

Chapter 1:

Pretrial Release

1.1	Importance of Pretrial Release	2
1.2	Required Proceedings	3
	A. Initial Appearance	
	B. Misdemeanors	
	C. Felonies	
1.3	Eligibility for Pretrial Release	6
	A. Noncapital Offenses	
	B. Capital Offenses	
1.4	Exceptions to Eligibility for Pretrial Release	7
	A. Generally	
	B. Initial Appearance Delayed	
	C. Setting of Pretrial Release Conditions Delayed: Domestic Violence and Probation Cases	
	D. Pretrial Release Conditions Set but Release Delayed: Impaired Driving and Other Cases	
	E. Pretrial Release Conditions Denied: Capital, Probation, and Other Cases	
	F. Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases	
	G. Circumstances Not Justifying Delay or Denial of Pretrial Release	
1.5	Types of Pretrial Release	13
	A. Types Not Requiring Security	
	B. Types Requiring Security	
	C. Electronic House Arrest	
	D. Pretrial Services Programs	
1.6	Law Governing Judge’s Discretion	16
	A. Factors	
	B. Restrictions on Activities	
	C. Secured Bond as Last Resort	
	D. Amount of Secured Bond	
	E. Type of Security	
	F. Source of Funds for Secured Bond	
1.7	Investigation and Preparation for Bond Reduction Motion	19

1.8 Procedure for Bond Reduction Motion	20
A. Who Hears the Motion	
B. Uncontested Bond Reductions	
C. Contested Bond Hearings	
D. Successive Motions	
1.9 Post-Release Issues	22
A. Modification of Pretrial Release Conditions	
B. Consequences of Violation of Conditions	
C. Consequences of Failure to Appear	
D. Orders for Arrest	
E. Bond Forfeitures	
F. Surrender by Surety	
G. Return of Security	
1.10 Release Pending Appeal	27
A. Appeal from District Court Conviction	
B. Appeal from Superior Court Conviction	
1.11 Dismissal as Remedy for Violations	29
A. Impaired Driving Cases	
B. Domestic Violence Cases	
C. Other Holds	
Appendix 1-1 Interview Checklist for Bond Hearing	38

G.S. 15A-531 through 15A-547.1 contain the basic provisions on pretrial (and posttrial) release for criminal charges. *See also* G.S. 15A-1345(b), (b1) (release conditions in probation cases). Subject to these general requirements, local policies and practices may vary. *See* G.S. 15A-535(a) (senior resident superior court judge, in consultation with chief district court judge, must issue pretrial release policies for each county in judicial district).

Prosecutors often will not oppose the setting of pretrial release conditions that your client can meet. At other times, defense counsel must overcome the prosecutor's or court's resistance to a bond reduction. For sample bond reduction and other pretrial release motions, consult the motions bank for non-capital cases on the IDS website, www.ncids.org. For a discussion of preadjudication custody in juvenile delinquency cases, *see* JUVENILE DEFENDER MANUAL Ch. 8, available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_08.pdf.

1.1 Importance of Pretrial Release

A critical first step in any case is to seek pretrial release of an in-custody client. Pretrial release has an obvious and immediate benefit for your client, but it also has other positive

consequences for preparation of the case.

- Your client can meet with you more easily and help you prepare for trial by, for example, showing you relevant places and locating witnesses.
- Your client has the opportunity to demonstrate good citizenship by getting a job, supporting his or her family, and other actions.
- Your client may put greater faith in your judgment on issues such as whether to testify or accept a plea.
- Your client may receive a better result at trial or sentencing simply because he or she is not in jail. *See Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978) (discussing phenomenon that defendant who is not incarcerated at time of trial stands better chance of being acquitted or, if convicted, receiving probationary sentence).

In some situations, your client may decide not to seek pretrial release. For example, he or she may have a better chance of receiving a misdemeanor plea on a felony charge or a sentence of time served. He or she also may have personal reasons (drug addiction, homelessness, or the prospect of a violent confrontation with another person) for preferring to stay in jail. Ultimately, however, it is for the client to decide whether to forego seeking pretrial release. *See* N.C. State Bar Rules of Professional Conduct, Rule 1.2 (allocation of authority between lawyer and client).

1.2 Required Proceedings

At a number of points during the life of a case, the court must consider the defendant's eligibility for pretrial release. Whenever feasible, counsel should be prepared to present information on the defendant's behalf.

A. Initial Appearance

By the time the court appoints counsel, the defendant ordinarily will have appeared at least once before a judicial official on the question of pretrial release. Upon arrest, the defendant must be taken without unnecessary delay before a magistrate or other judicial official for an initial appearance. *See* G.S. 15A-501(2), 15A-511. An initial appearance before a magistrate is required in both misdemeanor and felony cases. *See* G.S. 15A-511 (requirements of initial appearance). In most instances, the magistrate must set conditions of pretrial release. Defense counsel ordinarily has no input at this stage of the case; however, counsel who already represents the client may be able to speak with the magistrate who holds the initial appearance and thereby avoid a later bond motion. Errors made by a magistrate, such as holding a defendant without bond, may provide grounds for relief for a defendant in some circumstances. *See infra* § 1.4 (discussing when release may be delayed or denied); § 1.11 (remedies for violations). For a detailed discussion of magistrates' responsibilities at initial appearance, *see* Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08 (Dec. 2009),

available at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0908.pdf.

B. Misdemeanors

Generally. Unless local practice provides otherwise, a judge does not automatically review pretrial release conditions in a misdemeanor case. Typically, at initial appearance the magistrate sets a trial date in district court, which may be a week or more away. At the first trial date, the district court may appoint counsel and continue the case but does not necessarily reconsider pretrial release conditions. By the time counsel learns of appointment, the defendant may have served as much time as he or she could receive if convicted. Counsel therefore should consider moving for a bond reduction immediately after appointment or for the court date to be moved up if, for example, the defendant plans to enter a plea of guilty for time served.

Legal limits on delay. Delays in the appointment of counsel for an indigent defendant in a misdemeanor case may result in longer pretrial incarceration and may violate statutory and constitutional requirements, although the remedy for a violation is not clear.

In its 2008 decision, *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the U.S. Supreme Court held that the right to counsel attaches at initial appearance before a magistrate. Although the Court did not require that a defendant have counsel at the initial appearance, it stated that counsel must be appointed within a reasonable time thereafter. North Carolina's statutes also require early inquiry into the appointment of counsel for in-custody defendants, in misdemeanor as well as felony cases. G.S. 7A-453 states that for defendants who have been in custody for 48 hours without having counsel appointed, the authority having custody of the defendant must notify the designee of the Office of Indigent Defense Services (IDS) in counties designated by IDS—that is, the Public Defender in districts with a public defender office—and the clerk of court in all other counties. The Public Defender or clerk must take steps to ensure appointment of counsel, who then can act to protect the client's rights, such as moving to modify pretrial release conditions. In practice, however, many districts may not be following the statute's requirements—for example, the custodian may not have a procedure in place for reviewing whether inmates have counsel and for notifying the Public Defender or clerk.

Practical solutions. Different districts may have procedures that expedite the appointment of counsel and the consideration of pretrial release conditions by a judge, but such procedures are not in place statewide. Some public defender offices have a system for reviewing the jail list to determine whether new inmates have counsel and to ensure that counsel is appointed. Some judicial districts hold first appearances for misdemeanors, although first appearances are not statutorily required. Some magistrates at initial appearance advise defendants of their *Rothgery* rights, telling them they have a right to have counsel appointed if they qualify and noting any request for counsel on the release order or other form; it is unclear, however, whether such an advisement leads to expedited appointment of counsel. In 2009, the General Assembly revised G.S. 7A-146(11) and G.S. 7A-292(15) to provide that chief district court judges may authorize

magistrates who are duly licensed attorneys to appoint counsel in noncapital cases for defendants entitled to counsel at state expense; most magistrates are not attorneys, however.

C. Felonies

First appearance. After the initial appearance in a felony case, the defendant ordinarily appears before a district court judge for a first appearance. For an in-custody defendant, the first appearance must occur within 96 hours of arrest or at the next regular session of district court, whichever is earlier. At the first appearance, the district court judge (or clerk of court if no district court judge is available) appoints counsel and reviews the conditions of pretrial release. *See generally* G.S. 15A-601 through 15A-606 (requirements of first appearance).

The prosecutor may argue that he or she is not prepared for or on notice of a hearing on bond, but counsel should resist any further delay by pointing out that it is mandatory for the court to review the defendant's eligibility for release at first appearance. *See* G.S. 15A-605.

In some instances, appointed counsel will enter the case early enough to represent an indigent defendant at first appearance. For example, under G.S. 7A-452(a), the Public Defender for the judicial district may appoint himself or herself to represent a defendant, subject to approval by the court; or, counsel already may represent the defendant on another matter. In an effort to reduce jail overcrowding, some counties (such as Durham) may have a "bond attorney" to represent indigent defendants at first appearance. *See also infra* § 1.5D (some pretrial services programs recommend pretrial release conditions at or before first appearance).

Probable cause hearing. In felony cases, the defendant is entitled to a probable cause hearing before a district court judge within fifteen working days of the first appearance. If the judge finds probable cause to bind the defendant over to superior court, he or she must review the defendant's conditions of pretrial release. *See* G.S. 15A-614. Counsel should be prepared to cite this provision because the State may argue, erroneously, that the district court no longer has jurisdiction to modify bond once it has found probable cause.

In many judicial districts, probable cause hearings seldom occur so the district court does not necessarily reconsider the defendant's eligibility for release. The probable cause stage of a case still may afford the opportunity to obtain more favorable pretrial release conditions. For example, counsel may want to argue for release or a lower bond if the probable cause hearing is continued over the defendant's objection, especially where contrary to statute. For a further discussion of probable cause hearings, see Chapter 3 of this manual.

Cases initiated by indictment. Some felony cases begin by indictment, with the

defendant arrested under an order for arrest. *See* G.S. 15A-305(b)(1). Upon the defendant's arrest, the magistrate still must hold an initial appearance and determine pretrial release conditions; however, if the superior court has specified a bond amount in the order for arrest, it is unlikely that the magistrate will lower the bond.

The defendant is entitled to a first appearance thereafter, at which a judge must review pretrial release conditions. The first appearance may take place in superior court because, upon indictment, the case is within the superior court's jurisdiction. As a practical matter, however, the district court holds the first appearance in some districts and reviews pretrial release conditions. The defendant does not receive a probable cause hearing when the case begins by indictment.

1.3 Eligibility for Pretrial Release

A. Noncapital Offenses

Generally. Under G.S. 15A-533(b), defendants charged with a noncapital offense are entitled to have pretrial release conditions determined except in specified circumstances. *See also State v. Labinski*, 188 N.C. App. 120 (2008) (subject to certain exceptions, a noncapital criminal defendant has the right to pretrial release under G.S. 15A-533). The exceptions are discussed *infra* § 1.4.

Probation violations. Generally, defendants charged with probation violations have the same right as other noncapital defendants to have conditions of release set pending a violation hearing. *See* G.S. 15A-1345(b); STEVENS H. CLARKE, *LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA* 180 (Institute of Government, 2d ed. 1997). Courts sometimes set a bond to apply in the event the defendant violates a condition of probation. This practice has been questioned by the Court of Appeals and at most constitutes a recommendation should the defendant be arrested for a probation violation. *See State v. Hilbert*, 145 N.C. App. 440 (2001). Following arrest, the court must hold a preliminary hearing (essentially, a probable cause hearing) within seven working days unless a full revocation hearing is first held or the probationer waives the preliminary hearing. If the court fails to hold a timely preliminary hearing, the probationer ordinarily must be released pending the revocation hearing. *See* G.S. 15A-1345(c).

In 2009, the General Assembly created exceptions to the usual pretrial release rules in cases in which the defendant is on probation and is charged with a new felony. *See infra* § 1.4C., E., F.

Infractions. A defendant charged with an infraction may not be incarcerated. *See* G.S. 15A-1113; ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* 46–47 (UNC School of Government, 3d ed. 2003) (describing rules for infractions); *see also Pulliam v. Allen*, 466 U.S. 522 (1984) (successful suit against magistrate for practice of setting secured bond on nonjailable offenses). Although a defendant charged with an

infraction may initially be asked to post a bond in some circumstances, an unsecured bond must be set if the defendant is unable to post a secured one. *See* G.S. 15A-1113(c).

A defendant also may not be arrested and required to post bond for offenses subject to the Interstate Wildlife Violator Compact. *See* John Rubin, 2009 *Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06, at 24–25 (Aug. 2008), available at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0806.pdf.

B. Capital Offenses

Defendants charged with a capital offense do not have the right to have pretrial release conditions determined; however, a judge (not a magistrate) has the discretion to authorize pretrial release. *See* G.S. 15A-533(c); *State v. Oliver*, 302 N.C. 28 (1981) (pretrial release of capital defendant within judge’s discretion). In *State v. Sparks*, 297 N.C. 314 (1979), the court found that the judge acted within his discretion in denying bail for a defendant charged with first-degree murder even though he could not be tried capitally because North Carolina’s capital scheme had been declared unconstitutional. *Sparks* may be limited to the unusual circumstances of that case and may not deny a defendant the right to have pretrial release conditions set in a first-degree murder case once the State has decided to proceed noncapitally.

1.4 Exceptions to Eligibility for Pretrial Release

A. Generally

The setting of bail may be delayed or denied only if authorized by statute and within constitutional limits. *See United States v. Salerno*, 481 U.S. 739 (1987) (discussing circumstances in which preventive detention, without bond, is permissible). The drafters of G.S. Chapter 15A decided initially to steer clear of provisions allowing bail to be delayed or denied based on predictions of future dangerousness. *See* G.S. 15A-534 commentary (observing that drafters “steered clear of the preventive detention controversy”). Over the years, however, statutory exceptions to the right to pretrial release have multiplied. And, as a practical matter, pretrial release is sometimes delayed or denied without statutory authorization.

By the time counsel appears in the case, some of these obstacles to pretrial release will have passed and release conditions will have been set. If a client is still being held without release conditions, counsel should make a motion to set conditions; many of the exceptions to pretrial release apply only to the setting of conditions by the magistrate at initial appearance. (The discussion below is organized from the perspective of when a magistrate may delay or deny pretrial release conditions.) The delay or denial of pretrial release conditions in some circumstances may warrant other relief as well. Provisions and practices delaying or denying pretrial release conditions have not been tested extensively

other than in impaired driving and domestic violence cases (*see infra* § 1.11) and may warrant challenge by defense counsel.

For a quick reference on pretrial release exceptions, *see* John Rubin, *Exceptions to Pretrial Release Procedures: A Guide for Magistrates* (Aug. 2010), available at www.sog.unc.edu/programs/crimlawindex/documents/ExceptionstoPretrialReleaseProceduresTable.pdf.

B. Initial Appearance Delayed

Inability to understand procedural rights. If the defendant is unable to understand his or her procedural rights, is unconscious, or is so unruly that he or she disrupts and impedes the proceeding, a magistrate may briefly postpone the initial appearance and setting of pretrial release conditions. *See* G.S. 15A-511(a)(3). This statute authorizes a brief delay only, as its effect is to deprive the defendant of other protections afforded at initial appearance, including the advisement of charges and the right to communicate with counsel.

C. Setting of Pretrial Release Conditions Delayed: Domestic Violence and Probation Cases

Domestic violence offenses. For certain domestic violence offenses, a defendant may be held in custody for up to 48 hours after arrest so that a judge can set conditions of pretrial release. *See* G.S. 15A-534.1. If a judge is not available within 48 hours of arrest, a magistrate must proceed to set pretrial release conditions. *Id.* Note that G.S. 15A-534.1 does not authorize a 48-hour hold on defendants arrested for the specified offenses. A defendant must be brought before a judge at the earliest opportunity, and the failure to do so may warrant dismissal. *See State v. Thompson*, 349 N.C. 483 (1998). Litigation over this provision is discussed *infra* § 1.11.

G.S. 15A-534.1(a)(1) also provides that a judge may delay release for a reasonable period of time even after the defendant is brought before the judge if the defendant's immediate release would pose a danger to a domestic violence victim or another person. *See State v. Gilbert*, 139 N.C. App. 657 (2000) (permissible for judge to delay release by additional five hours). This type of hold predated the General Assembly's enactment of the 48-hour provision and, as a practical matter, should be little used now because the defendant will already have been held for some time before having pretrial release conditions set.

Probationer charged with felony if insufficient information about danger. For this category of probationers, a magistrate or other judicial official must delay setting conditions if there is insufficient information about whether the defendant poses a danger to the public. G.S. 15A-534(d2). "Danger" is not defined in the statute. The judicial official must record the basis for the judicial official's decision that additional information is needed, the nature of the information needed, and a date, within 96 hours of arrest, for the defendant to be brought before a judicial official. If sufficient

information is provided before the first appearance, the first available judicial official must set pretrial release conditions. If a pretrial release determination has been delayed for insufficient information until the defendant's first appearance, the judge at first appearance must set conditions. It does not appear that the judge may further delay the determination. Presumably, the State has the burden of showing dangerousness and, if there is insufficient information about dangerousness, the judge must set pretrial release conditions as in other cases. If a person is found to pose a danger, pretrial release conditions are set as described in F., below.

Probation violation by probationer who has pending felony charge or is subject to sex offender registration, if insufficient information about danger. For this category of probationers, a magistrate or other judicial must delay setting conditions if there is insufficient information about dangerousness. G.S. 15A-1345(b1). "Danger" is not defined in the statute. Denial of release for this reason may last no longer than seven days. After seven days, if sufficient information has not been provided to determine dangerousness, the defendant must be brought before any judicial official to determine conditions of release. It does not appear that the judicial official may further delay the determination. If there is insufficient information about dangerousness, which presumably is the State's burden to show, the judicial official must set conditions of release as in other cases. If a person is found to pose a danger, release conditions may be denied as described in E., below.

D. Pretrial Release Conditions Set but Release Delayed: Impaired Driving and Other Cases

Impaired driving. A defendant charged with an impaired driving offense is entitled to have pretrial release conditions set. 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 must 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. The defendant may be detained for this reason no longer than 24 hours. Once condition (1) or (2) is met and the defendant has satisfied any conditions of pretrial release, such as the posting of bond, the defendant must be released. *See* G.S. 15A-534.2. If release is improperly delayed or denied, grounds may exist for dismissal of the charges. For a further discussion of this type of case, *see infra* § 1.11.A.

Testing for AIDS or Hepatitis B. A defendant may be detained for up to 24 hours for AIDS or hepatitis B testing in accordance with the requirements of G.S. 15A-534.3. In such cases, a magistrate ordinarily will conduct the initial appearance and set pretrial release conditions and will order the defendant held for up to 24 hours for the testing to be conducted.

E. Pretrial Release Conditions Denied: Capital, Probation, and Other Cases

Capital offenses. *See* G.S. 15A-533(c); *see also supra* § 1.3B.

Certain other offenses. For the following offenses, North Carolina statutes establish a rebuttable presumption that no condition of pretrial release would assure the safety of the community if the conditions set forth in the applicable statute apply:

- Certain drug trafficking offenses. G.S. 15A-533(d).
- Certain gang offenses. G.S. 15A-533(e).
- Certain methamphetamine offenses. G.S. 15A-534.6.

Violation of certain health control measures. If a person violates certain health control measures and poses a threat to the health and safety of others, the judicial official must deny pretrial release until the person no longer poses a threat. *See* G.S. 15-534.5.

Probation violation by probationer who has pending felony charge or is subject to sex offender registration, if probationer poses danger to public. For this category of probationers, if the person is found to be a danger, the judicial official must deny release conditions pending the violation hearing. “Danger” is not defined in the statute.

A person charged with a probation violation is entitled to a preliminary hearing under G.S. 15A-1345(c). That statute provides that if the hearing is not held within seven working days of arrest, the probationer is entitled to be released to continue on probation pending a hearing. For probationers in this category, however, the statute states that they must be held until the final violation hearing if they have been denied release on the ground of dangerousness. This provision may conflict with due process principles, which require that probationers be afforded a preliminary hearing “as promptly as convenient after arrest.” *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (parolees); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (applying principle to probationers).

Fugitives. A fugitive from another state has a limited right to pretrial release. G.S. 15A-736 states that a judge or magistrate may allow bail if the defendant is not charged with an offense punishable by death or life imprisonment in the state where the offense was committed. Once a governor’s warrant issues, a defendant does not appear to have a right to pretrial release regardless of the nature of the charges. *See* ROBERT L. FARB, STATE OF NORTH CAROLINA EXTRADITION MANUAL 41–42 (Institute of Government, 1987) (interpreting case law as barring pretrial release after issuance of governor’s warrant).

Interstate Probation Compact. An out-of-state probationer who is subject to the Interstate Compact for Adult Supervision (Art. 4B of G.S. Chapter 148, G.S. 148-65.4 through G.S. 148-65.9), is not subject to the rules on extradition of fugitives. Under current practice, a probationer charged with a violation is committed to jail to await a hearing, unless waived, before an administrative officer of the Department of Community Correction, at which the administrative officer determines whether the probationer should

be returned to the originating state. The hearing must take place within 15 days of arrest. *See* G.S. 148-65.8. The probationer does not receive release conditions pending the hearing, does not appear before a judge, and at present does not receive appointed counsel to assist him or her in preparing for the hearing, in determining whether to waive the hearing, or in challenging untimely hearings.

Post-release supervision or parole violations. A person taken into custody for a violation of post-release supervision or parole is not subject to the provisions on pretrial release. *See* G.S. 15A-1368.6 (post-release supervision); G.S. 15A-1376 (parole).

Involuntary commitment. A defendant who commits an offense while subject to a valid inpatient involuntary commitment order does not have a right to pretrial release; rather, the defendant is returned to the treatment facility where he or she was residing. *See* G.S. 15A-533(a); *compare infra* § 2.8E (person who is incapable of proceeding but not subject to inpatient involuntary commitment order may have pretrial release conditions set).

Federal offenses. A local officer may arrest a person for a federal offense and take the person before a North Carolina magistrate or judge, who may set pretrial release conditions in accordance with usual state procedures. In limited circumstances, the North Carolina judicial official may order the person temporarily detained without setting release conditions. *See* 18 U.S.C. 3041, 3142.

Military deserters. Military deserters are not entitled to pretrial release conditions. *See Huff v. Watson*, 99 S.E. 307 (Ga. 1919).

F. Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases

In some circumstances, a magistrate at initial appearance is required by statute to set certain pretrial release conditions. In all of these instances, counsel may still make a later motion to reduce or modify bond.

- *If a person fails to appear*, and he or she is arrested on an order for arrest (OFA) or surrendered by a surety, the magistrate must impose the conditions in the OFA. If the OFA does not require particular conditions, the magistrate must set a secured bond in at least twice the amount of the previous bond. If there was not a previous bond, the magistrate must set a secured bond of at least \$500. G.S. 15A-534(d1). If the person is surrendered by a surety before he or she is arrested, the OFA should be recalled because the person has already been taken into custody and had new pretrial release conditions set; if the OFA is not recalled, the person may be wrongfully rearrested.
- *If a probationer is charged with a felony and is found to be a danger*, the magistrate must impose a secured bond. G.S. 15A-534(d2).
- *If a person is placed on electronic house arrest*, the magistrate must set a secured bond. G.S. 15A-534(a).
- *In certain cases involving child victims*, the magistrate must impose specified

restrictions on the defendant's conduct, such as stay-away conditions. G.S. 15A-534.4.

- If *fingerprints or a DNA sample have not been collected from the defendant as required by certain statutes*, the magistrate must make collection a condition of pretrial release. G.S. 15A-534(a) (effective Feb. 1, 2011).

G. Circumstances Not Justifying Delay or Denial of Pretrial Release

Magistrates sometimes delay or deny release when there is no statutory authority for doing so. They may misapply the provisions described above or may delay or deny release without authority. Some common errors are as follows:

- Magistrates sometimes do not set pretrial release conditions if a person who is charged with an offense in another county is arrested in the magistrate's county. There is no authority for the magistrate in the arresting county to wait for the defendant to be transported to the charging county for the setting of release conditions; the magistrate in the arresting county must set pretrial release conditions, which are valid throughout the state and regardless where the offense occurred. *See* Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08, at 18–19 (Dec. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0908.pdf.
- Magistrates sometimes do not set pretrial release conditions if a person is arrested based on an electronic “hit” (via the Division of Criminal Information/Police Information Network) and the paperwork is not then available. A law enforcement officer may arrest a person if there is an outstanding warrant but the officer does not then have the paperwork. G.S. 15A-401(a)(2) (arrest by officer pursuant to warrant not in possession of officer). There is no authority, however, for a magistrate to delay setting conditions to await the arrival or service of paperwork. *See* Smith, *supra*, at 18–19.
- Electronic hits sometimes say “no bond,” particularly in cases in which it is alleged that a probationer is an “absconder.” There is no authority for denying bond to an in-state probationer except in the circumstances described in C., E., and F., above.
- Magistrates sometimes delay or deny pretrial conditions in cases in which they believe the defendant is not a citizen. Magistrates have no role in addressing citizenship matters. If Immigration and Customs Enforcement (ICE) has filed a detainer, the jail may detain the defendant for up to 48 hours (excluding weekends and holidays) after the defendant satisfies pretrial release conditions. 8 C.F.R. 287.7. The jail, not the magistrate, is responsible for implementing the 48-hour detainer, and the magistrate may not delay or deny conditions for this reason.

1.5 Types of Pretrial Release

North Carolina now recognizes five types of pretrial release: written promise to appear, unsecured bond, custody release, secured bond, and electronic house arrest with a secured bond. The judicial official must choose “at least” one of these in setting pretrial release conditions. G.S. 15A-534(a). Previously, the statute stated that the judicial official must impose “one” form of pretrial release, which apparently meant that a judicial official could impose one form only. The language was changed when house arrest with electronic monitoring (electronic house arrest or EHA) was added as a form of pretrial release and a secured bond was made a requirement for EHA. While the change may have been intended merely to give effect to the required combination of EHA and a secured bond, the phrasing is not limited to that situation and may authorize other combinations, such as a written promise to appear and a custody release.

A. Types Not Requiring Security

Three types of pretrial release do not require any security.

Written promise to appear. The judicial official does not specify any dollar amount for this form of pretrial release (known in some states as “release on own recognizance”). *See* G.S. 15A-534(a)(1).

Unsecured bond. The defendant executes an appearance bond promising to pay the amount specified if he or she does not appear. No one else need sign, and the defendant need not post any security. *See* G.S. 15A-534(a)(2). If the defendant fails to appear in court as required, he or she is bound to pay the specified amount to the State of North Carolina. As a practical matter, the State is unlikely to proceed civilly to collect the amount owed; instead, the court will issue an order for arrest in the criminal case and, once taken into custody, the defendant will likely have to satisfy a secured bond to obtain release. *See supra* § 1.4F (discussing doubling and securing of bond after failure to appear).

Custody release. Any individual or organization may agree to supervise a defendant, including friends, relatives, employers, and shelters. G.S. 15A-534(a)(3). Both the supervising party and defendant must consent. *See State v. Gravette*, 327 N.C. 114 (1990) (court may not order probation department to supervise defendant without department’s consent); G.S. 15A-534(a) (defendant may reject custody release and elect secured bond).

B. Types Requiring Security

The fourth and fifth type of pretrial release, a secured bond and a secured bond with electronic house arrest (EHA), must be secured in one of the ways described below. For a discussion of limits on a judge’s authority in setting a secured bond, *see infra* § 1.6; for a detailed discussion of the mechanics of posting a secured bond, *see* Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No.

2009/08, at 38–44 (Dec. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0908.pdf.

Cash. A defendant may secure a bond by posting cash, or having someone else post cash, in the full amount of the bond. *See* G.S. 15A-534(a)(4); G.S. 58-75-1 (person may post cash or securities of state of North Carolina or United States to satisfy bond requirement). When the defendant deposits cash, no one other than the defendant need sign the bond.

The AOC form appearance bond (AOC-CR-201) requires the defendant to agree that cash posted by him or her may be used to satisfy the defendant’s other obligations in the case, such as restitution or fines imposed if the defendant is convicted. (If a family member or someone else posts cash for a defendant, and he or she wants it returned at the end of the case and not applied to the defendant’s obligations, the person may so indicate on the bond form; if the person does not so indicate, the cash will be treated as belonging to the defendant and applied to the defendant’s obligations.) Requiring the defendant’s agreement to such a condition is not specifically authorized by statute, but it may be difficult for a convicted defendant to challenge the application of a cash bond for this purpose. Counsel should be alert, however, to the practice of bond being set in the amount alleged to be owed by the defendant—for example, the amount of child support alleged to be due in a child support contempt case. Collection of a debt allegedly due is not a recognized purpose in setting bond. *See infra* § 1.6C., D. (identifying purposes of secured bond); *see also* G.S. 15A-1364(b) (defendant may not be imprisoned for inability to comply with order to pay fine and costs).

Judicial officials sometimes require all-cash bonds. The propriety of this practice is discussed *infra* § 1.6E.

Mortgage. The defendant may meet the requirements of a secured bond by executing a mortgage on real property. *See* G.S. 15A-534(a)(4); G.S. 58-74-5 (describing mortgage procedure). If the defendant is the sole owner of the real property, no one else need sign the bond.

Commercial sureties. A bond may be secured by a commercial or noncommercial surety. Commercial surety companies fall into two categories—“surety bondsmen” and “professional bondsmen.” A surety bondsman is a licensed agent of an insurance company, who essentially pledges the assets of the insurance company as security (G.S. 58-71-1(11)); a professional bondsman is licensed to pledge his or her own assets (G.S. 58-71-1(8)). The differences between the two types of commercial sureties may be of little consequence for the defendant unless the court has specified an all-cash bond. *See infra* § 1.6E.

Noncommercial sureties. A private person who receives no consideration, such as a relative or friend, may act as surety. (An attorney may not act as a surety on a bail bond except for an immediate family member. *See* G.S. 15A-541.) Such a person, called an “accommodation” or “property” bondsman, promises to pay the amount of the bond in the

event of breach. The person must provide evidence that he or she has sufficient property (real or personal) to satisfy the bond. *See* G.S. 58-71-1(1). Although the statute does not require the person to post any property as security, some counties may require the person to provide security (such as a deed of trust, certificate of deposit, etc.) for bonds over a certain amount. For large bonds, many counties will allow two or more people to split the bond—that is, divide the liability. For example, on a \$50,000 bond, two sureties (commercial or noncommercial) could agree to be liable for half of the bond.

Automobile Club bond. For motor vehicle offenses other than impaired driving or a felony, a defendant may be able to use an automobile club card to secure a bond up to \$1500. *See* G.S. 58-69-55.

C. Electronic House Arrest

If a judicial official imposes electronic house arrest (EHA) as a form of pretrial release, he or she also must impose a secured bond. G.S. 15A-534(a). A magistrate should not impose EHA as a condition of release if the program is not then able to accept the defendant—for example, it does not have equipment available to place the defendant on EHA. Such a pretrial release condition would amount to denial of pretrial release, which ordinarily is impermissible. *See supra* § 1.4 (discussing exceptions to right to have conditions of pretrial release set). Not all counties have pretrial EHA programs. In those counties with programs, counsel may be able to seek a bond reduction and get the defendant released on the condition that he or she be placed on EHA.

Can a defendant be required to reimburse the administering agency for the cost of EHA? There does not appear to be statutory authority for requiring the defendant to do so. It appears that a convicted defendant placed on pretrial EHA may be assessed a one-time fee of \$15.00 for those services. *See* G.S. 7A-304(a)(5) (allowing \$15 for pretrial services, to be remitted to county providing the services). There does not appear to be authority to assess a fee for EHA for defendants who are not convicted or a fee greater than \$15.00 for those who are convicted. The Administrative Office of the Courts has interpreted the applicable statutes as allowing a \$15 assessment only.

D. Pretrial Services Programs

Because of their interest in reducing jail overcrowding, pretrial services programs may be a useful ally in obtaining pretrial release for a defendant. A number of North Carolina counties have pretrial services programs. As of the time of this writing, twenty-eight pretrial services programs are operating in North Carolina, each covering one county. Not all provide the same services, however. For example, some programs primarily gather information through interviews and record checks of defendants; others may arrange for pretrial release for defendants even before first appearance and then supervise them after release; and others become closely involved with defendants, obtaining substance abuse treatment for them and coordinating educational and employment activities.

Programs that supervise defendants can be thought of as an additional type of pretrial release. *See* G.S. 15A-535(b) (judge may release defendant to supervision of pretrial services program, with defendant’s consent, in lieu of other types of pretrial release). Defendants supervised by a pretrial services program often do not have to post bond and may obtain release more quickly than they otherwise could. Defendants may have to comply with various conditions, such as reporting periodically to a pretrial services caseworker, obtaining substance abuse treatment, etc. If the defendant complies with the conditions of supervised release, the pretrial services caseworker may be a helpful witness at sentencing. If the defendant fails to comply with the conditions, the pretrial services program may discontinue supervision and recommend that the court revoke pretrial release and set new conditions.

Check with your local program to determine the eligibility criteria for supervised release. Some use a rating system that does not depend on the nature of the charged offense; others have a list of “excluded offenses.”

1.6 Law Governing Judge’s Discretion

Although judges have considerable discretion in specifying conditions of pretrial release, some constraints exist.

A. Factors

G.S. 15A-534(c) lists several factors that judicial officials must consider in setting pretrial release conditions. They are:

- the nature and circumstances of the offense charged;
- the weight of the evidence against the defendant;
- the defendant’s family ties, employment, financial resources, character, and mental condition;
- whether the defendant is so intoxicated that he or she would be endangered if released without supervision;
- the length of the defendant’s residence in the community;
- the defendant’s record of convictions;
- the defendant’s history of flight to avoid prosecution or failure to appear at court proceedings; and
- any other evidence relevant to pretrial release.

Judicial officials often concentrate on the nature of the offense in determining pretrial release. G.S. 15A-534(c), however, requires judicial officials to consider all of the above factors. *But cf. State v. Gilbert*, 139 N.C. App. 657 (2000) (although judicial official must consider these factors, burden is on the defendant to demonstrate that the judicial official did not do so); *State v. Haas*, 131 N.C. App. 113 (1998) (even if factors were all in

defendant's favor, they did not mandate particular bond); *State v. Eliason*, 100 N.C. App. 313 (1990) (magistrate's failure to consider all factors did not warrant dismissal of charges). Studies also have indicated that the seriousness of the charged offense does not necessarily predict whether the defendant will fail to appear for court or commit a new crime. *See, e.g.*, STEVENS H. CLARKE, REDUCING THE PRETRIAL JAIL POPULATION AND THE RISKS OF PRETRIAL RELEASE: A STUDY OF CATAWBA COUNTY, NORTH CAROLINA (Institute of Government, 1988).

B. Restrictions on Activities

In addition to imposing one of the five types of pretrial release, a judicial official may place restrictions on travel, associations, conduct, and place of abode. *See* G.S. 15A-534(a) (general restrictions); G.S. 15A-534.1 (restrictions for certain domestic violence offenses); G.S. 15A-534.4 (restrictions for certain sex offenses and crimes of violence against children). The restrictions must be reasonable and must relate to the goals of pretrial release. *See* G.S. 15A-534(b) (identifying goals of pretrial release); *see also* *Berry v. District of Columbia*, 833 F.2d 1031 (D.C. Cir. 1987) (under Fourth Amendment, drug testing as condition of pretrial release is permissible only if based on individualized suspicion of drug use and reasonably related to goals of pretrial release).

Practice note: Defense counsel should be prepared to suggest to the court and prosecutor suitable non-financial conditions in lieu of a secured bond.

C. Secured Bond as Last Resort

The judicial official must impose one of the less onerous types of pretrial release (written promise to appear, unsecured bond, or custody release) unless he or she determines that such release “will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.” G.S. 15A-534(b); *see also* *State v. Labinski*, 188 N.C. App. 120 (2008) (substantial statutory violation by setting of secured bond where there was no evidence that defendant would pose injury to another person without a secured bond); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc) (incarceration of those who cannot afford money bail, without meaningful consideration of other forms of pretrial release, violates due process and equal protection); WITHOUT FAVOR, DENIAL OR DELAY: A COURT SYSTEM FOR THE 21ST CENTURY at 54 (Commission for the Future of Justice and the Courts in North Carolina, 1996) (as part of recommendations for criminal justice system, Futures Commission recommended that officials setting conditions of pretrial release “should be encouraged to follow present law favoring release on conditions that do not require a secured bond”). If local policy requires it, a judicial official must make written findings when imposing a secured bond instead of other types of pretrial release. *See* G.S. 15A-535(a); *State v. O’Neal*, 108 N.C. App. 661 (1993) (lack of findings in record did not establish that court failed to consider appropriate factors in imposing secured bond).

D. Amount of Secured Bond

Some judicial districts have secured bond schedules, with recommended amounts for different offenses. The judicial official must consider the facts of the particular case, however. The amount of a secured bond is supposed to be based primarily on the risk of nonappearance by the defendant, not on potential dangerousness or risk of harm; potential dangerousness is supposed to be taken into consideration in deciding whether to impose a secured bond at all. *See State v. Jones*, 295 N.C. 345 (1978) (relying in part on Art. I, § 27 of North Carolina Constitution, which prohibits excessive bail, court notes that primary purpose of appearance bond is to assure defendant's presence at trial); G.S. 15A-534 commentary; *see also Stack v. Boyle*, 342 U.S. 1 (1951) (bail set in amount higher than reasonably necessary to assure defendant's appearance excessive under Eighth Amendment). Such an approach arguably would support lower bond amounts in general, as studies have indicated a weak relationship between the size of the bond and whether the defendant will appear in court. *See STEVENS H. CLARKE, PRETRIAL RELEASE IN DURHAM, NORTH CAROLINA* (Institute of Government, 1987) (so finding). As a practical matter, judicial officials may set a high secured bond, one the defendant is unlikely to make, when they believe the defendant would pose a danger if released. Such a practice amounts to a form of preventive detention not specifically authorized by statute. *See supra* § 1.4 (describing circumstances in which a judicial official is statutorily authorized to delay or deny release)). It may be difficult, however, for a defendant to establish that a high bond was not for the purpose of assuring his or her appearance at trial.

E. Type of Security

G.S. 15A-534(a) appears to provide that when the judicial official requires a secured bond, the judicial official may not dictate the type of security the defendant must provide (cash, mortgage, or surety). The statute allows the judicial official to choose among the five different forms of pretrial release (written promise to appear, unsecured bond, etc.); but, if the judicial official chooses a secured bond, a defendant may satisfy the bond by any of the indicated forms of security (cash, mortgage, or surety). Nevertheless, some judicial officials specify that defendants must post all cash to satisfy a secured bond. G.S. 15A-531(4) ameliorates the potential hardship of an all-cash bond by providing that a cash bond may be satisfied by the posting of a secured bond by a "surety bondsman" (a licensed agent of an insurance company) except in child support contempt proceedings. A "professional bondsman," however, may not post a secured bond when a cash bond is required. For a discussion of the two types of bondsmen, *see supra* § 1.5B (commercial sureties).

Some districts still require the posting of cash if the judicial official employs a variant of the term cash, such as "U.S. currency" or "cash money." This practice appears inconsistent with the above statutory provisions, which authorize a surety bondsman to satisfy a cash bond regardless of the term used in the pretrial release order for "cash." Check with the clerk of court for a list of surety and professional bondsmen registered to practice in your district. *See* G.S. 58-71-140 (surety and professional bondsmen must

register with superior court clerk in counties where they write bail bonds).

F. Source of Funds for Secured Bond

The court may refuse to accept money or property offered as security where the State proves by the preponderance of the evidence that the security, because of its source, will not reasonably assure the appearance of the defendant. *See* G.S. 15A-539(b). This issue may arise, for example, in a controlled substance case where the evidence shows that a “kingpin” is trying to post “drug money” for the release of a defendant who is a smaller player in the drug trade.

1.7 Investigation and Preparation for Bond Reduction Motion

Preparation is key to a successful bond reduction motion. During the initial interview with your client, focus on obtaining information that demonstrates his or her ties to the community, such as employment, family, etc. Find out the amount of bond your client can afford and the people who might be available for a custody release. If your county has a pretrial services program, coordinate your efforts if possible. The factors mandated for judicial consideration by G.S. 15A-534(c) (*see supra* § 1.6A) will dictate the structure of your arguments to the prosecutor or judge, but you need not limit your information gathering to those factors. An interview checklist appears at the end of this chapter.

After the client interview, verify as much information as possible and talk to people who might supervise your client. You are inherently more credible than your client in the eyes of the prosecutor or judge so your position is immeasurably improved if you can attest to the information. Before contacting employers and others, however, be sure that your client is willing to have them informed of the pending criminal charges.

Before making the motion, determine whether the prosecutor will agree to a bond reduction. The information you’ve gathered may prove useful in meeting the prosecutor’s objections to a bond reduction, particularly if you can suggest suitable non-financial conditions of pretrial release. For example, if the prosecutor is concerned about your client’s substance abuse, participation in a treatment program might be an acceptable condition of pretrial release.

If the motion is contested, have key witnesses attend the hearing, particularly anyone willing to supervise the defendant on a custody release. Plan to flesh out your arguments with specific facts: for example, proposals for your client’s constructive use of time, suggested educational or employment situations, ways to maintain frequent contact between your client and the supervising party, etc. Also, obtain your client’s criminal record and be prepared to respond to the prosecutor’s argument that your client is at risk of reoffending if released.

1.8 Procedure for Bond Reduction Motion

A. Who Hears the Motion

Case pending in district court. As long as the case remains in district court, a district court judge may modify a release order of a magistrate or clerk or an order entered by him or her. *See* G.S. 15A-534(e) (authorizing district court judge to modify pretrial release conditions except when superior court judge has ruled on prosecutor’s application for revocation or modification of pretrial release under G.S. 15A-539). In a felony case, the district court retains jurisdiction to review a defendant’s pretrial release conditions even upon finding probable cause to bind the defendant over to superior court. *See* G.S. 15A-614 (requiring judge to review the defendant’s conditions of pretrial release upon binding the defendant over to superior court).

A district court judge appears able to modify a pretrial release order entered by another district court judge. Although G.S. 15A-534(e) states that a district court judge may modify a release order “entered by him,” case law establishes that one judge may modify an interlocutory order (that is, an order that’s not final) of another judge when the order involves the exercise of discretion and circumstances have changed. *See State v. Turner*, 34 N.C. App. 78 (1977) (stating general principle). Pretrial release orders clearly entail the exercise of discretion; and counsel should be prepared to argue that new circumstances have arisen, allowing one district court judge to modify a release order entered by another.

Case pending in superior court. After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk, or district court judge, or any order entered by him or her. *See* G.S. 15A-534(e). Here, again, general case law would appear to allow one superior court judge to modify a pretrial release order entered by another superior court judge when circumstances have changed.

Appeal of pretrial release determinations. A defendant may seek superior court review of a district court judge’s pretrial release order (or refusal to modify pretrial release conditions) by written application to a superior court judge. *See* G.S. 15A-538(a). Alternatively, the defendant may petition the superior court for a writ of habeas corpus. *See* G.S. 15A-547 (pretrial release statutes do not abridge right of habeas corpus).

A defendant may seek appellate review of a superior court’s pretrial release order, but such relief may be difficult to obtain. *See generally* G.S. 7A-32 (setting out types of remedial writs); *In re Reddy*, 16 N.C. App. 520 (1972) (treating motion to review bond in appellate court as petition for writ of habeas corpus).

B. Uncontested Bond Reductions

Many bond reductions are the result of a negotiated agreement between the defense attorney and prosecutor. A form bond reduction motion, with a place for the prosecutor to

stipulate to the reduction, appears in the noncapital trial motions bank at www.ncids.org.

C. Contested Bond Hearings

Filing and scheduling. There is no time limit on the filing of a bond reduction motion; however, the court and prosecutor may be more receptive to bond reduction at certain points in the case, such as when counsel first enters the case, at the time of a scheduled probable cause hearing in a felony case, or after some time has passed without the case coming to trial.

G.S. 15A-951, which governs motions practice in general, provides that pretrial motions must be in writing and served on the prosecutor. Oral bond motions may be permissible at certain stages of the case, such as at a first appearance in district court. *See* G.S. 15A-605 (directing district court judge to review pretrial release at first appearance). But, in most instances, and certainly in all felony cases, a written motion is advisable. A sample bond motion may be found in the noncapital trial motions bank at www.ncids.org.

Local practice varies on how much notice should be given to the prosecutor and how bond motions are scheduled for hearing.

Hearing. The rules of evidence do not apply at pretrial release hearings. *See* G.S. 15A-534(g). Counsel usually presents the information rather than offering testimony. If relatives, friends, or employers of the defendant attend the hearing, defense counsel can tender them to the court or prosecutor for questioning rather than have them formally sworn.

As the seriousness of the charged offense increases, so may the degree of formality of the hearing. Consider having the hearing recorded if you believe that a witness may make statements that you later may be able to use for impeachment or other purposes.

In most cases, you will want the defendant to be present. It is generally inadvisable, however, for the defendant to make any statements at the hearing because the prosecutor may seek to use such statements at trial.

Audio-visual transmission. Some counties have facilities for audio-visual transmission between the jail and courthouse. An initial appearance before the magistrate may be conducted by audio-visual transmission. *See* G.S. 15A-511(a1). Pretrial release hearings thereafter in noncapital cases may be conducted by audio-video transmission unless the defendant makes a motion objecting to the procedure. The transmission must allow for counsel and the defendant to confer fully and confidentially during the proceeding. *See* G.S. 15A-532(b). S.L. 2009-270 (H 1438) authorizes the Administrative Office of the Courts to conduct a pilot program under which participating courts may hold pretrial proceedings by audio-visual transmission with or without the defendant's consent, but implementation of the program depends on the receipt of grant funds, which have not been awarded as of the time of this writing.

D. Successive Motions

There is no limit on how often a defendant may seek modification of a pretrial release order, although counsel should be prepared to argue that changed circumstances justify reconsideration of pretrial release conditions. For example, a continuance of proceedings at the prosecutor's request may provide grounds for reconsideration of pretrial release conditions.

1.9 Post-Release Issues

A. Modification of Pretrial Release Conditions

Generally. Under G.S. 15A-539, the prosecutor may apply to an appropriate district or superior court judge for revocation or modification of a release order. *See also* G.S. 15A-534(f) (any judge may revoke release order for good cause). The prosecutor may not apply *ex parte* for revocation or bond modification. *See* 2001 Formal Ethics Opinion 15 (2002) (so stating); *see also State v. Hunt*, 123 N.C. App. 762 (1996) (grand jury issued indictment against defendant who was represented by counsel on other charges, and prosecutor asked judge to issue arrest order and set bond for charges in indictment; court found that prosecutor's request was not improper *ex parte* contact since charges were new, implying that prosecutor may not proceed *ex parte* for bond modification on pending charges). Just as prosecutors usually insist on advance notice of a bond reduction hearing, you should request sufficient time (24 hours, for example) to investigate and prepare to meet a motion to modify or revoke.

The factors the judge must consider in initially setting pretrial release conditions (*see supra* § 1.6A) also may bear on a prosecutor's motion to revoke or modify. If the judge revokes a release order, the defendant has the right to have new conditions of pretrial release determined. *See* G.S. 15A-534(f).

Habitual felon cases. In cases in which a person charged with a felony is later indicted as a habitual felon, judicial officials sometimes will issue an order for arrest and set additional release conditions when the defendant is taken into custody. This practice does not appear to be permissible. Being a habitual felon is a status, not a crime. If the prosecutor believes that stricter release conditions are appropriate in light of the habitual felon indictment, the proper practice would be for the prosecutor to make a motion, with proper notice to the defendant as in other cases, to modify the existing pretrial release conditions. *See also* Jeff Welty, *North Carolina's Habitual Felon and Violent Habitual Felon Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/04, at 18 (June 2008) (favoring the above approach), *available at* www.sog.unc.edu/programs/crimlaw/documents/aojb0804.pdf.

B. Consequences of Violation of Conditions

Generally. A judicial official may revoke a pretrial release order and issue an order for a defendant’s arrest if (1) the defendant violates conditions in the order, such as a requirement to stay away from a particular location; and (2) the judicial official has jurisdiction over the case. *See* G.S. 15A-534(d) (arrest may be ordered for violation); G.S. 15A-534(e) (describing when judicial official has jurisdiction to modify pretrial release order). Thus, if a defendant violates pretrial release conditions before he or she appears in court for the first time, a magistrate may revoke pretrial release and issue an order for arrest. *See* G.S. 15A-534(e). Thereafter, a judge at the level of court in which the case is then pending (district or superior) has jurisdiction to revoke release and issue an order for arrest.

Upon arrest, whether ordered by a magistrate or judge, the defendant must be taken before a magistrate for an initial appearance, at which the magistrate must set new pretrial release conditions. *See* G.S. 15A-511(a)(1).

Domestic violence cases. G.S. 15A-401(b)(2)f. allows a law enforcement officer to arrest, without a warrant or order for arrest issued by a judicial official, a defendant who has violated a pretrial release condition under G.S. 15A-534.1(a)(2), which sets out certain conditions that may be imposed in domestic violence cases, such as a “stay away” condition. This is the only situation in which a law enforcement officer may arrest a defendant without a warrant or order for arrest when the defendant has allegedly violated pretrial release conditions but has not committed a new crime. A defendant arrested for a violation of pretrial release conditions is not subject to the 48-hour law applicable to domestic violence offenses because the applicable statute, G.S. 15A-534.1, applies only when the defendant is *charged* with one of the offenses listed in that statute. A violation of pretrial release conditions is not itself a new offense, and pretrial release conditions must be set as in other cases.

C. Consequences of Failure to Appear

Several consequences may follow from a defendant’s failure to appear for court, including:

- issuance of order for arrest (G.S. 15A-305(b)(2));
- setting of secured bond in an amount required by statute (G.S. 15A-534(d1));
- surrender by surety (G.S. 15A-540);
- filing of criminal charge (G.S. 15A-543);
- forfeiture of bond (G.S. 15A-544.1 *et seq.*);
- contempt proceedings (G.S. 15A-546); and
- in motor vehicle cases, revocation of the defendant’s license to drive (G.S. 20-24.1, 20-24.2).

In most instances, a failure to appear results in an order forfeiting any previous bond and an order for arrest, whereupon the defendant will be taken into custody by a law enforcement officer or surrendered by a surety (bail bondsman) on the bond. The bond amount following arrest or surrender is set by statute. If no bond is described in the order for arrest, the magistrate must set a bond in at least twice the previous amount of the bond and make it secured. If the defendant was not under bond, the magistrate must impose at least a \$500 secured bond. G.S. 15A-534(d1). Defense counsel may take some steps, discussed in D., below, to address these consequences.

In motor vehicle cases in which the defendant fails to appear, the court may report the failure to the Division of Motor Vehicles, which will revoke the defendant's driver's license. *See* G.S. 20-24.1, 20-24.2. A defendant who has failed to appear and had his or her license revoked has the right to have the matter recalendared for trial. *See* G.S. 20-24.1(b1). This provision was added because in some districts the State would not recalendar the case, leaving the defendant's license revoked indefinitely, unless the defendant agreed to plead guilty. The cited statute gives the defendant the right to plead not guilty and proceed to trial, regardless of the passage of time.

D. Orders for Arrest

When a person on pretrial release fails to appear, the court may issue an order for the person's arrest. Defense counsel should consider the following steps if a client fails to appear.

- Try to avoid having the court issue an arrest order. Ask for time to find your client and get him or her to court that day.
- If the court orders the client's arrest, notify the client and ask him or her to contact you immediately.
- If you reach the client before he or she is arrested (or surrendered by a surety on the bond), make a motion to strike the arrest order and bond forfeiture and reinstate the previous pretrial release conditions. Have your client present for the motion and be prepared to explain why he or she was unable to appear at the scheduled time—for example, the client was sick, was told the wrong court date, or otherwise was not at fault. A form motion to strike can be found in the noncapital trial motions bank at www.ncids.org. In this situation, you should advise your client that he or she may be taken into custody upon entering the courtroom and will be taken to jail if the judge refuses to strike the order.
- If the client has been arrested and new pretrial release conditions have not been set, move to have pretrial release conditions set. *See* G.S. 15A-534(f) (upon application after revocation of pretrial release, defendant entitled to have new conditions determined). If conditions have already been set under G.S. 15A-534(d1), under which the magistrate must set a secured bond according to the minimums in that subsection, you may move to reduce the bond, showing why a reduction is appropriate.

E. Bond Forfeitures

Appointed counsel typically plays a limited role with respect to bond forfeitures for failure to appear. If counsel locates the client before arrest, counsel typically files a single motion asking the court to strike the order for arrest, reinstate the previous conditions of pretrial release, and strike the bond forfeiture. Because counsel usually makes this motion soon after a failure to appear, the motion ordinarily falls within the rules for striking forfeiture orders, discussed below.

After arrest, appointed counsel ordinarily is not involved in the question of bond forfeiture. Nevertheless, counsel may need to inform the client (or family members or others who have posted security) of the procedure for dealing with a bond forfeiture.

Striking forfeiture order. If the defendant (called the “principal”) fails to appear, the court enters an order forfeiting the bond. The forfeiture order must be served on the client and any surety listed on the bond by first-class mail within thirty days of entry of forfeiture. *See* G.S. 15A-544.4.

A forfeiture may only be set aside for one of the following reasons:

- the defendant’s failure to appear has been stricken;
- the charges for which the defendant was under bond have been disposed;
- a surety has surrendered the defendant;
- an order for arrest has been served on the defendant;
- the defendant has died;
- the defendant was imprisoned in the North Carolina Department of Correction or in a unit of the Federal Bureau of Prisons located in North Carolina at the time of the failure to appear; or
- the defendant was incarcerated anywhere else in the country and the district attorney for the county where the charges were pending received notice of this and the defendant remained in custody for ten days after receipt of the notice.

G.S. 15A-544.5(b). If one of the reasons listed in 15A-544.5(b) applies, the court must set aside the forfeiture.

The judge may enter an order setting aside a forfeiture at the time he or she strikes a failure to appear and recalls any order for arrest. *See* G.S. 15A-544.5(c); *see also* G.S. 15A-544(b) (forfeiture *must* be set aside if court strikes failure to appear and recalls order for arrest). Otherwise, the defendant or any surety may make a written motion to set aside a forfeiture within 150 days of notice of forfeiture, stating the applicable reason under G.S. 15A-544.5(b). *See* G.S. 15A-544.5(d). If neither the district attorney nor the local board of education files an objection to the motion by the tenth day after it was served, the clerk must enter an order setting aside the forfeiture. *See* G.S. 15A-544.5(d)(4). If the district attorney or the board of education objects, a hearing on the motion must be held

within thirty days after the objection is filed. *See* G.S. 15A-544.5(d)(5).

Relief from final judgment of forfeiture. If the forfeiture order is not set aside, it becomes a final judgment of forfeiture. *See* G.S. 15A-544.6. The defendant or surety may only get relief from the final judgment if not given proper notice of forfeiture or other extraordinary circumstances existed. *See* G.S. 15A-544.8(b). A motion for relief must be filed within three years of the date the judgment of forfeiture became final. *See* G.S. 15A-544.8(c)(1).

Revocation of Driver's License. In certain motor vehicle cases, an unvacated forfeiture of a cash bond may result in revocation of a defendant's license to drive. *See* G.S. 20-4.01(4a) (defining that event as a conviction), G.S. 20-24 (requiring that report of conviction be sent to DMV).

F. Surrender by Surety

Surrender of a defendant by a surety is governed by G.S. 15A-540 and G.S. 58-71-20 through 30. To the extent Chapter 15A and Chapter 58 conflict, Chapter 15A controls. *See* G.S. 58-71-195 (so stating). G.S. 58-71-30 allows a surety to request a judicial official to order the arrest of a defendant for the purpose of surrendering him or her, but a judicial official may issue the order only if it is authorized by G.S. 15A-305, which gives the grounds for orders for arrest.

If a surety decides to go off a bond and surrender the defendant before a breach—that is, before the defendant fails to appear—the original pretrial release conditions should remain the same, although the defendant will have to arrange for a new surety or other security on the bond to obtain release. If a surety surrenders the defendant after a failure to appear, the defendant is entitled to have new conditions of pretrial release determined. *See* G.S. 15A-540(c). The rules on doubling and securing the bond come into play in that instance, however, because the defendant failed to appear. *See supra* § 1.4F.

Sometimes confusion arises when a surety surrenders a defendant after an order for arrest (OFA) has been issued for the defendant's failure to appear. If the surety surrenders the defendant *before* he or she is arrested by a law enforcement officer, the OFA is supposed to be stricken. The reason is that the surrender accomplishes the purpose of the OFA—that is, the defendant is returned to custody and new pretrial release conditions are set. If the OFA is still outstanding, counsel should move to strike it to prevent the defendant's rearrest. If a surety surrenders a defendant *after* the defendant is arrested by a law enforcement officer, there should be no effect on the defendant's pretrial release conditions, which a magistrate or other judicial official should have redetermined when the defendant was arrested.

G. Return of Security

G.S. 15A-534(h) provides that a bail bond is binding on the obligor until one of the listed

circumstances occurs. Unless forfeited, cash or other security posted by a defendant must be returned to him or her in the described circumstances. *See also* G.S. 15A-547.1.

If the defendant has posted cash, the clerk of court in some counties automatically sends the defendant a check upon the occurrence of one of the indicated events. In other counties, the defendant must apply to the clerk for return of the money and must present the receipt previously issued by the clerk. *See also* G.S. 58-74-10 (providing for cancellation of mortgage executed as security on bond).

Defendants posting a cash bond may not get their money back in light of the AOC appearance bond form (AOC-CR-201), which requires defendants to agree that any cash posted by them may be used to satisfy their obligations in the case. *See supra* § 1.5B. Defendants who pay a percentage of the bond amount to a bondsman ordinarily do not get their money back at the end of the case. *Cf.* G.S. 58-71-20 (indicating that defendant is entitled to return of premium paid to bondsman who surrenders the defendant before a breach of the bond except in specified circumstances).

1.10 Release Pending Appeal

A. Appeal from District Court Conviction

District court’s authority to modify. When a defendant appeals a district court conviction to superior court, the pretrial release conditions in place in district court remain in effect pending a trial de novo unless modified. G.S. 15A-1431(e). In other words, a bond in superior court is not an appeal bond but rather a continuation of the defendant’s pretrial release conditions pending trial de novo. *See generally State v. Sparrow*, 276 N.C. 499, 507 (1970) (when a defendant appeals and exercises his or her right to be tried by a jury, the district court conviction “is completely annulled and is not thereafter available for any purpose”).

The statutes raise a jurisdictional question about the district court judge’s authority to modify a bond of a defendant who has requested a trial de novo. The pertinent statutes conflict on this question. *Compare* G.S. 15A-534(e)(1) (district court judge may modify pretrial release order until “noting of an appeal”) *with* G.S. 7A-290 and 15A-1431(c) (if defendant appeals, clerk transfers case to superior court ten days after date of district court judgment).

As a result of the conflict in the statutes, three interpretations have arisen as to district court judges’ authority to modify pretrial release conditions after an appeal: (1) the judge loses authority over the case as soon as the defendant appeals; (2) the judge loses authority at the end of that day’s session even if the defendant appeals during the session (by analogy to the limits on the judge’s authority to modify judgments after the end of the session, discussed *infra* § 10.8B); and (3) the judge loses authority at the expiration of ten days from the date of the judgment in district court.

Because of this uncertainty, some defense counsel have adopted the practice of filing appeals with the clerk of court on or shortly before the tenth day following the district court's judgment when they are concerned about how a district court judge may react to an appeal. *See* G.S. 15A-1431(c), (d) (providing that within ten days of entry of judgment, notice of appeal may be given in writing to clerk if defendant has not yet complied with judgment). In some districts, the clerk of court will notify the district court judge that an appeal has been filed, who then reviews the defendant's bond. Assuming the district court has the authority to modify the defendant's bond after the giving of appeal and before the expiration of ten days from judgment, there are a number of potential constraints on this practice. First, the district court would appear to have no jurisdiction to act after ten days have passed from the date of the judgment even if the clerk notifies the district court of the appeal within ten days. (The State may still apply to a superior court judge to modify the bond if necessary.) Second, there does not appear to be authority for the defendant automatically to be held in custody pending the holding of a hearing in district court to review his or her bond; the conviction itself does not provide a basis for the defendant's detention because, once appealed, it is vacated. Third, there does not appear to be authority for the district court to review and modify the defendant's bond *ex parte*; at the least, counsel for the defendant would need to be notified and given an opportunity to be heard before the court rules. *Cf.* 2001 Formal Ethics Opinion 15 (2002) (prosecutor may not apply *ex parte* for bond modification or revocation). Fourth, the defendant has a statutory and constitutional right to appeal for a trial *de novo* before a jury; any increase in bond because of the defendant's exercise of those rights is considered presumptively vindictive for the reasons discussed below.

In some districts, judges have set anticipatory bonds, to take effect if the defendant appeals. Generally, however, a court may not make an anticipatory ruling on bond or other matter; rather, the courts have indicated that if a judge wishes to address the possibility, he or she must do so in the form of a recommendation only. *See Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229 (1960) (stating generally that courts have no power to enter anticipatory judgments); *State v. Hilbert*, 145 N.C. App. 440 (2001) (disapproving of setting of anticipatory bond in probation judgment in event defendant violates; if judge addresses matter at time of probationary judgment, better practice would be to make recommendation only). Such a recommendation would not affect the defendant's release conditions, which would remain the same until a judge, considering the issue after the filing of appeal, modified the conditions. An anticipatory ruling, even in the form of a recommendation, also could have an impermissible chilling effect on the defendant's exercise of his or her rights, discussed next.

Constitutional limits. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 24 of the North Carolina Constitution guarantee defendants in criminal cases the right to a trial by jury. Pursuant to G.S. 7A-290 and G.S. 15A-1431(b), defendants have a statutory right to appeal a district court conviction to superior court for trial *de novo*. This statutory right to appeal for trial *de novo* provides the mechanism by which defendants in misdemeanor cases assert their constitutional right to trial by jury. It is impermissible for a court to increase a defendant's bond because of a

defendant's invocation of his or her statutory right to appeal and, thus, constitutional right to a trial by jury. *See Blackledge v. Perry*, 417 U.S. 21 (1974) (person convicted of offense in district court in North Carolina is entitled to pursue right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one; due process requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered trial division process); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (due process prohibits judge from increasing sentence on retrial to discourage appeal; very threat of such a punitive policy serves to chill the exercise of basic constitutional rights); *see also In re Renfer*, 345 N.C. 632 (1997) (Judicial Standards Commission recommended removal of district court judge from office for, among other things, improperly raising defendant's bond in response to appeal).

Note: For a further discussion of these issues, *see* Alyson Grine, *I Want a New Trial! Now What? A District Court Judge's Authority to Act Following Entry of Notice of Appeal for Trial De Novo (Parts I & II)*, UNC SCHOOL OF GOVERNMENT BLOG: NORTH CAROLINA CRIMINAL LAW (Feb. 22 & 23, 2010), <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1081> & <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1086>. For a sample motion raising these issues, *see* the noncapital motions trial bank on the IDS website at www.ncids.org.

B. Appeal from Superior Court Conviction

Once a defendant's guilt is established in superior court, the judge may (but is not required to) set conditions of release pending sentencing or appeal. *See* G.S. 15A-536(a) (release after conviction in superior court); *see also* G.S. 15A-1353(b) (order setting release conditions pending appeal must be forwarded to agency having custody of defendant). The court does not automatically consider setting release conditions; defense counsel must affirmatively move for release. If the superior court initially denies release, appellate counsel later may apply to the superior court to set release conditions. In exceptional cases, counsel may be able to obtain relief from the court of appeals (for example, if a superior court judge denies or sets a high bond on appeal of a case involving a probationary sentence). A sample motion for bond pending appeal appears in the noncapital motions trial bank on the IDS website at www.ncids.org.

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 (Sixth Amendment of U.S. Constitution and Article I, § 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.

The *Knoll* line of decisions is reviewed at length in 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 (Dec. 2009), available at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0907.pdf. The author opines that resistance to *Knoll* in some court of appeals decisions and changes in magistrate and jail procedures may make *Knoll* motions obsolete. Predictions about *Knoll's* demise may be premature. Violations may still occur, and 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 his 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* 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); *Labinski*, 188 N.C. App. 120 (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 (2001), *quoting State v. Hill*, 277

N.C. 547 (1971) (“[t]he right to communicate with counsel and friends necessarily includes the right of access to them”). 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. 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 some 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.

Some appellate cases since *Knoll* have been somewhat demanding about whether the violation or some other circumstance caused the defendant to lose the opportunity to obtain evidence. Thus, 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 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, you 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, you 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 release to a sober responsible adult was not made a condition of pretrial release or was not permitted, it may be sufficient to show that the defendant had someone who could have come for him or her if not for the improper determination (as in *Knoll*).

***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 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*. See 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.”).

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. Hatley*, 190 N.C. App. 639 (2008) (denial of right to have witness present for intoxilyzer test warranted suppression); *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 of the defendant. *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 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 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). The statute does not give the State carte blanche to hold the defendant for 48 hours even though it is sometimes referred to as the “48-hour law”; 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. 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 instances in which 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 does cover 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”); *but cf.* discussion of *ex parte* DVPO’s, below. 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 Brannon, *Domestic Violence Special Pretrial Release and Other Issues*, ADMINISTRATION OF JUSTICE BULLETIN No. 2001/06, at 5 (Dec. 2001), *available at* www.sog.unc.edu/programs/crimlaw/aoj200106.pdf. Others may argue that G.S. 15A-534.1 should be interpreted as applicable to same-sex relationships. The argument is that G.S. 50B-1(b) includes in the definition of a “personal relationship” for DVPO purposes “persons of the *opposite sex* who live together or have lived together” (emphasis added), while no such limitation appears in G.S. 15A-534.1.

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*, 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.

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. Thus, the holding 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 on 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 prior to 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.

Review of criminal history report. Effective October 1, 2010 (meaning effective for pretrial release determinations on or after that date), 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, is subject to the 48-hour law. In *State v. Byrd*, 363 N.C. 214 (2009), the supreme court ruled that a violation of an *ex parte* DVPO did not trigger criminal consequences, including presumably the 48-hour law, because of the wording of the statutes then in effect. The court 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. The General Assembly revised the pertinent statutes to make them applicable to *ex parte* DVPOs, but the constitutional concerns raised in *Byrd* have not been resolved as of this writing. See generally John Rubin, *2009 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 6–7 (Dec. 2009), available at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0909.pdf.

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 may still hold the defendant in custody without bond for a reasonable additional period. *See State v. Gilbert*, 139 N.C. App. 657 (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 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 A., above), a violation of due process (per the *Thompson* line of cases, discussed in 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 districts, the chief public defender. They may be able to bring them to the attention of the senior resident superior court and chief district court judge, who are charged under G.S. 15A-535(a) with adopting local rules on pretrial release.

Appendix 1-1

Interview Checklist for Bond Hearing

The following information may be useful both for preparing for a bond hearing and for locating the client later.

1. Identifying Information (name, aliases, social security #, citizenship, date and place of birth)

2. Length of residence (in North Carolina and _____ County)

3. Family ties in North Carolina (spouse, children, other relatives and dependents) and the names of neighbors, friends, and others who can verify information about the client (with work and home telephone numbers for each)

4. Present address, length of residence at that address, telephone number, and names and relationship to client of people living there

5. Prior addresses and length of residence at each

6. Present employment status, length of employment and job responsibilities, telephone number of employers, and job prospects if unemployed

7. Prior employment information

8. Education

9. Current and past military service
10. Health information (medical or mental health problems, alcohol or drug problems, and past or present treatment providers or programs)
11. Probation, post-release supervision, or parole status, including names and telephone numbers of previous attorney and probation officer
12. Other pending charges and name of attorney (if any), conditions of release, and other pertinent information
13. Prior convictions, prior release status in other cases, and whether there have been any past failures to appear
14. Financial resources for bond (client or willing relatives, friends, others). What bond could client make, if any?
15. Relatives, friends, or others who might agree to custody release
16. Client's priorities with regard to pretrial release conditions (keep job, care for children, continue medical treatment, get substance abuse treatment, etc.)