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Pretrial Release in Criminal Domestic Violence Cases

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A person arrested for a noncapital criminal offense usually has a right to pretrial release upon the setting of reasonable conditions. Pretrial release is generally ordered by a magistrate at a defendant's initial appearance. While the North Carolina General Statutes (hereinafter G.S.) provide general rules for considering the pretrial release of a defendant for most offenses, there are some requirements and limitations for specific offenses.

One such set of offenses involves domestic violence charges. As a special approach to setting conditions of pretrial release, the "48-hour rule," as it is known in domestic violence cases, shifts the responsibility to judges. The rule is set out in G.S. 15A-534.1, which (1) provides that a judge—rather than a magistrate—must set a defendant's pretrial release conditions during the first forty-eight hours after arrest for certain offenses and (2) lists the offenses subject to the 48-hour rule. Some offenses are subject to the rule based on the offense alone. A greater number of offenses are subject to the rule only if the defendant is charged with an offense listed in the statute *and* the defendant and victim are or have been in a relationship described in the statute.

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The courts have stated that the statute "serves the General Assembly's legitimate interest in ensuring that a judge, rather than a magistrate, consider[s] the terms of a domestic-violence offender's pretrial release."[1] Courts also have held, however, that if a defendant is held without an initial appearance when a judge is available to conduct one, dismissal of the charges may be required.

Through a series of questions and answers, this bulletin examines the special rules of pretrial release for domestic violence cases. The first few sections discuss pretrial release generally and in domestic violence cases. The sections that follow explore the mechanics of the 48-hour rule, the impact of violations of these special pretrial release rules, and questions on limitations of authority.

I. Pretrial Release Generally

How are pretrial release conditions usually set after a defendant's arrest?

Upon arrest in both misdemeanor and felony cases, a defendant must be taken without unnecessary delay before a judicial official for an initial appearance.[2] In most instances, the judicial official who sets conditions of pretrial release is a magistrate.

What are the basic types of pretrial release?

There are five basic types of pretrial release:

1. The defendant is released upon signing a written promise to appear.
2. The defendant is released upon executing an unsecured appearance bond in an amount specified by the judicial official.
3. The defendant is placed in the custody of a designated person or organization that has agreed to supervise the defendant.
4. The defendant is required to execute an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage, or by at least one solvent surety.
5. The defendant is ordered on house arrest with electronic monitoring.[3]

In granting pretrial release, a judicial official must impose type 1, 2, or 3 unless he or she determines that such release (a) will not reasonably assure the appearance of the defendant as required; (b) will pose a danger of injury to any person; or (c) is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. If the judicial official finds that one of these exceptions applies, he or she then may impose type 4 or 5 and, if required by local pretrial release policies issued by the senior resident superior court judge, must record the reasons for doing so in writing.[4]

1. State v. Thompson, 349 N.C. 483, 492 (1998) (holding that the statute was regulatory rather than punitive).
2. *See* G.S. 15A-501(2) (police duties upon arrest); 15A-511 (requirements of initial appearance).
3. G.S. 15A-534(a) (types of release).
4. G.S. 15A-534(b) (statutorily preferred release).

May a judicial official impose other conditions of pretrial release?

Yes. In addition to any of the five types of pretrial release discussed above, a judicial official may impose other restrictions on a defendant. Some common restrictions include staying away from the alleged victim or the place the alleged offense occurred. In determining which conditions of release to impose, a judicial official must consider the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he or she would be endangered by being released without supervision; the length of the defendant's residence in the community; the defendant's criminal history; the defendant's history of flight to avoid prosecution or his or her failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.[5]

Are different pretrial release procedures required for certain types of cases?

Yes. Generally, a defendant charged with a noncapital offense must have conditions of pretrial release determined in accordance with G.S. 15A-534.[6] The usual procedure in such cases is described in the previous questions. However, North Carolina law provides that special pretrial release procedures must be followed for some cases. Examples include cases involving

- crimes of domestic violence,
- detention of impaired drivers,
- detention for communicable diseases,
- sex offenses and crimes of violence against child victims,
- detention to protect public health,
- manufacture of methamphetamine,
- communicating a threat of mass violence, and
- rioting or looting.[7]

In these cases, the authority of a magistrate to set pretrial release conditions is limited. For cases involving domestic violence, communicating a threat of mass violence, and rioting or looting (effective December 1, 2023), a judge must determine the conditions of pretrial release. If a judge has not done so within the applicable statutory time period, then a magistrate must set the conditions. For cases involving impaired drivers and communicable diseases, a judicial official—typically a magistrate—sets a defendant's pretrial release conditions but delays release of the defendant to protect the public. In cases involving certain methamphetamine offenses or violations of public health measures, a judicial official—typically a magistrate—conducts an initial appearance but denies pretrial release if certain criteria are met.

This bulletin examines the variations in domestic violence cases only; variations for other cases are beyond the scope of this publication.

5. G.S. 15A-534(c) (considerations).

6. G.S. 15A-533(b) (noncapital offenses).

7. *See* S.L. 2023-6, § 4, effective for rioting or looting offenses committed on or after December 1, 2023 (special pretrial release procedures apply to such offenses); G.S. 15A-534.1–534.8 (covering the other offenses listed to which special pretrial release procedures apply and setting out said procedures).

What happens when a defendant violates conditions of pretrial release?

A judicial official may revoke a pretrial release order and issue an order for a defendant's arrest if (1) the defendant violates conditions in the order, such as a requirement to stay away from a particular location, and (2) the judicial official has jurisdiction over the case.[8] If a defendant violates pretrial release conditions before he or she appears in court for the first time, a magistrate has jurisdiction to revoke pretrial release and issue an order for arrest.[9] Once a defendant appears in court, a judge at the level of court in which the case is then pending (district or superior) has jurisdiction to revoke release and issue an order for arrest.

Upon arrest for a violation of pretrial release conditions, whether ordered by a magistrate or judge or upon a law enforcement officer's own initiative,[10] a defendant must be taken before a magistrate for an initial appearance, at which time the magistrate must set new pretrial release conditions.[11] This action is necessary because any arrest triggers the requirements of an initial appearance.[12]

II. Pretrial Release in Domestic Violence Cases

General Principles

How do pretrial release procedures in domestic violence cases differ from the usual procedures?

Pretrial release conditions are generally set by a magistrate at a defendant's initial appearance. The 48-hour rule applicable in domestic violence cases shifts that responsibility to judges. The rule, set out in G.S. 15A-534.1, provides that a judge—not a magistrate—must set a defendant's pretrial release conditions during the first forty-eight hours after arrest for certain offenses. The practical effect of this rule is that a defendant will not be immediately released but, rather, will be committed to a detention facility until pretrial conditions are set by a judge or until the defendant is returned to a magistrate after forty-eight hours.

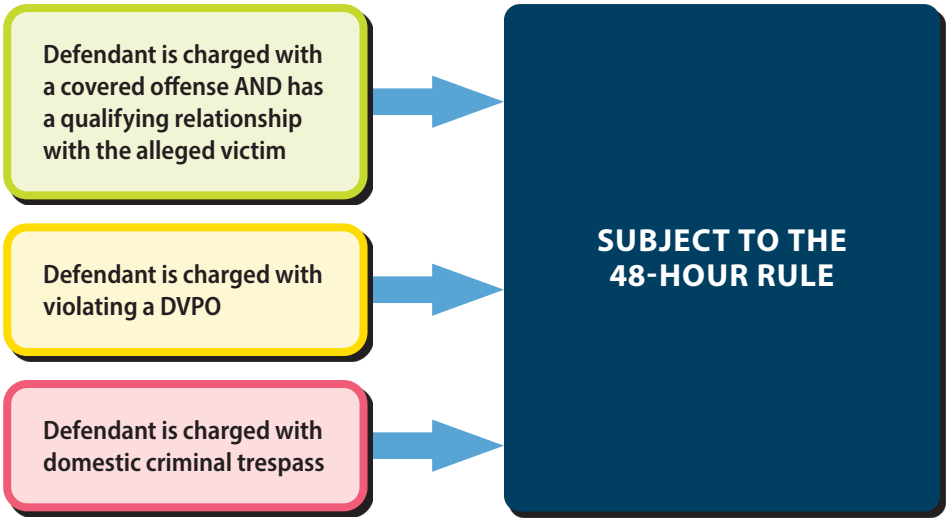
Application of this rule raises several additional issues discussed in this bulletin, such as the relationships and offenses to which the rule applies, a defendant's right to due process in such cases, and potential remedies for violation of the defendant's rights, including dismissal of the charges against a defendant.

How is domestic violence defined for purposes of the 48-hour rule?

G.S. 15A-534.1 lays out the circumstances under which a defendant is subject to the special forty-eight-hour pretrial release procedures. Some offenses, discussed below, are subject to the 48-hour rule based on the offense alone. A greater number of offenses are subject to the rule only if (1) the offense with which a defendant is charged is listed in the statute *and* (2) the defendant and the victim are or have been in a relationship described in the statute, also discussed below.

8. *See* G.S. 15A-534(d) (arrest may be ordered for violation); 15A-534(e) (describing when judicial official has jurisdiction to modify pretrial release order).
9. *See* G.S. 15A-534(e) (modifying pretrial release order).
10. *See* G.S. 15A-401(b) (arrest by an officer without a warrant).
11. *See* G.S. 15A-511(a)(1).
12. G.S. 15A-501(2); 15A-511(a)(1).

Figure 1. Charges/Circumstances That Trigger Application of the 48-Hour Rule



Covered Offenses for Pretrial Release in Domestic Violence Cases

What charges trigger application of the special pretrial release rules in domestic violence cases without an additional showing of a particular relationship?

All offenses subject to the 48-hour rule are listed in G.S. 15A-534.1. There are two offenses that are subject to the rule based on the offense alone: domestic criminal trespass and violation of a domestic violence protective order (DVPO).[13] The 48-hour rule does not require an additional showing of a certain relationship between a defendant and an alleged victim for the special pretrial release procedures to apply to these two offenses because such a relationship is inherent in the offenses themselves. One element of domestic criminal trespass requires that a person unlawfully enter or remain on premises occupied by a present or former spouse or by a person with whom the person charged has lived as if married.[14] Violation of a DVPO requires a knowing violation of a valid protective order, which would have only been issued if the parties had a personal relationship as described in G.S. 50B-1.

Because violation of a DVPO does not require an additional showing of a particular relationship, it is immaterial that the relationship between a defendant and an alleged victim would not otherwise suffice for purposes of G.S. 15A-534.1. For example, if a mother has a DVPO against her adult son and the son violates the DVPO, he would be subject to the 48-hour rule; it would not matter that the parent/child relationship would not independently subject the son to the 48-hour rule.

13. The offense of violating a domestic violence protective order includes violations of ex parte orders.
14. G.S. 14-134.3 (domestic criminal trespass).

What charges trigger application of the special pretrial release rules in domestic violence cases only if the defendant and alleged victim have a particular relationship?

A greater number of offenses are subject to the 48-hour rule only if the defendant is charged with an offense listed in G.S. 15A-534.1 *and* the defendant and alleged victim are or have been in a relationship described in the statute. The covered offenses in this category are assault, stalking, communicating a threat, and the felonies proscribed by G.S. Chapter 14, Articles 7B, 8, 10, or 15, such as rape, kidnapping, and arson.

Are any other charges subject to special pretrial release rules in domestic violence cases?

No. The statutory list of covered offenses is exclusive. If an offense is not specifically listed in G.S. 15A-534.1, it is not within the scope of the 48-hour rule. For example, a frequent question is whether the statute's inclusion of "stalking" also includes cyberstalking as defined in G.S. 14-196.3. Because cyberstalking is a different offense than stalking and is not specified in G.S. 15A-534.1, it probably is not subject to the 48-hour rule.[15] Other offenses like interfering with emergency communication under G.S. 14-286.2 or breaking or entering to terrorize or injure an occupant under G.S. 14-54(a1) might sometimes be domestic violence–related. However, because neither offense is covered by G.S. 534.1, a defendant charged only with one of these offenses would not be subject to the 48-hour rule and may have his or her pretrial release conditions set by a magistrate at the initial appearance.

Is a violation of pretrial release conditions for a domestic violence offense subject to the 48-hour rule?

No. The consequences for violating pretrial release conditions are consistent regardless of the underlying charges. Upon arrest, whether ordered by a magistrate or judge, a defendant must be taken before a magistrate for an initial appearance, at which time the magistrate must set new pretrial release conditions.[16] Even if the underlying charges were domestic violence offenses covered by G.S. 15A-534.1, the defendant will not be subject to the 48-hour rule when arrested for a violation of pretrial release conditions. This is because violation of release conditions alone is not a new offense, nor is it a circumstance specified in G.S. 15A-534.1 as subject to the 48-hour rule.

If the State takes a voluntary dismissal on domestic violence charges and then reinstates the charges, will the defendant again be subject to the 48-hour rule?

Probably. Sometimes the State may opt to voluntarily dismiss and then refile charges against a defendant in a domestic violence case if a witness does not appear in court. Whether or not the defendant will again be subject to the 48-hour rule will largely depend on the process that the magistrate issues. If the magistrate issues an arrest warrant, and the defendant is arrested, then the defendant would likely again be subject to the 48-hour rule on the refiled charges and would have to have a new bond set. If the magistrate instead issues a criminal summons, there would be no arrest and the 48-hour rule would not apply.

If, instead, the State dismisses the charges because of a 48-hour rule violation and refiles, the defendant likely has a strong *Thompson* claim.[17] For further discussion of this issue, refer to the prejudice discussion below.

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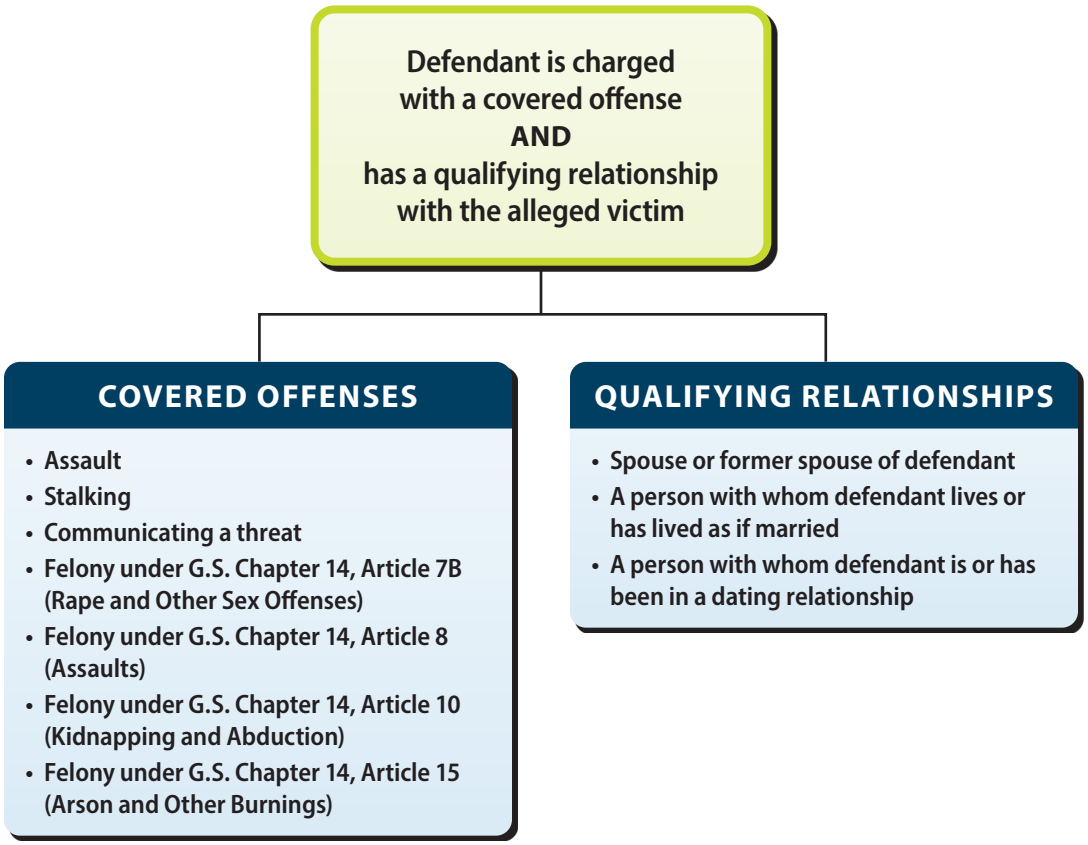
15. *See* Jeff Welty, *Cyberstalking and the 48-Hour Rule*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Nov. 28, 2012) (discussing potential counterargument).

16. *See* G.S. 15A-511(a)(1).

17. Referencing *State v. Thompson*, 349 N.C. 483 (1998), discussed in more detail below.

Figure 2. Covered Offenses and Qualifying Relationships That Trigger Application of the 48-Hour Rule



Covered Relationships for Pretrial Release in Domestic Violence Cases

What relationships trigger the application of special pretrial release rules in domestic violence cases?
The requirement of a covered relationship is met if the offense with which a defendant is charged is against a spouse or former spouse, a person with whom the defendant lives or has lived as if married, or a person with whom the defendant is or has been in a dating relationship. As indicated above, charges of domestic criminal trespass and violation of a domestic violence protective order do not require an additional showing of a covered relationship and are automatically subject to the 48-hour rule.

What does a "dating relationship" mean under the domestic violence laws?
G.S. 15A-534.1 refers to G.S. 50B-1 to define the term "dating relationship." Under G.S. 50B-1(b)(6), a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. The statute specifies that a casual acquaintance or ordinary fraternization between people in a business or social context is not a dating relationship.

In a case addressing whether a DVPO was unconstitutionally denied, the North Carolina Court of Appeals held that the term "dating relationship" should be interpreted broadly to cover a wide range of romantic relationships, with "only the least intimate of personal relationships" excluded.[18] A short-term romantic relationship may therefore qualify as a "dating relationship" within the meaning of G.S. 50B-1(b)(6).[19] Factors to consider in making the determination include how long the alleged dating activities continued prior to the alleged acts of domestic violence; the nature and frequency of the parties' interactions; the parties' ongoing expectations with respect to the relationship, either individually or jointly; and whether the parties demonstrated an affirmation of their relationship before others by statement or conduct.

This analysis applies whether the defendant and victim are the same sex or opposite sexes. Nothing in the definition of "dating relationship" requires the parties to be of different sexes. Under G.S. 50B-1(b), a "dating relationship" is a "personal relationship" only if the parties are of different sexes, but the applicability of the 48-hour rule turns on the existence of a "dating relationship" because G.S. 15A-534.1 uses that term only; it does not refer to and does not require the existence of a "personal relationship."[20]

Is there a limit as to how long ago the defendant and alleged victim had to be in a relationship for it to qualify as a covered relationship under law?

No. There is no specified time limit for any of the three past relationships listed in G.S. 15A-534.1—former spouse of the defendant, a person with whom the defendant has lived as if married, or a person with whom the defendant has been in a dating relationship. A broad interpretation of the statute thus indicates that it applies even to relationships that ended years or decades before the alleged conduct.

Note that the interpretation is different for the "current or recent former dating relationship" required by the new misdemeanor crime of domestic violence, discussed below. The use of the word "recent" to describe the past relationship indicates that there is a limit as to how long ago the relationship must have existed for it to be a covered relationship. Although the new statute does not specify the outer limit for recency, it likely excludes relationships that ended years or decades ago.[21]

Other Domestic Violence Statutes

Is the definition of domestic violence under G.S. 15A-534.1 the same as in other North Carolina statutes on domestic violence?

No. Other statutes define domestic violence differently.

18. Thomas v. Williams, 242 N.C. App. 236, 240 (2015).

19. *Id.* at 241.

20. Jeff Welty, *Domestic Violence Crimes and the 48-Hour Rule* (Dec. 2019), available for download from the UNC School of Government's NC Magistrate's microsite at sog.unc.edu/resources/microsites/nc-magistrates/domestic-violence-48-hour-rule-paper. *See also* sources cited *infra* note 23 and accompanying text (discussing appellate rulings holding that exclusion of same-sex dating relationships from domestic violence protection order protections is unconstitutional).

21. *See infra* note 23.

Are there any civil domestic violence statutes?

Yes. G.S. 50B-1 is a civil statute rather than a criminal one and governs eligibility for a civil order of protection against domestic violence. Under G.S. 50B-1, domestic violence is defined as the commission of a certain act upon a victim or upon a minor child residing with or in the custody of the victim, by a person with whom the victim has or has had a personal relationship. Under this statute, the covered offenses are fewer than under G.S. 15A-534.1, and the qualifying relationships are more expansive than those addressed in G.S. 15A-534.1. For an act to be considered domestic violence under G.S. 50B-1, there must be a qualifying act committed and a qualifying relationship between the victim and the defendant. A qualifying act is one or more of the following:

- Attempting to cause bodily injury or intentionally causing bodily injury to the victim
- Placing the victim or a member of the victim's family or household in fear of imminent serious bodily injury
- Continued harassment that rises to such a level as to inflict substantial emotional distress
- Committing rape or any other sex offense(s)

In addition to one of the listed acts, a personal relationship must exist between the victim and defendant. A personal relationship is one in which the parties

1. are current or former spouses;
2. are people of the opposite sex who live together or have lived together;
3. are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren;
4. have a child in common;
5. are current or former household members; or
6. are people of the opposite sex who are in a dating relationship or have been in a dating relationship.

Although G.S. 50B-1(b)(6), in defining the term "personal relationship," uses the language "persons of *the opposite sex* who are in a dating relationship," the North Carolina Court of Appeals ruled in *M.E. v. T.J.*[22] that the exclusion of complainants in same-sex relationships from domestic violence protective order (DVPO) protection was unconstitutional. Thus, same-sex couples are now covered under this type of personal relationship.

Where both a qualifying act and a personal relationship are present, the victim qualifies under G.S. 50B-1 for a DVPO against the defendant. While G.S. 50B-1 and G.S. 15A-534.1 each require both a covered offense and a qualifying relationship, the requirements do not mirror one another. Even so, in some instances, a domestic violence scenario could meet the requirements for both the issuance of a DVPO and the defendant being subject to the 48-hour rule.

22. 275 N.C. App. 528 (2020).

Are there any other criminal domestic violence statutes?

Yes. Effective December 1, 2023, G.S. 14-32.5 proscribes a new misdemeanor crime of domestic violence. Under this statute, 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:

1. The person is a current or former spouse, parent, or guardian of the victim
2. The person shares a child in common with the victim
3. The person is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian
4. The person is similarly situated to a spouse, parent, or guardian of the victim
5. The person has a current or recent former dating relationship with the victim[23]

While G.S. 14-32.5 and G.S. 15A-534.1 each require both a covered offense and a qualifying relationship, the requirements do not mirror one another. The list of qualifying relationships in G.S. 14-32.5 is broader than the list of qualifying relationships in G.S. 15A-534.1, so a person charged with this offense will not necessarily or automatically be subject to the 48-hour rule. Even so, in some instances, a domestic violence scenario involving an assault could result in the defendant being charged with the misdemeanor offense and being subject to the 48-hour rule.

Are there any other forty-eight-hour pretrial release rules that could coincide with the usual procedures in domestic violence cases?

Yes. A new pretrial release provision, G.S. 15A-533(h), was enacted effective for offenses committed on or after October 1, 2023, limiting a magistrate's authority to set conditions of release for a defendant who is arrested for a new offense that is alleged to have been committed while the defendant was on pretrial release for another pending proceeding. In these cases, the general rule is that only a judge may set conditions of release within the first forty-eight hours after arrest for the new offense.

A defendant may be arrested on a charge that triggers the forty-eight-hour provision under both G.S. 15A-534.1 and 15A-533(h). In these situations, the statutes apply simultaneously, meaning that the defendant is subject to only one forty-eight-hour window. Additionally, both statutes authorize a magistrate to act after forty-eight hours. So, regardless of which statute is applied, a magistrate has the authority to set conditions of release forty-eight hours after the arrest of a defendant if a judge has not done so.

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23. New G.S. 14-32.5(b) specifies that the term "dating relationship" is defined as it is in 18 U.S.C. § 921(a)(37). Under the federal statute, the term "dating relationship" means a relationship between individuals who have or have *recently* had a continuing serious relationship of a romantic or intimate nature (emphasis added). The statute does not define the term "recently," and because it is a newly enacted provision (June 25, 2022), there has yet to be any case law or other guidance as to what constitutes "recently." Courts in other jurisdictions have found that the requirement of recency was not met without expressly defining a time limit. *See* L. L. v. M. B., 286 A.3d 489, 498 (Conn. App. Ct. 2022) (concluding that the trial court did not abuse its discretion in determining that a dating relationship which occurred two years prior to the filing of the application was not recent); Sanchez v. State, 499 S.W.3d 438, 443 (Tex. Crim. App. 2016) (finding that a period of three years between the end of the dating relationship and the assault "does not fit within the concept of recently").

Are there other special pretrial release rules that could take precedence over the usual procedures in domestic violence cases?

Yes. Effective for offenses committed on or after October 1, 2023, G.S. 15A-533(b) was amended 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 the following offenses:

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

Given that many of these offenses are also covered under G.S. 15A-534.1, it is possible that a defendant's conduct may fall within the scope of both G.S. 15A-534.1 and 15A-533(b). In those situations, G.S. 15A-533(b) will control. The defendant will not be entitled to pretrial release, and a judge will have discretion to determine whether release is warranted for these offenses. Additionally, these cases will not be sent back before a magistrate to consider pretrial release. Because G.S. 15A-533(b) does not impose a time frame during which a judge must set conditions, there is no forty-eight-hour limitation as with G.S. 15A-534.1, and a defendant may not have recourse for a delayed appearance before a judge as in cases subject to G.S. 15A-534.1.[24]

III. Mechanics of the 48-Hour Provision

Issues During the First Forty-Eight Hours

What is the magistrate's role when a defendant is arrested for a domestic violence offense within the meaning of 15A-534.1?

The magistrate should conduct the initial appearance as usual except for the setting of pretrial release conditions. The magistrate must inform the defendant of the charges, the right to communicate with counsel and friends, and the general circumstances under which pretrial release may be obtained.[25] The magistrate is not authorized to set pretrial release conditions during the first forty-eight hours after arrest. Only a judge may do so.

24. See *infra* Part IV, Violations and Their Impact.
25. G.S. 15A-511(b) (statement by the magistrate).

During the initial appearance, the magistrate should order that the defendant be taken to the first available court session in the county for a first appearance before a judge. In some instances, this may include a court session that is already in progress. The magistrate should also order that the defendant be returned to a magistrate if a judge does not set pretrial release conditions within forty-eight hours after arrest. If a judge has not set conditions within forty-eight hours after arrest, a magistrate is authorized to do so. The magistrate may retain the defendant for a reasonable period of time while determining pretrial release conditions if the defendant's immediate release poses a danger of injury or intimidation and an appearance bond will not prevent injury or intimidation.[26]

Does the forty-eight-hour waiting period begin upon arrest or after the initial appearance?

The forty-eight-hour period begins to run at the time of arrest, not at the later time when the defendant initially appears before a magistrate.[27] The distinction is important, as it reduces the likelihood that the defendant will spend more time in custody than necessary. The length of time between arrest and initial appearance before a magistrate could be affected by several factors, including the distance from the jail, traffic, and the number of other arrestees awaiting an initial appearance, which could result in an additional hour or more in custody if the forty-eight-hour period were to start running at the time the initial appearance is held.

What does "first available judge" mean?

As mentioned above, a person arrested for a domestic violence offense may be briefly detained while awaiting a hearing on pretrial release held by the first available judge. During the first forty-eight hours after arrest, a defendant must be brought before a judge at the earliest reasonable opportunity.[28] In some instances, this may include a court session that is already in progress. In *State v. Thompson*,[29] the defendant was arrested on a Saturday at 3:45 p.m. and was not brought before a judge until Monday at 3:45 p.m., even though judges were available to set pretrial release conditions as of 9:00 a.m. on Monday. In assessing availability, the *Thompson* court took judicial notice of both district and superior court sessions in the county and of the start times of those sessions. The court concluded that as long as a session of either superior or district court has convened in a county, a judge is considered available for purposes of G.S. 15A-534.1.[30]

Are there any circumstances under which a defendant may be held in custody for longer than forty-eight hours?

Yes. G.S. 15A-534.1(a)(1) allows a judge (or a magistrate, when applicable) to delay the setting of pretrial release conditions for a reasonable period of time if (1) the defendant's immediate release poses a danger of injury to the victim or another person or is likely to result in intimidation of the victim and (2) an appearance bond is inadequate to protect against the injury or intimidation. Thus, where the defendant has been brought before a judge at the earliest reasonable opportunity within forty-eight hours after arrest, the judge still may hold the

26. G.S. 15A-534.1(a)(1) (hold for risk of injury or intimidation).
27. G.S. 15A-534.1(b) (magistrate's authority).
28. *See, e.g.*, State v. Thompson, 349 N.C. 483 (1998).
29. *Id.*
30. *Id.* at 498 (noting district and superior court sessions that convened in the county prior to the time pretrial release conditions were set).

defendant in custody without bond for a reasonable additional period.[31] In *State v. Gilbert*, the defendant was taken in at a detention facility at around 9:00 p.m. and received a hearing before a judge at 9:00 a.m. the next morning, at which time the judge imposed an unsecured bond but ordered that the defendant not be released until after 2:00 p.m. that afternoon. The court held that the additional five-hour delay was not an unconstitutional application of G.S. 15A-534.1.[32]

This type of hold predated the General Assembly's enactment of the 48-hour law and, as a practical matter, should now be used sparingly because the defendant will already have been held for some time before appearing before a magistrate.

When both domestic violence and non–domestic violence offenses are charged, can a magistrate set conditions for the non–domestic violence charges?

While practices vary across the state in these situations, it usually comes down to one of two options. If domestic violence offenses and non–domestic violence offenses are charged on the same process, magistrates sometimes apply the 48-hour rule to all the offenses and leave the determination of pretrial release conditions to the judge. If the domestic violence offenses and non–domestic violence offenses are charged on different processes, magistrates sometimes apply the 48-hour rule to the former and proceed to set pretrial release conditions on the latter.

Barring any preexisting county-specific practices, magistrates might consider setting conditions for non–domestic violence offenses before committing the defendant to jail for domestic violence offenses in both same- and different-process cases. This reduces the risk of any error in delaying pretrial release for the non–domestic violence offenses.

Other Issues for Magistrates

Can a magistrate order that a defendant be held for forty-eight hours?

No. The 48-hour rule is sometimes erroneously referred to as a "48-hour hold." This misnomer suggests that a defendant should always be held without conditions being set, by a judge or magistrate, for forty-eight hours. This interpretation is incorrect.

The 48-hour rule does not authorize a hold for any reason other than the unavailability of a judge. If a judge is available, then a defendant should not be held and should be taken promptly before the judge. If a defendant is held for forty-eight hours even though a judge has been available in the interim, dismissal of the charges is warranted.[33]

Can a magistrate set conditions to take effect immediately if it is clear that a judge will not be available within forty-eight hours?

No. G.S. 15A-534.1(b) is clear and unambiguous that a magistrate cannot act within the first forty-eight hours of arrest. In some situations, it is evident that a judge will not be available for forty-eight hours, such as when a defendant is arrested on a Friday evening. The question often arises as to whether it is permissible in that instance for a magistrate to set pretrial release conditions to take effect immediately. Even then, the statute does not allow a magistrate to do so.

31. *See* State v. Gilbert, 139 N.C. App. 657 (2000).
32. *Id.* at 669.
33. Jeff Welty, *Domestic Violence Cases and the 48 Hour Rule*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Sep. 7, 2011).

Some defendants have raised constitutional questions about whether there is a valid purpose for "holding" a defendant for forty-eight hours when it is evident that a judge will not be available, such as with Friday evening arrests. That question should be raised with the trial court rather than with the magistrate. A magistrate may not "rule" on the constitutionality of G.S. 15A-534.1 by choosing to not comply with it. Until a higher court rules otherwise, a magistrate's authority does not take effect until a defendant has been in custody for more than forty-eight hours without pretrial release conditions having been set by a judge.

Can a magistrate preset conditions to take effect in forty-eight hours if it is clear that a judge will not be available within forty-eight hours?

Probably not. In some cases, statutes allow magistrates to preset conditions for a delayed release. For example, in cases involving impaired driving, if a magistrate has determined by clear and convincing evidence that a defendant is so impaired as to present a danger to themself or others were they to be released, the magistrate is authorized to set pretrial release conditions and order the defendant into custody, for up to twenty-four hours, until they are no longer impaired to a dangerous extent.[34] In cases involving communicable diseases, if a magistrate finds probable cause that an individual was exposed to a person in a nonsexual manner that poses a significant risk of transmission of AIDS or Hepatitis B, the magistrate is authorized to set pretrial release conditions and order the person into temporary custody for up to twenty-four hours for testing.[35]

Under the domestic violence statutes, there are no circumstances described in the statute under which a magistrate may preset conditions and delay release in domestic violence cases. The fact that no such circumstances were expressed in the law might signify that it was not the General Assembly's intent to allow magistrates to take such actions.

Can a magistrate set conditions of confinement, rather than conditions of release, to take effect immediately?

Probably. This approach finds some support in *State v. Mitchell*.[36] In *Mitchell*, the court determined that a condition of no contact with the victim, imposed by a magistrate at the start of the forty-eight-hour period and twice readopted by a judge, was binding on the defendant even though the defendant remained in jail.[37] The court concluded that the defendant's violation of the no-contact conditions in the judge's orders could be used to support a later charge of felony stalking while a court order is in effect.

The trial judge imposed the no-contact condition on the "Conditions of Release and Release Order" form,[38] despite what the title suggests. In addition to establishing conditions of release, the orders issued in *Mitchell* committed the defendant to a detention facility; noted that he was subject to a domestic violence hold; directed when he was to again be produced before a judicial official; and, for one of the orders, required that he provide fingerprints.

34. G.S. 15A-534.2 (detention of impaired drivers).

35. G.S. 15A-534.3 (detention for communicable diseases).

36. 259 N.C. App. 866 (2018).

37. For further analysis, see Shea Denning, *Does a No Contact Order Apply While the Defendant Is in Jail?*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (June 6, 2018).

38. N.C. Administrative Office of the Courts (AOC), form AOC-CR-200, Conditions Of Release And Release Order.

The court noted that such orders "memorialize[] the trial court's determinations governing the defendant, whether the defendant is held in a detention facility or released."[39] The court explained that some of the terms of such an order apply whether a defendant is committed or released, while others apply only in one circumstance or another. The court stated that the directive in *Mitchell* ordering that the defendant have no contact with the victim contained no language indicating that the provision applied only upon the defendant's release. Thus, the court concluded, contact with the victim was barred as long as the orders were in effect, and the orders were in effect until the charges were disposed of, whether the defendant remained confined in jail or was released.[40]

It is important to note that the orders specifically at issue in *Mitchell* were issued by a judge, so *Mitchell* is clear on the point that judges have the authority to set conditions of confinement to take effect immediately. However, given that a magistrate is required to complete the "Conditions of Release and Release Order" form to commit a defendant to a detention facility,[41] and the magistrate in *Mitchell* initially entered a no-contact order on that form, it is reasonable to assume that such conditions are effective immediately and remain in effect until amended or adopted by a judge. The alternative interpretation—that a defendant is not bound by conditions of confinement set by a magistrate—would allow conduct such as contact with the victim to go unrestricted, which could exacerbate the circumstances under which a defendant was arrested in the first place.

Matters for Judicial Officials (Judges and Magistrates) to Consider

Is there anything a judicial official is obligated to consider in setting pretrial release conditions in domestic violence cases?

Yes. In determining which conditions of release to impose, a judicial official must consider the same factors as in other cases. The judicial official must consider

- the nature and circumstances of the offense charged;
- the weight of the evidence against the defendant;
- the defendant's family ties, employment, financial resources, character, and mental condition;
- whether the defendant is intoxicated to such a degree that he or she would be endangered by being released without supervision;
- the length of the defendant's residence in the community;
- the defendant's history of flight to avoid prosecution or failure to appear at court proceedings; and
- any other evidence relevant to the issue of pretrial release.[42]

39. *Mitchell*, 259 N.C. App. at 873.
40. For more on the court's ruling and analysis, see the blog post cited *supra* note 37.
41. G.S. 15A-521(a) (commitment to a detention facility pending trial); 15A-511(e) (commitment or bail).
42. G.S. 15A-534(c).

The judicial official must also (1) direct a law enforcement officer or a district attorney to provide a criminal history report for the defendant and (2) consider the defendant's criminal history when setting conditions of release. However, the judicial official may not unreasonably delay the determination of conditions of pretrial release for the purpose of reviewing the defendant's criminal history report.[43]

What conditions of pretrial release may a judicial official impose in a domestic violence case?

In addition to the conditions of release that may be imposed in other cases, a judicial official may impose the following conditions on pretrial release in domestic violence cases:

- That the defendant stay away from the home, school, business, or place of employment of the alleged victim
- That the defendant refrain from assaulting, beating, molesting, or wounding the alleged victim
- That the defendant refrain from removing, damaging, or injuring specifically identified property
- That the defendant may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge
- That the defendant abstain from alcohol consumption, as verified by the use of a continuous alcohol monitoring system, and that any violation of this condition be reported by the monitoring provider to the district attorney.[44]

Should a judicial official set pretrial release conditions for an out-of-county defendant who is subject to the 48-hour rule?

Yes. Being arrested on an out-of-county charge is not a basis for denying or delaying the setting of pretrial release conditions. In out-of-county arrests for non–domestic violence offenses, a magistrate must conduct the initial appearance as usual, regardless of where the offense occurred. There is no authority to order that the person arrested be held for pick up by the charging county. Similarly, for domestic violence offenses, an out-of-county defendant must be taken before a judge in the custodial county at the earliest reasonable opportunity within forty-eight hours after arrest. After forty-eight hours, a magistrate in the custodial county must act.

If an out-of-county defendant satisfies pretrial conditions and is released, he or she then appears in court in the charging county on the court date provided to him or her. If an out-of-county defendant is unable to satisfy conditions of release, the involved counties must coordinate the transportation of the defendant, since the first appearance must be held in the county where the charges are pending.[45]

Does a judge have authority to set pretrial release conditions for an out-of-county defendant?

Yes. There may be concern about whether district court judges have the authority to set pretrial release conditions in domestic violence cases because ordinarily, district court judges have venue only over offenses alleged to occur within their counties.[46] However, venue rules do

43. G.S. 15A-534.1(a).
44. G.S. 15A-534.1(a)(2).
45. G.S. 15A-601(a) (first appearances).
46. G.S. 15A-131(a); *see also* G.S. 15A-131(b) (venue for pretrial proceedings in cases within the original jurisdiction of the superior court lies in the superior court district or set of districts embracing the county where venue for trial lies).

not apply to initial appearances and therefore do not prohibit a judge from acting under these circumstances.[47] In setting pretrial release conditions in a case subject to the 48-hour law, a judge is essentially stepping into the shoes of a magistrate and completing the initial appearance. A magistrate has venue to hold an initial appearance anywhere in North Carolina.[48] This facilitates holding prompt initial appearances after arrest. Judges are authorized in general to hold initial appearances[49] and are required to handle the pretrial release component in domestic violence cases during the first forty-eight hours after arrest.[50]

IV. Violations and Their Impact

The Holding in *State v. Thompson*

What happens when the special pretrial release rules are not followed in domestic violence cases?

G.S. 15A-534.1 does not give a judicial official unfettered authority to hold a defendant for forty-eight hours after arrest. The defendant must be brought before a judge at the earliest reasonable opportunity.[51] A violation of procedural due process occurs when a defendant is held without conditions of pretrial release and a judge was available to set them.[52] If a judge has not acted within forty-eight hours of arrest, then a magistrate must set the conditions of pretrial release. A defendant also has a claim for violation of procedural due process rights when no judge was available to set conditions of pretrial release and the defendant was held for more than forty-eight hours rather than brought back before a magistrate. The remedy for a violation under either scenario is dismissal.

What was the holding in State v. Thompson*?*

The defendant in *Thompson* was arrested and charged with second-degree trespass, assault on a female, and assault inflicting serious injury, the latter being the offense that subjected him to the 48-hour rule under G.S. 15A-534.1. The defendant was arrested on a Saturday at 3:45 p.m. and was not brought before a judge until Monday at 3:45 p.m., even though judges were available to set pretrial release conditions as of 9:00 a.m. on Monday. The *Thompson* court held that "[t]he failure to provide defendant with a bond hearing before a judge at the first opportunity on Monday morning, and the continued detention of defendant well into the afternoon, was unnecessary, unreasonable, and thus constitutionally impermissible."[53]

47. *See* G.S. 15A-131(f) ("pretrial proceedings are proceedings occurring *after* the initial appearance") (emphasis added).
48. *See* G.S. 7A-273(7) (any magistrate may hold an initial appearance).
49. G.S. 15A-511(f) (initial appearance powers not limited to magistrate).
50. G.S. 15A-534.1 (crimes of domestic violence).
51. State v. Thompson, 349 N.C. 483 (1998).
52. *Id.*
53. *Id.* at 500.

What was the basis of the Thompson *court's holding?*

The court noted the State's legitimate interest in providing that a legally trained judge must perform individualized determinations of bail and set conditions of release in domestic violence cases. In finding a due process violation, the *Thompson* court cited G.S. 15A-954, which authorizes dismissal for constitutional violations, among other grounds. The court found dismissal warranted in that "[t]he constitutional violation deprived defendant of liberty unreasonably, well beyond any time period necessary to serve any governmental interest in detaining him without a hearing for regulatory purposes."

What does it mean for a defendant to have a "timely" pretrial release hearing?

During the first forty-eight hours after arrest, a defendant must be brought before a judge at the earliest reasonable opportunity. In some counties, this may include a court session that is already in progress. The question of whether a defendant's procedural due process rights have been violated by a delay will generally hinge on (1) when a judge became available to set conditions of pretrial release and (2) how long after that point the defendant was held without conditions.

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 *Thompson* claim. In *State v. Jenkins*,[54] the defendant was arrested at 6:15 a.m. on 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 found that no violation of the defendant's constitutional rights occurred even though he 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."

The point remains that a defendant must be seen at the earliest reasonable opportunity, but that standard is likely met when defendants are held for court sessions that are specifically dedicated to first appearances or general criminal court, provided that those sessions are scheduled for that afternoon, as in *Jenkins*, or for the next morning.

How does the Thompson *remedy differ from the remedies for other types of delays?*

The remedy afforded by *Thompson* is an unusual one. Courts have provided a similar remedy in the impaired driving context but in few others. In impaired driving cases, violation of pretrial release procedures may interfere with a defendant's ability to obtain evidence for his or her defense and therefore warrant dismissal. The remedy for a violation in this context—called a *Knoll* violation based on the North Carolina Supreme Court decision on the issue, *State v. Knoll*[55]—is generally dismissal because the violation deprives the defendant of the opportunity to obtain a range of evidence.

Outside of the domestic violence and impaired driving contexts, the courts have been reluctant to order dismissal for delays in setting pretrial release conditions. In *State v. Pruitt*,[56] the defendant was incarcerated for twenty-nine days before being granted a first appearance before a judge. During that time, the defendant was questioned by police on two occasions without an attorney. Although the court expressed its disapproval of the failure to hold a first

54. 137 N.C. App. 367 (2000).
55. 322 N.C. 535 (1988).
56. 42 N.C. App. 240 (1979).

appearance for the defendant, it found no prejudice affecting the validity of his trial, noting that the defendant had been fully advised of his constitutional rights and had intelligently and voluntarily waived his right to the presence of counsel.

Violation of a defendant's pretrial release in other contexts may provide a basis for dismissal or other remedies if the defendant can show prejudice (as in *Knoll*), a violation of due process (as in *Thompson*), or a violation of other statutory or constitutional requirements.

Other Potential *Thompson* Issues

Is the dismissal of the charges on a Thompson *motion with prejudice or without prejudice?*

With prejudice. The *Thompson* court found a constitutional violation in the unlawful hold and cited G.S. 15A-954 as the basis of the dismissal of the charges against the defendant.[57] Dismissal for a constitutional violation suggests that it necessarily carries some finality. Quite a few of the other violations listed in G.S. 15A-954, both constitutional and statutory, are typically dismissed with prejudice (e.g., statute of limitations has run, violation of right to speedy trial, double jeopardy).[58] The *Thompson* court's citation to G.S. 15A-954 suggests that dismissals under *Thompson* should carry the same kind of remedy.

If a defendant is arrested on both domestic violence and non–domestic violence charges and there is a Thompson *violation, should only the domestic violence charge(s) be dismissed?*

If a defendant is simultaneously arrested for both domestic violence and non–domestic violence offenses, the 48-hour rule would still be triggered for the domestic violence offense, and the defendant would have to be brought before a judge at the earliest reasonable opportunity. It is unclear whether, on violation, all charges on which the defendant was arrested would be subject to dismissal with prejudice, as opposed to only the domestic violence charges.

The defendant in *Thompson* was arrested and charged with three misdemeanor offenses: assault inflicting serious injury, assault on a female, and second-degree trespass. The charge of misdemeanor assault inflicting serious injury was the only domestic violence charge, as the other two offenses were committed against a person with whom the defendant did not have a qualifying relationship. All three charges were dismissed due to the violation of the 48-hour rule under 15A-534.1(b), although only one charge triggered the provision.

While dismissal of all charges was the result in *Thompson*, the court did not expressly consider the alternative of dismissing only the domestic violence charge, so the case may not settle the issue. Dismissal of charges with prejudice is a drastic remedy, and one our courts may be unwilling to extend to cases in which a defendant was simultaneously charged with more serious, non–domestic violence offenses.

If a charge is dismissed for a Thompson *violation, can different charges be brought based on the same conduct?*

Maybe. In *State v. Clegg*,[59] the defendant was taken into custody around 7:00 p.m. on Saturday, February 28, for a charge of assault on a female. He received a hearing before a judge sometime after 2:00 p.m. on Monday, March 2, although several sessions of court had convened that morning. After receiving information that the victim's injuries were more serious than initially

57. State v. Thompson, 349 N.C. 483, 503 (1998).
58. *See* G.S. 15A-954.
59. 142 N.C. App. 35 (2001).

believed, the State dismissed the assault on a female charge on March 25 and charged the defendant with assault with a deadly weapon inflicting serious injury. Once *Thompson* was decided later that year, the North Carolina Court of Appeals applied its ruling retroactively and held that the defendant was unconstitutionally detained in connection with the original assault on a female charge. The court further held, however, that the defendant was not detained on the superseding felony assault charge and that, to obtain dismissal, he had to show that the detention on the misdemeanor prejudiced his defense of the felony charge.

The court found no prejudice but suggested that it would have reached a different result had the State dismissed the misdemeanor charge and refiled different charges in an effort to avoid the consequences of the earlier unconstitutional detention. This suggests that if there is a *Thompson* violation, the State cannot dismiss and refile the charge before the court rules on the violation. It also suggests that the State can file different charges in some circumstances if the purpose is not to evade the *Thompson* violation.