

COUNTY OF MECKLENBURG)
STATE OF NORTH CAROLINA)

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
0XCRXXXXXX

STATE OF NORTH CAROLINA)
)
vs.)
)
XXXXXXXXXXXXXXXXXXXXXXX)

MOTION TO DISMISS

NOW COMES the defendant, by his undersigned counsel, respectfully moves the court to dismiss this action pursuant to G.S. 15A-954(a)(4); and, as grounds therefore, shows the following:

1. G.S. 15A-533(b) requires all persons charged with a non-capital crime to have conditions of pretrial release set pursuant to G.S. 15A-534.
2. G.S. 15A-534.1 requires that a judge set the conditions for pretrial release for any person charged with specified acts defined as acts of domestic violence.
3. Defendant was arrested for the offense of XXXXXXXXXXXXXXXX G.S. XXXXXXXXXXXXX.
4. This matter was determined to involve an act of domestic violence and the magistrate held the matter over for a judge to set the conditions of pretrial release pursuant to G.S. 15A-534.1.
5. Defendant was committed to Mecklenburg County Jail at XXXXXXXX on XXXXXXXXXXXX.
6. The magistrate ordered the defendant's release "not authorized" and he was to be produced in courtroom 4130 at 9:00 AM ('C' Session) on XXXXXXXXXXXXXXXX.
7. Our Supreme Court held in *State v. Thompson*, 349 N.C. 483 (1998), that failure to adhere with the statutory scheme for consideration of pretrial detention unreasonably violated defendant's Procedural Due Process rights without serving any legitimate government interest.
8. Our Supreme Court also held in *Thompson* that subsection (b) of G.S. 15A-534.1 "reflects the General Assembly's regulatory purpose by authorizing magistrates to detain an arrestee for up to forty-eight hours while attempting to secure **the first available judge** to hold a pretrial-release hearing." (Emphasis added.) *Id.* at 492.
9. Our Supreme Court also held in *Thompson* that dismissal is the appropriate remedy when the defendant is unreasonably deprived of his right to a timely post-deprivation hearing to set the conditions of his pretrial release.
10. When the 4130 (or 2202) 'C' Session was created in 2004, the Sheriff's Office established a "cutoff time" of 4 A.M. to make that morning's 'C' Docket for a first appearance, meaning

that so long as a defendant was received by Mecklenburg County Jail prior to 4 A.M., they would be in court that same morning to have a pretrial-release hearing.

11. On the afternoon, 'B' Session, of XXXXXXXXXXXXXXXXXXXX, 6 Criminal District Courtrooms were in operation and conducting various hearings, trials, and other administrative court functions.
12. Defendant was unreasonably deprived of his right to have a reasonable appearance bond set in a reasonable time by the failure to schedule him in court until the next morning, "while available judges spent several hours conducting other business..." on the previous afternoon. Quoting *Thompson* at 498.
13. Defendant has been deprived of his Procedural Due Process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the Law of the Land provisions of Article 1, Section 19 of the North Carolina Constitution.

WHEREFORE, defendant respectfully prays that this Court enter an Order dismissing XXXXXXXXXXXXXXX.

Respectfully submitted, this the XX day of XXXXXXXXXXXXXXX, 2007.

Timothy S. Emry, Esq.
Attorney for the Defendant
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Dismiss has been duly served upon an Assistant District Attorney, 700 East Trade Street, Second Floor, Charlotte, NC 282802 by delivery in person.

This the _____ day of _____, 2007.

Timothy S. Emry, Esq.
Attorney for the Defendant