AVOIDING INCONSISTENT INTERPRETATIONS: *UNITED STATES V. KELLY*, THE FOURTH CIRCUIT, AND THE NEED FOR A CERTIFICATION PROCEDURE IN NORTH CAROLINA

INTRODUCTION

Certification is a procedure that allows a federal court, deciding a question of state law, to request that the highest state court review the issue and explain how it would rule.[1] The state court then has the opportunity to accept the certified question and provide an answer, or to decline to decide the issue.[2] Any party to the litigation typically can certify a question of state law, or the federal court can certify a question sua sponte.[3] The creation of a certification procedure is minimally burdensome on the highest state court because it is completely discretionary.[4] Certified questions only arise when a decision hinges on an ambiguous issue of state law.[5] Federal courts "do not employ certification lightly": certifying a question transfers authority to another court and thus is used only when necessary.[6]

There are a number of ways that a certification procedure benefits litigants and the court system. Certification gives the state judiciary the authority to decide the meaning and application of its own law.[7] This relieves the federal court of the burden of determining how the law of another jurisdiction would be applied, and it facilitates consistency within the body of state law.[8] By

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1. Sharika Robinson, Note, *Right, but for the Wrong Reasons: How a Certified Question to the Supreme Court of North Carolina Could Have Alleviated Conflicting Views and Brought Clarity to North Carolina State Law*, 34 N.C. CENT. L. REV. 230, 232–33 (2012).

2. Richard Alan Chase, Note, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN'S L. REV. 407, 409–10 (1992).

3. Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1690, 1692 (2003).

4. Eric Eisenberg, Note, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 77 (2008).

5. *Id.* at 79.

6. Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. REV. 2123, 2145–46 (1999).

7. William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 SETON HALL L. REV. 491, 498 (1998).

8. Eisenberg, *supra* note 4, at 75–76.

allowing the highest state court to weigh in on an issue, there is a reduced likelihood that an incorrect rule of decision will be applied.[9] Certification supports comity and cooperative federalism between the state and federal judiciary.[10] It discourages forum shopping—whereby a plaintiff may bring a case in federal court or state court based upon the expected result—by developing a uniform body of state law.[11] Certification procedures promote certainty regarding the law[12] because the highest court's statement of its own law will be "definitive" by definition.[13] By contrast, a federal court's attempt to determine an unsettled issue of state law can be reversed when the state court subsequently decides the issue.[14] Finally, a certification procedure is a means of facilitating the accurate application of the law, and it does not require either federal courts or state courts to take any unwanted action.[15]

The practical need for a certification procedure arose in response to the decision of *Erie Railroad Co. v. Tompkins*.[16] In 1938, the Supreme Court of the United States famously held that a federal court sitting in diversity is required to apply substantive state law.[17] Because federal courts were often required to apply state law under *Erie*, a problem arose when the law of a state was unsettled, contradictory, or unclear.[18] In 1945, Florida became the first state in the United States to initiate a process enabling a federal district court, court of appeals, or the Supreme Court of the United States to certify an uncertain question to the highest state court.[19] Other states slowly followed Florida's lead, and by 1976

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9. Bassler & Potenza, *supra* note 7.

10. *Id.*

11. Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN ST. L. REV. 377, 386 (2010).

12. Bassler & Potenza, *supra* note 7, at 517 (arguing that requiring federal courts to predict the determination of issues of state law "results in confused and fragmented legal norms that are befuddling to the citizens of the state obligated to obey them").

13. Nash, *supra* note 3, at 1698.

14. Robinson, *supra* note 1, at 231.

15. Eisenberg, *supra* note 4.

16. 304 U.S. 64 (1938).

17. *Id.* at 78–79.

18. Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 246 (2006).

19. FLA. STAT. ANN. § 25.031 (West 2012) ("The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or

fifteen states had created procedures for certification.[20] By 1998, forty-six states had instituted a mechanism allowing certification of state-law questions in federal court.[21]

Today, every state in the United States, with the exception of North Carolina, has enacted a certification procedure.[22] In addition, the District of Columbia,[23] Guam,[24] the Northern Mariana Islands,[25] and Puerto Rico[26] have all instituted certification procedures. The lack of a certification procedure in our state poses significant problems for federal courts applying North Carolina law.[27]

Consider the case of *United States v. Kelly*.[28] The defendant in *Kelly* had been convicted under a state statute, section 14-33(c)(2) of the North Carolina General Statutes, of a crime that *might* qualify as a misdemeanor crime of domestic violence under 18 U.S.C. §

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propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.").

20. Bassler & Potenza, *supra* note 7, at 495.

21. *Id.*

22. ARK. CONST. amend. LXXX, § 2(D)(3); DEL. CONST. art. IV, § 11(8); FLA. CONST. art. V, § 3(b)(6); N.Y. CONST. art. VI, § 3(b)(9); UTAH CONST. art. VIII, § 3; ARIZ. REV. STAT. ANN. § 12-1861 (2003); CONN. GEN. STAT. ANN. § 51-199b(d) (West 2005); FLA. STAT. ANN. § 25.031 (West 2014); GA. CODE ANN. § 15-2-9(a) (2012); HAW. REV. STAT. § 602-5(2) (1993); IND. CODE ANN. § 33-24-3-6 (LexisNexis 2012); IOWA CODE ANN. § 684A.1 (West 1998); KAN. STAT. ANN. § 60-3201 (2005); LA. REV. STAT. ANN. § 13:72.1(A) (2011); MD. CODE ANN., CTS. & JUD. PROC. § 12-603 (LexisNexis 2013); MINN. STAT. ANN. § 480.065(3) (West 2014); MO. ANN. STAT. § 477.004(1) (West 2004); NEB. REV. STAT. § 24-219 (2008); N.M. STAT. ANN. § 39-7-4 (LexisNexis 2004); OKLA. STAT. ANN. tit. 20, § 1602 (West 2002); OR. REV. STAT. § 28.200 (2013); S.D. CODIFIED LAWS § 15-24A-1 (2014); UTAH CODE ANN. § 78A-3-102(1) (LexisNexis 2012); WASH. REV. CODE ANN. § 2.60.020 (West 2004); W. VA. CODE ANN. § 51-1A-3 (LexisNexis 2008); WIS. STAT. ANN. § 821.01 (West 2007); WYO. STAT. ANN. § 1-13-106 (2013); ALA. R. APP. P. 18(a); ALASKA R. APP. P. 407(a), *available at* http://courts.alaska.gov/app.htm#407; ARIZ. SUP. CT. R. 27(a)(1); ARK. SUP. CT. R. 6-8(a)(1); CAL. APP. R. 8.548(a); COLO. APP. R. 21.1(a); CONN. R. APP. P. § 82-1; DEL. SUP. CT. R. 41(a)(ii); FLA. R. APP. P. 9.150(a); GA. R. SUP. CT. 46; HAW. R. APP. P. 13(a); IDAHO APP. R. 12.3(a); ILL. SUP. CT. R. 20(a); IND. R. APP. P. 64(A); KY. R. CIV. P. 76.37(1); LA. SUP. CT. R. XII(1); ME. R. APP. P. 25(a); MASS. SUP. JUD. CT. R. 1:03; MICH. CT. R. 7.305(B)(1); MISS. R. APP. P. 20(a); MONT. R. APP. P. 15(3); NEV. R. APP. P. 5(a); N.H. SUP. CT. R. 34; N.J. CT. R. 2:12A-1; N.M. R. APP. P. 12-607(A); N.Y. CT. R. 500.27(a); N.D. R. APP. P. 47(a); OHIO SUP. CT. PRAC. R. 9.01; OR. R. APP. P. 12.20; PA. R. APP. P. 3341(a); PA. SUP. CT. I.O.P. 8(A); R.I. R. APP. P. 6(a); S.C. APP. CT. R. 244(a); TENN. SUP. CT. R. 23(1); TEX. R. APP. P. 58.1; UTAH R. APP. P. 41(a); VT. R. APP. P. 14(a); VA. SUP. CT. R. 5:40(a); WASH. R. APP. P. 16.16(a); WYO. R. APP. P. 11.01.

23. D.C. CODE § 11-723(a) (LexisNexis 2012); D.C. CT. APP. R. 22.

24. GUAM R. APP. P. 20(b)(1), *available at* http://www.guamcourts.org/compileroflaws/CourtRules/GRAP%2020140224.pdf.

25. N. MAR. I. SUP. CT. R. 13(a), *available at* http://www.cnmilaw.org/pdf/court_rules/R01.pdf.

26. P.R. LAWS ANN. tit. 4, § 24s(f) (2010).

27. *See infra* Parts III and IV.

28. 917 F. Supp. 2d 553 (W.D.N.C. 2013).

922(g)(9).[29] The law, 18 U.S.C. § 922(g)(9), is a federal statute that makes it a crime for an individual convicted of a "misdemeanor crime of domestic violence" to own a firearm.[30] This statute has significant implications for the safety of victims of domestic abuse, and it has been repeatedly upheld despite challenges under the Second Amendment of the U.S. Constitution.[31] Allowing individuals convicted of domestic violence to own guns would almost certainly result in increased violence, with a disproportionate amount directed toward women.[32] Indeed, being shot by an intimate partner is the most common way that women are intentionally killed in the United States, and a domestic abuse victim is twelve times more likely to be killed when the perpetrator has a gun than when he does not.[33]

Previous North Carolina case law made it very difficult for the *Kelly* court to determine the elements of this offense under state law. North Carolina courts had inconsistently described the level of physical violence required for a violation of section 14-33(c)(2).[34] Without the opportunity to certify the question to the Supreme

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29. *Id.* at 554.

30. 18 U.S.C. § 922(g)(9) (2012).

31. The Second Amendment protects the "the right of the people to keep and bear Arms." U.S. CONST. amend. II. 18 U.S.C. § 922(g)(9) has been found to be constitutional under the Second Amendment by the First, Fourth, Seventh, Ninth, and Eleventh Circuits. *See* United States v. Chovan, 735 F.3d 1127, 1142 (9th Cir. 2013); United States v. Staten, 666 F.3d 154, 168 (4th Cir. 2011); United States v. Booker, 644 F.3d 12, 26 (1st Cir. 2011); United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010); United States v. Skoien, 614 F.3d 638, 645 (7th Cir. 2010). The issue has not been reviewed by the Supreme Court.

32. *See* Amy Barasch, *Why Give Violent Domestic Abusers a Gun?*, SLATE (Jan. 15, 2014, 6:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/supreme_court_hears_castleman_this_insane_suit_would_give_guns_to_domestic.2.html; Lynn Rosenthal, *Supreme Court Decision in* U.S. v. Castleman *Will Save Women's Lives*, WHITE HOUSE (Mar. 28, 2014, 2:23 PM), http://www.whitehouse.gov/blog/2014/03/28/supreme-court-decision-us-v-castleman-will-save-womens-lives; David G. Savage, *Supreme Court Keeps Guns Away from Those Guilty of Domestic Violence*, L.A. TIMES (Mar. 26, 2014, 7:27 PM), http://www.latimes.com/nation/la-na-court-guns-20140327,0,74538.story#axzz2yKIg3cc2; *see also* Linda McFayden-Ketchum, *Supreme Court Must Protect Victims of Domestic Violence*, HUFFINGTON POST (Jan. 15, 2014, 10:18 AM), http://www.huffingtonpost.com/linda-mcfadyenketchum/supreme-court-must-protect-victims-of-domestic-violence_b_4602303.html.

33. Barasch, *supra* note 32; Rosenthal, *supra* note 32.

34. *See, e.g.*, City of Greenville v. Haywood, 502 S.E.2d 430, 433 (N.C. Ct. App. 1998) ("[A]n 'assault' occurs when a person is put in apprehension of harmful or offensive contact, without any actual contact."); State v. Davis, 314 S.E.2d 828, 832 (N.C. Ct. App. 1984) (defining assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another" (quoting State v. Roberts, 155 S.E.2d 303, 305 (N.C. 1967)); State v. Sawyer, 221 S.E.2d 518, 520 (N.C. Ct. App. 1976) (establishing that simple assault "requires an overt act or an attempt with force and violence to do some immediate physical injury").

Court of North Carolina, the *Kelly* court had no other option than to make a prediction of how that court would rule on the basis of conflicting and contradictory case law.[35] The problem faced by the court in *Kelly* is unsettling and unacceptable, and it illustrates the unique difficulties involved in applying a federal law that is predicated upon an uncertain issue of North Carolina law. Moreover, the Fourth Circuit Court of Appeals has repeatedly referenced its inability to certify questions to the Supreme Court of North Carolina, and federal appellate judges have been forced to decide cases with important implications for our state on the basis of unclear or contradictory North Carolina case law.[36]

This Comment first sets forth the facts of *Kelly* and the issue before the court. Second, it reviews the federal law that was applied in *Kelly*, as well as the circuit split that was recently resolved by the Supreme Court in *United States v. Castleman*.[37] Third, it considers the underlying problem of state law in *Kelly* and the court's reasoning in rendering its decision. Fourth, it outlines two categories of cases that have proved particularly difficult for the Fourth Circuit Court of Appeals in applying North Carolina law. Finally, this Comment concludes that both *Kelly* and the experience of the Fourth Circuit illustrate the overwhelming need for a certification procedure in our state.

I. FACTS OF *UNITED STATES V. KELLY*

On January 14, 2001, Justin Kelly was convicted of misdemeanor assault on a female in violation of section 14-33(c)(2) of the North Carolina General Statutes.[38] Subsequently, Kelly was arrested by police while working as an armed security guard without a license at the Club Kalipzo in Charlotte, North Carolina.[39] The officers confiscated the Sig Sauer .45 handgun that Kelly was carrying along with a black shotgun found in his vehicle.[40] A federal jury indicted him under 18 U.S.C. § 922(g)(9) for the possession of a firearm after a previous conviction for misdemeanor domestic violence.[41] As defined by Congress, a "misdemeanor crime of domestic violence" is an act that:

35. United States v. Kelly, 917 F. Supp. 2d 553, 560 (W.D.N.C. 2013).
36. *See infra* Part IV.
37. 134 S. Ct. 1405 (2014).
38. *Kelly*, 917 F. Supp. 2d at 554. The record detailing his conviction has not been preserved, and the remaining evidence is limited to the police report. *Id.* at 554, 561.
39. *Id.* at 554.
40. *Id.*
41. *Id.*

> (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[42]

Thus, the central issue in Kelly was whether the defendant's previous conviction for misdemeanor assault on a female in violation of section 14-33(c)(2) constituted a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9).[43]

II. WHAT IS REQUIRED FOR A "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" UNDER 18 U.S.C. § 922(G)(9)?

The Lautenberg Amendment, 18 U.S.C. § 922(g)(9), was enacted in 1996 by Congress following its proposal by Senator Frank Lautenberg, a Democrat from New Jersey.[44] On the floor of Congress, Senator Lautenberg explained that the law was intended to close a "dangerous loophole" that allowed nonfelons convicted of spousal abuse to continue to own firearms.[45] In many cases, a conviction for a crime of domestic violence is not a felony[46] and thus does not automatically prevent the person convicted from owning a firearm. The purpose of the Lautenberg Amendment was to "keep guns away from violent individuals who threaten their own families."[47] "The amendment says: Abuse your wife, lose your gun; beat your child, lose your gun; assault your ex-wife, lose your gun; no ifs, ands, or buts."[48]

Despite this no-nonsense language, the lack of clarity in 18 U.S.C. § 922(g)(9) has proved to be a major obstacle in the enforcement of the law.[49] Courts have had trouble determining if 18 U.S.C. § 922(g)(9) requires that the underlying state statute punishes crimes against domestic partners, or if any assault conviction is sufficient so long as the victim is a domestic partner.[50]

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42. 18 U.S.C. § 921(a)(33)(A) (2012).

43. *Kelly*, 917 F. Supp. 2d at 554.

44. Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to 3009-372 (1996); *see also* 142 CONG. REC. S10,377 (1996).

45. 142 CONG. REC. S10,378 (1996).

46. *See generally* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992).

47. 142 CONG. REC. S10,378 (1996).

48. *Id.*

49. Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 514 (2008).

50. *Id.*

In addition, courts have disagreed about when the "use or attempted use of physical force" requirement is satisfied given that state statutes are written with various levels of specificity and often can be satisfied in multiple ways.[51] A state statute may identify a threshold level of harm ranging from "offensive physical contact"[52] to "touch[ing] . . . in a rude, insolent or angry manner"[53] to "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another."[54] Because a violation of 18 U.S.C. § 922(g)(9) is a pure matter of law, the statutory language and the way that the relevant words in a statute have been construed by previous courts is often determinative.

In the last few years, the Supreme Court of the United States has taken steps to clarify 18 U.S.C. § 922(g)(9). In *United States v. Hayes*,[55] the Court held that a state statute need not require a domestic relationship between the offender and victim in order to trigger 18 U.S.C. § 922(g)(9).[56] *Hayes* widened the circumstances in which a citizen convicted of previously harming his spouse or domestic partner could be prohibited from owning a gun.[57] In *Johnson v. United States*,[58] the Supreme Court made further progress in elucidating the language of 18 U.S.C. § 922(g)(9). The Court addressed the level of physical contact necessary under a state statute to satisfy the federal statutory language of "use . . . of physical force."[59] The defendant in *Johnson* argued that his conviction for battery under section 784.03(2) of the Florida Statutes, which prohibits "[a]ctually and intentionally touch[ing]" another person, was insufficient to constitute a "violent felony" under 18 U.S.C. § 924.[60] The Court agreed, reversing the Eleventh Circuit and setting aside Johnson's conviction.[61] Although *Johnson* did not create binding precedent regarding the level of physical violence necessary to constitute a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9), the Court foreshadowed this next step:

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51. *See id.* at 513, 519.
52. ME. REV. STAT. ANN. tit. 17-A, § 207(1)(A) (West 2012).
53. WYO. STAT. ANN. § 6-2-501(g)(i) (2013).
54. IOWA CODE § 708.1(2)(a) (2012).
55. 555 U.S. 415 (2009).
56. *Id.* at 418.
57. *See* David G. Savage, *High Court Keeps Guns Away from Domestic Abusers*, L.A. TIMES (Feb. 25, 2009), http://articles.latimes.com/2009/feb/25/nation/na-supreme-court-guns25.
58. 559 U.S. 133 (2010).
59. *Id.* at 135.
60. *Id.* at 135–36.
61. *Id.* at 145.

> We have interpreted the phrase "physical force" only in the context of a statutory definition of "violent felony." We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence. The issue is not before us, so we do not decide it.[62]

At the time of the *Kelly* decision, circuit courts were deadlocked on the issue of the level of violence necessary to satisfy 18 U.S.C. § 922(g)(9).[63] The First,[64] Eighth,[65] Eleventh,[66] and D.C.[67] Circuits supported a broader interpretation of the "use or attempted use of physical force," which could be satisfied by the violation of any state statute prohibiting de minimis force. In these circuits, if a state statute could be satisfied by "physical contact," it was sufficient for a conviction under 18 U.S.C. § 922(g)(9).[68] By contrast, the Fourth,[69] Sixth,[70] Ninth,[71] and Tenth[72] Circuits held that statutory language requiring only de minimis contact was insufficient to establish the "use or attempted use of physical force" under 18 U.S.C. § 922(g)(9). These circuits rejected the idea that a previous conviction under a statute merely requiring physical contact was sufficient.[73] In the Fourth Circuit, *United States v. White*[74] established that 18 U.S.C. § 922(g)(9) required "force capable of causing physical pain or injury to another person."[75] Thus, in *Kelly* the meaning of 18 U.S.C. § 922(g)(9) as a matter of federal law was clear.

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62. *Id.* at 143–44.

63. This circuit split was recently resolved by the Supreme Court of the United States in *United States v. Castleman*, 134 S. Ct. 1405, 1413 (2014) (establishing that de minimis force is sufficient for a violation of 18 U.S.C. § 922(g)(9)).

64. United States v. Nason, 269 F.3d 10, 11–12 (1st Cir. 2001).

65. United States v. Smith, 171 F.3d 617, 621 (8th Cir. 1999).

66. United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006).

67. United States v. Barnes, 295 F.3d 1354, 1365–66 (D.C. Cir. 2002).

68. *Griffith*, 455 F.3d at 1342; *Barnes*, 295 F.3d at 1365–66; *Nason*, 269 F.3d at 12; *Smith*, 171 F.3d at 621.

69. United States v. White, 606 F.3d 144, 153 (4th Cir. 2010) ("We see no principled basis upon which to say a 'crime of domestic *violence*' would include *nonviolent* force such as offensive touching in a common law battery.").

70. United States v. Castleman, 695 F.3d 582, 591–92 (6th Cir. 2012), *rev'd*, 134 S. Ct. 1405 (2014).

71. United States v. Belless, 338 F.3d 1063, 1068 (9th Cir. 2003).

72. United States v. Hays, 526 F.3d 674, 681 (10th Cir. 2008).

73. *Castleman*, 695 F.3d at 591; *White*, 606 F.3d at 153; *Hays*, 526 F.3d at 681; *Belless*, 338 F.3d at 1068.

74. 606 F.3d 144.

75. *Id.* at 153 (quoting Johnson v. United States, 559 U.S. 133, 140 (2010)).

III. IS SECTION 14-33(C)(2) OF THE NORTH CAROLINA GENERAL STATUTES A "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" UNDER 18 U.S.C. § 922(G)(9)?

The central issue in *Kelly* was interpreting the state law: did a conviction under section 14-33(c)(2) constitute a crime of misdemeanor domestic violence?[76] Under section 14-33(c)(2), misdemeanor assault on a female occurs when a "male person at least 18 years of age" "[a]ssaults a female."[77] Because of the limited assistance given by the statutory definition of section 14-33(c)(2), the elements of misdemeanor assault on a female have been defined in North Carolina through the common law.[78]

In *State v. Roberts*,[79] the Supreme Court of North Carolina defined an "assault" under section 14-33(c)(2) as:

> [A]n overt act or an 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 must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.[80]

This common law definition of assault arguably established that section 14-33(c)(2) requires both force *and* violence. However, the *Kelly* court was concerned about contradictory evidence elsewhere in *Roberts*. First, the *Roberts* court stated that an assault could be committed when a perpetrator makes a "show of violence" and this showing is "accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed."[81] Under this "show of violence" exception, an assault could occur in circumstances where no physical contact occurred between assailant and victim. This would clearly be insufficient to satisfy 18 U.S.C. § 922(g)(9) as construed by the Fourth Circuit in *White*. Second, the *Roberts* court referenced other cases in which assault had been defined inconsistently by the Supreme Court of North Carolina.[82] In *State v. Johnson*,[83] either the use or an attempt to use "force and violence" or a "show of force or menace of violence" was held sufficient to constitute an assault

76. United States v. Kelly, 917 F. Supp. 2d 553, 554 (W.D.N.C. 2013).
77. N.C. GEN. STAT. § 14-33(c)(2) (2013).
78. State v. Roberts, 155 S.E.2d 303, 305 (N.C. 1967) ("There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules.").
79. 155 S.E.2d 303.
80. *Id.* at 305.
81. *Id.*
82. *Id.* at 305–07.
83. 142 S.E.2d 151 (N.C. 1965).

under section 14-33(c)(2).[84] Yet another definition of assault, provided by the court in *State v. Ingram*[85] and cited by *Roberts*, requires an "unequivocal appearance of an attempt, with force and violence, to do a corporal injury—such an act as will convey to the mind of the other person a well-grounded apprehension of personal injury."[86] Finally, the *Roberts* court also referenced the decision in *State v. Silver*,[87] in which a conviction for assault on a female was reversed because it was not accompanied by "violence, threats *or* any display of force."[88]

In an attempt to make sense of the clearly contradictory authority regarding the level of physical contact required for an assault on a female under North Carolina state law, the *Kelly* court reviewed subsequent decisions applying the statute. In *State v. Wortham*,[89] the Supreme Court of North Carolina interpreted section 14-33(c)(2) to include the use of "force *and* violence" as well as a show of "force *or* menace."[90] More recently, the North Carolina Court of Appeals described an assault in a manner that is directly contradictory on the issue of whether "force *and* violence" or "force *or* violence" is required for the crime.[91]

In sorting through the "quagmire of alternative definitions of assault on a female," the *Kelly* court noted that an underlying finding of either battery or assault had been held sufficient to satisfy section 14-33(c)(2).[92] Under North Carolina law, an assault is "an intentional attempt, by violence, to do injury to the person of another."[93] Battery is "an assault whereby any force is applied, directly or indirectly, to the person of another."[94] Althqugh the "force" requirement of a battery would typically be sufficient to satisfy the mandatory Fourth Circuit interpretation of a "misdemeanor crime of domestic violence" under *White*, case law in North Carolina suggested that an assault might occur without the use of force. Indeed, the most recent cases decided by the North Carolina Court of Appeals indicated that minimal contact could

84. *Id.* at 153.
85. 74 S.E.2d 532 (N.C. 1953).
86. *Id.* at 535 (quoting State v. Daniel, 48 S.E. 544, 545 (N.C. 1904)).
87. 42 S.E.2d 208 (N.C. 1947).
88. *Id.* at 209 (emphasis added).
89. 351 S.E.2d 294 (N.C. 1987).
90. *Id.* at 296 (emphasis added).
91. State v. Gilley, 522 S.E.2d 111, 117 (N.C. Ct. App. 1999) (emphasis added); State v. Holman, 380 S.E.2d 128, 130 (N.C. Ct. App. 1989) (emphasis added).
92. United States v. Kelly, 917 F. Supp. 2d 553, 559 (W.D.N.C. 2013). See *State v. Britt*, 154 S.E.2d 519, 521 (N.C. 1967), for the requirement of assault or battery to satisfy assault on a female.
93. *Kelly*, 917 F. Supp. 2d at 559 (quoting State v. West, 554 S.E.2d 837, 839–40 (N.C. Ct. App. 2001)).
94. *Id.* (quoting *West*, 554 S.E.2d at 839–40).

provide the basis for an assault or battery. In *State v. Williams*,[95] an "offensive touching" of another person was held to be a battery.[96] In *State v. Clay*,[97] the North Carolina Court of Appeals stated that "intentionally touch[ing]" another person could be a battery.[98] These cases appeared to allow a conviction for assault on a female in circumstances that would be materially insufficient to satisfy 18 U.S.C. § 922(g)(9) under the mandatory precedent of *White*.

The *Kelly* court was clearly uncertain of how to decide the crucial issue of whether Justin Kelly's conviction under section 14-33(c)(2) qualified as a misdemeanor crime of domestic violence under federal law. There was no way of definitively answering this question under existing North Carolina precedent. The Fourth Circuit had rejected the view that de minimis contact was sufficient to sustain a conviction under 18 U.S.C. § 922(g)(9).[99] The Supreme Court of North Carolina had never considered the meaning of 18 U.S.C. § 922(g)(9).[100] The statutory definition of section 14-33(c)(2) did not specify the elements of assault. The common law inconsistently defined assault under section 14-33(c)(2) and was riddled with contradictions regarding the level of force or harm required.[101] The obvious choice for the *Kelly* court, if any law other than North Carolina law applied, would have been to certify the question to the highest state court. The presiding judge, the Honorable Frank Whitney of the Western District of North Carolina, expressed his regret that certification was not a possibility:

> [T]his Court does not have the option of certifying this hazy issue of state law to the North Carolina Supreme Court. North Carolina is the sole state in the union that does not permit a federal court to certify questions of state law to the high state court for resolution.[102]

Without guidance from the Supreme Court of North Carolina, Judge Whitney gave weight to the fact that an individual might be convicted of assault on a female for an act that involved merely touching.[103] Referencing the rule of lenity, which requires courts to interpret ambiguous statutory language in favor of criminal defendants,[104] the court granted the defendant's motion to dismiss the charge that he had violated 18 U.S.C. § 922(g)(9).[105]

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95. No. COA08-318, 2008 WL 4635507 (N.C. Ct. App. Oct. 21, 2008).
96. *Id.* at *2.
97. No. COA05-568, 2005 WL 3046634 (N.C. Ct. App. Nov. 15, 2005).
98. *Id.* at *2.
99. United States v. White, 606 F.3d 144,153 (4th Cir. 2010).
100. United States v. Kelly, 917 F. Supp. 2d 553, 561 (W.D.N.C. 2013).
101. *Id.* at 560.
102. *Id.*
103. *Id.*
104. *Id.* at 561.
105. *Id.* at 562.

Kelly illustrates the complex issues of federalism, adjudicative fairness, and legal clarity that arise when federal judges apply unsettled North Carolina law. Judge Whitney describes the problem as follows:

> [W]ithout a certification process, a federal judge may interpret a North Carolina statute differently than the elected officials of the State, including and especially the State's elected judicial officers. If there were a certification process in North Carolina, hopefully we could avoid such inconsistent interpretations, and the people of North Carolina through their chosen judicial officers would be the primary interpreters of North Carolina statutes rather than federal judges.[106]

The remainder of this Comment argues that the absence of a certification mechanism not only undermines North Carolina law when it is applied in federal courts but—as *Kelly* illustrates—impedes the application of federal statutes that are predicated upon state law convictions. Even further, the missing link of a certification mechanism thwarts the fair and orderly review of the law by federal appellate courts.

IV. CERTIFICATION PROCEDURES HAVE BEEN WIDELY ADOPTED, AND NORTH CAROLINA'S ADOPTION OF CERTIFICATION WOULD AID THE FOURTH CIRCUIT IN REVIEWING DISTRICT COURT DECISIONS.

The Fourth Circuit Court of Appeals is responsible for hearing appeals from the federal district courts located in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.[107] As a result, the state laws at issue in cases heard by the Fourth Circuit are most often the laws of these states.[108] Despite the relatively small number of decisions rendered by the Fourth Circuit each year and the limited number of cases involving uncertain issues of North Carolina law, judges in this court have repeatedly referenced the lack of a certification procedure in North Carolina. Below, I analyze two categories of these cases: lawsuits in which a North Carolina municipality is a party and those where a facet of the State's tort law is in controversy.[109]

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106. E-mail from Frank D. Whitney, Chief Judge, W. Dist. of N.C., to Michael Klotz, Student, Wake Forest Univ. Sch. of Law (Feb. 22, 2014, 08:54 EST) (on file with the author).

107. 28 U.S.C. § 41 (2012); 28 U.S.C. § 1291 (2012).

108. *Cf.* Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010) ("The Eighth Circuit frequently has to decide questions of law involving the law of Arkansas, Missouri, Iowa, Nebraska, Minnesota, and North and South Dakota, and occasionally addresses the law of more far-flung jurisdictions.").

109. It is worth reviewing other cases, not discussed here, in which the Fourth Circuit has referenced the lack of a certification procedure in North Carolina. *E.g.*, E.M.A. *ex rel.* Plyler v. Cansler, 674 F.3d 290, 312 n.1 (4th Cir.

A. *Lawsuits in Which a North Carolina Municipality Is a Party*

When a North Carolina municipality is a party to a case involving uncertain state law, the absence of a certification procedure puts the Fourth Circuit in a difficult position: it must either abstain and stay the matter, resulting in additional delay and expense for the parties, or apply North Carolina law based upon its prediction of how the Supreme Court of North Carolina would construe the law.[110] In such an instance, the State of North Carolina has an undeniable and direct interest in the expedient and accurate application of its own law.

In *MLC Automotive, LLC v. Town of Southern Pines*,[111] the plaintiff, a commercial property owner, purchased a tract of land in Southern Pines, North Carolina, after receiving written confirmation from the town that it could be rezoned for a car dealership provided that he complied with existing zoning procedures.[112] The plaintiff then entered into a binding contract with American Suzuki Motor Corporation to establish a Suzuki franchise on the property.[113] Residents in Southern Pines opposed the development of the property, and the City Council subsequently rezoned the land in a manner that would prohibit a car dealership, despite plaintiff's compliance with existing zoning procedures.[114]

The central issue in *MLC Automotive* was whether the plaintiff had a "vested right" in the land before the rezoning occurred, given that he had obtained a final interpretation from the town's planning staff and received an architectural permit but had not yet begun to build on the property.[115] The facts of *MLC Automotive* had no clear precedent in North Carolina: they "[fell] somewhere in between [the] caselaw."[116] Because certification was not available in North Carolina, the options were either for the federal court to predict how the Supreme Court of North Carolina would rule or to stay the matter using *Burford* abstention.[117] The district court ultimately determined that the case should be stayed under *Burford*.[118]

Burford abstention is a form of administrative abstention that is invoked either when the state has a strong interest in adjudicating a dispute or when the federal review of a state

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2012) (Agee, J., concurring in part and dissenting in part); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 711 n.1 (4th Cir. 1999); McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 328 n.4 (4th Cir. 1996); Doe v. Doe, 973 F.2d 237, 240 n.2 (4th Cir. 1992).

110. *See* Schaffer & Herr, *supra* note 108, at 1626–29.
111. 532 F.3d 269 (4th Cir. 2008).
112. *Id.* at 273.
113. *Id.*
114. *Id.* at 274.
115. *Id.* at 283.
116. *Id.*
117. *See id.* (referring to Burford v. Sun Oil Co., 319 U.S. 315 (1943)).
118. *Id.* at 284.

administrative scheme would require the federal court to engage in state policymaking.[119] In the Fourth Circuit, district courts abstain under *Burford* when the state has a substantial interest in the outcome of the adjudication.[120] In *MLC Automotive*, the Fourth Circuit was charged with reviewing whether the facts of the case indicated that the district court correctly determined that the state had a sufficient interest in the outcome to justify *Burford* abstention.[121] The Town of Southern Pines argued that the district court's decision to stay the case under *Burford* constituted an abuse of discretion.[122] In its brief opposing the decision to stay the case, the Town of Southern Pines observed that both parties had already "engaged in substantial discovery, amassed a voluminous record[,] and incurred tens of thousands of dollars in attorneys' fees and costs."[123] The Fourth Circuit rejected this argument, holding that it was not an abuse of discretion to order *Burford* abstention.[124] In reaching this holding, the court specifically referenced its inability to certify the central question of the case.[125]

Although certifying a question to the highest state court involves some delay, the amount of time is "usually substantially shorter" than what is required for abstention.[126] The consensus among legal scholars is that certifying a question of law is preferable to abstention because it "impos[es] fewer costs on litigants,"[127] including the "delay and expense" that is a consequence of abstention.[128] Even if one were to argue that there are circumstances where abstention is preferable to certification, the experience of the *MLC Automotive* court illustrates the drawback for federal courts when this option is not on the table.

Five years after *MLC Automotive*, the Fourth Circuit faced a similar situation in *Town of Nags Head v. Toloczko*.[129] In that case, the Town of Nags Head, North Carolina, filed suit seeking to establish its ability to regulate private beachfront properties that encroach onto public trust lands.[130] The Town of Nags Head intended to condemn beachfront properties damaged by tropical

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119. *See* Kade N. Olsen, Note, Burford *Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 769–78 (2013).

120. *Id.* at 774.

121. *MLC Auto.*, 532 F.3d at 280.

122. *Id.* at 277.

123. Brief of Appellants at 20, *MLC Auto.*, 532 F.3d 269 (No. 07-2039), 2007 WL 5067028, at *20.

124. *MLC Auto.*, 532 F.3d at 284.

125. *Id.*

126. *See* Theodore B. Eichelberger, Note, *Certification Statutes: Engineering a Solution to* Pullman *Abstention Delay*, 59 NOTRE DAME L. REV. 1339, 1341 (1984).

127. Nash, *supra* note 3, at 1696–97.

128. 36 C.J.S. *Federal Courts* § 55 (2014).

129. 728 F.3d 391 (4th Cir. 2013).

130. *Id.* at 393.

storms and other natural events and to order their destruction.[131] The federal district court in *Toloczko* observed that it did not have the ability to certify the issues of state law because of the lack of a certification procedure in North Carolina[132] and stayed the proceeding under the *Burford* doctrine.[133] On review, the Fourth Circuit, again noting the lack of an option to certify the state-law issues to the Supreme Court of North Carolina, held that the district court had abused its discretion under *Burford* because the state law was clear enough to determine the issues in controversy.[134] Because there was no authority from the Supreme Court of North Carolina on the issue, the issue should have been decided on the basis of an "intermediate state appellate court"—the North Carolina Court of Appeals.[135] Referencing the policy concerns of "fairness and judicial economy," the Fourth Circuit reversed and remanded the case, instructing the federal district court to apply this version of North Carolina law.[136]

In *MLC Automotive* and *Toloczko*, the lack of both a certification procedure and clear authority from the Supreme Court of North Carolina posed a problem for the Fourth Circuit. In each instance, the court was forced to undertake a laborious *Burford* analysis. Neither of the likely outcomes are beneficial for litigants or courts: either the federal proceeding is stayed pending disposition in the state court (*MLC Automotive*), or a federal court is left to apply North Carolina law that has not been reviewed by the state's high court with a binding effect on a state municipality (*Toloczko*). Given the indisputable state interest in the correct application of its own law when a municipality is a party to a lawsuit, this is a circumstance in which certification would be especially useful.

B. Cases Where Unsettled North Carolina Tort Law Is Determinative

The Fourth Circuit has also referenced its inability to invoke certification in cases involving unsettled issues of tort law. North Carolina is one of only five jurisdictions in the United States—along with Virginia, Maryland, Alabama, and the District of Columbia—that recognizes contributory negligence within its tort law.[137] Contributory negligence bars a party from recovering from a

131. *Id.* at 394.

132. Town of Nags Head v. Toloczko, 863 F. Supp. 2d 516, 527 (E.D.N.C. 2012), *rev'd*, 728 F.3d 391 (4th Cir. 2013).

133. *Id.* at 535.

134. *Toloczko*, 728 F.3d at 396–98.

135. *Id.* at 398.

136. *Id.* at 399.

137. Peter Nash Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 U. RICH. L. REV. 359, 360 n.8 (2011).

tortfeasor if the party's own negligence contributed to the injury in any way.[138] It may be that tort cases involving North Carolina state law are more difficult for the Fourth Circuit to decide without a certification procedure because the state's tort scheme is uncommon and perhaps more difficult to predict.

In *Fontenot v. Taser International, Inc.*,[139] the Fourth Circuit was faced with a novel issue of North Carolina tort law.[140] The plaintiff in *Fontenot* brought a products liability suit on behalf of her deceased son, Darryl Turner, against Taser International, a manufacturer of stun guns.[141] The basic facts are as follows: Mr. Turner refused to leave a Food Lion grocery store following a dispute on the premises.[142] The Charlotte-Mecklenburg Police Department was contacted and asked to remove Mr. Turner from the store.[143] When Mr. Turner refused to comply, an officer shot him in the chest using a Taser manufactured by Taser International.[144] One of the Taser darts struck very close to Mr. Turner's heart, and he collapsed and suffered ventricular fibrillation.[145] Despite attempts to revive him, Mr. Turner was pronounced dead at the hospital.[146] The plaintiff in *Fontenot* brought a products liability claim on the grounds that Taser International failed to warn users (including police officers) that shooting a person near the heart could cause an adverse cardiac event.[147] In response, Taser International attempted to assert the affirmative defense of contributory negligence, arguing that Mr. Turner failed to exercise ordinary care for his own safety.[148] The district court granted the plaintiff's motion to bar the affirmative defense of contributory negligence on the basis of the statutory language of section 99B-4(3) of the North Carolina General Statutes,[149] which allows such a defense in a products liability claim when "[t]he claimant failed to exercise reasonable care under the circumstances *in the use of* the product."[150] The district court

138. *See* Schlemmer v. Buffalo, Rochester, & Pittsburgh Ry. Co., 220 U.S. 590, 595 (1911) ("[A]ny negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence, either greater or less than his own, of the other party.").

139. 736 F.3d 318 (4th Cir. 2013).

140. *See id.* at 331 ("We . . . note the absence of any North Carolina cases finding contributory negligence in a product liability action in which claimant did not use the product at issue.").

141. *Id.* at 321–22.

142. *Id.* at 322.

143. *Id.*

144. *Id.*

145. *Id.* at 323.

146. *Id.*

147. *Id.* at 325.

148. *Id.*

149. *Id.*

150. N.C. GEN. STAT. § 99B-4 (2013) (emphasis added).

observed that all previous North Carolina products liability cases involved plaintiffs who had actually used products that were allegedly defective.[151] The court concluded that Mr. Turner did not "use" the Taser because it was always in the control of the police officer and Mr. Turner never had it in his possession.[152]

On appeal, the Fourth Circuit reviewed Taser International's claim that the district court erred when it barred the defense of contributory negligence.[153] Taser International raised two major arguments. First, it argued that the district court's ruling violated the general principle of North Carolina law to allow a contributory negligence defense.[154] Second, Taser International argued that under the plain language of the statute the phrase "in the use of" clearly referred to an injury that occurred when *anyone* was using the product.[155] In support of this argument, Taser International pointed to the previous amendment of section 99B-4(3) by the North Carolina legislature.[156]

Prior to 1996, section 99B-4(3) authorized the affirmative defense of contributory negligence when "the claimant failed to exercise reasonable care under the circumstances in *his* use of the product."[157] Effective January 1, 1996, the wording of the statute was amended to "in *the* use of the product."[158] Taser International argued that this revision reflected the intent of the North Carolina legislature to allow a contributory negligence defense when any party had used a defective product.[159] The plaintiff in *Fontenot* contended that this revision was also consistent with a more likely rationale of the legislature: to make the wording of the law gender-neutral.[160] By changing "his" to "the," the North Carolina legislature may have intended to make clear that the statute applied to all persons. It is worth noting that when the statute was amended, another section within chapter 99B of the North Carolina General Statutes was also revised, yet gendered language within this provision was not changed to gender-neutral.[161] Thus, the intent of the North Carolina legislature is genuinely unclear. It may

151. *Fontenot*, 736 F.3d at 325.
152. *Id.*
153. *Id.* at 326.
154. *Id.*
155. *Id.* at 327.
156. *Id.* at 327–28; *see also* Act of July 29, 1995, ch. 522, § 1, 1995 N.C. Sess. Laws 1872, 1874 (codified as amended at N.C. GEN. STAT. § 99B-4(3)).
157. Act of May 28, 1979, ch. 654 § 1, 1979 N.C. Sess. Laws 687, 689; *Fontenot*, 736 F.3d at 327–28.
158. §§ 1, 4, 1995 N.C. Sess. Laws at 1874, 1877; *Fontenot*, 736 F.3d at 327.
159. *Fontenot*, 736 F.3d at 327.
160. *Id.* at 328.
161. § 1, 1995 N.C. Sess. Laws at 1873 (retaining the language "unless the seller damaged or mishandled the product while in *his* possession" in section 99B-2(a) (emphasis added)). This argument was not raised or considered by the court in *Fontenot*.

be true that section 99B-4(3) was amended to reflect the gender-neutral application of the statute; on the other hand, the statute may have been revised to clarify the general right of parties to a contributory negligence defense. This is precisely the type of determination that ought to be made by the Supreme Court of North Carolina.

Without the option of certifying the question, the Fourth Circuit affirmed the district court's holding that contributory negligence is not a defense to a products liability claim under North Carolina law when the injured party did not use the product that caused the harm.[162] In reaching this decision, the court cited Fourth Circuit precedent of not "expand[ing] state common law principles to encompass novel circumstances" for which there is no existing state precedent.[163] The court also referenced the fact that North Carolina "has no mechanism" allowing a federal court to certify an unclear issue of state law.[164]

The judge in this case, the Honorable Barbara Milano Keenan, was likely aware that the *Fontenot* decision would have immediate policy implications for police officers in the state.[165] To hold that contributory negligence is available in this type of factual situation would provide tort immunity whenever a person "is involved in a dispute, does not surrender to authorities, and is subdued or killed by a police officer's use of a [T]aser."[166] This is a situation that occurs "in nearly every instance in which a [T]aser is deployed by a law enforcement officer."[167] Whether one agrees or disagrees with the outcome in *Fontenot*, the decision further illustrates the problems that arise due to the lack of a certification procedure in North Carolina. Interpreting the intent of the North Carolina legislature on an issue that will have significant and immediate implications for police officers within the state is a matter that should be decided by a North Carolina court rather than a federal court.

The aftermath of *Fontenot* clearly demonstrates this. On the afternoon of the verdict, Charlotte City Attorney Mac McCarley announced that the *Fontenot* decision would not affect the Taser policy of the city police force.[168] A few hours later, another Charlotte man, twenty-one-year-old Lareko Williams, died after being tased by

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162. *Fontenot*, 736 F.3d at 331.

163. *Id.*

164. *Id.* at 326.

165. *See* Ian A. Mance, Comment, *Power Down: Tasers, the Fourth Amendment, and Police Accountability in the Fourth Circuit*, 91 N.C. L. REV. 606, 612–13 (2013) (stating that North Carolina police officers "enjoy unusually wide discretion to use [T]asers" and adding that North Carolina has the third-highest rate of Taser-related deaths in the nation).

166. *Fontenot*, 736 F.3d at 331.

167. *Id.*

168. Mance, *supra* note 165, at 614.

police officers.[169] The next day, the Charlotte police department indefinitely suspended the use of Tasers by its law enforcement officers.[170] It seems quite likely that *Fontenot*—which clarified a new area of tort liability for injuries to citizens resulting from the use of Tasers—was a factor in this decision.

CONCLUSION

The difficulties encountered by the Fourth Circuit in deciding cases involving unsettled issues of North Carolina law—particularly when a North Carolina municipality is a party, or a facet of the State's tort law is at issue—indisputably illustrate our need for a certification procedure. Given the overwhelming benefits of certification and its widespread adoption, it is puzzling that North Carolina has failed to take advantage of this procedure. Think again of the legal issue in *Kelly*. Whether one is committed to preserving the right to bear arms under the Second Amendment or is an advocate for limiting gun rights, everyone can agree that a federal judge deciding this type of legal issue should have the ability to expeditiously and accurately determine the relevant law. The lack of a certification procedure not only impedes cooperation between the federal and state judiciaries, it also delays the clarification of uncertain areas of state law and may lead to a lower level of judicial consistency. This is an unacceptable situation for all citizens and one that should be remedied.

Michael Klotz[*]

169. *Id.*

170. *Id.* (noting that the Charlotte-Mecklenburg Police Department later lifted the suspension on Taser use after spending nearly $2 million to purchase new Tasers with special safety features).

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