1.11 Dismissal as Remedy for Violations

A. Impaired Driving Cases

Generally. In impaired driving cases, violation of pretrial release procedures may interfere with the defendant's ability to obtain evidence for his or her defense and therefore warrant dismissal. If a person is improperly denied release or access to counsel or witnesses while in custody within the critical first hours after arrest, he or she may lose the opportunity to gather evidence (such as a blood test or opinions as to sobriety) showing that he or she was not illegally impaired. The way to raise this issue is by a motion to dismiss, known as a *Knoll* motion based on the principal North Carolina Supreme Court decision on the issue, *State v. Knoll*, 322 N.C. 535 (1988). A sample *Knoll* motion is available in the non-capital trial motions bank on the IDS website, www.ncids.org. In district court, the defendant should ordinarily make the motion before trial. *See* G.S. 20-38.6 (motions to dismiss or suppress must be made before trial in implied-consent cases in district court if supporting facts are known to the defendant).

The essential question to be decided on a *Knoll* motion is whether the defendant was denied the opportunity to obtain evidence for his or her defense. The *Knoll* case itself actually involved three separate cases with three defendants arrested for impaired driving. In all three cases, the state supreme court dismissed the charges because the defendants were denied the opportunity to obtain evidence for their defense by the failure to allow them to have access to witnesses while in custody, the failure to allow their release, or a combination of the two. In reaching this result, the court in *Knoll* drew on its previous decision in *State v. Hill*, 277 N.C. 547 (1971), which for similar reasons required dismissal of an impaired driving case in which the defendant had been denied release and denied access to counsel and witnesses. *See also United States v. Canane*, 622 F. Supp. 279 (W.D.N.C. 1985) (failure to allow defendant's father to see him after arrest warranted dismissal of charges), *aff'd*, 795 F.2d 82 (4th Cir. 1986).

A denial of the opportunity to obtain evidence may violate both the defendant's statutory and constitutional rights. *See State v. Hill*, 277 N.C. 547 (1971) (Sixth Amendment of U.S. Constitution and article I, section 23 of North Carolina Constitution give the defendant the right to have counsel and obtain witnesses on his or her behalf); *State v. Knoll*, 322 N.C. 535 (1988) (finding statutory violation). Defense attorneys who handle impaired driving cases should become familiar with the specialized post-arrest and pretrial release procedures applicable in such cases, described briefly below, which if violated may amount to a constitutional as well as statutory violation.

In 2006, the General Assembly made changes in magistrate and jail appearance procedures to reduce the potential for *Knoll* errors. *See* Shea Riggsbee Denning, *What's* Knoll *Got to Do with It? Procedures in Implied Consent Cases to Prevent Dismissals under* Knoll, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/07 (UNC School of Government, Dec. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0907.pdf. *Knoll* violations may still occur, however, and may warrant dismissal. Defense counsel should

evaluate the applicable case law as well as the receptivity of local judges to *Knoll* motions, which varies significantly around the state. Key points to keep in mind in making such motions are discussed below.

Statutory scheme. As in other criminal cases, a defendant arrested for an impaired driving offense is entitled to an initial appearance before a magistrate and is entitled to have pretrial release conditions set. *See State v. Labinski*, 188 N.C. App. 120 (2008) (recognizing these rights). But, if the magistrate finds by clear and convincing evidence that the defendant's impairment presents a danger of physical injury or damage to property, the magistrate may delay release until either: (1) the defendant is no longer impaired to the extent that he or she presents such a danger; *or* (2) a sober, responsible adult assumes responsibility for the defendant. G.S. 15A-534.2. The imposition of these conditions is known as a "DWI hold." In imposing a DWI hold, the magistrate must follow the procedures set forth in G.S. 15A-534.2 and G.S. 20-38.4 (enacted in 2006). In conjunction with a DWI hold, a magistrate also may set other conditions of pretrial release, such as a secured bond (although as discussed below an excessive bond may result in an impermissible hold and deny the defendant the opportunity to obtain evidence for his or her defense). Once a defendant satisfies the conditions of the DWI hold and any bond or other condition of pretrial release, the defendant must be released. The DWI hold must be lifted once the defendant's blood alcohol level is .05 or below (unless there is evidence that the defendant is impaired from some other substance) and in any event after 24 hours. The defendant is then only required to satisfy any bond or other condition of pretrial release. G.S. 15A-534.2.

If a defendant is unable to obtain immediate release because of an inability to meet the conditions of the DWI hold or any bond or other pretrial release condition, he or she is still entitled to meet with counsel and witnesses while in custody. The arresting officer and magistrate must advise the defendant of these rights. *See* G.S. 15A-534.2(a) (statute "may not be interpreted to impede a defendant's right to communicate with counsel and friends"); G.S. 20-38.4 (magistrate must inform defendant in writing of procedure to have others appear at jail to observe defendant's condition or administer additional chemical analysis); G.S. 20-38.5 (requiring each district to put in place various procedures to satisfy defendant's rights); G.S. 20-139.1(d) (in-custody defendant has right to arrange for additional testing); *see also generally* G.S. 15A-501(5) (law enforcement officer must without unnecessary delay advise arrested person of right to communicate with counsel and friends and must allow reasonable time and opportunity to do so).

Potential errors. The statutory pretrial release scheme in impaired driving cases has generally been upheld by our courts. A magistrate may impose a DWI hold, as described above, and may impose other conditions of pretrial release, including a secured bond in appropriate circumstances. *See State v. Bumgarner*, 97 N.C. App. 567 (1990) (upholding detention provisions with proper findings); *see also State v. Labinski*, 188 N.C. App. 120 (2008) (court finds that secured bond was not supported by any evidence and was improper, implying that secured bond would be permissible in appropriate cases); *State v. Eliason*, 100 N.C. App. 313 (1990) (failure to consider all statutory factors in imposing secured bond in impaired driving case did not violate defendant's rights).

Various violations of pretrial release requirements may still occur, however, that prevent the defendant from obtaining evidence for his or her defense. The following are some errors you may encounter:

- A magistrate, law enforcement officer, or jailer may fail to or incorrectly advise the defendant of the right to communicate with counsel and witnesses or may improperly deny access. *See State v. Lewis*, 147 N.C. App. 274, 277 (2001) ("[t]he right to communicate with counsel and friends necessarily includes the right of access to them" (quoting *State v. Hill*, 277 N.C. 547, 552 (1971))). In *Lewis*, in which no violation was found, the evidence showed that the defendant was fully advised of his rights and did not exercise them, while in *Hill*, in which a violation was found, the evidence showed that the jailer refused to release the defendant after bond was posted and no one other than law enforcement officers had access to the defendant for the eight hours that he was in custody.
- A magistrate may not have grounds for imposing a DWI hold or the record may not reflect the grounds for a hold. *See State v. Labinski*, 188 N.C. App. 120 (2008) (magistrate automatically imposed DWI hold on defendant who had .08 reading without making required findings; however, defendant failed to show that hold denied her opportunity to obtain evidence in circumstances of case).
- The magistrate may improperly refuse to allow the defendant to be released to a particular person. *See State v. Daniel*, 208 N.C. App. 364 (2010) (majority holds that competent evidence supported finding that person attempting to secure release for defendant was not a sober, responsible person; dissent finds evidence insufficient to show that person was not sober, responsible adult); *State v. Haas*, 131 N.C. App. 113 (1998) (defendant's rights were not violated by magistrate's refusal to release defendant to passenger in car driven by defendant where evidence showed that passenger was intoxicated).
- To avoid the administrative difficulties of the specialized DWI hold procedures, some magistrates may impose a high secured bond only, with a provision that the bond automatically converts to a lower or unsecured bond after the passage of so many hours. Such "convertible" bonds, which are evidently intended to keep the defendant in custody for a specified period of time, may prevent the defendant from obtaining evidence and therefore violate *Knoll*. Because secured bonds may improperly deny access to counsel and witnesses, some districts have a policy of not imposing secured bonds in impaired driving cases.

Prejudice. The defendant must show that a violation of impaired driving procedures resulted in "prejudice" in the sense required by the cases—that is, the defendant must show that the violation actually denied the defendant the opportunity to obtain evidence for his or her defense. For example, in *Knoll*, one defendant made several requests to call his father but was not allowed to do so for an hour. Once the defendant called his father, the father called the magistrate and said he wanted to pick up his son. The magistrate told the father that he could not pick him up for another six hours. The court found prejudice.

A defendant may have difficulty demonstrating prejudice if the defendant has access to

witnesses while detained. In *State v. Labinski*, 188 N.C. App. 120 (2008), four of the defendant's friends went to the magistrate's office after her arrest, but the court found that neither the defendant nor her friends specifically asked to see or talk with each other and therefore the improper release conditions imposed by the magistrate were not the cause of the lack of access and the lost opportunity to obtain evidence. In *State v. Daniel*, 208 N.C. App. 364 (2010), a majority of the court found that competent evidence supported the finding that the defendant's friend, who sought the defendant's release, was not a sober, responsible adult and that the refusal to release the defendant to the friend was therefore not a violation of the defendant's rights; alternatively, the court found that the defendant was not prejudiced by the refusal to release her because she declined to have a witness present for the intoxilyzer test and her friend was able to meet with and observe her before the friend left the magistrate's office. (The dissent found that the magistrate should have released the defendant to the friend and that the defendant's 18-hour confinement, in which she was permitted to meet with her friend for only eight minutes, was comparable to the prejudice in *Knoll* and warranted dismissal.) *See also* Shea Denning, *State v. Daniel Tees up an Analysis of Prejudice*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 9, 2010), http://nccriminallaw.sog.unc.edu/?p=1811.

In light of the prejudice requirement as interpreted in *Knoll* and subsequent cases, defense counsel should be prepared to show how the violations denied the defendant the opportunity to obtain evidence for his or her defense. The showing of prejudice will vary with the violation and its impact. Thus, in a case in which the defendant was not advised of his or her rights, counsel may not need to show more than the failure to advise because the defendant would not have known of the steps that he or she could take. In a case in which the defendant was advised of his or her rights, counsel may need to show that the defendant sought to exercise them (for example, asked to see counsel or witnesses) and the request was not honored. In a case in which access to witnesses was allowed but release improperly denied, counsel should be prepared to show how denial of release precluded the defendant from obtaining evidence for his or her defense.

Per se impairment cases. *Knoll* stated that in cases in which the State is proceeding on a per se impairment theory—that is, on the basis of an intoxilyzer reading of .08 or more (at the time, .10 or more)—a violation of pretrial release procedures is not automatically prejudicial; the defendant must show prejudice. As applied, however, this standard does not appear to require a greater showing by the defendant in per se impairment cases than in cases in which the State is proceeding on an appreciable impairment theory. The court of appeals in *Knoll* found that per se impairment cases are different because in such cases the chemical analysis alone is sufficient to convict. 84 N.C. App. 228 (1987). The supreme court agreed that the defendants had to show prejudice in a per se impairment case and that it would not presume prejudice, as it had in its pre-*Knoll* decision in *State v. Hill*, 277 N.C. 547 (1971). In requiring the defendant to show prejudice, however, the supreme court did not appear to change its definition of prejudice. The supreme court held that the defendants in *Knoll*, all charged on a per se impairment theory, met the prejudice standard by showing that, if not for the violations, they would have obtained access to witnesses and would have been able to obtain evidence for their defense, including lay opinions about their sobriety and additional testing. The supreme court

found that the loss of such evidence was prejudicial. This analysis is consistent with the supreme court's description of prejudice in *Hill*. 277 N.C. at 554 ("The evidence in this case will support no conclusion other than that defendant was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony. Under these circumstances, to say that the denial was not prejudicial is to assume that which is incapable of proof.").

Practice note: The prejudice requirement from the *Knoll* line of cases does *not* mean that the defendant must show that the lost evidence would have been sufficient to rebut the State's evidence of impairment, whether the State is proceeding on a per se or appreciable impairment theory. Prejudice in the *Knoll* context, as discussed above, means that the violation denied the defendant the opportunity to obtain evidence for his or her defense.

Remedy. The relief for a *Knoll* violation is generally dismissal because the violation deprives the defendant of the opportunity to obtain a range of evidence. The violation generally does not result in improper evidence for the State; therefore, suppression ordinarily does not remedy the prejudice to the defendant.

A violation related to a particular procedure, however, may warrant suppression of that procedure rather than dismissal. Thus, G.S. 20-16.2 requires an officer to give the defendant the opportunity to confer with counsel and have a witness present for a chemical analysis. Suppression of the chemical analysis may be sufficient to remedy a violation of that right. *See State v. Buckheit*, ___ N.C. App. ___, 735 S.E.2d 345 (2012) (denial of right to have witness present for intoxilyzer test warranted suppression); *State v. Hatley*, 190 N.C. App. 639 (2008) (same); *State v. Myers*, 118 N.C. App. 452 (1995) (to same effect for breathalyzer test); *see also State v. Rasmussen*, 158 N.C. App. 544 (2003) (suppression of field sobriety tests and dismissal of appreciable impairment theory by trial court cured any prejudice as a result of refusal to allow witness to observe field sobriety tests conducted after arrest). Suppression of the particular procedure may be insufficient, however, if the violation denied the defendant access to witnesses to rebut other evidence by the State, such as observations by the authorities. *See State v. Ferguson*, 90 N.C. App. 513, 519 (1988) (in case in which defendant refused test because wife was not present and State's case rested solely on authorities' personal observations, court stated that dismissal would be required if evidence on remand showed that wife's arrival was timely and she made reasonable efforts to gain access to defendant).

Effect of 2006 legislation. In 2006, the General Assembly revised several statutes governing procedures in impaired driving cases, adding among other things Article 2D, Implied Consent Offense Procedures, in G.S. Chapter 20. These changes clarified the obligations of magistrates, officers, and jailers in impaired driving cases, but they did not fundamentally alter the principles established in *Knoll*. For example, under G.S. 20-38.4 and G.S. 20-38.5, each district must implement procedures allowing counsel and witnesses to meet with the defendant after arrest and giving the defendant written notice of these procedures. The magistrate also must follow the requirements in G.S. 15A-534.2

on DWI holds. If the statutory requirements are followed, a *Knoll* violation is less likely to occur, but if violations occur and the defendant is prejudiced, *Knoll* still would warrant dismissal.

B. Domestic Violence Cases

Generally. 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." During the first 48 hours after arrest for certain domestic violence offenses, however, only a judge may set conditions of pretrial release. G.S. 15A-534.1(a), (b). Even though sometimes referred to as the "48-hour law," the statute does not give the State carte blanche to hold the defendant for 48 hours; rather, 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 although a judge was available to set them. *Id.* The remedy for such violations is dismissal. Further, if a judge is not available after 48 hours have passed, then a magistrate must set pretrial release conditions. G.S. 15A-534.1(b). The defendant 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. There also may be *Thompson* violations when the defendant is erroneously held under the 48-hour provisions for an offense not covered by the law. A sample *Thompson* motion is available in the non-capital trial motions bank on the IDS website, www.ncids.org.

Offenses subject to 48-hour law. The term "domestic violence" is used differently in different parts of North Carolina law. For the purpose of the 48-hour law, a domestic violence offense is defined as a crime specified in G.S. 15A-534.1(a)—assault, stalking, communicating threats, domestic criminal trespass, violation of a 50B order, or designated felonies—if the crime was committed upon "a spouse or former spouse or a person with whom the defendant lives or has lived as if married." This definition is narrower than the definition of a "personal relationship" for the purpose of issuance of a domestic violence protective order (DVPO) under G.S. Chapter 50B. For example, the defendant is not subject to the 48-hour law where the relationship with the victim is that of parent and child or grandparent and grandchild, although that relationship would be sufficient for issuance of a DVPO. The 48-hour law covers a violation of a DVPO that has already been issued, however, even though the "personal relationship" authorizing issuance of the DVPO is one not covered by the 48-hour law. *See* G.S. 15A-534.1(a) (48-hour provisions apply to a "violation of an order entered pursuant to Chapter 50B"). The 48-hour law also covers domestic criminal trespass, which by definition requires a spousal or spouse-like relationship.

The relationship "lives or has lived as if married" creates 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 the 48-hour law. Some have concluded that the provision would not apply to a defendant in a same-sex relationship because same-sex couples are not eligible to marry under the laws of North Carolina. *See*

Joan G. Brannon, *Domestic Violence Special Pretrial Release and Other Issues*, ADMINISTRATION OF JUSTICE BULLETIN No. 2001/06, at 5–6 (UNC School of Government, Dec. 2001), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200106.pdf. Others have concluded, however, that G.S. 15A-534.1 should be interpreted as applicable to same-sex relationships. The argument is that G.S. 50B-1(b)(2) includes in the definition of a "personal relationship" for DVPO purposes "persons of *opposite sex* who live together or have lived together" (emphasis added), while no such limitation appears in G.S. 15A-534.1. *See* Jeff Welty, *Domestic Violence Cases and the 48 Hour Rule*, N. C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 7, 2011), http://nccriminallaw.sog.unc.edu/?p=2857. The latter position appears to have greater support in the statutory language and the policy reasons behind the 48-hour law.

Availability of judge. If the offense is covered by G.S. 15A-534.1, the question of whether a defendant's procedural due process rights have been violated will hinge primarily 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 *Thompson*, the defendant was arrested on a Saturday at 3:45 p.m. and was not brought before a judge until Monday at 3:45 p.m., even though judges were available to set pretrial release conditions as of 9:00 a.m. on Monday. The *Thompson* court held: "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 . . . ." 349 N.C. 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. 349 N.C. at 498 (noting that district and superior court sessions had convened in the county prior to the time that conditions were set); *State v. Clegg*, 142 N.C. App. 35, 39 (2001) (same). *But see State v. Jenkins*, 137 N.C. App. 367 (2000), below, discussing scheduling considerations. 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. The usual venue rules do not limit the authority of judges to determine pretrial release conditions in these circumstances. *See infra* "Venue for out-of-county offenses" in this subsection B.

In *State v. Malette*, 350 N.C. 52 (1999), decided one month after *Thompson*, the 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 fuller record been made regarding the sessions of court that had convened that day and the time that conditions were actually set.

In *State v. Jenkins*, 137 N.C. App. 367 (2000), the 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 a.m. on Friday and received a hearing before a judge at approximately 1:30 p.m. the same day. While the district court convened at 9:30 a.m. on Friday mornings, the afternoon session was typically devoted to bond hearings. The court of appeals held that "[a]lthough defendant was detained for approximately seven hours, we find his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system." *Id.* at 371. Thus, where the delay is short and attributable to the normal pattern of scheduling in the county, the defendant is less likely to prevail on a *Thompson* claim.

In *State v. Clegg*, 142 N.C. App. 35 (2001), the defendant was taken into custody around 7:00 p.m. on Saturday, February 28, for a charge of assault on a female. He received a hearing before a judge some time after 2:00 p.m. 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 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 superseding felony assault charge and, to obtain dismissal, he had to show that the detention on the misdemeanor prejudiced his defense of the felony charge. The court found no prejudice but suggested that it would have reached a different result had the State dismissed the misdemeanor charge and refiled different charges in an effort to avoid the consequences of the earlier unconstitutional detention. The court's consideration of prejudice in *Clegg* is based on the circumstances of that case, in which the defendant was not actually held on the felony charge because it had not yet been filed. In the typical case, *Thompson* does not require the defendant to demonstrate any prejudice on the charges for which he or she was improperly detained; the defendant simply must show improper detention.

Practice note: In pursuing a *Thompson* claim, counsel should make a record of what sessions of court convened before the time that conditions were set and the nature of the sessions (whether the session was criminal or civil, whether a judge was available to set bond regardless of the session designation, whether a prosecutor was present or available, etc.). The court may be willing to take judicial notice of facts of record, such as the court schedule; otherwise, counsel should be prepared to call a witness, such as the clerk of court.

Venue for out-of-county charges. If a person is arrested on an out-of-county charge subject to the 48-hour law—for example, a defendant is arrested in New Hanover County for an offense that allegedly occurred in Buncombe County—the appropriate judicial official in New Hanover county must set pretrial release conditions as in any other domestic violence case subject to the 48 hour law (unless Buncombe county has picked

up the defendant). Thus, during the first 48 hours after arrest, a judge in New Hanover County sets pretrial release conditions; after 48 hours, a magistrate in New Hanover County sets pretrial release conditions. That the defendant is being held on an out-of-county charge is not a basis for denying or delaying the setting of pretrial release conditions. *See supra* "Common Violations" in § 1.4G, Circumstances Not Justifying Delay or Denial of Pretrial Release.

Some district court judges have questioned whether they have the authority to set pretrial release conditions in these cases because ordinarily they have venue only over offenses alleged to occur within their county. G.S. 15A-131(a); *see also* G.S. 15A-131(b) (venue for pretrial proceedings in cases within original jurisdiction of superior court lies in the superior court district or set of districts embracing the county where venue for trial lies). Venue rules are not a bar because, in setting pretrial release conditions in a case subject to the 48-hour law, a judge is essentially stepping into the shoes of the magistrate and completing the initial appearance. A magistrate has venue to hold an initial appearance anywhere in North Carolina. *See* G.S. 7A-273(7) (any magistrate may hold an initial appearance); *see also* G.S. 15A-131(f) (for purposes of venue requirements, "pretrial proceedings are proceedings occurring after the initial appearance before the magistrate . . . ."). An essential part of an initial appearance is the setting of pretrial release conditions. G.S. 15A-511(e). Judges are authorized in general to hold initial appearances (G.S. 15A-511(f)) and are required to handle the pretrial release component in 48-hour cases during the first 48 hours after arrest. G.S. 15A-534.1. If a judge was available and failed to timely set pretrial release conditions on an out-of-county charge, counsel should move to dismiss under *Thompson*.

Review of criminal history report. Effective October 1, 2010, amended G.S. 15A-534.1(a) provides that the judge must direct a law enforcement officer or district attorney to provide a criminal history report on the defendant and that the judge must consider the report in setting conditions. The judge must return the report to the agency that provided the report; it is not placed in the case file. The revised statute prohibits unreasonable delay in the setting of conditions for the purpose of reviewing the criminal history report. These requirements also appear to apply to magistrates who set pretrial conditions under the 48-hour statute because G.S. 15A-534.1(b) states that if a judge has not acted within 48 hours of arrest, the magistrate must set conditions under the provisions of G.S. 15A-534.1.

Ex parte DVPOs. A violation of a DVPO entered under G.S. Chapter 50B, including a violation of an ex parte DVPO, appears to be subject to the 48-hour law because the law applies to "violation of an order entered pursuant to Chapter 50B." G.S. 15A-534.1(a) (so stating). The 48-hour law does not appear to exclude ex parte DVPOs.

In *State v. Byrd*, 363 N.C. 214 (2009), the supreme court ruled that a violation of an ex parte DVPO did not trigger certain criminal consequences because the wording of the particular DVPO statutes did not then cover ex parte orders. The General Assembly has since revised the pertinent statutes to make them applicable to ex parte DVPOs. *See* G.S. 50B-4(f) (stating that a "valid protective order" includes an ex

parte order); G.S. 50B-4.1(h) (to same effect); *see generally* John Rubin, *2009 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 6–7 (UNC School of Government, Dec. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0909.pdf.

The court in *Byrd* also expressed concerns about the constitutionality of imposing criminal consequences for a violation of an ex parte order, which is necessarily entered without notice to the defendant and an opportunity to be heard. As of this writing, the state supreme court had not revisited the potential constitutional issues.

Hold for risk of injury or intimidation. G.S. 15A-534.1(a)(1) allows a judge to delay setting pretrial release conditions for a reasonable period of time if the defendant's immediate release poses a danger of injury to the victim or another person or is likely to result in intimidation of the victim, and an appearance bond is inadequate to protect against the injury or intimidation. Thus, where the defendant has been brought before a judge at the earliest, reasonable opportunity within 48 hours after arrest in compliance with *Thompson*, the judge still may hold the defendant in custody without bond for a reasonable additional period. *See State v. Gilbert*, 139 N.C. App. 657, 669 (2000) (defendant was received at a detention facility around 9:00 p.m. and received a hearing before a judge at 9:00 a.m. the next morning, at which the judge imposed an unsecured bond but ordered that the defendant not be released until after 2:00 p.m. that afternoon; court held that additional five-hour delay was not an unconstitutional application of G.S. 15A-534.1). This type of hold predated the General Assembly's enactment of the 48-hour law and, as a practical matter, should now be used sparingly because the defendant will already have been held for some time before appearing before a judge or magistrate.

C. Other Holds

Outside of the impaired driving and domestic violence contexts, the courts have been reluctant to order dismissal for pretrial release violations. *See, e.g.*, *State v. Pruitt*, 42 N.C. App. 240 (1979) (disapproving of failure to hold first appearance for defendant charged with felony and incarcerated for almost a month, but finding no prejudice). Violation of the defendant's pretrial release in other contexts may still provide a basis for dismissal or other remedies if the defendant can show prejudice (per the *Knoll* line of cases discussed in subsection A., above), a violation of due process (per the *Thompson* line of cases, discussed in subsection B., above), or a violation of other statutory or constitutional requirements. *See also* G.S. 15A-954(a)(4) (dismissal warranted if defendant prejudiced by violation of constitutional rights). Defense counsel should continue to bring to the court's attention improper holds and delays resulting in a deprivation of the defendant's liberty. Even if you cannot obtain a remedy in the specific case, you may reduce the incidence of such violations in the future. You also may want to discuss problematic practices with your local bar committee and, in public defender or contract districts, the chief public defender or regional defender. They may be able to bring such practices to the attention of the senior resident superior court and chief district court judges, who are charged under G.S. 15A-535(a) with adopting local rules on pretrial release.