated by the new statutes.

Additionally, G.S. 14-33(c) contains the limiting language that the enumerated conduct constitutes an A1 misdemeanor unless the conduct is covered under some other provision of law providing greater punishment. This provision has normally been interpreted to mean that if a greater offense is charged, a defendant may not also be punished for a lesser offense for the same conduct. *See* ***State v. Williams*** <https://appellate.nccourts.org/opinions/?c=2&pdf=5304> , 201 N.C. App. 161, 173 (2009) ("the language 'unless the conduct is covered under some other provision of law providing greater punishment' indicated legislative intent to punish certain offenses at a certain level, but that if the same conduct was punishable under a different statute carrying a higher penalty, defendant could only be sentenced for that higher offense"). There is an open question as to whether this limiting language applies to offenses that carry the *same* punishment, like assault with a deadly weapon under G.S. 14-33(c)(1), for example, and misdemeanor domestic violence. Under the usual interpretation, a defendant charged with both assault offenses could be sentenced for only one, unless there has been a **distinct interruption** <https://nccriminallaw.sog.unc.edu/state-v-dew-multiple-assault-offenses-and-distinct-interruptions/> in the act sufficient to constitute two separate assaults.

The new law will also expand the list of people who could be charged with Class A1 misdemeanors for acts of simple assault (a Class 2 misdemeanor). Consider a man and a woman in a dating relationship, who have each been arrested for assaulting the other. Under current law, the man would be charged with assault on a female, a Class A1 misdemeanor, while the woman would be charged with simple assault. They both could be charged under the new law and punished at the same level for the similar acts. This application also extends to other similarly situated parties, including couples in same-sex relationships.

Why does the new law matter?

The most likely answer is that the General Assembly wanted to create an offense that would count for purposes of the federal gun disqualification. My colleague, Jeff Welty, **blogged** <https://nccriminallaw.sog.unc.edu/vinson-voisine-misdemeanor-crimes-domestic-violence/> about this issue several years ago. To start, note that it is a federal crime under 18 U.S.C. 922(g)(9) for a person who has been convicted of a "misdemeanor crime of domestic violence" to possess a gun.

Vinson, the Fourth Circuit case.

In 2015, the Fourth Circuit ruled in ***United States v. Vinson*** <http://www.ca4.uscourts.gov/Opinions/Published/144078A.P.pdf> , 805 F.3d 120 (4th Cir. 2015) that North Carolina misdemeanor assault convictions aren't considered misdemeanor crimes of domestic violence within the meaning of the federal statute. The court ruled that a man with a previous North Carolina domestic violence conviction for assault on a female had not been convicted of a "misdemeanor crime of domestic violence." The court reasoned that the phrase "use of physical force" in 18 U.S.C. 921(a)(33) means the intentional use of physical force. The court further reasoned that North Carolina allows assault convictions that can be based on "culpable negligence" rather than intent, and consequently North Carolina assault convictions do not require, "as an element," the "use of physical force."

More plainly stated, under *Vinson*, because North Carolina assault convictions don't require intent as an element, they aren't "misdemeanor crimes of domestic violence" and thus don't count for purposes of the federal gun disqualification.

Voisine, the Supreme Court case.

In 2016, the United States Supreme Court decided ***Voisine v. United States*** <https://www.law.cornell.edu/supremecourt/text/14-10154> , 579 U.S. 686 (2016). *Voisine* involved two defendants who had previous domestic violence assault convictions in Maine. Under Maine law, an assault may be committed by intentionally, knowingly, or recklessly causing injury to another. Each defendant subsequently possessed a firearm and was charged in federal court with violating 18 U.S.C. § 922(g)(9). Declining the opportunity to declare that *any* domestic violence assault conviction involving force qualifies as a misdemeanor crime of domestic violence, regardless of the specific *mens rea* required by the assault statute, the Court ruled more narrowly that reckless assaults may qualify as misdemeanor crimes of domestic violence. It also stated, in dicta, that the "use" of force is not limited to the intentional use of force.

Even so, while *Voisine* may have cast some doubt on *Vinson*, it did not clearly overrule it. Thus, the Fourth Circuit's ruling in *Vinson* remained and remains unbothered, meaning that North Carolina assault convictions don't count for purposes of the federal gun disqualification.

How does the new law fit?

With the *Vinson* court's ruling still intact, the new misdemeanor crime under G.S. 14-32.5 was written to closely track the language of the federal statute. Although the new offense doesn't clearly state a *mens rea*, it will likely be interpreted to mean the intentional use of physical force as in *Vinson* and will presumably be the only North Carolina misdemeanor assault offense that would count for the federal gun disqualification under 18 U.S.C. 922(g)(9). My best guess is that once the new law takes effect on December 1, 2023, officers, magistrates, and prosecutors will begin charging this offense rather than the other misdemeanor assault offenses in domestic violence cases. Maybe then, it will be less questionable whether those defendants have lawful access to firearms after conviction.

I welcome your thoughts. If you have any questions about this offense or its application, please feel free to email me at bwilliams@sog.unc.edu.

North Carolina Criminal Law Blog

More on the New Pretrial Integrity Act

September 13, 2023 by **Brittany Bromell**

<https://nccriminallaw.sog.unc.edu/author/bwilliams/>

Last month, my colleague Jeanette Pitts **blogged** <https://nccriminallaw.sog.unc.edu/north-carolinas-new-pretrial-integrity-act/> about the new Pretrial Integrity Act enacted under **S.L. 2023-75** <https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H813v7.pdf> (H 813). Since the bill was passed, I have gotten a few questions about potential issues that might arise once it goes into effect on October 1. This post addresses some of those concerns.

As a refresher, the law amends G.S. 15A-533(b) to expand the list of offenses for which only a judge may consider conditions of pretrial release. Previously, this provision applied only to first-degree murder cases; it now will apply to several other high-level felonies, such as kidnapping, rape, sexual offenses, and robbery. For these cases, the statute sets no time limit on when a judge must rule on pretrial release, although in-custody defendants are entitled to a first appearance before a judge within 72 hours after arrest, an issue I discuss at the end of this post.

The law also enacts new G.S. 15A-533(h), limiting a magistrate's authority to set conditions of release for a defendant who is arrested for a new offense while the defendant was on pretrial release for another pending proceeding. In these cases, only a judge may set conditions of release within the first 48 hours after arrest for the new offense. A magistrate may set conditions within the first 48 hours after arrest for the new offense for violations of Chapter 20 of the General Statutes, but the new 48-hour rule applies to offenses involving impaired driving, namely:

- impaired driving, G.S. 20-138.1;
- impaired driving in a commercial vehicle, G.S. 20-138.2;
- operating a commercial vehicle after consuming alcohol, G.S. 20-138.2A;
- operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol, G.S. 20-138.2B;
- habitual impaired driving, G.S. 20-138.5; and
- death or injury by vehicle, G.S. 20-141.4.

The questions below begin with a discussion of the impact of the new 48-hour law, then turn to the offenses for which only a judge may set pretrial conditions.

The new 48-hour law applies to defendants who were on pretrial release before October 1.

New G.S. 15A-533(h) is effective for offenses committed on or after October 1, 2023. This language means that the new 48-hour rule applies to all offenses committed on or after that date, regardless of when the defendant was released on pretrial release. So, even if a defendant was released on pretrial release before October 1, 2023, a judge must set conditions of pretrial release within the first 48 hours for any new offense committed by the defendant on or after October 1, 2023. On the other hand, if a defendant who was released on pretrial release is arrested for a new offense late in the day on September 30, a magistrate has the authority to set pretrial release conditions for the new offense whether the initial appearance takes place before or after October 1.

A magistrate may set conditions if a defendant on pretrial release is arrested for failing to appear.

If a defendant is on pretrial release and is later arrested for failing to appear in court, a magistrate ordinarily has authority to set conditions of release during the initial appearance. The reason is that failing to appear is not a new offense unless it is specifically charged as such, a relatively rare occurrence. *See* G.S. 15A-543.

The new offense need not be similar to the pending offense.

New G.S. 15A-533(h) applies if a defendant is arrested for any new offense allegedly committed while the defendant was on pretrial release for another pending proceeding. For example, a defendant on pretrial release for a drug offense need not be arrested for another drug offense for this provision to apply. If that defendant is arrested for larceny, that defendant's pretrial release conditions for the larceny must be determined by a judge in the first 48 hours.

A violation of procedural due process could occur if a judge was available to set conditions within the first 48 hours for defendants in custody pursuant to new G.S. 15A-533(h) but did not.

There are now several pretrial release statutes that deviate from the procedure requiring that pretrial release conditions be determined without unnecessary delay as part of the defendant's initial appearance, typically before a magistrate. *See* G.S. 15A-511 (initial appearance procedures). Like new G.S. 15A-533(h), two of these statutes require that a judge rather than a magistrate set pretrial release conditions within a certain amount of time after arrest. For cases in which a defendant is charged with (1) certain domestic violence offenses, (2) communicating a threat of mass violence on educational property in violation of G.S. 14-277.6, or (3) communicating a threat of mass violence at a place of religious worship in violation of G.S. 14-277.7, a judge must set a defendant's pretrial release conditions during the first 48 hours after arrest. *See* G.S. 15A-534.1, 15A-534.7. Similarly, new G.S. 15A-534.8 as enacted by **S.L. 2023-6** <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-6.pdf> (H 40), provides a 24-hour window during which a judge must set conditions of release for defendants arrested for rioting or looting under G.S. 14-288.2 or 14-288.6. This new statute is effective for offenses committed on or after December 1, 2023.

In the domestic violence context, case law has held that the defendant must be brought before a judge at the earliest, reasonable opportunity under G.S. 15A-534.1. *State v. Thompson*, 349 N.C. 483 (1998). A violation of the defendant's right to procedural due process occurs where the defendant is held without conditions of pretrial release and a judge was available to set them. *Id*. In those cases, the remedy for such violations is dismissal of the charges with prejudice.

Outside of cases involving domestic violence under G.S. 15A-534.1, the courts have been reluctant to order dismissal for delays in setting pretrial release conditions without a showing of prejudice by the defendant. *See, e.g., State v. Pruitt*, 42 N.C. App. 240 (1979) (disapproving of failure to hold first appearance for defendant charged with felony and incarcerated for almost a month but finding no prejudice by the denial of his first appearance rights). In *Thompson*, however, the court did not require a showing of prejudice to preparation of the defense—a violation of the requirements of the domestic violence statute supported dismissal—so a defendant may be able to obtain dismissals for a violation of comparable time limits in new G.S. 15A-533(h), new G.S. 15A-534.8, and G.S. 15A-534.7. Still, dismissal of the charges is a drastic remedy and one our courts may be unwilling to extend, without a showing of prejudice, beyond the domestic violence context.

Administrative restructuring is not necessarily required, although it may be useful.

Since it is possible that a defendant's right to due process may be violated if not provided a timely first appearance before a judge, care must be taken in getting defendants to court. However, chief judges need not completely reschedule or restructure court sessions to accommodate defendants who are awaiting a first appearance before a judge.

The defendant in *State v. Jenkins*, 137 N.C. App. 367 (2000), was arrested at 6:15 a.m. on a Friday and received a hearing before a judge at approximately 1:30 p.m. the same day. While the district court convened at 9:30 a.m. on Friday mornings, the afternoon session was typically devoted to bond hearings. The court of appeals held that no violation of the defendant's constitutional rights occurred although the defendant was not brought before a judge at the first opportunity in the morning. The court held that "[a]lthough defendant was detained for approximately seven hours, we find his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system." Thus, where the delay is short and attributable to the normal pattern of scheduling in the county, the defendant is less likely to prevail on a claim that his or constitutional rights were violated.

The point still remains that a defendant should be seen at the earliest reasonable opportunity.

A violation of procedural due process could occur if defendants in custody pursuant to G.S. 15A-533(b) are not afforded a timely first appearance.

Amended G.S. 15A-533(b) expands the list of offenses for which only a judge may consider conditions of pretrial release. While this revised statute does not impose a time frame during which a judge must set conditions (*e.g.*, 24 hours, 48 hours, etc.), defendants arrested for those offenses are entitled to a timely first appearance in accordance with G.S. 15A-601. These in-custody defendants must be brought before a district court judge within 72 hours of arrest or at the first regular session of district court in the county, whichever occurs first. G.S. 15A-601(c). If the courthouse is closed for longer than 72 hours (*e.g.*, holiday weekends), the first appearance before a district court judge must be held within 96 hours after arrest.

Once revised G.S. 15A-533(b) takes effect, the number of defendants requiring conditions to be set by a judge is almost certain to increase. While a judge has discretion to determine whether release is warranted for these offenses, a judge does not have discretion to delay or deny a first appearance altogether. The failure to hold a timely first appearance and consider conditions, as required by 15A-601, could violate due process in the same way that a failure to meet the specific time limits in domestic violence cases has been found by our courts to violate due process.

In addition to the question whether our courts would extend *Thompson* beyond the domestic violence context, discussed above, there is the question whether our courts would find a violation without specific time limits controlling when a judge must act. There is also the question whether a delay in the first appearance for these higher-level felonies, at which a judge may deny pretrial release altogether under 15A-533(b), is comparable to cases in which a defendant has the right to pretrial release conditions, such as in *Thompson*. While there are not yet any clear answers to these questions, these defendants should be brought in front of a judge as earlier as practicable to effectuate defendants' rights and reduce the risk of violating them.

The Pretrial Integrity Act has generated several questions and concerns, and I anticipate more once the laws take effect. If you have questions or thoughts about the potential impact of these new laws, please feel free to send me an email at **bwilliams@sog.unc.edu**.

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