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# What's *Knoll* Got to Do with It? Procedures in Implied Consent Cases to Prevent Dismissals Under *Knoll*

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## Introduction

In addition to enacting the pretrial motions and appeals procedures for implied consent cases recently upheld by the North Carolina Court of Appeals in *State v. Fowler*[1] and *State v. Palmer*,[2] the Motor Vehicle Driver Protection Act of 2006, S.L. 2006-53, created statutory provisions designed to, in the words of the task force recommending the changes, "avoid a dismissal under *Knoll*."[3] The *Knoll* reference is to the North Carolina Supreme Court's opinion in *State v. Knoll*[4] ordering that charges of impaired driving against defendants in three separate cases be dismissed. The court had found in each case that the magistrate committed substantial statutory violations related to the setting of conditions of pretrial release that prejudiced the defendant's ability to gain access to witnesses. Though *Knoll* is most widely recognized for its outcome—the dismissal of charges in three impaired driving cases—the *Knoll* court's holding actually *increased* the showing required from certain defendants to warrant dismissal of impaired driving charges. Before *Knoll*, to obtain dismissal of the charges a defendant charged with impaired driving had only to demonstrate that he or she was denied access to witnesses during the time in which such witnesses might provide testimony as to his or her lack of intoxication; prejudice from such a denial was presumed. *Knoll* requires that to establish a basis for dismissal of charges a defendant charged with impaired driving based upon driving with an alcohol concentration that equals or exceeds the per se limit in Section 20-138.1(a)(2) of the North Carolina General Statutes (hereinafter G.S.) must not only demonstrate a substantial statutory violation of the defendant's right to pretrial release, but also prove that he or she was prejudiced by the violation.

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1. ___ N.C. App. ___, 676 S.E.2d 523 (2009).
2. ___ N.C. App. ___, 676 S.E.2d 559 (2009).
3. Governor's Task Force on Driving While Impaired, *Final Report to Governor Michael F. Easley* (January 14, 2005) (hereinafter Task Force Report), 22.
4. 322 N.C. 535, 369 S.E.2d 558 (1988).



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Among the implied consent–offense procedures enacted in 2006 to prevent dismissals based on *Knoll* is G.S. 20-38.4, which governs initial appearances in implied consent cases. This statute requires, among other things, that a magistrate who finds probable cause for an offense involving impaired driving consider whether the defendant is "impaired to the extent that the provisions of G.S. 15A-534.2 should be imposed."[5] G.S. 15A-534.2, enacted by the Safe Roads Act of 1983, provides that if a magistrate "finds by clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger, if he is released, of physical injury to himself or others or damage to property, the judicial official must order that the defendant be held in custody and inform the defendant that he will be held in custody until" (1) the defendant is no longer impaired to the extent that the defendant poses a danger or (2) a sober, responsible adult is willing and able to assume responsibility for the defendant until the defendant is no longer impaired.[6] G.S. 20-38.4 also requires a magistrate conducting an initial appearance for an implied consent offense[7] to "[i]nform the person in writing of the established procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond."[8] Magistrates must also "[r]equire the person who is unable to make bond to list all persons he wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed."[9]

Because of the adoption of implied consent–offense procedures in 2006 and their relationship to *Knoll* motions, the twenty-year-old *Knoll* case and its progeny (which are seldom mentioned) deserve examination to determine (1) under what circumstances dismissal of impaired driving charges is warranted based upon the denial to a detained defendant of access to family and friends and (2) how the implied consent–offense procedures may impact such motions.

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5. N. C. Gen. Stat. (hereinafter G.S.) § 20-38.4(a)(3).

6. G.S. 15A-534.2(b), (c).

7. The following are implied consent offenses:
- Impaired driving (G.S. 20-138.1)
- Driving after consuming alcohol or drugs by a person under 21 (G.S. 20-138.3)
- Violating no-alcohol condition of limited privilege (G.S. 20-179.3)
- Impaired instruction (G.S. 20-12.1)
- Impaired driving in commercial vehicle (G.S. 20-138.2)
- Operating commercial vehicle after drinking (G.S. 20-138.2A)
- Operating school bus, school activity bus, or child care vehicle after drinking (G.S. 20-138.2B)
- Habitual impaired driving (G.S. 20-138.5)
- Open container (G.S. 20-138.7)
- Driving in violation of restriction requiring ignition interlock (G.S. 20-17.8(f))
- Felony death by vehicle or felony serious injury by vehicle (G.S. 20-141.4)
- First- or second-degree murder or involuntary manslaughter if the offense involved impaired driving (G.S. 14-17; G.S. 14-18)

G.S. 20-16.2(a1). While first-degree murder is statutorily defined as an implied consent offense, the state supreme court in *State v. Jones*, 53 N.C. 159, 538 S.E.2d 917 (2000), reversed the defendant's first-degree murder convictions, which were based upon deaths resulting from the defendant's commission of the felony offense of assault with a deadly weapon with intent to inflict serious injury. The court held that because the intent required to prove the felony assault was not actual intent but instead was implied from defendant's culpable negligence in driving while impaired, the felony assault could not serve as the underlying felony for felony murder under G.S. 14-17.

8. G.S. 20-38.4(a)(4)a.

9. G.S. 20-38.4(a)(4)b.

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## Denial of Access to Family and Friends in Implied Consent Cases

To understand *Knoll*, one must first consider *State v. Hill*,[10] which established a defendant's right to the extraordinary remedy of dismissal based upon the denial of access to witnesses.

### *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971)

The North Carolina Supreme Court held in *Hill* that the defendant's Sixth Amendment right to obtain witnesses on his behalf was violated when his brother-in-law, who also was his attorney, was not allowed to see him after his arrest. The jailer holding Hill refused to release him after his brother-in-law posted bond and further refused to allow the brother-in-law to see Hill. From the time Hill was arrested at 11 p.m. until 7 a.m. the next morning, only law enforcement officers saw or had access to him.

The *Hill* court recognized that for offenses "of which intoxication is an essential element," the denial of immediate access to witnesses may deprive "a defendant of his only opportunity to obtain evidence which might prove his innocence."[11] Because the guilt or innocence of a defendant charged with impaired driving "depends upon whether he was intoxicated at the time of his arrest," such a defendant "must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest" in order to have "witnesses for his defense."[12] The court held that in Hill's case "the right . . . to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication."[13]

The court concluded, therefore, that Hill was denied his constitutional and statutory right to communicate with counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony.[14] The court held that "[u]nder these circumstances, to say that the denial was not prejudicial is to assume that which is incapable of proof."[15]

The General Assembly codified the holding in *Hill* by enacting G.S. 15A-954(a)(4), which requires that a court dismiss criminal charges upon determining that "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution."[16] The Official Commentary notes the assumption "that the drastic relief called for under this motion would be granted most sparingly."[17]

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10. 277 N.C. 547, 178 S.E.2d 462 (1971).
11. *Id.* at 555, 178 S.E.2d at 467.
12. *Id.* at 553, 178 S.E.2d at 466.
13. *Id.*
14. Hill moved for dismissal before the superior court on the basis that he was denied counsel at a critical stage of the proceedings, but the supreme court based its ruling on the defendant's right to communicate with counsel and friends generally, noting that these rights were "not limited to receiving professional advice from his attorney." *Id.* at 552, 178 S.E.2d at 465.
15. State v. Hill, 277 N.C. 547, 554, 178 S.E.2d 462, 466 (1971).
16. *See* Official Commentary to G.S. 15A-954. Despite the statement in the official commentary that subdivision (a)(4) is "intended to embody the holding" in *Hill*, the provision adds the requirement that "irreparable prejudice" result from the violation.
17. *Id.*

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***State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988)**

Three impaired driving cases were consolidated for hearing in *Knoll*. In each case, the defendant was charged with impaired driving in Wake County, North Carolina, and made a pretrial motion to dismiss the charge based upon a violation of statutory and constitutional rights.

***Defendant Knoll***

David Knoll was stopped at 1:15 p.m. and charged with driving while impaired. He submitted to a chemical analysis of his breath at 2:31 p.m., which revealed a breath alcohol concentration of 0.30. Knoll then appeared before a magistrate, who set bond at $300 without inquiring into any of the factors relevant to conditions of pretrial release. Between 4 p.m. and 5 p.m., Knoll made several requests to call his father. He was allowed to call him at about 5 p.m. After speaking to Knoll, Knoll's father spoke to the magistrate, telling him that he wanted to come right away to get his son. The magistrate told Knoll's father that Knoll could not be released until 11 p.m. As a result, Knoll's father waited until 11 p.m. to go to the jail to post bond. Knoll's father stated that when he talked with his son on the phone, his son was oriented and coherent and not noticeably impaired in either his manner of speech or in the substance of what he said.

***Defendant Warren***

The second defendant, Samson Warren Jr., was stopped at 10:11 p.m. and charged with driving while impaired. Warren submitted to a chemical analysis of his breath at 11:08 p.m., which revealed a breath alcohol concentration of 0.25. Warren then appeared before a magistrate, who set a $500 secured bond. The magistrate did not inform Warren of his right to communicate with counsel and friends. Two adult friends of Warren attempted to secure his release. The first, Donald Martin, arrived at the magistrate's office between 11 p.m. and 11:30 p.m., while Warren was in the breath-testing room. Martin spoke with Warren and observed his condition. Martin had $300 in cash and was willing to assume responsibility for Warren, but the magistrate told Martin that Warren would have to go to jail until 6 a.m. in order to sober up.

John Lewis went to the courthouse between 1 a.m. and 1:30 a.m. following Warren's arrest. The magistrate informed Lewis, who had $200 in cash with him, that Warren could not be released until 6 a.m. After being so advised, Lewis did not request to see Warren. Warren was released from the Wake County Jail at 8 a.m. when Martin posted bond for him.

***Defendant Hicks***

The third defendant, Bennie Hicks, was arrested for driving while impaired at 12:45 a.m. He submitted to a chemical analysis of his breath, which revealed a breath alcohol concentration of 0.18. Hicks appeared before a magistrate, who set a $200 bond without informing Hicks of his right to communicate with counsel and friends and without asking questions about matters relevant to conditions of release. Hicks had $2,200 in cash but was not allowed to post his own bond. At 1:30 a.m., Hicks called his wife at their home, which was about thirty minutes away from the Wake County courthouse. Hicks's wife did not have a vehicle at the time and could not come to the courthouse to pick him up. Hicks was released from jail at 6 a.m.

***Knoll* court's analysis**

The court began its analysis in *Knoll* by reviewing "the general obligations of the magistrate" in impaired driving cases.[18] Curiously, however, this exposition failed to mention provisions of G.S. 15A-534.2 requiring in certain circumstances that a defendant charged with an offense

18. State v. Knoll, 322 N.C. 535, 536, 369 S.E.2d 558, 559 (1988).

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involving impaired driving be detained. Though the court later acknowledged a magistrate's authority to "refuse to release one who is intoxicated to such a degree that he would be endangered by being released without supervision,"[19] this was a reference to G.S. 15A-534(c), which governs the setting of conditions of pretrial release generally and permits a magistrate to consider, among other factors, "whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision," rather than the more specific requirements of G.S. 15A-534.2.

The court found that Knoll and Warren were unlawfully detained because they could have been released into the custody of "appropriate people who were seeking their release."[20] As for Hicks, the court concluded that though his "wife was temporarily unavailable to pick him up, he could have, by the use of a taxi, been in the presence of his wife within a short period of time."[21] The high court agreed with the superior court's determination that the magistrate failed to comply with statutory provisions governing the setting of conditions of pretrial release, and that, but for these statutory deprivations, each defendant could have had access to friends and family.

The court of appeals in *State v. Knoll*[22] had distinguished *Hill*, concluding that the creation of a per se impaired driving offense meant that denial of access was "no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case."[23] The appellate court opined that "[p]rejudice may or may not occur since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict."[24] Prejudice might result from "a denial of access or unwarranted detention," explained the court of appeals, if the "defendant was not advised of his right to a second chemical test . . . or where his right to secure a second test was denied."[25] The court of appeals explained that "[p]rejudice might also occur . . . if pertinent evidence relating to contested elements of the offense, such as whether the defendant was in fact driving, became unavailable as a result of the denial of access."[26] The court of appeals found nothing in the record to support the trial court's finding that the statutory deprivations caused Knoll to lose significant evidence or testimony helpful to his defense, noting that the result of the chemical analysis alone was sufficient to convict Knoll.

Though the state supreme court adopted the rule articulated by the court of appeals that a defendant charged with a per se violation of the impaired driving statute must demonstrate prejudice resulting from a substantial statutory violation,[27] the supreme court, unlike the court of appeals, found that each defendant made a sufficient showing that "lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost" because of the statutory violations.[28] The court based this determination on each defendant's confinement "during the crucial period" in which friends and family could have observed him to "form opinions as to his condition following arrest."[29] The court explained that "[t]his opportunity to gather evidence and to prepare a case in his own

19. *Id.* at 542, 369 S.E.2d at 563 (internal citations omitted).
20. *Id.*
21. *Id.*
22. 84 N.C. App. 228, 233, 352 S.E.2d 463, 466 (1987), *rev'd*, 322 N.C. 535, 369 S.E.2d 558 (1988). Only Craig Raymond Knoll's case was before the court of appeals.
23. *Knoll,* 84 N.C. App. at 233, 352 S.E.2d at 466.
24. *Id.* at 234, 352 S.E.2d at 466.
25. *Id.* at 233, 352 S.E.2d at 466.
26. *Id.* at 233–34, 352 S.E.2d at 466.
27. State v. Knoll, 322 N.C. 535, 545, 369 S.E.2d 558, 564 (1988).
28. *Id.* at 547, 369 S.E.2d at 565 (internal citations omitted).
29. *Id.*

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defense was lost to each defendant as a direct result of a lack of information during processing as to numerous important rights and because of the commitment to jail."[30] The court found that "[t]he lost opportunities, in all three cases, to secure independent proof of sobriety, and the lost chance, in one case, to secure a second test for blood alcohol content" constituted prejudice to the defendants.[31]

The court's reliance upon "lost opportunities" and "a lost chance" as establishing prejudice raises questions regarding whether the prejudice requirement as applied in *Knoll* requires any showing additional to that presumed prejudicial in *Hill*. Knoll, like Hill, was denied access to a witness who sought his release. One might interpret *Knoll* as adhering to the proposition that denial of sought-after access during the "crucial period" is always prejudicial. But if denial of access is presumptively prejudicial, then the rule announced in *Knoll* did not, in fact, depart from *Hill*. And while the basis for the finding of prejudice in Knoll's case is not clearly specified, it is even more difficult to ascertain in Warren's and Hicks's cases.

Shortly after he submitted to the chemical analysis, Warren spoke in person to Martin, one of the people who attempted to secure his release. Thus Warren did not suffer a complete denial of access to witnesses. One might argue that his ability to communicate with a friend so soon after his arrest eliminated any prejudice resulting from his unlawful detention.

In Hicks's case, the finding of prejudice is difficult to reconcile with a magistrate's statutory obligation to hold certain impaired drivers. While the court held that Hicks should have been released to take a taxi home to his wife, G.S. 15A-534.2 makes clear that a defendant who is detained pursuant its provisions may only be released to the custody of a sober, responsible adult who appears before the judicial official ordering the release. And while Hicks attempted to procure his release by posting bond, there is no evidence that he requested to see anyone while confined or that anyone requested to see him.

Perhaps the court based its determination in part on the fact that neither Warren nor Hicks were informed by the magistrate that they had the right to access counsel and friends; yet, again, any determination that such a statutory violation is presumptively prejudicial does not comport with the standard articulated by the court requiring that the defendant demonstrate prejudice.

These curious aspects of the court's holding may explain why *Knoll*, which purported to increase the showing required to obtain dismissal of charges, is widely perceived as the seminal case entitling defendants charged with impaired driving to the dismissal of charges.

#### *Right to dismissal based upon a constitutional, versus statutory, claim*

Though the *Knoll* defendants argued that dismissal was warranted on the basis of a violation of constitutional as well as statutory rights, the court did not rule on the defendants' constitutional claims. In *State v. Gilbert*,[32] the court of appeals distinguished statutory violations resulting from a magistrate's failure to comply with statutory procedures governing the setting of conditions of pretrial release from constitutional violations. The *Gilbert* court found a magistrate's refusal to set conditions of release and the ensuing five-hour detention of a defendant to constitute statutory,

30. *Id.*

31. *Id.*

32. 85 N.C. App. 594, 355 S.E.2d 261 (1987). *Gilbert* was decided after the decision of the court of appeals in *State v. Knoll*, see 84 N.C. App. 228, 352 S.E.2d 463 (1987), but before the supreme court's ruling reversing the court of appeals, see 322 N.C. 535, 369 S.E.2d 558 (1988). *Gilbert* is still good law, however, as it relied upon the determination of the court of appeals in *Knoll* that the presumptive prejudice rule of *Hill* did not govern in statutory per se cases—a rule adopted by the supreme court.

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but not constitutional, violations.[33] The court explained that Gilbert, who saw his brother shortly after he was administered a breath test, did not request and was not denied access to anyone. For this reason, the court determined that Gilbert failed to establish a constitutional violation. *Gilbert* further explained that a defendant seeking dismissal of per se impaired driving charges based upon a violation of the constitutional right to access witnesses must, like a defendant seeking dismissal for a statutory violation, demonstrate irreparable prejudice resulting from the violation.[34]

***Prejudice: Proven or presumed?***

Because the *Knoll* requirement that a defendant demonstrate prejudice resulting from a violation of statutory rights related to pretrial release or the constitutional right to have access to witnesses applies only in cases in which the defendant is charged with a per se violation of the impaired driving statute, two lines of cases exist post-*Knoll*: the *Knoll* branch, requiring proof of prejudice for dismissal of charges pursuant to G.S. 20-138.1(a)(2) (the per se prong), and the presumptive prejudice branch,[35] for cases in which a defendant prosecuted solely pursuant to G.S. 20-138.1(a)(1) (the impairment prong) is denied access to witnesses. Furthermore, post-*Knoll* jurisprudence suggests that dismissal is an appropriate remedy in an impairment-prong case only when the defendant is denied his or her constitutional right to obtain evidence in his or her defense; less serious statutory violations warrant suppression of evidence rather than dismissal of charges.[36]

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33. *Gilbert*, 85 N.C. App. at 597, 355 S.E.2d at 263.

34. *Id*. at 597, 355 S.E.2d at 264 (citing as support *State v. Curmon*, 295 N.C. 453, 245 S.E.2d 503 (1978); *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978)); *see also* State v. Haas, 131 N.C. App. 113, 505 S.E.2d 311 (1998) (explaining that "[a] motion to dismiss will only be granted when the statutory or constitutional violation caused irreparable prejudice to the development of [the defendant's] case."). Note that this standard differs from that set forth in G.S. 15A-1443(b), which provides that "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt" and places the burden upon the state to "demonstrate, beyond a reasonable doubt, that the error was harmless."

35. *See* State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

36. The court of appeals decided *State v. Ferguson*, 90 N.C. App. 513, 369 S.E.2d 378 (1988), another presumptive prejudice case, one week before the supreme court decided *Knoll*. *Knoll* made no mention of *Ferguson*. In *Ferguson*, the defendant was advised of his right to have a witness observe his breath test. Ferguson called his wife and told her to arrive at the jail in twenty minutes. When the twenty minutes expired, Ferguson refused the test because his wife was not there. Ferguson did not see his wife until he was released from jail later that evening. She had arrived at the jail within the twenty minutes and informed the desk officer that she was there to witness her husband's breath test but was told that she was too late. She waited an hour and a half before seeing her husband.

Ferguson moved to dismiss the charges because he was denied his constitutional and statutory right of access to a witness to observe the breath test. While the trial court expressed its "distress" over the "regrettable" circumstances, it denied Ferguson's motion. *Id.* at 518–19, 369 S.E.2d at 381. The court of appeals remanded to the trial court noting that if, upon remand, it found "that Mrs. Ferguson's arrival to the jail was timely and she made reasonable efforts to gain access to the defendant, then defendant was denied access to a potential witness." *Id.* at 519, 369 S.E.2d at 382. The appellate court concluded that "[t]he denial of access to a witness in this case—when the State's sole evidence of the offense is the personal observations of the authorities—would constitute a flagrant violation of the defendant's constitutional right to obtain witnesses under N.C. Const. Art. 1 Sec. 23 as a matter of law and would require that the charges be dismissed." *Id.* (citing *Hill*, 277 N.C. 547, 178 S.E.2d 462).

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Were *Knoll* the end of the matter, one might conclude that any time a magistrate fails to comply with statutory provisions governing initial appearances and the setting of conditions of pretrial release, resulting in the detention of a defendant charged with impaired driving, a defendant suffers prejudice requiring dismissal of the charges. But cases following *Knoll* emphasize that to warrant dismissal of charges, a defendant must make more than a perfunctory showing of prejudice resulting from such a violation to be entitled to the drastic relief of dismissal.

### ***Knoll*'s Progeny**

Cases in *Knoll's* wake have identified numerous circumstances in which the complained-of violations were deemed unfounded, insubstantial, or not prejudicial to the defendant. Indeed, there are no reported appellate court opinions post-*Knoll* in which the courts have found dismissal of implied consent charges an appropriate remedy for an alleged violation of provisions governing pretrial release. Instead, the court of appeals has made the following determinations in post-*Knoll* cases:

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*State v. Eliason*, 100 N.C. App. 313, 395 S.E.2d 702 (1990), cited *Ferguson* for the proposition that "if a witness arrived timely under the breathalyzer statute and was unable to gain access to the accused despite reasonable efforts to do so, it would constitute a flagrant violation of defendant's constitutional right to gather witnesses and would require dismissal of all charges." *Id.* at 317, 395 S.E.2d at 704. Eliason was charged with a per se violation of the impaired driving statute and alleged that the magistrate's failure to inquire into all of the statutory considerations before setting the conditions of his pretrial release violated his statutory and constitutional rights to access to counsel and friends. The court determined that Eliason failed to show that he was prejudiced by this denial as required by *Knoll* and was not entitled to relief on constitutional grounds as there was no showing that he was denied access to anyone. The court found that "[t]here was no violation of defendant's constitutional rights which would warrant dismissal of the charges against him." *Id.* at 318, 395 S.E.2d at 704.

In subsequent cases in which a defendant has been denied the right to have a witness observe the breath test, the court of appeals has characterized this as a denial of a statutory, rather than a constitutional, right, which requires suppression of the test results rather than dismissal of the charges. In *State v. Myers*, 118 N.C. App. 452, 455 S.E.2d 492 (1995), the defendant moved to suppress the results of the chemical analysis based upon the officer's statement, after Myers requested that his wife come into the breath-testing room, that "that might not be a good idea because she had been drinking also." *Id.* at 453, 455 S.E.2d at 493. Myers's wife then left the police department. The court of appeals held that the breath test results should have been suppressed based on the refusal of Myers's request to have his wife witness the test. Myers did not argue that the case should have been dismissed because of the violation, and the court did not intimate that dismissal would have been an appropriate remedy.

In *State v. Hatley*, ___ N.C. App. ___, 661 S.E.2d 43 (2008), the defendant likewise moved to suppress the results of a chemical analysis of her breath based upon the denial of her right to have a witness observe the testing procedures. The court of appeals cited *Ferguson* for the proposition that "[a] witness who has been selected to observe the testing procedures must make reasonable efforts to gain access to the defendant." *Id.* at ___, 661 S.E.2d at 45. The court held that the denial of this right "requires suppression of the intoxilyzer results" but again did not intimate that dismissal was the appropriate remedy. *Id.* at ___, 661 S.E.2d at 45.

Thus, while the presumptive prejudice rule of *Hill* has survived, post-*Ferguson* cases suggest that while suppression of a chemical analysis is warranted when defendant is denied the right to have a witness observe the procedures, dismissal of the case is not necessarily warranted upon such a denial. Instead, it appears that there must be outright denial of access to witnesses during the relevant time frame to warrant dismissal based upon a flagrant violation of a defendant's constitutional rights.

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- Dismissal was not warranted based upon the defendant's allegation that law enforcement officials refused to take him to the hospital for additional testing or to withdraw blood for later testing. The alleged refusal did not violate the defendant's statutory rights under G.S. 20-139.1 or his constitutional right to due process. Law enforcement officials met their statutory and constitutional obligations by providing the defendant access to a telephone and by allowing access to the defendant for purposes of conducting an initial test.[37]
- The defendant was not entitled to dismissal of charges based upon the magistrate's failure to inquire into every statutorily enumerated factor relevant to setting conditions of pretrial release where he failed to show that consideration of other factors would have required different conditions of release.[38]
- To warrant dismissal, a defendant must prove that he or she was denied access to witnesses and friends during the crucial period during which exculpatory evidence could have been gathered.[39]
- Suppression of evidence regarding field sobriety tests and dismissal of appreciable impairment theory cured any prejudice resulting from denial of the defendant's request to allow a witness to observe field sobriety tests. The defendant was not entitled to have charges under the per se prong of G.S. 20-138.1 dismissed.[40]
- Substantial violation of the defendant's right to pretrial release does not establish basis for dismissal of charges when she was not denied access to family and friends while in jail. Defendant, who was unlawfully detained, saw her friends at the jail but did not ask to speak to them.[41]

Juxtaposing *Knoll* and the latest case of its progeny, *State v. Labinski*,[42] reveals the heightened evidentiary standard applied by the appellate courts post-*Knoll* to defendants' claims that they have suffered irreparable prejudice arising from an unlawful detention. In *Labinski*, the defendant was arrested for impaired driving and taken to the jail for a breath test. On the way to the jail, Labinski sent a text message to her friend Brian Anderson to let him know she was in trouble. The officer who administered the breath test notified Labinski of her rights, including her right to have a witness present. Labinski did not call anyone. She submitted to the chemical analysis of her breath at 3 a.m., which revealed a breath alcohol concentration of 0.08.

Around the time Labinski was performing her breath test, four of her friends, including Anderson, arrived at the jail. Labinski saw her friends while she was walking with the officer from the breath-testing room to the magistrate's office, but she did not ask to speak with them, and they did not ask to speak to her. Labinski appeared before the magistrate at 3:25 a.m. The magistrate set a $500 secured bond and conditioned Labinski's release upon release to a sober, responsible adult or would release her either when she had a breath alcohol concentration of 0.05 or at 9 a.m.

Labinski was logged into the jail at 3:47 a.m. She was placed in an interview room with a phone and given a list of bail bondsmen. A detention officer allowed Labinski to retrieve telephone numbers from her mobile phone, and she called three of her friends who were already at

37. State v. Bumgarner, 97 N.C. App. 567, 389 S.E.2d 425 (1990).
38. State v. Haas, 131 N.C. App. 113, 505 S.E.2d 311 (1998); *Eliason,* 100 N.C. App. 313, 395 S.E.2d 702.
39. State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992).
40. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44 (2003).
41. State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740 (2008).
42. 188 N.C. App. 120, 654 S.E.2d 740 (2008).

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the jail. She did not call a bail bondsman. Ultimately, a bail bondsman contacted by one of her friends posted bond for her release. At 5:02 a.m. she was released to the bail bondsman and one of her friends who had been waiting at the jail.

Labinski moved to dismiss the impaired driving charges based upon violation of her right to timely pretrial release and thus, access to family and friends. Labinski contended that the magistrate violated G.S. 15A-534.2 by ordering her detained without considering whether she was so intoxicated that she posed a danger to herself or others. She also argued that the magistrate required a secured bond without making the findings required by G.S. 15A-534(b) and considering the factors listed in G.S. 15A-534(c). Labinski alleged that the magistrate's failure to grant her timely pretrial release and access to friends and family resulted in the loss of evidence, which prejudiced her defense to the impaired driving charges. She asserted that, under *Knoll*, the appropriate remedy for the violation was dismissal of the charges.

In considering Labinski's appeal, the court noted that a noncapital defendant generally has the right to pretrial release. Citing *Knoll*, the court explained that if statutory provisions governing conditions of pretrial release in an impaired driving case are violated and the defendant can show irreparable prejudice directly resulting from a lost opportunity to gather evidence in her behalf by having family and friends observe her and form opinions about her condition after her arrest and to prepare a case in her own defense, the charges must be dismissed.

The court recognized the magistrate's authority under G.S. 15A-534.2 to hold Labinski in custody if he found clear and convincing evidence that her impairment presented a danger, if she was released, of physical injury to herself or others or damage to property. The trial court found that "based on [the magistrate's] opinion that anyone charged with driving while impaired who blows a 0.08 or above on the Intoxilyzer 5000 would possibly hurt himself or someone else, [the magistrate] set the defendant's bond at $500 secured."[43] The court of appeals held that this finding was not supported by the evidence. The magistrate did not testify regarding his reason for setting a $500 secured bond but said he required that Labinski be released to a sober, responsible adult "'[b]ecause that's what the statute requires me to do.'"[44] The magistrate did not testify that he had any concern about Labinski hurting herself or anyone else or to having an opinion regarding her behavior based on a particular alcohol concentration alone. Indeed, the magistrate stated that Labinski was polite and cooperative. Thus the court concluded that the magistrate substantially violated Labinski's right to pretrial release by ordering her held without evidence that her impairment presented a danger to herself or others or of damage to property.

The court then considered whether Labinski suffered irreparable prejudice resulting from the statutory violation. Labinski alleged that her commitment to jail under improper release conditions prevented her friends from observing her physical and mental condition during the time period crucial to her defense. The court concluded, however, that even though Labinski was not timely released from detention, she was not denied access to friends and family such that she lost the opportunity to gather evidence in her behalf. The court noted that Labinski was informed of her right to have a witness present for the breath test and that she did not request a witness, even though four of her friends were at the jail and could have witnessed the test. The court further noted that these friends were at the jail by the time Labinski left the breath-testing room and remained there until she was released. The court reported that Labinski could see her friends and they could see her but that she did not ask to speak to them or that they be permitted

43. *Id.* at 124, 654 S.E.2d at 743.
44. *Id.* at 126, 654 S.E.2d at 744.

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to come to her. Finally, the court noted that Labinski had access to a telephone and made several phone calls.

In *Knoll*, the court determined that the detention of Warren, like that of Labinski, amounted to a statutory violation. Warren's friends, like Labinski's, came to the jail notwithstanding his unlawful detention. And Warren spoke to one of his friends in person, while Labinski only saw her friends. When another of Warren's friends was informed that Warren could not be released to him, the friend did not ask to see Warren. The *Knoll* court found prejudice, but the *Labinski* court did not, reasoning in part that Labinski did not ask to speak to her friends, nor they to her. *Knoll's* progeny, including *Labinski*, demonstrate that despite the curious circumstances in *Knoll*, prejudice will not be automatically—or even readily—inferred from a statutory violation, even one that results in the defendant's unlawful detention.

## Procedural Requirements Enacted in 2006

As previously noted, the Motor Vehicle Driver Protection Act of 2006 includes several procedural requirements designed to ensure that defendants in impaired driving cases are detained when appropriate and that detained defendants are not denied access to witnesses.

### Impaired Driving Holds

Among the new provisions is G.S. 20-38.4, which requires a magistrate, upon finding probable cause for an implied consent offense, to consider whether the defendant "is impaired to the extent that the provisions of G.S. 15A-534.2 should be imposed." G.S. 15A-534.2 applies to initial appearances for *offenses involving impaired driving.* These offenses are as follows:

1. Impaired driving (G.S. 20-138.1)
2. Habitual impaired driving (G.S. 20-138.5)
3. Impaired driving in a commercial vehicle
4. Death by vehicle based upon impaired driving (G.S. 20-141.4)
5. First- or second-degree murder under G.S. 14-17 based on impaired driving
6. Involuntary manslaughter under G.S. 14-18 based on impaired driving
7. Substantially similar offenses committed in another state or jurisdiction

If a magistrate conducting an initial appearance for an offense involving impaired driving finds clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger, if the defendant is released, of physical injury to the defendant or others or damage to property, the magistrate must order that the defendant be held in custody. Such detentions commonly are referred to as "impaired driving holds." A magistrate ordering such a detention must inform the defendant that he or she will be held in custody until (a) the magistrate determines that the defendant's physical and mental faculties are no longer impaired to the extent that the defendant presents a danger of physical injury to himself, herself, or others, or of damage to property if released or (b) a sober, responsible adult is willing and able to assume responsibility for the defendant until the defendant's physical and mental faculties are no longer impaired. A magistrate who orders a defendant detained pursuant to these provisions must also determine the appropriate conditions for pretrial release in accordance with G.S. 15A-534, which governs the setting of conditions of pretrial release generally.

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A defendant subject to detention under G.S. 15A-534.2 may be denied pretrial release based upon the defendant's impairment for no longer than twenty-four hours. After twenty-four hours, a defendant held pursuant to G.S. 15A-534.2 must be released upon meeting the conditions of pretrial release imposed at the initial appearance. In determining whether a defendant subject to an impaired driver hold remains impaired, a magistrate may request the defendant to submit to periodic tests to determine his or her alcohol concentration. Approved alcohol screening devices as well as other approved chemical analysis instruments may be used for this purpose. A magistrate must determine that a defendant with an alcohol concentration of 0.05 or less is no longer impaired unless there is evidence that the defendant is still impaired from a combination of alcohol and some other impairing substance or condition.

It bears noting that G.S. 15A-534.2 itself was unchanged by the Motor Vehicle Driver Protection Act of 2006. Its statutory provisions have authorized impaired driving holds since the provisions were enacted in 1983. The significance of the 2006 legislation for impaired driving is its explicit requirement that magistrates consider whether such a hold be imposed. In addition, G.S. 20-38.4(b) requires that the Administrative Office of the Courts (AOC) adopt a form implementing its requirements. The implementing form is AOC-CR-270, which must be completed by a magistrate who detains an impaired driver pursuant to G.S. 15A-534.2. The magistrate must set forth in writing in the "Findings" section of AOC-CR-270 the reasons for the detention. When the defendant is released, the magistrate must complete the corresponding section of the form. If release is to a sober, responsible adult, that person's name must be entered on the form. The sober, responsible adult must sign the form certifying that he or she is a sober, responsible person, at least 18 years old, and is willing and able to assume responsibility for the defendant until the defendant's physical and mental faculties are no longer impaired.

In determining whether an adult who seeks to secure a defendant's release qualifies as a "sober, responsible adult," a magistrate may rely upon his or her own observations as well as reports from others.[45] There is no statutory or case law guidance for determining whether an adult is responsible. A magistrate making this determination might reasonably consider factors such as whether the person was a passenger in the car at the time the defendant was driving while impaired, whether the person has a driver's license, the person's criminal record, and the person's relationship to the defendant. The ultimate determination must be based upon the magistrate's exercise of reasonable discretion. In addition to being sober and responsible, an adult who assumes responsibility for an impaired defendant must be "willing and able" to do so. While a magistrate generally may base his or her determination that someone is willing to assume responsibility upon that person's request to assume custody, further inquiry may be necessary to determine the person's ability to secure the safety of the defendant and others. These determinations likewise are left to the magistrate's reasonable exercise of discretion.

The completion of AOC-CR-270, which requires a magistrate ordering an impaired driving hold to provide reasons for the detention, may reduce the risk that a defendant will be unlawfully held pursuant to G.S. 15A-534.2. The "Findings" section of the form disabuses the notion that persons who commit an offense involving impaired driving are, without additional findings, subject to detention based on impairment simply based on the finding of probable cause to believe the offense occurred. The form also makes clear that it is the magistrate, rather than the

45. *See* State v. Haas, 131 N.C. App. 113, 505 S.E.2d 311 (1998) (finding that magistrate had no duty to release defendant to the custody of an adult who was a passenger in the car driven by the defendant when officer informed magistrate that that adult was extremely intoxicated eighty minutes earlier).

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jailer, who determines whether a defendant is no longer impaired such that the defendant is subject to the impaired driving hold and whether an adult meets the criteria for assuming custody of the defendant during the time the defendant is impaired.

### Procedures for Gaining Access to Witnesses

In addition to enacting procedures designed to ensure that defendants charged with implied consent offenses are detained in appropriate cases involving impaired driving, the Motor Vehicle Protection Act of 2006 enacted provisions designed to ensure that defendants confined to jail are informed of the manner in which they may gain access to witnesses while detained. G.S. 20-38.4(a)(4) requires the magistrate to inform a defendant "unable to make bond" of "the established procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond."

The established procedures must be approved by the chief district court judge, the Department of Health and Human Services, the district attorney, and the sheriff.[46] County procedures vary. Guilford County's procedures are included in the appendix as an example. A magistrate who conducts an initial appearance in an implied consent case for a defendant who will be detained in jail, however briefly, must certify on form AOC-CR-271 that the magistrate has informed the defendant of the procedures to access others while in jail and that he or she has required the defendant to list all persons the defendant wishes to contact and their telephone numbers.

Some argue that the requirement that a magistrate inform a defendant charged with an implied consent offense who is "unable to make bond" of the procedures for access to witnesses while in jail does not apply to defendants subject to an impaired driving hold, but instead applies to persons detained solely because of their inability to post bond sufficient to satisfy pretrial release conditions set in G.S. 15A-534. Under this interpretation, a defendant who has posted bond but is held based upon his or her impairment is not entitled to the notice. This reading of the statute is problematic for several reasons. First, a defendant subject to an impaired driving hold could be described as "unable to make bond" given that the posting of bond will not secure the defendant's release. Moreover, interpreting G.S. 20-38.4(a)(4) as requiring notice to all defendants charged with implied consent offenses who are detained better aligns it with the task force goal of "prevent[ing] dismissals related to delays in processing and by the defendant's lack of access to witnesses."[47] Informing all defendants about how to access witnesses and health care professionals in jail serves to counter any argument that a defendant was prejudiced by his or her detention.

The magistrate must complete AOC-CR-271 and provide the defendant, along with that form, a copy of written local procedures explaining how the defendant may contact others and how others can observe the defendant at the jail and administer an additional chemical analysis. The magistrate also must require a defendant unable to make bond to list on form AOC-CR-271 names and telephone numbers for anyone the defendant wishes to contact. If the defendant returns the AOC-CR-271, the magistrate must note the return and place a copy of the form in the case file. If the defendant does not return the form, the magistrate must note in the space provided on a separate AOC-CR-271 that the defendant failed to return the form. The magistrate must place the form on which this notation is made in the file.

46. G.S. 20-38.5(a)(3).
47. Task Force Report, *supra* note 3, at 21.

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### New Procedures and *Knoll*

North Carolina's appellate courts have not ruled on the merits of any appeals from *Knoll* motions in cases governed by the 2006 procedures, which became effective December 1, 2006. Indeed, compliance with the amended procedural requirements may render *Knoll* motions obsolete, since a defendant seeking dismissal under *Knoll* must demonstrate a substantial statutory violation, and the requirement that a magistrate consider whether an impaired driving hold should be imposed and make written findings supporting that determination reduces the likelihood a defendant will be detained when the detainment is not statutorily authorized. In addition, to warrant dismissal of the charges, a defendant must demonstrate prejudice resulting from the violation. It will be difficult for a defendant to meet this burden if he or she is informed of the procedures for gaining access to witnesses but fails to avail him- or herself of the available access.

## Procedures Governing Consideration of *Knoll* Motions in District and Superior Court

### Motion to Dismiss

#### *District court*

A defendant seeking dismissal of implied consent charges in district court must move for dismissal before trial begins unless the defendant can establish that the motion is based upon facts not previously known that are discovered during the trial.[48] Given that *Knoll* motions are premised upon the denial of access to witnesses, it seems unlikely that such motions ever will be founded on facts unknown to the defendant before trial. There is no requirement that such motions be made in writing in district court.[49]

#### *Superior court*

In superior court, a defendant may file a motion to dismiss based upon a denial of constitutional rights prior to trial[50] but is not required to do so.[51] Motions made pretrial in superior court must be filed in writing, but motions made during trial may be oral.[52] A defendant may file a motion to dismiss upon trial de novo in superior court regardless of whether the defendant filed such a motion in district court.[53] A defendant whose motion to dismiss is denied by the district court may again move to dismiss upon trial de novo in superior court.[54]

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48. G.S. 20-38.6(a).
49. The procedures governing motions to dismiss charges and suppress evidence in implied consent cases in district court are discussed in detail in Shea Riggsbee Denning, "Motions Procedures in Implied Consent Cases after *State v. Fowler* and *State v. Palmer*," *Administration of Justice Bulletin* No. 2009/06 (December 2009), http://www.sog.unc.edu/programs/crimlaw/Motions%20Procedures%20Fowler %20Palmer.pdf.
50. *See* G.S. 15A-952.
51. G.S. 15A-954(a), (c).
52. *See* G.S. 15A-951.
53. G.S. 15A-953.
54. *Id*.

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### Motion Hearings

A defendant who makes a timely motion for dismissal in district or superior court must be heard on the motion. The court is not required, however, to conduct a full evidentiary hearing unless the defendant has sufficiently alleged a denial of constitutional or statutory rights.[55] The court may summarily deny a motion to dismiss that contains only conjectural and conclusory allegations of possible constitutional or statutory violations or of prejudice resulting therefrom.[56]

A defendant who files a motion to dismiss for denial of access to witnesses bears both the burden of producing evidence in support of the motion and establishing the violation and resulting prejudice.[57] The dismissal of charges on this basis is "drastic relief" that "should be granted sparingly."[58] A district or superior court hearing such a motion may summarily rule on the motion if the defendant fails to produce sufficient evidence to warrant an evidentiary hearing. If an evidentiary hearing is required, the court must conduct a hearing at which testimony is provided under oath.[59] A superior court must issue a final written ruling on the motion, containing findings of fact and conclusions of law,[60] while a district court must issue a written preliminary determination containing findings of fact and conclusions of law and indicating how the court intends to rule on the motion.[61] The State may appeal a district court's preliminary determination granting a motion to dismiss to superior court[62] and may appeal to the court of appeals a superior court order dismissing charges based upon denial of access to family and friends.[63]

## Conclusion

*Knoll* and its progeny permit the dismissal of impaired driving charges only in extraordinary cases. To succeed in establishing a basis for the dismissal of charges, a defendant charged with driving while impaired under the per se prong of G.S. 20-138.1 must show not only a constitutional or substantial statutory violation, but also must establish that the defendant was prejudiced by the violation. Appellate court opinions following *Knoll* reveal that establishing prejudice is a high hurdle for the defense. Magistrates' compliance with implied consent procedures enacted in 2006 further reduces the likelihood that a defendant will successfully establish a basis for relief on these grounds. These procedures are designed to ensure that defendants are detained only as authorized by statute and, furthermore, that when defendants are detained, they are informed about how to gain access to witnesses while in custody and are afforded such access pursuant to established and agreed-upon methods.

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55. *See* State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).
56. *See* State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).
57. *See* G.S. 15A-951; State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (2008).
58. *Williams*, 362 N.C. at 634, 669 S.E.2d at 295 (internal citations omitted).
59. G.S. 20-38.6(e); *see* State v. Lewis, 147 N.C. App. 274, 279, 555 S.E.2d 348, 351 (2001).
60. *Lewis*, 147 N.C. App. at 277, 555 S.E.2d at 351 ("When a defendant alleges he has been denied his right to communicate with counsel, family, and friends, the trial court must conduct a hearing on defendant's motion to dismiss and make findings and conclusions.").
61. *See* G.S. 20-38.6(f).
62. *See* G.S. 20-38.7(a).
63. G.S. 15A-1445(a)(1).

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## Appendix
### AOC-CR-270

**STATE OF NORTH CAROLINA**

_______________ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

**STATE VERSUS**

*Name Of Defendant*

*Date Of Birth*

**DETENTION OF IMPAIRED DRIVER**

G.S. 15A-534.2

**FINDINGS**

The undersigned judicial official conducting an initial appearance for the defendant named above finds the following by clear and convincing evidence:

1. The defendant has been charged with an offense involving impaired driving as defined in G.S. 20-4.01(24a).
2. At the time of the defendant's initial appearance, the impairment of the defendant's physical or mental faculties presents a danger, if the defendant is released, of physical injury to the defendant or others or damage to property in that *(specify reasons)*:

**DETENTION ORDER**

Based upon the foregoing findings, the undersigned judicial official ORDERS that the defendant be detained in the custody of the Sheriff until an appropriate judicial official determines that

1. the defendant's physical and mental faculties are no longer impaired to the extent that the defendant presents a danger of physical injury to the defendant or others or of damage to property if the defendant is released or
2. a sober, responsible adult is willing and able to assume responsibility for the defendant until the defendant's physical and mental faculties are no longer impaired.

The period of detention under this Order shall not exceed twenty-four (24) hours.

*Date* | *Time* ☐ AM ☐ PM | ☐ *Magistrate* ☐ *Clerk Of Superior Court*
*Signature Of Judicial Official* | ☐ *Deputy CSC* ☐ *District Court Judge* | ☐ *Assistant CSC* ☐ *Superior Court Judge*

**RELEASE FROM DETENTION ORDER**

The undersigned judicial official ORDERS that the defendant be released from the detention order entered above because

☐ 1. the defendant's physical and mental faculties are no longer impaired to the extent that the defendant presents a danger of physical injury to the defendant or others or of damage to property if the defendant is released.

☐ 2. _______________ *(name)*, a sober, responsible adult, has indicated by signing below that he/she is willing and able to assume responsibility for the defendant until the defendant's physical and mental faculties are no longer impaired.

☐ 3. the period of detention has reached twenty-four (24) hours.

By signing immediately below, I certify that I am a sober, responsible person, age 18 or older, who is willing and able to assume responsibility for the defendant until the defendant's physical or mental faculties are no longer impaired.

*Date* | *Signature Of Sober Responsible Adult*

The conditions, if any, of the defendant's pretrial release are contained on form AOC-CR-200.

*Date* | *Time* ☐ AM ☐ PM | ☐ *Magistrate* ☐ *Clerk Of Superior Court*
*Signature Of Judicial Official* | ☐ *Deputy CSC* ☐ *District Court Judge* | ☐ *Assistant CSC* ☐ *Superior Court Judge*

**NOTE:** *"If there is a finding of probable cause, the magistrate shall consider whether the person is impaired to the extent that the provisions of G.S. 15A-534.2 should be imposed." G.S. 20-38.4(a)(3).*

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AOC-CR-271

**STATE OF NORTH CAROLINA**

_______________ County

*File No.*

In The General Court Of Justice
Before The Magistrate

**STATE VERSUS**

*Name Of Defendant*

**IMPLIED CONSENT OFFENSE NOTICE**

G.S. 20-38.4

OBSERVATION PROCEDURE

**TO THE DEFENDANT:**

**The established local procedure to contact other persons and have other persons appear at the jail to observe your condition or administer an additional chemical analysis to you is provided in writing with this form and incorporated into this form by reference. You are hereby notified of this procedure.**

CONTACT PERSONS

**TO THE DEFENDANT:**

Pursuant to G.S. 20-38.4(a)(4), you are required to list all persons you wish to contact and their telephone numbers: *(attach additional sheets if necessary)*

| | **Name** | **Telephone Number** |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |

☐ I do not wish to contact anyone.

SIGNATURE

By signing below, the defendant indicates that he/she has received notice of the contact and observation procedure and has listed all persons that he/she wishes to contact.

| *Date* | *Signature Of Defendant* |
|---|---|
| | |

MAGISTRATE'S CERTIFICATION

The undersigned magistrate certifies that pursuant to Article 24 of Chap. 15A and G.S. 20-38.4 that

1. An initial appearance was held and the undersigned found probable cause to believe the defendant committed an implied consent offense.
2. The undersigned reviewed all alcohol screening tests, chemical analyses and testimony from law enforcement officers concerning impairment and the circumstances of the arrest, and observed the defendant.
3. The undersigned considered whether the defendant was impaired to the extent that the provisions of G.S. 15A-534.2 should have been imposed.
4. The undersigned informed the defendant in writing of the established procedure to have others appear at the jail to observe the defendant's condition or to administer an additional chemical analysis.
5. The undersigned required the defendant to list all persons the defendant wishes to contact and telephone numbers on a copy of this form.
   - ☐ The defendant returned this form to the undersigned at the initial appearance.
   - ☐ The defendant failed to return this form at the initial appearance.

| *Date* | *Time* ☐ AM ☐ PM | *Signature Of Magistrate* |
|---|---|---|
| | | |

The defendant returned this form to the undersigned after the initial appearance.

| *Date* | *Time* ☐ AM ☐ PM | *Signature* | ☐ *Magistrate* ☐ *Assistant CSC* ☐ *Deputy CSC* ☐ *Clerk Of Superior Court* |
|---|---|---|---|
| | | | |

**NOTE:** *If a defendant charged with an implied consent offense is unable to make bond, the magistrate must (1) inform the defendant in writing of the established procedure to have others appear at the jail to observe the defendant's condition or administer an additional chemical analysis and (2) require the defendant to list all persons the defendant wishes to contact and their telephone numbers. A copy of this form must be placed in the case file. G.S. 20-38.4(a)(4).*

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### Guilford County Implied Consent Procedures

**Procedures for the Observation of Prisoners Charged with Implied Consent Offenses Pursuant to N.C.G.S. 20-38.5**

1. Any person seeking to observe jailed or incarcerated impaired drivers shall first check in with the Staff Duty Officer or Detention staff on duty at the Guilford County Sheriff's Office. Observations are limited to the first twenty-four hours following the defendant's admission into the jail.
2. The Staff Duty or Detention Officer shall immediately notify the arresting officer and Booking officer that a witness is present to observe the defendant. The time of this notification shall be documented by Booking in the Booking log book and by the dispatcher on the attached witness observation form.
3. Booking shall inform the jail supervisor on-duty of the witness's presence in the facility. The supervisor shall send a detention officer to escort the witness to the jail or appropriate viewing area. The escorting officer shall obtain the form and complete the information concerning the name of the witness, the person to be observed, the time and date the witness was escorted to the jail and the time and date of the completion of the observation.
4. A witness seeking to observe the defendant shall be admitted to observe the defendant in an area designated by the Sheriff for observation of the defendant. Jail staff shall note the time the witness is admitted to the jail and the time the observation begins.
5. All witnesses shall be required to submit to a search of their person and belongings prior to entry into the jail. Witnesses must comply with all jail or facility regulations prior to being admitted into any secured area.
6. Guilford County Sheriff's Office staff shall not hold or retain any personal property items for the witness.
7. No person under the age of 16 will be admitted to the jail as a witness to observe impaired defendants.
8. The jail supervisor shall determine the number of persons that may be admitted at one time to observe defendants in jail.
9. Observations of defendants will be limited to five (5) minutes and will include the ability for the witness to observe the person by sight, sound, and smell.
10. No physical contact will be allowed between the witness and the person charged.
11. All witnesses will be searched initially and supervised by jail detention officers during the entire observation period.

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