

**2021 Legislative Reforms to Policing Practices in North Carolina**  
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Policing reform has drawn tremendous attention at the state and national level in recent years from the public, elected officials, and law enforcement agencies. In the 2021-2022 legislative session, North Carolina enacted new laws on a variety of policing issues, ranging from curbing excessive use of force to improving reporting and disclosure of officer misconduct. This briefing paper provides an overview of the new laws.

**Duty to Intervene to Prevent Use of Excessive Force.**

North Carolina's statute governing arrests by law enforcement officers, G.S. 15A-401, permits officers to use *non-deadly force* "to the extent that [the officer] reasonably believes it necessary" to (1) prevent the escape from custody or effect an arrest of a person who the officer believes has committed a criminal offense; or (2) to defend themselves or a third person from what the officer reasonably believes to be the use or imminent use of physical force while making an arrest or preventing an escape.<sup>1</sup> The statute permits officers to use *deadly force* for the same purposes, but only to prevent the escape or effect an arrest of a person who is employing a deadly weapon or presents an imminent threat of death or serious physical injury to others; to prevent the escape of a person from custody imposed after a felony conviction; or to defend against the use or imminent use of deadly physical force.<sup>2</sup>

Part XVI of [S.L. 2021-138](#)<sup>3</sup> amends G.S. 15A-401, creating a duty to intervene by officers to prevent the use of excessive force. Specifically, an officer has a duty to intervene

- (1) when acting in the line of duty
- (2) the officer observes another officer use force against a person
- (3) that the officer reasonably believes is excessive under the statute, and
- (4) intervening is both safe and possible.<sup>4</sup>

Additionally, and regardless of whether the officer had a safe opportunity to intervene, the officer must report the use of excessive force to a superior officer within seventy-two hours of the incident.<sup>5</sup> Requiring that officers intervene in and report other officers' use of excessive force was recommended by both the North Carolina Task Force for Racial Equity in Criminal Justice and the North Carolina Sheriff's Association.<sup>6</sup>

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<sup>1</sup> G.S. 15A-401(d)(1).

<sup>2</sup> G.S. 15A-401(d)(2).

<sup>3</sup> An identical statutory amendment also was enacted by [S.L. 2021-137](#).

<sup>4</sup> New G.S. 15A-401(d1).

<sup>5</sup> For a fuller discussion of the new duty to intervene, see Shea Denning, *New Requirement that Law Enforcement Officers Intervene and Report Excessive Use of Force*, NC CRIM. LAW BLOG (Sept. 13, 2021), <https://nccriminallaw.sog.unc.edu/new-requirement-that-law-enforcement-officers-intervene-and-report-excessive-use-of-force/>.

<sup>6</sup> *Id.*

### **Body Camera Changes.**

After the April 2021 killing of Andrew Brown Jr. by law enforcement officers in Elizabeth City, North Carolina as Brown tried to flee the execution of drug warrants, state law governing access to police body camera footage came under scrutiny.<sup>7</sup> Under the law in effect at that time, the head of the law enforcement agency possessing a body camera recording made the initial decision whether to allow qualified individuals to view the footage. A judge was responsible for hearing petitions from qualified individuals to view the footage when the agency refused a viewing. Part XXI of S.L. 2021-138 changes those procedures. Under the new law, for cases involving recordings of a death or serious bodily injury, a judge makes the initial determination about whether to allow qualified individuals to view the footage.<sup>8</sup> The change was controversial, with some saying it did not go far enough towards transparency and others saying that access to footage must be controlled to protect investigations.<sup>9</sup>

### **Investigations of Officer-Involved Deaths.**

After the killing of Andrew Brown Jr., mechanisms for initiating investigation by the North Carolina State Bureau of Investigation (SBI) into use of force by law enforcement officers also came to the public's attention.<sup>10</sup> Traditionally, the SBI investigated these incidents when a law enforcement agency or district attorney asked for SBI assistance.<sup>11</sup> A newly enacted statute, G.S. 143B-919(b1),<sup>12</sup> builds upon these investigative avenues by requiring SBI investigations of law enforcement use of deadly force at the Governor's request.<sup>13</sup>

### **Critical Incident Database & Early Warning System.**

*Critical Incident Database.* Part III of S.L. 2021-138 enacts parallel statutory provisions requiring the Criminal Justice Standards Division and the Justice Officers' Standards Division of the North Carolina Department of Justice to develop and maintain a statewide database for use by law

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<sup>7</sup> See John Rubin, *The Andrew Brown Body Cam Rulings*, NC CRIM. LAW BLOG (May 11, 2021), <https://nccriminallaw.sog.unc.edu/the-andrew-brown-body-cam-rulings/>; Sarah Delia, *Bodycam Footage in NC is Not Public Record, but Some Lawmakers and Advocates Say That Needs to Change*, WFAE.ORG (May 27, 2021), <https://www.wfae.org/crime-justice/2021-05-27/body-worn-camera-footage-in-nc-is-not-public-record-but-some-lawmakers-and-advocates-say-that-needs-to-change>.

<sup>8</sup> See also Shea Denning, *General Assembly Amends Rules for Disclosure of Body Cam Recordings*, NC CRIM. LAW BLOG (Sept. 22, 2021), <https://nccriminallaw.sog.unc.edu/general-assembly-amends-rules-for-disclosure-of-body-cam-recordings/>.

<sup>9</sup> See, e.g., Yanqi Xu, *NC Just Enacted Ambitious Criminal Justice Reform Legislation. Here's What it Does*, NC POLICY WATCH (Sept. 7, 2021), <https://ncpolicywatch.com/2021/09/07/nc-just-enacted-ambitious-criminal-justice-reform-legislation-heres-what-it-does/>. The amended statutory scheme does not alter existing North Carolina law whereby a judge is responsible for determining whether to provide qualified individuals with a copy of body camera footage.

<sup>10</sup> Laura Lee & Jordan Wilkie, *How Does the SBI Investigate Police Shootings in NC?*, CAROLINA PUBLIC PRESS (May 6, 2021), <https://carolinapublicpress.org/45348/how-does-the-sbi-investigate-police-shootings-in-nc/>.

<sup>11</sup> See generally JOHN ALDRIDGE, NORTH CAROLINA SHERIFFS' ASSOCIATION, OFFICER'S USE OF FORCE: THE INVESTIGATIVE PROCESS (2018), <https://ncsheriffs.org/wp-content/uploads/Officers-Use-of-Force-The-Investigative-Process.pdf>.

<sup>12</sup> Enacted by Part X of S.L. 2021-138.

<sup>13</sup> The SBI also may be called upon to investigate deaths that occur while a person is in the custody of the Department of Public Safety, a state prison, a county jail, or a local confinement facility.

enforcement agencies<sup>14</sup> that tracks all “critical incident data” of North Carolina law enforcement officers.<sup>15</sup> A “critical incident” is defined as “[a]n incident involving any use of force by a law enforcement officer that results in death or serious bodily injury to a person.”

*Early Warning System.* A new statute<sup>16</sup> enacted by Part VIII of S.L. 2021-138 requires that every North Carolina law enforcement agency develop and implement an “early warning system to document and track the actions and behaviors of law enforcement officers for the purpose of intervening and improving performance.” At a minimum, the system must track (1) instances of the discharge of a firearm; (2) instances of use of force; (3) vehicle collisions; and (4) citizen complaints.

### **Employment Requirements & Records.**

*Universal Minimum Standards, Recruiting Best Practices & In-Service Training.* Parts and V and IX of S.L. 2021-138 broadly direct the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs’ Education and Training Standards Commission<sup>17</sup> to jointly develop statewide minimum standards for law enforcement officers. These standards are to be codified as administrative rules. The law enforcement officer training standards commissions also were directed to develop a best practices guide to help law enforcement agencies recruit and retain a diverse workforce. The commissions were required to report to the Joint Legislative Oversight Committee on Justice and Public Safety on the development of statewide minimum standards by December 31, 2021, and must report on the best practices guide no later than April 1, 2022.

Part XI of S.L. 2021-138 amends the statutory requirements for in-service training of law enforcement officers by adding several topics to the mandatory training standards established by the law enforcement officer training standards commissions. The new training topics include ethics, mental health for officers, community policing, minority sensitivity, use of force, and the duty to intervene and report.<sup>18</sup>

*Mental Health and Wellness & Psychological Screening.* Statutory amendments made by Part VII of S.L. 2021-138<sup>19</sup> require the law enforcement officer training standards commissions to include education and training related to “effective mental health and wellness strategies” among the standards promulgated by the commissions for both entry level employment and in-

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<sup>14</sup> A new statute enacted by Part XVIII of [S.L. 2021-180](#) prohibits state agencies from creating or maintaining a database that “compiles and makes available to the public” information or data regarding critical incidents or disciplinary actions taken against law enforcement officers unless specifically authorized to do so by the General Assembly. See new G.S. 143B-907. This statute presumably will prevent public access to the critical incident database described here.

<sup>15</sup> G.S. 17C-15; G.S. 17E-15.

<sup>16</sup> G.S. 17A-10.

<sup>17</sup> These commissions are referred to together hereinafter as the “law enforcement officer training standards commissions.”

<sup>18</sup> G.S. 17C-6(a)(14)(c) through (h); G.S. 17E-4(a)(11)(c) through (h).

<sup>19</sup> Overlapping versions of the statutory amendments also were enacted by S.L. 2021-137.

service officer training.<sup>20</sup> For the in-service component, the commissions are directed to require two hours of training on mental health and wellness issues every three years.

Other statutory amendments made by Part VII direct the law enforcement officer training standards commissions to require, as part officer certification, the administration of a psychological screening examination, including a face-to-face interview by a licensed psychologist. The purpose of the examination is to determine a person’s “psychological suitability to properly fulfill the responsibilities” of a law enforcement officer.<sup>21</sup> The examination must be given before initial certification as an officer or before performing any action requiring certification by the respective commissions.

*Criminal Record Check & Fingerprinting.* A new statute enacted by Part II of S.L. 2021-138 requires the SBI to provide the law enforcement officer training standards commissions with the state and national criminal history of any person who applies for certification or is certified as a law enforcement officer.<sup>22</sup> The SBI must enroll the fingerprints of applicants and certified officers into the Statewide Automated Fingerprint Identification System (SAFIS). The SBI also must enroll the fingerprints into the Federal Bureau of Investigation’s Next Generation Identification (NGI) System and Criminal Justice Record of Arrest and Prosecution Background (Rap Back) Service. The SBI additionally must notify the applicable certifying commission of any subsequent arrest of an individual identified through the FBI Rap Back Service.

*Creation and Use of Decertification Databases.* Parts I and XV of S.L. 2021-138 introduce new requirements for tracking law enforcement officer decertification at the state and national level. Part I enacts new statutes directing the law enforcement officer training standards commissions to develop and maintain publicly accessible statewide databases that contain all revocations and suspensions of officer certifications by the respective commissions.<sup>23</sup> Part XV grants the commissions the power to search names of every applicant for certification or lateral transfer using the National Decertification Index maintained by the International Association of Directors of Law Enforcement Standards and Training to determine whether an applicant has any record that would disqualify them for certification.<sup>24</sup>

### ***Giglio Material Reporting.***

When prosecutors learn of misconduct that calls a law enforcement officer’s credibility into question, they may notify the officer and the officer’s employing agency that the officer no longer will be called to testify in criminal trials. This notification commonly is referred to as a “*Giglio* notification” or “*Giglio* letter.” In *Giglio v. United States*, the United States Supreme Court held that the constitution requires prosecutors to notify a defendant of evidence

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<sup>20</sup> G.S. 17C-6(a); G.S. 17E-4(a).

<sup>21</sup> G.S. 17C-10(c); G.S. 17E-7(c).

<sup>22</sup> G.S. 143B-972.1.

<sup>23</sup> G.S. 17C-14; G.S. 17E-14.

<sup>24</sup> G.S. 17C-6(a)(21); G.S. 17E-4(a)(17). Overlapping statutory amendments were made by S.L. 2021-137.

affecting the reliability of certain witnesses.<sup>25</sup> For various reasons, including concern about confidentiality of personnel records and practical barriers to information sharing, *Giglio* notifications historically have not been widely shared between different law enforcement agencies and jurisdictions.<sup>26</sup> Since the notifications often are not widely shared, an officer who has been barred from testifying in one jurisdiction sometimes is able to find new employment in a different jurisdiction and testify in criminal trials there, because actors in the new jurisdiction are unaware of the officer's past *Giglio* notification.

Part IV of S.L. 2021-138 enacts new statutes significantly revising North Carolina law on *Giglio* notifications.<sup>27</sup> Under the new statutes,<sup>28</sup> a law enforcement officer<sup>29</sup> who receives notification that he or she "may not be called to testify at trial based on bias, interest, or lack of credibility" must report and provide a copy of the notification to the appropriate Standards Division of the North Carolina Department of Justice<sup>30</sup> within thirty days of receiving the notification. To trigger the reporting requirement, the notification to the officer must be either (1) made in writing by a North Carolina trial court judge, federal judge, district attorney, assistant district attorney, United States attorney, assistant United States attorney, or the officer's agency head; or (2) made in open court by a North Carolina trial court judge or federal judge and documented in a written order.<sup>31</sup> The officer must make the report to the appropriate Standards Division in writing and must state who provided notice.<sup>32</sup> The officer must make the same report to the officer's agency head, who likewise is obligated to report the notification to the appropriate Standards Division.<sup>33</sup> The person who issued the notification also must report it to the appropriate Standards Division, and provide a copy of the associated written document or order.<sup>34</sup>

If a Standards Division transfers to another agency the certification of any officer who has received a *Giglio* notification, the Division must inform in writing the head of the new agency

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<sup>25</sup> 405 U.S. 150 (1972). A *Giglio* notification sometimes is referred to as a "death letter" because it often ends an officer's career with their employing agency.

<sup>26</sup> See, e.g., Carolina Public Press, *DAs Warn Police About Untrustworthy Officers but Won't Share With Public*, CAROLINAPUBLICPRESS.ORG (June 3, 2021), <https://carolinapublicpress.org/46100/das-warn-police-about-untrustworthy-officers-but-wont-share-with-public/>.

<sup>27</sup> Overlapping versions of the new statutes also were enacted by S.L. 2021-137.

<sup>28</sup> See generally G.S. 17C-16; G.S. 17E-16. See also Shea Denning, *New Reporting Requirements for Giglio Notifications*, NC CRIM. LAW BLOG (Oct. 18, 2021), <https://nccriminallaw.sog.unc.edu/new-reporting-requirements-for-giglio-notifications/>.

<sup>29</sup> The new statutory requirements apply to any person who is certified or has received an offer of employment conditional on certification by the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriffs' Education and Training Standards Commission.

<sup>30</sup> The Criminal Justice Standards Division and the Justice Officers' Standards Division of the North Carolina Department of Justice administer the certification and training programs of the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission, respectively.

<sup>31</sup> G.S. 17C-16(a); G.S. 17E-16(a).

<sup>32</sup> G.S. 17C-16(b); G.S. 17E-16(b).

<sup>33</sup> *Id.*

<sup>34</sup> G.S. 17C-16(c); G.S. 17E-16(c).

and the relevant elected district attorney that the officer previously received a *Giglio* notification.<sup>35</sup> When a Standards Division transfers a covered certification to a state law enforcement agency, the Division must notify every North Carolina elected district attorney. The new statutes make provisions for situations where a *Giglio* notification is rescinded in writing and include a mechanism for officers to apply for a hearing before a judge for a determination of whether the person has received a notification covered by the new statutes.<sup>36</sup> The law enforcement officer training standards commissions must make yearly reports to the General Assembly regarding the number of individuals for whom reports were received and what action has been taken against their certifications.<sup>37</sup>

### **Responses to Legislation**

The policing reforms discussed here received bipartisan support in the North Carolina General Assembly. They incorporated recommendations from diverse stakeholders including the North Carolina Task Force for Racial Equity in Criminal Justice and the North Carolina Sheriff's Association.<sup>38</sup> However, some advocates, including the ACLU of North Carolina, have been critical of the legislation, asserting that it did not go far enough in increasing transparency in or providing oversight of policing practices.<sup>39</sup>

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<sup>35</sup> G.S. 17C-16(d); G.S. 17E-16(d).

<sup>36</sup> See G.S. 17C-16(e) & (h); G.S. 17E-16(e) & (h).

<sup>37</sup> G.S. 17C-16(f); G.S. 17E-16(f).

<sup>38</sup> See Xu, *supra* note 9.

<sup>39</sup> *Id.*