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Chapter 1: Pretrial Release

G.S. 15A-531 through 15A-547 contain the basic provisions on pretrial (and posttrial) release. 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, issues pretrial release policies in each judicial district).

Prosecutors often will not oppose the setting of pretrial release conditions that your client is capable of meeting. (A form motion appears at the end of this chapter.) At other times, however, defense counsel must overcome the prosecutor's or court's resistance to a bond reduction.

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 sites 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.

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. Often, however, these proceedings afford counsel little opportunity 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. 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. (For exceptions, *see infra* § 1.3C, p. 6.) Defense counsel ordinarily has no input at this stage of the case; however, counsel who already represents the client may be able to see the magistrate who holds the initial appearance and thereby avoid a later bond motion.

B. Misdemeanors

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 filing a bond reduction motion immediately after appointment.

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. (Some judicial districts have first appearances for misdemeanors, but they are not statutorily required.) 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).

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, one county (Durham) funds a "bond attorney" to represent indigent defendants at first appearance. *See also infra* §

1.4C, p. 9 (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.

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 a lower bond if the probable cause hearing is continued. For a further discussion of probable cause hearings, *see infra* Chapter 3.

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. In some judicial districts, however, the district court holds the first appearance. 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), all defendants charged with a noncapital offense are entitled to have pretrial release conditions determined except in the circumstances discussed in subsection C. below.

Probation Violations. Defendants charged with probation violations have the same right as other noncapital defendants to have conditions of pretrial release set. *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). In addition, the court must hold a preliminary hearing (essentially, a probable cause hearing) within seven working days of the arrest of a probationer 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 must be released pending the revocation hearing. *See* G.S. 15A-1345(c).

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* 56 (Institute of Government, 2d ed. 1992) (describing rules for infractions). *See also Pulliam v. Allen*, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984) (successful suit against magistrate for practice of setting secured bond on nonjailable offenses).

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, 274 S.E.2d 183 (1981) (pretrial release of capital defendant within judge's discretion).

C. Exceptions

In the following situations the judicial official may refuse to set pretrial release conditions or may delay the person's release. By the time counsel appears in the case, some of these obstacles to pretrial release will have passed.

Inability to Understand Procedural Rights. If the defendant is unable to understand his or her procedural rights, a magistrate may briefly postpone the initial appearance and setting of pretrial release conditions. *See* G.S. 15A-511(a)(3).

Domestic Violence Offenses. During the first 48 hours after arrest for certain domestic violence offenses, only a judge (not a magistrate or clerk of court) may set conditions of pretrial release. *See* G.S. 15A-534.1(b); *State v. Thompson*, 128 N.C. App. ___, 496 S.E.2d 597 (court upholds statute against challenge to facial validity, but does not address constitutionality of statute as applied), *review granted*, 348 N.C. 289, 501 S.E.2d 916 (1998). The judge may briefly delay setting pretrial release conditions if the defendant's immediate release would pose a danger to a domestic violence victim. *See* G.S. 15A-534.1(a).

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 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. The defendant may be detained for this reason no longer than 24 hours. *See* G.S. 15A-534.2. If release is improperly delayed or denied, grounds may exist for dismissal of the charges. *See infra* § 1.10B, p. 19.

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.

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); *see also infra* 2.8E, p. 20 (person who is incompetent to proceed but not subject to inpatient involuntary commitment order may have pretrial release conditions set).

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 other state. 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).

Juveniles. The Juvenile Code governs the right of a juvenile to obtain release from custody while the case is pending in district court. *See* G.S. 7A-571 through 7A-578.

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

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.

D. Preventive Detention

The United States Supreme Court has upheld the constitutionality of narrowly-drafted, preventive-detention statutes, which permit a court to keep a defendant in custody before trial because of the defendant's dangerousness. *See United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). North Carolina courts have no such authority. Except in the limited circumstances discussed above, a judicial official may not refuse to set pretrial release conditions or delay pretrial release. *See* G.S. 15A-534 commentary (drafters "steered clear of the preventive-detention controversy").

1.4 Types of Pretrial Release

North Carolina recognizes four types of pretrial release: written promise to appear, unsecured bond, custody release, and secured bond. The judicial official must choose one of these in setting pretrial release conditions.

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 in an amount specified by the judicial official. No one else need sign, and the defendant need not post any security. *See* G.S. 15A-534(a)(2).

Custody Release. Any individual or organization may agree to supervise the defendant, including friends, relatives, employers, and shelters. Both the supervising party and defendant must consent. *See State v. Gravette*, 327 N.C. 114, 393 S.E.2d 865 (1990) (court may not order probation department to supervise defendant without department’s consent); G.S. 15A-534(a)(3) (defendant may reject custody release and elect secured bond).

B. Types Requiring Security

The fourth type of pretrial release, a secured bond, must be secured in one of the following ways. (For a discussion of limits on a judge’s authority in setting a secured bond, *see infra* § 1.5, p. 10.)

Cash. A defendant always 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.

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* § 1.5E, p. 12 for a discussion of all-cash bonds.

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, however, 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. 58-77-1, -5. The card itself should indicate the conditions of coverage.

C. 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. Several North Carolina counties have pretrial services programs. 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.”

1.5 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. Eliason*, 100 N.C. App. 313, 395 S.E.2d 702 (1990) (magistrate’s failure to consider all factors did not warrant dismissal of charges). Studies also indicate that the seriousness of the charged offense does not 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 four 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).

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 defendant’s appearance, 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* *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, 424 S.E.2d 680 (1993).

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, and may set the bond no higher than reasonably necessary to assure the defendant’s appearance. *See* *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951) (bail set in amount higher than reasonably necessary to assure defendant’s appearance excessive under Eighth Amendment); *State v. Jones*, 295 N.C. 345, 245 S.E.2d 711 (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* STEVENS H. CLARKE, PRETRIAL RELEASE IN DURHAM, NORTH CAROLINA (Institute of Government, 1987)

(finding a weak relationship between the size of the bond and whether the defendant will appear in court).

E. Type of Security

G.S. 15A-534(a)(4) 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). Nevertheless, many judges specify that defendants must post all cash to satisfy a secured bond. G.S. 15A-531(1) ameliorates the potential hardship of an all-cash bond. It provides 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* § 1.4B, p. 8, “Commercial Sureties.” The clerk of court should have 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).

1.6 Investigation and Preparation for Bond Reduction Motion

Preparation is, of course, the 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* § 1.5A, p. 10) 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 legal 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.

1.7 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).

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 of another judge when the order involves the exercise of discretion (an apt description of pretrial release orders) and circumstances have changed. *See State v. Turner*, 34 N.C. App. 78, 237 S.E.2d 318 (1977) (stating general principle).

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, 192 S.E.2d 621 (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 appears at the end of this chapter.

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, but at least in felony cases, a written motion is advisable. A sample of an individualized written motion appears at the end of this chapter.

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 to 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. Unless the defendant objects, pretrial release hearings in noncapital cases may be conducted by audio-video transmission. The transmission must allow for counsel and the defendant to confer fully and confidentially during the proceeding. *See* G.S. 15A-532(b).

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 prosecutor's delay in setting a case for trial may provide reason for reconsideration of pretrial release conditions. *See generally Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994) (discussing potential abuses of calendaring authority).

1.8 Post-Release Issues

A. Revocation

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). 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. *Cf. State v. Hunt*, 123 N.C. App. 762, 475 S.E.2d 722 (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 finds that prosecutor's request was not improper *ex parte* contact since charges were new, implying that prosecutor may have had to give notice for bond modification on pending charges).

The factors the judge must consider in initially setting pretrial release conditions (*see supra* § 1.5A, p. 10) 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).

B. 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));
- surrender by surety (G.S. 15A-540);
- filing of criminal charge (G.S. 15A-543);
- forfeiture of bond (G.S. 15A-544);
- 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).

C. 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. A form letter for that purpose appears at the end of this chapter.
- If you reach the client before he or she is arrested, make a motion to strike the arrest order and bond forfeiture. Have your client with you 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 appears at the end of this chapter.
- 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).

D. 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 by certified mail at the addresses listed on the bond. *See* G.S. 15A-544(b).

The clerk of court places the matter on a forfeiture calendar, which the court may hear no sooner than 60 days after entry of the forfeiture order. *See* G.S. 15A-544(d). The defendant or surety may move to strike the forfeiture order at the first presentation of this calendar but need not wait for that proceeding. Under G.S. 15A-544(c), the defendant or surety may move to strike the forfeiture “at any time” within 60 days following service of the forfeiture order (and thus defense counsel ordinarily may move to strike a forfeiture order when moving to strike an order for arrest). The motion may be oral or written, and

the forfeiture order “must” be set aside if the failure to appear was not the defendant’s fault, it was impossible for the defendant to appear, or the defendant was incarcerated in North Carolina and unable to appear. *See* G.S. 15A-544(c), (c1).

Remitting Forfeiture Judgment. If the forfeiture order is not set aside, the court enters a judgment of forfeiture. The defendant or surety has 90 days after entry of the forfeiture judgment to move to remit—that is, strike—the judgment. *See* G.S. 15A-544(e) (explaining procedural requirements for motion and grounds for remission).

Obtaining Refund After Execution. If a forfeiture judgment is not remitted within 90 days after entry, the clerk issues an execution on the judgment. The defendant or surety may move to remit the judgment even after issuance of an execution on a showing of extraordinary cause, and the court may order a refund of any money obtained through the execution. *See* G.S. 15A-544(h).

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), -24.

E. 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. Chapter 15A provides more limited grounds than Chapter 58 for the arrest of a defendant on a surety’s request. *Compare* G.S. 15A-305 (grounds for orders for arrest) *with* G.S. 58-71-30 (requests by surety). To the extent the two chapters conflict, Chapter 15A controls. *See* G.S. 58-71-195 (so stating). If surrendered by a surety, the defendant is entitled to an immediate hearing to determine release conditions. *See* G.S. 15A-540(b).

F. Return of Security

Unless forfeited, a bail bond posted by a defendant must be returned to him or her in the circumstances described in G.S. 15A-534(h). The defendant’s security must be returned if

- judgment has been entered in district court (and no appeal has been taken) or judgment has been entered in superior court;
- a judge has released the defendant from the bond;
- the proceeding has been terminated by voluntary dismissal by the state; or
- prayer for judgment has been continued indefinitely in district court.

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 above 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).

1.9 Release Pending Appeal

A. Appeal from District Court Conviction

G.S. 15A-1431(e) provides that a pretrial release order remains in effect pending appeal to superior court unless the judge modifies the order. This provision raises a jurisdictional issue: may a district court judge increase a defendant's bond after he or she requests a trial de novo? The statutes conflict. *Compare* G.S. 15A-534(e)(1) (district court judge may modify pretrial release order before "noting of 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). Assuming that district court judges may modify a pretrial release order after the noting of appeal and before expiration of the ten-day period following judgment, they may not use that authority to penalize the defendant for appealing. *See generally* *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (due process prohibits judge from increasing sentence on retrial to discourage appeal); *In re Renfer*, 345 N.C. 632, 482 S.E.2d 540 (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: Defense counsel may file an appeal of a district court conviction with the clerk after the day's session of court rather than in open court at the time of the judgment. *See* G.S. 15A-1431(c), (d) (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).

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 (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 at the end of this chapter.

1.10 Dismissal as Remedy for Violations

A. Prejudice

Violation of the defendant's pretrial release rights may provide the basis for a later motion to dismiss if the defendant can show prejudice. *See, e.g., State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988) (failure to follow initial appearance requirements warranted dismissal of charges where defendant showed prejudice); *State v. Pruitt*, 42 N.C. App. 240, 256 S.E.2d 249 (1979) (disapproving of failure to hold first appearance for defendant incarcerated for almost a month, but finding no prejudice); G.S. 15A-954 (dismissal warranted if defendant prejudiced by violation of constitutional rights).

B. Impaired Driving Cases

In impaired driving cases in particular, incarceration in violation of pretrial release procedures may result in prejudice because it interferes with the defendant's ability to obtain exculpatory evidence. *See supra* § 1.3C, p. 6 (discussing pretrial release procedures in impaired driving cases). If a person is improperly denied release within the first hours after arrest, he or she loses the opportunity to gather evidence (such as a blood test or opinions as to sobriety) showing that he or she was not impaired above the legal limit. The following decisions have addressed this issue: *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988) (magistrate's failure to determine pretrial release conditions for defendants charged with DWI required dismissal of charges; magistrate's failure to inform defendants of circumstances under which they could obtain release was additional ground for dismissal); *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971) (failure to permit defendant to communicate with counsel and friends, who could have observed defendant's condition after arrest, warranted dismissal of DWI charges); *State v. Ham*, 105 N.C. App. 658, 414 S.E.2d 577 (1992) (dismissal of DWI charges not warranted on facts); *State v. Eliason*, 100 N.C. App. 313, 395 S.E.2d 702 (1990) (to same effect); *State v. Bumgarner*, 97 N.C. App. 567, 389 S.E.2d 425 (to same effect); *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).

