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DOMESTIC VIOLENCE OFFENSES: WHAT NEW DEFENDERS NEED TO KNOW¹

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1. What Constitutes a Domestic Violence Offense?

There is no single definition of “domestic violence” in North Carolina or federal law. The definition varies with the context. For example, conduct may constitute domestic violence for purposes of issuance of a domestic violence protective order under Chapter 50B while the same conduct would not constitute a domestic violence offense for purposes of North Carolina pretrial release procedures. It is therefore important to understand the context in which the case arises and the applicable definitions.

A. Definition of Domestic Violence in Chapter 50B

“Domestic violence” is defined in Chapter 50B as the commission of certain acts against a person (“the victim”) or against a child who is living with or in the custody of the victim, by a person who has a personal relationship with the victim. G.S. 50B-1. Thus, the nature of the *acts* committed and the *relationship* between the parties determine whether domestic violence has occurred for purposes of Chapter 50B.

Acts. The covered acts are:

- Attempting to or causing bodily injury;
- Placing the victim, or a member of the victim’s family or household in fear of imminent serious bodily injury, or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
- Committing rape or other sex offenses, defined in G.S. 14-27.2-14-27.7.

G.S. 50B-1(a).

Relationship. Domestic violence occurs only where the parties have a “personal relationship,” meaning one where the parties are:

- Current or former spouses;

¹ While males are sometimes victims of domestic violence, for purposes of clarity the defendant is presumed to be male and the victim female throughout this manuscript; and the corresponding gender specific pronouns are used to identify them.

- People of the opposite sex who live or have lived together;
- Parent and child or grandparent and grandchild;
- Parents with a child in common;
- Current or former household members; or
- People of the opposite sex who are or have been in a dating relationship.

G.S. 50B-1(b).

The relationship of “current or former household members” encompasses homosexual partners who live together or have lived together. Non-romantic “roommate” relationships also fall in this category. Any minor child who is in the custody of or living with a person with whom the defendant has a personal relationship is also covered under Chapter 50B. G.S. 50B-1(a).

B. Definitions of Domestic Violence in the Criminal Procedure Act

For criminal law purposes, domestic violence is not always defined as in Chapter 50B. Within the Criminal Procedure Act it is defined in several different ways in order to address different purposes.

Crimes of domestic violence for purposes of bail and pretrial release. Under G.S. 15A-534.1, the requisite personal relationship between the parties is defined more narrowly than in G.S. 50B-1(b). For purposes of setting conditions of pretrial release, the matter is considered a domestic violence crime if the defendant commits certain crimes against “a spouse or former spouse or a person with whom the defendant lives or has lived as if married[.]” G.S. 15A-534.1(a). Thus, the defendant is not subject to this provision where the relationship with the victim is that of parent and child, or grandparent and grandchild. Similarly, unless the defendant and the victim were married or lived together as if married at some point, the defendant would not be subject to this provision where the relationship with the victim was one of parents with a child in common, current or former household members, or people of the opposite sex who are or have been in a dating relationship..

The relationship “lives or has lived as if married” presents some gray area with respect to same-sex relationships. The North Carolina courts have not determined whether a defendant in a same-sex relationship with the victim would be subject to this provision. Some scholars believe that the provision would not apply to a defendant in a same-sex relationship because the defendant is not eligible to marry under the laws of North Carolina. *See, e.g.,* Joan Brannon, *Domestic Violence Special Pretrial Release and Other Issues*, ADMINISTRATION OF JUSTICE BULLETIN No. 2001/06, at 5 (Dec. 2001), online at <http://www.sog.unc.edu/programs/crimlaw/aoj200106.pdf>, at p. 5. Others assert that G.S. 15A-534.1 should be interpreted as applicable to same-sex relationships. They argue that G.S. 50B-1(b) defines a “personal relationship” for DVPO purposes as, *inter alia*, “persons of the opposite sex who live together or have lived together,” while no such limitation appears in G.S. 15A-534.1. In other words, the legislature knows how to limit a relationship to one between people of the opposite sex, but did not do so in G.S.

15A-534.1, while simultaneously choosing to use such limiting language in what is now Chapter 50B. *See* S.L. 1979-561.

If the required relationship exists, the covered crimes in this context are: assaults, stalking, communicating threats, domestic criminal trespass, violation of a 50B order, rape and other sex offenses, kidnapping and abduction, and arson and other burnings. G.S. 15A-534.1; *see also* section 2B below for a discussion of pretrial release issues in domestic violence cases.

Reports of disposition; domestic violence; sentencing. G.S. 15A-1382.1 defines domestic violence in terms of a more limited number of offenses, but relies on the broader Chapter 50B definition of the requisite relationship between the parties. Under G.S. 15A-1382.1(a), a judge must indicate on the judgment form that a case involved domestic violence where the defendant has been found guilty of either an assault or communicating threats, and the defendant has a personal relationship with the victim. “Personal relationship” for purposes of this provision is defined as in G.S. 50B-1(b). G.S. 15A-1382.1(c)(3). Once the case has been designated a domestic violence matter, the judge must make certain sentencing determinations, discussed below in section 6.

Examples of North Carolina domestic violence crimes. Common misdemeanor charges that constitute domestic violence offenses where the parties have the requisite personal relationship include: simple assault, assault on a female, communicating threats, and violation of a domestic violence protective order.

C. Federal Law

Certain federal provisions include definitions of domestic violence. *See, e.g.*, 18 U.S.C. 922(g)(9) (Gun Control Act prohibits a person who has been convicted of a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921 (a)(33) from possessing firearm or ammunition); INA 237 (a noncitizen is deportable if convicted of a crime of domestic violence as defined in 18 U.S.C. 16).

2. Arrest and Pretrial Release

A. Mandatory Arrest for Violation of Protective Order

Law enforcement officers must arrest a person, with or without a warrant, if they have probable cause to believe that the person knowingly violated a valid protective order in the circumstances described in G.S. 50B-4.1(b). New legislation S.L. 2009-389 clarifies that G.S. 50B-4.1(b) is a mandatory arrest provision. S.L. 2009-389 (effective July 31, 2009), *reversing in part Cockerham-Ellerbe v. Town of Jonesville*, 176 N.C. App. 372 (2006). In *Cockerham-Ellerbe*, the plaintiff sued the town and two police officers for failing to arrest the defendant for violations of a protective order. Following the failure to arrest, the defendant stabbed the plaintiff and her daughter, resulting in serious injury to the plaintiff and death to her daughter. At issue was whether the officers properly exercised their discretion in not arresting the defendant, such that the public duty doctrine applied. The Court of Appeals held that the G.S. 50B-4.1(b) did not create a mandatory

duty to arrest, in spite of statutory language that “[a] law enforcement officer shall arrest and take a person into custody without a warrant or other process” where probable cause exists to believe the person violated a protective order. The new legislation clarified that the statute is a true mandate of police action: “Notwithstanding the holding by the North Carolina Court of Appeals in *Cockerham-Ellerbee v. The Town of Jonesville*, 176 N.C. App. 372, 626 S.E.2d 685 (2006), G.S. 50B-4.1(b) creates a mandatory provision requiring a law enforcement officer to arrest and take a person into custody without a warrant or other process if the requirements set forth in the subsection are met.” S.L. 2009-389.

A valid protective order includes an “emergency” or “*ex parte*” order entered under Chapter 50B. See S.L. 2009-342, *reversing in part State v. Byrd*, 363 N.C. 214 (2009) (adding subsections G.S. 50B-4(f) and G.S. 50B-4.1(h)). Where the DVPO was entered *ex parte*, counsel may argue that the expanded definition of a protective order exposes the defendant to deprivation of liberty without a hearing in violation of his constitutional right to due process, a concern raised by the North Carolina Supreme Court in *Byrd*. The expanded definition of a DVPO does not include a temporary restraining order (TRO); thus arrest is not mandatory where an officer has probable cause to believe that the defendant has violated a TRO. For an analysis of the legislative response to *State v. Byrd* by School of Government faculty member John Rubin, see the online memorandum available at <http://www.sog.unc.edu/programs/crimlaw/Byrd2.pdf>.

Following arrest for a violation of a DVPO, conditions for pretrial release are determined pursuant to G.S. 15A-534 and 15A-534.1. See generally G.S. 15A-533(b).

B. Arrest Without a Warrant

An officer who has probable cause to believe that certain domestic violence crimes have taken place may arrest a suspect without a warrant even though the offense occurred outside the officer’s presence. G.S. 15A-401(b)(2). The specified crimes are:

- Domestic criminal trespass. G.S. 134.3.
- Simple assault or simple assault and battery pursuant to 14-33(a), where a personal relationship existed as defined in G.S. 50B-1.
- Assault inflicting serious injury or assault with a deadly weapon pursuant to G.S. 14-33(c)(1), where a “personal relationship” as defined in G.S. 50B-1.
- Violation of a domestic violence protective order. G.S. 50B-4.1(a).

Under G.S. 15A-401(b)(2)(f), an officer may also arrest without a warrant where probable cause exists to believe that a person has violated certain conditions of release that a judge may impose in domestic violence cases. The conditions include that the defendant stay away from the home, school, or job of the alleged victim and refrain from assaulting her. G.S. 15A-534.1(a)(2). A violation of a domestic violence pretrial release condition is not a crime, and does not trigger the 48 hour hold for first available judge, as discussed in C below.

C. Hold for up to 48 Hours for First Available Judge to Set Pretrial Release Conditions

General rule. Pursuant to G.S. 15A-533(b), “[a] defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.” However, during the first 48 hours after arrest for domestic violence crimes, only a judge can set conditions of pretrial release. G.S. 15A-534.1(a), (b). The statute does not give the State carte blanche to hold the defendant for 48 hours; the defendant must be brought before a judge at the earliest, reasonable opportunity. *State v. Thompson*, 349 N.C. 483 (1998). A violation of procedural due process occurs where the defendant is held without conditions of pretrial release and a judge was available to set them. *Id.* See Appendix 1 (*Thompson* Motion). If a judge is not available after 48 hours have passed, then a magistrate must set the conditions of pretrial release. G.S. 15A-534.1(b). The defendant also has a *Thompson* claim for violation of procedural due process where no judge was available to set conditions and the defendant was held beyond 48 hours rather than being brought back before a magistrate. The remedy for such violations is dismissal.

Availability of judge. The question of whether a defendant’s procedural due process rights have been violated will hinge on: 1) at what point a judge was available to set conditions of pretrial release, and 2) how long after that point the defendant was held without conditions. In the pivotal case of *State v. Thompson*, 349 N.C. 483 (1998), the defendant was arrested on a Saturday at 3:45 pm and was not brought before a judge until Monday at 3:45 pm, even though judges were available to set pretrial release conditions as of 9:00 am on Monday. The *Thompson* court held, “The 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....” *Id.* at 500.

In assessing availability, the *Thompson* court took judicial notice of both district and superior court sessions in the county, and the start times of those sessions. Thus, as long as a session of either superior or district court has convened in the county, a judge is “available” for purposes of the statute. *Thompson* at 498 (noting district and superior court sessions that convened in the county prior to the time conditions were set); *Clegg* at 39 (same); *but see Jenkins*, below, discussing scheduling. To date, cases interpreting availability have arisen in single-county districts. In a multi-county district, the defendant might argue that a judge was available for purposes of the statute where a session of either district or superior court convened within the district but in a neighboring county.

In *State v. Malette*, 350 N.C. 52 (1999), decided one month after *Thompson*, the North Carolina Supreme Court held that G.S. 15A-534.1(b) was applied constitutionally where the defendant was arrested on Sunday, and was brought before a judge some time the next day. The court reasoned that “[t]here is no evidence here that the magistrate arbitrarily set a forty-eight hour limit as in *Thompson* or that the State did not move expeditiously in bringing defendant before a judge.” *Id.* at 55. The holding in *Malette* might have been different had a better record been made regarding what sessions of court had convened that day and what time conditions were actually set.

In *State v. Jenkins*, 137 N.C. App. 367 (2000), the North Carolina Court of Appeals relied on the holding in *Malette* to hold that no violation of the defendant's constitutional rights occurred although the defendant was not brought before a judge at the first opportunity in the morning. The defendant in *Jenkins* was arrested at 6:15 am on Friday and received a hearing before a judge at approximately 1:30 pm the same day. While the district court convened at 9:30 am on Friday mornings, the afternoon session was typically devoted to bond hearings. The Court of Appeals held that "[a]lthough the 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." *Id.* at 371. Thus, where the delay is short and attributable to the normal pattern of scheduling matters in the county, the defendant is less likely to prevail on a *Thompson* claim.

In *State v. Clegg*, 142 N.C. App. 35 (2001), the defendant was taken into custody around 7:00 pm on Saturday, February 28 for a charge of assault on a female. He received a hearing before a judge some time after 2:00 pm on Monday, March 2, although several sessions of court had convened that morning. Thus, the defendant was held for approximately 39 hours without bond. After receiving information that the victim's injuries were more serious than initially 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. The North Carolina Court of Appeals held that the defendant was unconstitutionally detained in connection with the original assault on a female charge, but he was not detained on the superceding felony assault charge and failed to show that his detention on the misdemeanor assault prejudiced his defense of the felony assault charge.

A key finding in *Clegg* was that the State did not act in bad faith; *Thompson* had not been decided at the time the State dismissed the assault on a female charge and filed the new charges; thus the State could not have been attempting to circumvent the holding in *Thompson*. While *Clegg*, like *Malette*, involved circumstances in which a defendant was not brought before a judge at the first opportunity in the morning, the holding in *Clegg* is confined to the unusual facts of that case, in which the defendant was not actually held on the felony charge because it had not yet been filed. *Thompson* is still good law; the *Thompson* court did not require the defendant to demonstrate how he was prejudiced on the charges on which he was improperly confined, but simply held that dismissal was proper based on the unconstitutional deprivation of liberty.

Applicability. As discussed in section 1B above, "domestic violence crimes" in this context includes certain crimes (assaults, stalking, communicating threats, domestic criminal trespass, violation of a 50B order, rape and other sex offenses, kidnapping and abduction, and arson and other burnings), only if committed against "a spouse or former spouse or a person with whom the defendant lives or has lived as if married[.]" Alleged violations of "emergency" and "*ex parte*" orders entered under Chapter 50B are subject to the 48 hour hold, but temporary restraining orders are not. S.L. 2009-342 (effective July 24, 2009), *reversing in part State v. Byrd*, 363 N.C. 214 (2009). See Appendix 2 (Domestic Violence Crimes to which 48 Hour Hold Applies). Where the DVPO was

entered *ex parte*, counsel may argue that the expanded definition of a protective order exposes the defendant to deprivation of liberty without a hearing in violation of his constitutional right to due process, a concern raised by the North Carolina Supreme Court in *Byrd*.

New requirement regarding criminal record. S.L. 2010-135 (H 1812), effective for pretrial release determinations on or after October 1, 2010, amends G.S. 15A-534.1(a) to provide that in setting pretrial release conditions in domestic violence cases subject to the 48-hour law, the judge must direct a law enforcement officer or district attorney to provide a criminal history report for the defendant and that the judge must consider the report. Also provides that after setting conditions the judge must return the report to the agency that provided the report; it is not placed in the case file. However, the provision prohibits unreasonable delay in setting conditions for the purpose of reviewing the criminal history report. The new requirements also appear to apply to magistrates who set pretrial conditions where a judge has not acted within 48 hours of arrest.

D. Hold for Risk of Injury or Intimidation

A judge may delay setting pretrial release conditions for a reasonable period of time if the defendant's immediate release poses a danger of injury or is likely to result in intimidation of the victim, and an appearance bond is inadequate to protect against the injury or intimidation. G.S. 15A-534.1(a)(1). Thus, where the defendant has been brought before a judge at the earliest, reasonable opportunity within 48 hours after arrest in compliance with *Thompson*, the judge may still hold the defendant in custody without bond, and the hold may extend beyond the initial 48 hours. "A judge conducting [a 15A-534.1(a)(1)] hearing 'may detain the defendant in custody for a reasonable period of time' beyond the initial forty-eight hours ...if the judge determines that 'release of the defendant will pose a danger of injury to the alleged victim.'" *Thompson* at 500.

In *State v. Gilbert*, 139 N.C. App. 657 (2000), the defendant was received at a detention facility around 9:00 pm and received a hearing before a judge at 9:00 am the next morning. At the hearing, the judge imposed an unsecured bond but ordered that the defendant not be released until after 2:00 pm that afternoon. The North Carolina Court of Appeals held that the order was not an unconstitutional application of 15A-534.1. Thus, a detention of approximately five hours was considered reasonable under the facts.

While a judge making determinations under 15A-534.1(a)(1) must hold a hearing, the judge is not required to make written findings of fact. *Gilbert* at 671. At the hearing, counsel should remind the court that continued detention is not authorized where an appearance bond would reasonably assure that no injury or intimidation would occur. Counsel should also argue that any detention without bond should be commensurate with whatever risk of injury or intimidation allegedly exists, and should last only as long as necessary to determine appropriate conditions of pretrial release.

3. Pleadings

A. Defects

The requirements of a valid pleading and common pleading defects are discussed in the NC Defender Manual, Vol. 1, Chapter 8 (Criminal Pleadings). *See also* Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment* (hereinafter, “*The Criminal Indictment*”), ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03 (July 2008), online at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf>. Some commonly occurring defects in the domestic violence context are highlighted below.

Victim’s name. One pleading defect that commonly occurs in the context of assault cases is failure to correctly name the victim. The State must name the victim in the pleading. Fatal variance results when the name is incorrect; amendment is not allowed. *State v. Call*, 349 N.C. 382 (1998) (fatal variance between indictment charging defendant with assault on Gabriel Hernandez Gervacio and evidence at trial revealing that the victim’s correct name was Gabriel Gonzalez); *see generally* Smith, *The Criminal Indictment* at 9-10.

Enhancements. A person is subject to increased punishment for violating a protective order in the circumstances described in G.S. 50B-4.1(d) (commit a felony while knowing the conduct was prohibited by protective order), 50B-4.1(f) (two prior convictions of violating a protective order), and 50B-4.1(g) (possess deadly weapon and fail to stay away from a person or place as directed by order). Any fact (other than a prior conviction) that increases the punishment for a crime beyond the statutory maximum must be pleaded and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004). Subsection G.S. 50B-4.1(e) describes pleading requirements where the defendant is subject to increased punishment under G.S. 50B-4.1(d). Further, an indictment brought under G.S. 50B-4.1(f) must conform to the pleading requirements set out in G.S. 15A-928.

Deadly weapon. While it is not necessary for the pleading to describe the size, weight, or particular use of a potentially deadly weapon, it must (i) name the weapon and (ii) state that the weapon was used as a “deadly weapon” or allege facts demonstrating the deadly character of the weapon. *See, e.g., State v. Palmer*, 293 N.C. 633 (1977) (stating rule); *State v. Moses*, 154 N.C. App. 332 (2002) (indictment failed to allege assault inflicting serious injury with deadly weapon because it did not name weapon). *See generally* Smith, *The Criminal Indictment*, at 26-28.

4. Evidence Issues

A. Crawford

A common occurrence in domestic violence cases is that the victim fails to appear for court and the prosecutor tries to introduce her out of court statement in lieu of live testimony. The defense lawyer must be prepared to argue constitutional and statutory

grounds for exclusion. Any extrajudicial statement, such as a statement to a police officer, must meet two basic requirements to be admissible against a criminal defendant. One, it must satisfy the Confrontation Clause of the Sixth Amendment to the United States Constitution, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and Article I, § 24 of the North Carolina Constitution. Two, it must satisfy North Carolina's hearsay and other evidence rules.

The Sixth Amendment to the United States Constitution guarantees the accused the right to be confronted by the witnesses against him. Clearly, the Confrontation Clause is satisfied when the witness is present at trial and the defendant is able to cross-examine her. A much thornier question is: under what circumstances can a witness' out-of-court statement be admitted without running afoul of the Confrontation Clause? This is the issue addressed in *Crawford* and progeny.

Under the old Confrontation Clause test of *Ohio v. Roberts*, the admissibility of hearsay evidence turned on whether the evidence fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford* held that the test of *Ohio v. Roberts* was inadequate to protect defendants' rights under the Confrontation Clause. Under *Crawford*, as a general rule, testimonial statements of witnesses who do not testify at trial are not admissible. Two fundamental questions follow. First, what constitutes a "testimonial" statement? Second, what are the exceptions to the general rule? These questions are addressed in brief in Appendix 3 (*Crawford v. Washington* Flowchart), and in detail in Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* (April 2005), online at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf>; and *Emerging Issues in Confrontation Litigation: A Supplement to Crawford v. Washington: Confrontation One Year Later* (March 2007), online at www.sog.unc.edu/pubs/electronicversions/pdfs/crawfordsuppl.pdf. The discussion that follows merely provides a brief outline of the issues.

Prior in-court testimony or the functional equivalent is considered testimonial. *Crawford*. For example, if the witness testified at an *ex parte* hearing while seeking a protective order, this would be a testimonial statement that would not be admissible at a subsequent criminal trial where the witness did not take the stand (unless some exception applied). An affidavit or court filing is also considered testimonial. *Id.* In contrast, offhand remarks to an acquaintance and business records would be considered nontestimonial. *Id.* Statements taken by police in the course of interrogation may be testimonial, depending on the primary purpose of the interrogation. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *State v. Lewis*, 361 N.C. 541 (2007) (NC Supreme Court recognizes applicability of *Davis* after its earlier decision in *Lewis* was vacated by the U.S. Supreme Court and the case remanded). Where the primary purpose of interrogation is to establish past events relevant to prosecution, statements are testimonial. However, where the primary purpose of interrogation is to enable officers to meet an ongoing emergency, statements are nontestimonial. *Id.* For a list of factors to consider in determining whether an emergency is ongoing, see Smith, *Emerging Issues in Confrontation Litigation* at 6.

Exceptions to the general rule of *Crawford* may exist where: 1) the witness is unavailable for trial but the defendant had the opportunity to cross-examine the witness at a previous proceeding; 2) the defendant forfeited the confrontation right by wrongdoing in that he did something to prevent the witness from testifying at trial, e.g., killed the witness; 3) the statement was a dying declaration; or 4) the statement is not offered for its truth.

In a recent opinion, *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678 (2008), the United States Supreme Court held that the doctrine of forfeiture by wrongdoing requires evidence that the defendant engaged in wrongdoing that was intended to prevent the witness from testifying. Merely causing the witness to be unavailable to testify is insufficient. The Court commented on domestic violence and the doctrine of forfeiture by wrongdoing: “Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed an intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.” *Id.* at 2693.

B. Hearsay

If a statement is nontestimonial, the Confrontation Clause does not apply. *See Davis v. Washington*, 547 U.S. at 821. Hearsay and other state evidence rules still must be satisfied for out-of-court statements to be admissible. For a discussion of the hearsay rule and exceptions that may apply in the domestic violence context, see John Rubin, “Domestic Violence Evidence Issues,” online at <http://www.sog.unc.edu/programs/crimlaw/domestic.pdf>. *See also* John Rubin “Child Evidence Issues,” online at <http://www.sog.unc.edu/programs/crimlaw/childev.pdf> at 6-14. In brief, hearsay exceptions that may be applicable where the victim does not testify include: present sense impression; excited utterance; then existing mental, physical or emotional condition; and medical records.

C. Impeachment

The primary purpose of impeachment is to reduce or discount the credibility of a witness so that the finder of fact will give less weight to his or her testimony in arriving at the ultimate facts in the case. *State v. Nelson*, 200 N.C. 69 (1930). Any evidence tending to show a defect in the witness' perception, memory, narration, or truthfulness is relevant for impeachment purposes. *State v. Looney*, 294 N.C. 1 (1978). Any bias or prejudice of the witness is fertile ground for impeachment, and may be proven with extrinsic evidence. *State v. Cutshall*, 278 N.C. 334 (1971).

Recanting witness. Under Rule 607, any party may attack the credibility of a witness, including the party that called the witness. However, a party may not call a witness that it knows will not reiterate a prior statement for the purpose of impeaching the witness with that statement. *State v. Hunt*, 324 N.C. 343 (1989). Thus, if the State knows that the victim has recanted a prior statement, the State may not call the victim to the stand as a mechanism to introduce or air the prior statement.

Hearsay. Under Rule 806, a hearsay declarant is subject to impeachment as if she had testified at trial; a prior inconsistent statement may be used to impeach her. *State v. Small*, 131 N.C. App. 488 (1998).

Prior convictions under Rule 609. The bare fact of a prior conviction is admissible for impeachment under Rule 609 only if the defendant takes the stand and thereby places his credibility at issue. *State v. Chandler*, 100 N.C. App. 706 (1990). Under Rule 609, the State is prohibited from eliciting details of prior convictions at trial other than the name of the crime, time, place, and punishment. *State v. Lynch*, 334 N.C. 402 (1993). A conviction for a Class 3 misdemeanor is not admissible under Rule 609. Further, a conviction over ten years old is not admissible absent notice and a judicial determination that the probative value substantially outweighs the prejudicial effect. G.S. 8C-1, Rule 609(b).

D. Prior bad acts under Rule 404(b).

An analysis of whether 404(b) evidence is admissible will hinge on whether the evidence is: 1) being offered for a proper, relevant purpose, not for the purpose of showing propensity to commit the current offense (not to show “character”); 2) sufficiently similar to the offense at bar; 3) not too remote in time; and 4) not more prejudicial than probative. Rule 404(b) has been described as a general rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, subject to an exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature charged. *State v. Coffey*, 326 N.C. 268, 278-79 (1990). This means that the proponent is not limited to the admissible purposes specifically listed in Rule 404(b) as long as the evidence is offered for a relevant purpose, and not for the purpose of showing propensity to commit the crime charged. *See State v. Morgan*, 315 N.C. 626 (1986) (evidence of defendant’s prior instances of assaultive behavior not relevant to issue of whether he acted in self-defense; error where State allowed to admit the evidence to prove defendant’s character for violence); *State v. Ward*, ___ N.C. App. ___ (Aug. 18 2009) (404(b) evidence must be relevant to the issue of the defendant’s guilt of the crime for which he or she is on trial); *see also State v. Morgan*, 156 N.C. App. 523 (2003) (evidence of threats and entry of domestic violence orders against defendant properly admitted to show intent to kill victim); *State v. Everhardt*, 96 N.C. App. 1 (1989), *aff’d*, 326 N.C. 777 (1990) (defendant’s long history of domestic violence admissible to show victim’s fear of defendant, explain why victim did not move out, and negate inference that victim consented to sexual abuse). Evidence that is otherwise relevant may still be excluded if

its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Coffey* at 281, citing G.S. 8C-1, Rule 403.

In addition to the requirements of relevancy “the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity.” *State v. Al-Bayyinah*, 356 N.C. 150, 155 (2002). A prior crime or act is similar if there are “some unusual facts about both crimes.” *State v. Stager*, 329 N.C. 278, 303 (1991). A prior act that is very similar to the crime at bar may be admitted even though it is relatively remote in time. *State v. Brooks*, 138 N.C. App. 185 (2000) (domestic violence assault against different victim from 17 years earlier admissible under 404(b) where there were numerous similarities in the way the different assaults were carried out). The State may not introduce the bare fact of a prior conviction under Rule 404(b). *State v. Wilkerson*, 356 N.C. 418 (2002) (*per curiam*, adopting dissent in 148 N.C. App. 310 (2002)).

E. 911 Tapes

The Confrontation Clause may be implicated where the witness is not available to testify at trial and the State seeks to admit a recording of the witness’s 911 call. In *Davis v. Washington*, 547 U.S. 813 (2006), the United States Supreme Court addressed the admissibility of a 911 call in which the victim identified the defendant as the perpetrator of an assault. The victim did not testify at trial, and the trial court admitted the 911 call. The Supreme Court found that the statements were nontestimonial in that the primary purpose of the interrogation by the 911 operator was to meet an ongoing emergency. Thus, the Confrontation Clause was not violated by admission of the statements. The Court found it persuasive that the victim was describing events as they were happening, but acknowledged that a person might call 911 where there is no such ongoing emergency. Additionally, a call that was originally made to address an immediate danger could evolve into a more formal interrogation of a testimonial character once the danger abated.

Where the Confrontation Clause is not implicated, a 911 recording still must satisfy the North Carolina Rules of Evidence, such as the rules regarding hearsay and authenticity, in order to be admissible. Under Rule 901(a), the requirement of authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. A voice may be identified “whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” Evidence Rule 901(b)(5). Thus, a lay person who is familiar with a voice may identify it, whether the familiarity was acquired before or after the recording was made. *State v. Stager*, 329 N.C. 278 (1991) (testimony of four witnesses that tape recording contained voice of victim sufficient to authenticate it). The State has the burden of proving the admissibility of a recording. The court must conduct a voir dire to determine admissibility. At the hearing, the State must show that the tape was legally obtained and contains admissible evidence, and must establish that the recording is accurate through a witness with personal knowledge. *Id.*

A transcript of a recorded conversation is admissible where both the recording and the transcript are authenticated. *State v. Toomer*, 311 N.C. 183 (1984). The transcript is authenticated where a witness who was present when the recording was made testifies that the conversation was transcribed and the transcript accurately represents the conversation. A transcript may be admissible without prior authentication of the recording where a person who was present at the time the recording was made testifies that the conversation was recorded and transcribed, and that the transcript was compared to the recording and is an accurate representation of the conversation. *State v. Jeffries*, 63 N.C. App. 181 (1983).

F. Privileges

Chapter 8, Article 7 (Competency of Witnesses) of the General Statutes describes a number of privileges. Generally, a privilege encourages free communication between parties, such as a doctor and a patient, by ensuring that the doctor cannot be compelled to disclose information acquired during treatment against the patient's wishes. In many instances, the court can overcome the privilege and order disclosure for the proper administration of justice. Privileges that are likely to arise in the domestic violence context include the following.

Agents of domestic violence programs or rape crisis centers. G.S. 8-53.12. As a general rule, an agent of a domestic violence program cannot be compelled to disclose information learned while providing services to a victim. The victim may waive the privilege however. Thus, the State may not call the agent to testify without the victim's consent. The judge may order disclosure in a criminal case, at the defendant's request and without the victim's consent, if the information is relevant, material, and exculpatory; not offered for character impeachment; and not cumulative or already available to a party. The exclusion of information offered for impeachment purposes may be improper, however, as it may violate the defendant's constitutional right to exculpatory evidence, which has been consistently interpreted by the U.S. Supreme Court as including impeachment evidence. *See, e.g., Youngblood v. West Virginia*, 547 U.S. 867 (2006). If the judge finds that a sufficient showing has been made, the judge shall order the records produced under seal, examine them in chambers, and disclose whatever portions are subject to disclosure.

Husband and wife in criminal actions. G.S. 8-57. As a general rule, where the spousal privilege applies, a wife cannot testify as to a confidential marital communication over a husband's objection (and vice versa). *See State v. Holmes*, 330 N.C. 826 (1992). However, the spousal privilege does not preclude a spouse from testifying in a prosecution of the other spouse for assault, communicating a threat, or trespass. G.S. 8-57(b). Recently, the North Carolina Supreme Court has given weight to the setting in which the communication took place in deciding whether a communication is confidential. *See State v. Rollins*, 363 N.C. 232 (2009) (marital communications privilege does not extend to visiting area of DOC facilities because no reasonable expectation of privacy exists in that setting).

Privilege against self-incrimination. G.S. 8-54. Defendants in criminal cases have an absolute right not to testify under the Fifth Amendment to the United States Constitution. No adverse inference may be drawn from a defendant’s failure to testify. *State v. Willis*, 22 N.C. App. 465 (1974). See Appendix 4 (Basics of Right Against Self-Incrimination).

Other privileges that may arise in the domestic violence context include:

- Physician and patient. G.S. 8-53.
- Clergyman and communicant. G.S. 8-53.2.
- Psychologist and client. G.S. 8-53.3.
- Marriage counselor and clients. G.S. 8-53.5.
- Social worker. G.S. 8-53.7.

5. Selected Offenses: Elements and Bars and Defenses

A. Violation of a Domestic Violence Protective Order (DVPO)

The State must prove the defendant:

- knowingly
- violates
- a valid protective order.

Knowingly.

- New legislation amends G.S. 50B-2(a) to provide that “[a]ny action for a domestic violence protective order requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. Attachments to the summons shall include the complaint, notice of hearing, any temporary or *ex parte* order that has been issued, and other papers through the appropriate law enforcement agency where the defendant is to be served.” S.L. 2009-342. The new statutory language may support an argument that the defendant must be placed on formal notice of an *ex parte* DVPO to be prosecuted for the crime of violating a DVPO. The State may argue, however, that actual notice is sufficient to prove the defendant knowingly violated a DVPO, e.g., where there are facts tending to show that someone told the defendant that an *ex parte* DVPO was entered and that it prohibited the conduct that the defendant is alleged to have committed. Where the defendant has not been properly served with the order, the State may have difficulty proving the defendant had actual notice and therefore knowingly violated a DVPO. For example, if the defendant’s estranged wife testifies that she told the defendant about the *ex parte* order, she may have credibility issues in that she is an interested party. Thus, where the order was entered *ex parte*, counsel should check to see if the defendant was served with the order or otherwise learned of its existence and conditions prior to the date of the alleged violation.
- A DVPO may be renewed after one year “for good cause” pursuant to G.S. 50B-3(b). If the alleged conduct in violation of the DVPO took place following renewal, check to make sure the defendant was served with a summons, complaint and notice for the one-year hearing.

- If the DVPO was entered at an emergency hearing pursuant to G.S. 50B-2(b), make sure the defendant was served with a summons, complaint, and notice of hearing.

Violates. Make sure that the conduct that allegedly violates the DVPO was in fact forbidden by the DVPO. For example, in some instances contact is allowed for the purpose of exchanging children.

New legislation S.L. 2010-5 (S 140), effective for offenses committed on or after December 1, 2010, adds G.S. 50B-4.1(g1) to make it a Class H felony for a person: (1) who is subject to a valid protective order under G.S. Ch. 50B; (2) to enter property operated as a safe house or haven for victims of domestic violence; (3) where a person protected by the order is residing. The violation occurs regardless of whether the person protected by the order is then present on the property.

Valid Protective Order.

- A valid protective order includes an emergency and *ex parte* order entered under Chapter 50B. See S.L. 2009-342, *reversing in part State v. Byrd*, 363 N.C. 214 (2009) (adding subsections G.S. 50B-4(f) and G.S. 50B-4.1(h)). A temporary restraining order (TRO) does not qualify as a valid protective order. An order entered in a court of another state or an Indian tribe qualifies. G.S. 50B-4.1(a). Where the DVPO was entered *ex parte*, counsel may argue that the expanded definition of a protective order exposes the defendant to deprivation of liberty without a hearing in violation of his constitutional right to due process, a concern raised by the North Carolina Supreme Court in *Byrd*.
- A DVPO is valid for one year, but may be renewed for up to two additional years. G.S. 50B-3(b). Check to make sure the order was still in effect at the time of the alleged offense. If the order was renewed, check to make sure the request to renew was made prior to the expiration of the former order. Also, check to see if “good cause” existed to support renewal.
- A hearing must be held on an *ex parte* order within ten days of issuance of the order or within seven days of service, whichever occurs later. G.S. 50B-2. Check to make sure the alleged conduct occurred within this time frame where the defendant is alleged to have violated an *ex parte* order.
- Check to make sure that the subject of the protective order is a person (or the minor child of a person) with whom the defendant had a “personal relationship” as defined in G.S. 50B-1(b).
- Check to make sure that the order was supported by an act of domestic violence as defined in G.S. 50B-1(a). At a trial for violation of a DVPO, the judge may be resistant to “re-litigating” whether grounds existed to issue the DVPO. However, the State has the burden to prove that a valid DVPO was in effect; thus counsel may argue that the order was void *ab initio* because it was not supported by evidence of domestic violence. See, e.g., *Smith v. Smith*, 145 N.C. App. 434 (2001) (DVPO not properly entered where daughter said father’s touching made her feel “creepy,” but failed to demonstrate she was in fear of bodily injury); *Price v. Price*, 133 N.C. App. 440 (1999) (evidence that former wife entered

trailer and spilled food on floor did not support conclusion that domestic violence occurred to support issuance of DVPO); *Brandon v. Brandon*, 132 N.C. App. 646 (1999) (conclusion that domestic violence had occurred was not supported where there was no finding that wife feared imminent serious bodily injury).

- Check to make sure an *ex parte* order is supported by a danger of acts of domestic violence against the victim or a minor child. G.S. 50B-2(c). (See discussion in bullet above.)
- Check to make sure the judge signed the order.
- Make sure the relief granted by the order is allowed under G.S. 50B-3.
- A consent order, or a DVPO entered by consent of the parties, is not valid absent a finding that an act of domestic violence occurred. *Bryant v. Williams*, 161 N.C. App. 444 (2003).
- A mutual DVPO is not valid unless both parties file a claim and the court makes detailed findings of fact indicating, *inter alia*, that both parties were aggressors. G.S. 50B-3(b).
- A DVPO may be invalid for vagueness. For example, if the order includes disjunctive language, such as a finding of fact that the defendant committed domestic violence by doing x, y, or z; it is impossible to tell whether the court's conclusions are supported by its finding. *See Brandon v. Brandon*, 132 N.C. App. 646 (1999).

Bars and defenses that may apply.

- Double jeopardy: Where the defendant has been prosecuted for contempt pursuant to G.S. 50B-4(a) for violating a DVPO, the defendant may not also be prosecuted for violation of a DVPO based on the same conduct. The defendant may not be prosecuted for violation of a DVPO or for contempt for violating a DVPO, and also be prosecuted for the substantive crime that constituted the violation. *See State v. Dye*, 139 N.C. App. 148 (2000) (double jeopardy barred later prosecution for domestic criminal trespass after defendant had been adjudicated to be in criminal contempt for violating domestic violence protective order forbidding similar conduct); *State v. Gilley*, 135 N.C. App. 519 (1999) (double jeopardy precluded conviction for assault on female where defendant had previously been held in criminal contempt for violation of protective order by committing assault).
- Jurisdiction: The court may be deprived of subject matter jurisdiction by some pleading defects, as described in section 3 above.
- Self-defense: G.S. 50B-1(a) specifically exempts self-defense from the definition of domestic violence. At a trial for violation of a DVPO, it may be difficult to re-litigate whether there were grounds to enter the DVPO. However, if the parties concede that the defendant acted in self-defense in committing the acts that gave rise to the DVPO, the defendant has an argument that the DVPO was not valid because there was no act of domestic violence to support it.

B. Assault on a Female

The State must prove the defendant:

- is a male at least 18 years old, and

- assaults
- a woman.

18 years old. Circumstantial evidence may be adequate to establish a defendant's age. *State v. Barnes*, 324 N.C. 539 (1989). However, the defendant's age may not be determined beyond a reasonable doubt by observing his appearance in court, absent direct or circumstantial evidence. *In re Jones*, 135 NCA 400 (1999), *distinguishing State v. Evans*, 298 N.C. 263 (1979). There is no age requirement for the victim. *State v. Mueller*, 184 N.C. App. 553 (2007).

Assault.

- Attempted assault is not a crime because the definition of assault includes an attempt. *State v. Barksdale*, 181 N.C. App. 302 (2007).
- In order to find a defendant guilty of separate assaults, there must be a distinct interruption between them. *State v. Maddox*, 159 N.C. App. 127 (2003) (five shots fired at same place in rapid succession supported only one assault charge). *Cf. State v. Irick*, 292 N.C. 480 (1977) (firing shots at two different law enforcement officers supported two convictions of assault on officer).
- North Carolina recognizes two forms of assault:
 - An overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence is sufficient to put a person of reasonable firmness in fear of immediate physical injury. The focus of this definition of assault is the intent of the person accused.
 - By contrast, the "show of violence" rule places the emphasis on the reasonable apprehension of the person assailed. The State must demonstrate some show of violence by the defendant, accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed, which causes the person assailed to engage in a course of conduct that he or she would not otherwise have followed.

State v. McDaniel, 111 N.C. App. 888, 890 (1993). The pleading must clarify which form of assault the defendant is alleged to have committed. *See State v. Garcia*, 146 N.C. App. 745 (2001) (describing requirements for pleading where State is alleging assault by show of violence).

Woman. This offense does not deny men equal protection of law in violation of the Fourteenth Amendment to the United States Constitution, even though a male defendant is subject to greater punishment than a female who commits the same act. *State v. Gurganus*, 39 N.C. App. 395 (1979). In *Gurganus*, the Court took judicial notice that men are taller, heavier, and physically stronger than women on average; and concluded that it was reasonable for the General Assembly to put in place greater protections for women by imposing greater punishment for men. Counsel may argue that the holding in *Gurganus* hinged on dated notions regarding gender, and that the disparity in punishment can no longer be viewed as substantially related to the objective of physical integrity of the citizens of North Carolina. This argument is more likely to be persuasive in a case in

which the alleged victim is a woman who is significantly larger and heartier than the male defendant.

Bars and defenses that may apply.

- Self-defense: A person may use non-deadly force against another when the amount of force reasonably appears necessary to protect one's self from offensive contact or injury, even where the person is not in danger of death or great bodily harm. *State v. Anderson*, 230 N.C. 54 (1949). A person may use more force than is actually necessary to prevent harm, if he reasonably believes it to be necessary. *State v. Francis*, 252 N.C. 57 (1960). The State must prove beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Fletcher*, 268 N.C. 140 (1966). Brandishing a weapon as a warning may constitute non-deadly force. *State v. Francis*; *State v. Yancey*, 74 N.C. 244 (1876). *See generally The Law of Self-Defense in North Carolina* (1996), by John Rubin.
- Defense of others: A person may use force to protect a third person where he reasonably believes the third person would have been justified in using the force. *State v. Terry*, 337 N.C. 615 (1994).
- Defense of personal property: A person may use reasonable, non-deadly force to protect personal property. *State v. Lee*, 258 N.C. 44 (1962)
- Defense of habitation (home): A person has a right to use deadly force to prevent or terminate a forcible entry into his home in some circumstances. G.S. 14-51.1; *State v. McCombs*, 297 N.C. 151 (1979).
- Double jeopardy: A person may not be re-prosecuted for the same offense following acquittal or conviction, and may not be punished twice for the same offense absent clear legislative intent. Two offenses are the same where all elements of one are included in the other. *State v. Hill*, 287 N.C. 207 (1975). *See also State v. Gilley*, 135 N.C. App. 519 (1999) (double jeopardy precluded conviction for assault on female where defendant had previously been held in criminal contempt for violation of protective order by committing assault).
- Defective pleading: Certain defects in the charging instrument deprive the court of jurisdiction. Further, where the State's proof at trial differs from what is alleged in the pleading, a fatal variance may occur. *See section 3 above.*
- Accident: The State has the burden to prove beyond a reasonable doubt that the defendant did not injure another person unintentionally. *State v. Turner*, 330 N.C. 249 (1991).

C. Communicating Threats

The State must prove the defendant:

- without lawful authority
- willfully threatens to injure another person or that person's child, sibling, spouse, or dependent; or willfully threatens to damage another's property, and
- communicates that threat to the person
- in a manner to make a reasonable person believe that it is likely to be carried out, and
- the threat is believed by the threatened person.

Threatens. Where the communication is clearly a joke, exaggeration, or impossibility (e.g., “If you were not an old man, I would hit you”), counsel may argue that there was no threat; or alternatively, that a reasonable person could not believe the threat would be carried out. *See State v. Mortimer*, 142 N.C. App. 321 (2001) (no threat where student created screen saver stating “The End is Near” on school computer as a prank). A conditional threat (e.g., “If you do not turn your music down, I will hit you”) constitutes a threat for purposes of the statute only where the defendant did not have the right to impose the condition. *State v. Roberson*, 37 N.C. App. 714 (1978).

Communicates. The threat must be communicated, either to the threatened person or to the person with the required relationship, e.g., parent or sibling. The threat may be communicated via a third person, not listed in the statute, where the defendant intends for the threat to be conveyed. *See State v. Thompson*, 157 N.C. App. 638, 646 (2003) (holding that offense occurred where defendant “utilized” a third party to communicate threat as part of “psychological warfare”).

Threat is believed. The person threatened must actually, subjectively believe the threat will be carried out. *State v. Love*, 156 N.C. App. 309 (2003) (substantial evidence existed that victim subjectively believed threat would be carried out where she flinched when defendant swung fists at her, said she was scared, called police, and ran to a neighbor’s house until police arrived).

Bars and defenses that may apply.

- Double jeopardy: A person may not be re-prosecuted for the same offense following acquittal or conviction. Two offenses are the same where all elements of one are included in the other. *State v. Hill*, 287 N.C. 207 (1975). *See also State v. Gilley*, 135 N.C. App. 519 (1999) (double jeopardy precluded conviction for assault on female where defendant had previously been held in criminal contempt for violation of protective order by committing assault).
- Defective pleading: Certain defects in the charging instrument deprive the court of jurisdiction. Where the State’s proof at trial differs from what is alleged in the pleading, a fatal variance may occur. *See* section 3 above.

6. Sentencing

A. Special Conditions of Probation

Under G.S. 15A-1382.1(a) (Reports of disposition; domestic violence; sentencing), a judge must indicate on the judgment form that a case involved domestic violence where the defendant has been found guilty of either an assault or communicating threats, and the defendant has a personal relationship with the victim. “Personal relationship” for purposes of this provision is defined as in G.S. 50B-1(b). G.S. 15A-1382.1(c)(3). Additionally, the clerk must ensure that the defendant’s record reflects the conviction involved domestic violence.

Once the case has been designated a domestic violence matter, the judge must determine whether to impose one or more special conditions of probation in addition to any other authorized punishment. Special conditions of probation include psychiatric treatment (either inpatient or outpatient), imprisonment (pursuant to special probation), intensive supervision, and community service. G.S. 15A-1343(b1). Additionally, the defendant may be placed on electronic house arrest even where intermediate punishment is not imposed.

B. Enhancements for Certain Violations of DVPO

Violation of a DVPO is a Class A1 misdemeanor. G.S. 50B-4.1(a). However, a person is subject to increased punishment for violating a DVPO in certain circumstances described in G.S. 50B-4.1. For the State to seek these enhanced punishments and for the court to impose them, the State must have alleged the required elements in the warrant or other charging document. *See* section 3 above (describing pleading requirements for enhancements). Under subsection (d), a person who commits a felony while knowing the conduct was prohibited by a DVPO is guilty of a crime one class higher than the principal felony, with a few exceptions. Subsection (f) requires that a defendant be convicted of a Class H felony where he violates a DVPO and has two prior convictions of violating a DVPO. Finally, under subsection (g) a person who violates a DVPO while in possession of a deadly weapon by failing to stay away from a person or place as ordered is guilty of a Class H felony. Additionally, under G.S. 50B-3.1(j), it is a Class H felony to own or possess or attempt to own or possess a firearm where forbidden by a DVPO. Finally, new legislation S.L. 2010-5 (S 140), effective for offenses committed on or after December 1, 2010, adds G.S. 50B-4.1(g1) to make it a Class H felony for a person: (1) who is subject to a valid protective order under G.S. Ch. 50B; (2) to enter property operated as a safe house or haven for victims of domestic violence; (3) where a person protected by the order is residing. A violation occurs regardless of whether the person protected by the order is then present on the property.

C. Deferred Prosecutions

Statutory deferred prosecution agreement (DPA). Certain defendants may be placed on probation as a condition of a statutory DPA. G.S. 15A-1341(a1). Under a DPA, the State agrees not to prosecute the charges for a period of time, giving the defendant an opportunity to demonstrate good conduct by fulfilling conditions, e.g., completing an anger management program and not committing any new offenses. On completion of the terms of the DPA, the prosecutor dismisses the charges. Thus, a DPA is a good vehicle to avoid a criminal record for a defendant who is capable of completing the conditions. (However, a DPA may have immigration consequences for a noncitizen, as discussed below). In addition to the statutory specifications, local practice will dictate which defendants are eligible for a DPA. In some districts, the prosecutor will not enter into a DPA where the victim objects. *See* G.S. 15A-1341(a1)(2) (victim has right to be heard with respect to DPA).

A new provision, G.S. 15A-1342(a1), clarifies that probation officers are authorized to supervise defendants who have entered into a DPA. Where the defendant has allegedly violated the terms of the DPA, the State may not deprive him of the benefit of the DPA without due process. As with other cases of probation, the matter must be brought before the court for a hearing under G.S. 15A-1345, and a judge must make a finding that a violation has occurred. *See* G.S. 15A-1342(a1) (violations of DPA must be reported to court as provided in Article 82 (Probation)); 15A-1344 (all probationers must be brought before the court in accordance with G.S. 15A-1345 before probation may be revoked).

Non-statutory DPA. The State may also choose to enter into non-statutory DPAs with defendants. The defendant will not be supervised by a probation officer under such an agreement. *See State v. Gravette*, 327 N.C. 114 (1990) (interpreting G.S. 15A-1341 as an inclusive listing of the circumstances in which supervised probation may be ordered). A prosecutor may have greater discretion under a non-statutory DPA to terminate the agreement for alleged non-compliance as there is no right to a violation hearing before the court. However, a defendant still could defend against the renewed prosecution on the ground that he has the right to enforce the agreement on which he relied to his detriment. *See Santobello v. New York*, 404 U.S. 257 (1971) (defendant has constitutional right to enforcement of plea agreement once it has been accepted by the court); *State v. Johnson*, 95 N.C. App. 757 (1989) (State obligated to abide by plea agreement when prosecutor did not move to vacate plea until after court had accepted defendant's plea of guilty); *State v. Rodriguez*, 111 N.C. App. 141 (1993) (ordering remedy of specific performance with plea agreement). Additionally, the defendant may argue that he has a due process right to notice and a hearing before the DPA can be terminated based on his alleged non-compliance.

Admissions. A defendant may be asked to sign a statement admitting to the charged conduct pursuant to a statutory or non-statutory DPA. The form that is typically used for entry of statutory DPAs includes as a condition: "The admission of responsibility given by me and any stipulation of facts shall be used against me and *admitted* into evidence without objection in the State's prosecution against me for this offense should prosecution become necessary as a result of these terms and conditions of deferred prosecution." *See* AOC-CR-610 (Rev. 4/08) (Condition 5), online at <http://www.nccourts.org/Forms/Documents/1025.pdf>. In the event the defendant is found to be non-compliant with the DPA and is tried for the offense, the State may seek to introduce the DPA as an admission against interest under Evidence Rule 804, or, where the defendant takes the stand, to cross examine the defendant with regard to any such admission. Further, an admission may have collateral consequences regardless of whether the defendant is convicted of the crime, as discussed below in section D (Immigration).

D. Collateral Consequences of Admissions and Convictions

Immigration. A defendant who is not a United States citizen may be deportable where the elements of the offense establish that the offense is a "crime of violence" and the offense is against a person in a domestic relationship with the defendant. *See generally Immigration Consequence of a Criminal Conviction in North Carolina* (April 2008)

(hereinafter “*Immigration Consequences*”) at 36, 78-79, and Appendix A (N.C. Offense Chart), online at <http://www.ncids.org/Other%20Manuals/Immigration%20Manual/Text.htm>. “Crime of violence” is defined in 18 U.S.C. 16. A domestic relationship exists for immigration law purposes where the offense is committed against a current or former spouse, co-parent of a child, a person with whom the defendant is or has cohabited as a spouse, any other individual similarly situated to a spouse, or other individual protected under federal, state, tribal, or local domestic or family violence laws. 8 U.S.C. 1227(a)(2)(E)(i).

U.S. Immigration and Customs Enforcement has alleged that a conviction of assault on a female is a crime of domestic violence where it is committed against a person in a domestic relationship with the defendant. However, some noncitizens have successfully argued that assault on a female does not satisfy the crime of violence definition and is therefore not a crime of domestic violence.

A noncitizen is deportable if a civil or criminal court finds that he has violated the portion of a protective order that protects against credible threats of violence, repeated harassment, or bodily injury. *See* 8 U.S.C. 1227(a)(2)(E)(ii). Such a violation of a North Carolina DVPO constitutes a deportable offense, even though the requisite relationship is defined more broadly under Chapter 50B of the North Carolina statutes than under federal law.

State law does not determine what constitutes a conviction for immigration purposes. *See Immigration Consequences* at 45-51. A prayer for judgment continued (PJC) and a deferred prosecution agreement (DPA) may count as a conviction. A DPA will most likely be treated as a conviction for immigration purposes where a defendant makes an admission of having committed the elements of the offense and the court imposes conditions as part of the agreement. Thus, a statutory DPA pursuant to G.S. 15A-1341(a1) is likely to be treated as a conviction, especially where the box is checked for condition 5 on the AOC form, suggesting that the defendant made an admission. *See* AOC-CR-610 (Rev. 4/08), online at <http://www.nccourts.org/Forms/Documents/1025.pdf>. Where possible, avoid checking the box for condition 5 and strike any language on the DPA that may be interpreted as an admission.

Guns. Under G.S. 50B-3.1, upon issuance of a DVPO, the court shall order the defendant to surrender firearms, permits, and ammunition under certain circumstances. Additionally, the court may prohibit a person from purchasing a firearm while a DVPO is in effect. G.S. 50B-3(a)(11). It is a Class H felony to violate a DVPO while in possession of a deadly weapon by failing to stay away from a person or place as ordered. G.S. 50B-4.1(g). Additionally, it is a Class H felony to own or possess or attempt to own or possess a firearm when forbidden by DVPO. G.S. 50B-3.1(j); G.S. 14-269.8. Firearms may be disposed of where a defendant does not file a timely motion requesting that they be returned after the DVPO has expired, criminal charges have been resolved, and the defendant is otherwise eligible to possess the firearms. G.S. 50B-3.1(h). North Carolina

must comply with criminal case firearm notification requirements of the federal Violence Against Women Act of 2005. *See* G.S. 15A-1336.

Under the federal Gun Control Act (also referred to as the “Brady Act”), it is unlawful for anyone who has been convicted of a misdemeanor crime of domestic violence to possess any firearm or ammunition. 18 U.S.C. 922(g)(9). A violation may result in a sentence of up to ten years imprisonment. 18 U.S.C. 924. A misdemeanor crime of domestic violence is one that is committed by a person who:

- is a current or former spouse of the victim;
- is a parent, or guardian of the victim;
- shares a child in common with the victim;
- is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or
- is similarly situated to a spouse, parent, or guardian of the victim; and
- is a misdemeanor under Federal, State, or Tribal law; and
- has as an element:
 - use or attempted use of physical force; or
 - threatened use of a deadly weapon.

18 U.S.C. 921 (a)(33).

Further, federal law prohibits anyone subject to a domestic violence protection order from possessing any firearm or ammunition. The Act defines a domestic violence protection order as one that:

- was issued after a hearing the respondent had actual notice of and had the right to participate in;
- restrains a person from harassing, stalking, or threatening an intimate partner or child of an intimate partner, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
- includes a finding that the respondent represents a credible threat to the physical safety of an intimate partner or child; or
- explicitly prohibits the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury to an intimate partner or child that would reasonably be expected to cause bodily injury.

18 U.S.C 992(g)(8). An intimate partner includes the respondent’s spouse, former spouse, the other parent of respondent’s child, or a person who cohabitates or has cohabited with the respondent. 18 U.S.C. 921(32).

Crime Victims’ Rights Act. The court must order restitution to the victim or the victim’s estate for offenses subject to the Crime Victims’ Rights Act (CVRA). G.S. 15A-1340.34(b). The following misdemeanors are covered under the CVRA where the defendant and victim were in a personal relationship as defined in G.S. 50B-1(b): assault with a deadly weapon, assault inflicting serious injury, assault on a female, simple assault, assault by pointing a gun, domestic criminal trespass, and stalking. G.S. 15A-830(7)(g). *See* Appendix 2 (Domestic Violence Crimes to which 48 Hour Hold Applies)

(noting whether CVRA applies to selected domestic violence crimes). If the defendant is placed on probation or post-release supervision, restitution must be ordered as a condition. G.S. 15A-1340.34(b). Restitution must be ordered even where the defendant receives an active sentence. A restitution order in excess of \$250 is enforceable as a civil judgment. G.S. 15A-1340.38. In cases that are not subject to the CVRA, the court must consider whether restitution is appropriate but is not required to order it. G.S. 15A-1340.34(a), (c).

Other. There are many other collateral consequences beyond the scope of this paper that may follow from a conviction or admission to a domestic violence crime. There may be implications in the family law context with regard to distribution of marital property, spousal support, and child custody. There may also be consequences with regard to eligibility for public housing, government benefits, certain jobs, and licenses.

7. Ethical Considerations

The victim calls you before trial and wants to talk about the case. Can you talk to her?

- If she is unrepresented, you may interview her, and it is a good idea to do so because her testimony will typically form the core of the State's evidence. You should not share any confidential information with her without your client's consent. Rule of Professional Conduct (RPC) 1.6. If the victim does not seem to understand your role as advocate for the defendant, you have to correct her misunderstanding. RPC 4.3.
- If she is represented, e.g., in an ancillary civil matter such as a custody dispute, you should not talk to her without the consent of her lawyer or a court order. RPC 4.2.

You call the victim and she says she doesn't want to talk to you. Can you make her submit to an interview?

No, you can't interview her without her consent. *State v. Phillips*, 328 N.C. 1 (1991). However, the State may not instruct her not to speak with you. *State v. Pinch*, 306 N.C. 1 (1982).

How else could you get her statement?

Under G.S. 8-53.12, the defendant may request that the court compel an agent of a domestic violence program to reveal information the agent learned while providing services to the victim under certain circumstances. Additionally, while there is no right to statutory discovery in district court, you may file a motion requiring the State to turn over exculpatory evidence as a matter of constitutional law. Exculpatory evidence is evidence that is material, relevant to guilt or punishment, and favorable to the accused. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Impeachment material must be disclosed under *Brady* and *Kyles*. *Youngblood v. West Virginia*, 547 U.S. 867 (2006). The prosecutor has an affirmative duty to seek out and turn over any exculpatory material in the possession of anyone acting on behalf of the State, such as law enforcement

officers. *Id.* If you are unable to get the statement by filing a *Brady* motion, you may have to hear the victim's testimony at a bench trial and exercise your client's right to trial *de novo* in superior court.

The victim says she doesn't want to pursue the charges and asks if you can get them dropped. What can you tell her?

Tell her that you cannot give her legal advice and that she should call the District Attorney's Office.

The victim asks you if she has to appear for court, and wants to know what will happen to the case if she doesn't show up.

Tell her that she should contact the District Attorney's Office for any questions about court dates and whether her appearance is required. Criminal charges could lie for obstruction of justice, intimidation of a witness, or contempt if you discourage the witness from appearing for a court date, or suggest that your client do so.

APPENDICES

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COUNTY OF MECKLENBURG)
STATE OF NORTH CAROLINA)

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
OXCXXXXXX

STATE OF NORTH CAROLINA)
)
vs.)
)

MOTION TO DISMISS

XXXXXXXXXXXXXXXXXXXXXXX)

NOW COMES the defendant, by his undersigned counsel, respectfully moves the court to dismiss this action pursuant to G.S. 15A-954(a)(4); and, as grounds therefore, shows the following:

1. G.S. 15A-533(b) requires all persons charged with a non-capital crime to have conditions of pretrial release set pursuant to G.S. 15A-534.
2. G.S. 15A-534.1 requires that a judge set the conditions for pretrial release for any person charged with specified acts defined as acts of domestic violence.
3. Defendant was arrested for the offense of XXXXXXXXXXXXXXXX G.S. XXXXXXXXXXXX.
4. This matter was determined to involve an act of domestic violence and the magistrate held the matter over for a judge to set the conditions of pretrial release pursuant to G.S. 15A-534.1.
5. Defendant was committed to Mecklenburg County Jail at XXXXXXXX on XXXXXXXX.
6. The magistrate ordered the defendant's release "not authorized" and he was to be produced in courtroom 4130 at 9:00 AM ('C' Session) on XXXXXXXXXXXXXXXX.
7. Our Supreme Court held in *State v. Thompson*, 349 N.C. 483 (1998), that failure to adhere with the statutory scheme for consideration of pretrial detention unreasonably violated defendant's Procedural Due Process rights without serving any legitimate government interest.
8. Our Supreme Court also held in *Thompson* that subsection (b) of G.S. 15A-534.1 "reflects the General Assembly's regulatory purpose by authorizing magistrates to detain an arrestee for up to forty-eight hours while attempting to secure **the first available judge** to hold a pretrial-release hearing." (Emphasis added.) *Id.* at 492.
9. Our Supreme Court also held in *Thompson* that dismissal is the appropriate remedy when the defendant is unreasonably deprived of his right to a timely post-deprivation hearing to set the conditions of his pretrial release.
10. When the 4130 (or 2202) 'C' Session was created in 2004, the Sheriff's Office established a "cutoff time" of 4 A.M. to make that morning's 'C' Docket for a first appearance, meaning that so long as a defendant was received by Mecklenburg County Jail prior to 4 A.M., they would be in court that same morning to have a pretrial-release hearing.

11. On the afternoon, 'B' Session, of XXXXXXXXXXXXXXXX, 6 Criminal District Courtrooms were in operation and conducting various hearings, trials, and other administrative court functions.

12. Defendant was unreasonably deprived of his right to have a reasonable appearance bond set in a reasonable time by the failure to schedule him in court until the next morning, "while available judges spent several hours conducting other business..." on the previous afternoon. Quoting *Thompson* at 498.

13. Defendant has been deprived of his Procedural Due Process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the Law of the Land provisions of Article 1, Section 19 of the North Carolina Constitution.

WHEREFORE, defendant respectfully prays that this Court enter an Order dismissing XXXXXXXXXXXX.

Respectfully submitted, this the XX day of XXXXXXXXXXXX, 2007.

Timothy S. Emry, Esq.
Attorney for the Defendant
500 East Morehead, Ste. 101
Charlotte, North Carolina 28202
(704) 342-4357

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Dismiss has been duly served upon an Assistant District Attorney, 700 East Trade Street, Second Floor, Charlotte, NC 282802 by delivery in person.

This the _____ day of _____, 2007.

Timothy S. Emry, Esq.

Attorney for the Defendant

DOMESTIC VIOLENCE CRIMES²

Crime Charged	Relationship Between Defendant and Victim	Only Judge May Set Bond for First 48 Hours After Arrest	Crime Victims' Rights Act (VRA) Applies
Simple assault [G.S. 14-33(a)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes [Magistrate must indicate VRA Case on the criminal process]</p>
Assault on a female [G.S. 14-33(c)(2)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes [Magistrate must indicate VRA Case on the criminal process]</p>
Assault with a deadly weapon [G.S. 14-33(c)(1)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes [Magistrate must indicate VRA Case on the criminal process]</p>

² This chart, prepared by School of Government faculty member Jeff Welty, lists the most common offenses to which the special 48-hour pretrial release rule applies, but it does not list every felony to which it applies. The rule covers any felony in Articles 7A (Rape and Sexual Offenses), 8 (Assaults), 10 (Kidnapping and Abduction), or 15 (Arson and Other Burnings) of the General Statutes if the relationship between the defendant and the victim is current or former spouse or persons who are living together or have lived together as if married.

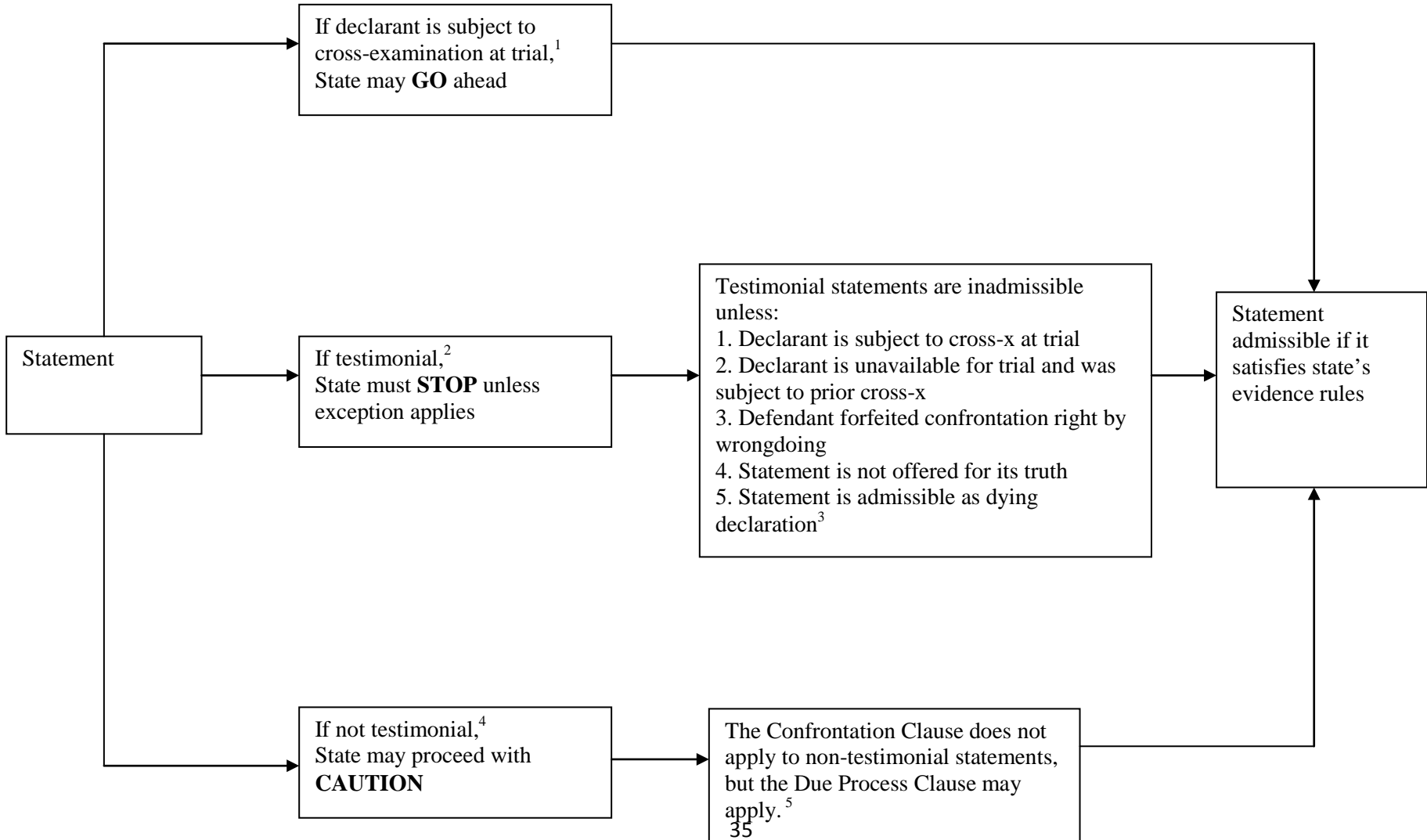
Crime Charged	Relationship Between Defendant and Victim	Only Judge May Set Bond for First 48 Hours After Arrest	Crime Victims' Rights Act (VRA) Applies
Assault inflicting serious injury [G.S.14-33(c)(1)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes</p> <p style="text-align: center;">[Magistrate must indicate VRA Case on the criminal process]</p>
Assault by pointing a gun [G.S. 14-34]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes</p> <p style="text-align: center;">[Magistrate must indicate VRA Case on the criminal process]</p>
Assault with a deadly weapon with intent to kill [G.S. 14-32(c)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes; because VRA felony no matter what relationship.</p>
Assault with a deadly weapon inflicting serious injury [G.S. 14-32(b)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes; because VRA felony no matter what relationship.</p>

Crime Charged	Relationship Between Defendant and Victim	Only Judge May Set Bond for First 48 Hours After Arrest	Crime Victims' Rights Act (VRA) Applies
Assault with a deadly weapon with intent to kill inflicting serious injury [GS 14-32(a)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members.. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	Yes; because VRA felony no matter what relationship.
Assault inflicting serious bodily injury [G.S. 14-32.4(a)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	Yes; because VRA felony no matter what relationship.
Assault by strangulation [G.S. 14-32.4(b)]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	No
Communicating a threat [G.S. 14-277.1]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	No

Crime Charged	Relationship Between Defendant and Victim	Only Judge May Set Bond for First 48 Hours After Arrest	Crime Victims' Rights Act (VRA) Applies
Kidnapping [GS. 14-39]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes because VRA felony no matter what relationship.</p>
Harassing telephone calls [G.S. 14-196]	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">No</p>	<p style="text-align: center;">No</p>
Arson	<ul style="list-style-type: none"> • Current or former spouses. • Persons who live or have lived together as if married. <hr/> <ul style="list-style-type: none"> • Child in common. • Persons of the opposite sex in a dating relationship. • Parent and child or grandparent and grandchild. • Current or former household members. 	<p style="text-align: center;">Yes</p> <hr/> <p style="text-align: center;">No</p>	<p style="text-align: center;">Yes because VRA felony no matter what relationship.</p>

Crawford v. Washington, 541 U.S. 36 (2004): Flow Chart

Prepared by John Rubin, Institute of Government, with thanks to Professor Robert Mosteller, Duke Law School
Revised April 21, 2008



Notes to *Crawford* Flow Chart

1. If the declarant successfully invokes a privilege against testifying or the judge unduly interferes with cross-examination, then the declarant would not be subject to cross-examination and the Confrontation Clause would not be satisfied.
2. The *Crawford* court gave the following as possible definitions of testimonial statements: *ex parte* in-court testimony or its functional equivalent, extrajudicial materials contained in formalized testimonial materials, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. The Court gave the following examples of statements that are testimonial: prior testimony at a preliminary hearing, before a grand jury, or at a former trial; affidavits and depositions; police interrogations (used in a colloquial rather than technical, legal sense); and plea allocutions. *See also* *Davis v. Washington*, 547 U.S. 813 (2006) (considers circumstances in which questioning by police and agents of police results in testimonial statements).
3. A testimonial statement does not satisfy the Confrontation Clause merely because it falls within a firmly-rooted exception to the hearsay rule. If testimonial, a statement is admissible only if it satisfies one of the exceptions identified in *Crawford*. The *Crawford* court stated (without deciding the issue) that testimonial dying declarations might be admissible but found that such statements are *sui generis* and did not adopt any other hearsay exceptions as grounds for admitting testimonial statements.
4. The *Crawford* court gave the following as examples of non-testimonial statements: an off-hand, overhead remark; a casual remark to an acquaintance; business records; and statements in furtherance of a conspiracy.
5. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the U.S. Supreme Court held that the Confrontation Clause bars admission of an unavailable witness's statement if the statement does not bear "adequate indicia of reliability." To meet that test, the evidence either had to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The *Crawford* court overruled the *Roberts* test for testimonial statements but did not resolve whether that test continued to apply to non-testimonial statements. The U.S. Supreme Court has since held that non-testimonial statements are not subject to the Confrontation Clause. *See Davis*, 547 U.S. at 821. The admissibility of such evidence may still be governed by the Due Process Clause (as well as a state's own hearsay and other evidence rules).

For an in-depth analysis of developments since the issuance of *Crawford*, *see* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* (Apr. 2005); *Emerging Issues in Confrontation Litigation: A Supplement to Crawford v. Washington: Confrontation One Year Later* (Mar. 2007); and *Understanding the New Confrontation Clause Analysis: Crawford*,

Davis, and Melendez-Diaz (Apr. 2010); available at <http://shopping.netsuite.com/s.nl?c=433425&sc=7&category=6977&search=confront> .

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Basics of Right against Self-Incrimination

June 2008

- I. [Defendant’s right not to take stand]** Under the Fifth Amendment, a criminal defendant has the right not take the stand. If a defendant decides not to testify:
 - A. The State may not call the defendant to the stand;
 - B. The court may not call the defendant to the stand; *and*
 - C. A co-defendant may not call the defendant to the stand at their joint trial. *See Jones v. State*, 586 A.2d 55 (Md. App. 1991).

- II. [Witness’s right not to answer]** Under the Fifth Amendment, a witness has the right to refuse to answer questions if:
 - A. The answer may tend to “incriminate” the witness (see III., below);
 - B. The witness is not “immune” from prosecution (see IV., below); *and*
 - C. The witness has not “waived” the privilege (see V., below).

- III. [Witness’s rights: meaning of “incrimination”]** A witness has the right to refuse to answer questions that may tend to incriminate him or her.
 - A. An answer is incriminating if it would constitute a direct admission of guilt, furnish a link in a chain of evidence tending to prove guilt, or even provide a lead to evidence that might ultimately establish guilt. *See* 1 BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126, at 403–04 (6th ed. 2004); *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (it must be “perfectly clear” that a witness’s answers “cannot possibly” incriminate him or her).
 - B. If a question on its face calls for an answer that may incriminate a witness, the judge must uphold the witness’s refusal to answer. 1 BRANDIS & BROUN, *supra*, at 417.
 - C. If it is unclear whether a question calls for an incriminating answer, the judge may conduct a limited inquiry into the basis for the refusal but must stop once it is apparent that answering the question may tend to incriminate the witness. *Id.*

IV. [Witness’s rights: meaning of “immunity”] A witness may not refuse to answer an incriminating question if the witness has immunity from prosecution.

- A. Immunity includes a formal grant of immunity by the prosecutor as provided in G.S. 15A-1051.
 - 1. The District Attorney must comply with the steps required in G.S. 15A-1052.
 - 2. “Use” immunity as afforded under the statute is sufficient. “Transactional” immunity is not required. *See also Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (immunity granted in state court protects witness from use of testimony in federal court).
- B. Immunity may include acquittal, pardon, running of statute of limitations, and other bars to prosecution.
 - 1. If the question calls for information that may be incriminating regarding conduct for which prosecution is *not* barred (for example, an acquittal covers some but not other conduct by the witness), the witness may still refuse to answer.
 - 2. The judge may conduct a limited inquiry if necessary to determine whether the answer may tend to incriminate the witness.

V. [Witness’s rights: meaning of “waiver”] A witness may not refuse to answer an incriminating question if the witness has waived the privilege against incrimination.

- A. A witness does not have the right to refuse to take the stand on Fifth Amendment grounds; nor does a witness waive the privilege by taking the stand.
- B. A witness waives the Fifth Amendment privilege if he or she does not timely assert the privilege during questioning. *See Minnesota v. Murphy*, 465 U.S. 420 (1984).
 - 1. The witness must wait until asked a question that calls for an answer that may tend to incriminate him or her and then assert the Fifth.
 - 2. If a witness testifies to part of the facts constituting a transaction, the witness cannot then refuse to answer further questions relating to that transaction.
 - 3. Because of the risk of waiver, witnesses tend to assert the Fifth Amendment early in their testimony.

VI. [Advisement] The court is not required to, although may, advise a defendant or witness of self-incrimination rights. *See State v. Poindexter*, 69 N.C. App. 691 (1984) (no requirement that court advise *pro se* defendant of Fifth Amendment right); *State v. Lashley*, 21 N.C. App. 83 (1974) (to same effect); 1 MCCORMICK ON EVIDENCE § 131, at 556–57 (6th ed. 2006) (generally witness has no right to warning, although judge is not barred from alerting witness to self-incrimination right).