

\$50,000 Secured Bond for DWLR, That Can't Be Right
or
The District Court Judge Just Jacked my Client Up on a \$1 Million Appeal
Bond
What Can I Do Now?

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NOTE: This paper was originally presented to the Dan Pollitt Criminal Defense Bar, which is the criminal defense bar for Judicial District 15B. All references in this paper to the local bond policy are to the District 15B policy.

I. Excessive Bond is Unconstitutional. So is the Use of Bond as a Form of Pre-trial Punishment or as a Deterrent to the Exercise of the Right to *De Novo* Appeal.

N.C. Constitutional Provisions:

"Excessive bail shall not be required[.]"

Art. I, Sec. 27

"No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. **The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.**"

Art. I, Sec. 24

U.S. Constitutional Provisions:

"Excessive bail shall not be required[.]"

U.S. Const., Amend. VIII

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"

U.S. Const., Amend. VI

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

U.S. Const. Amend. XIV, §1

CASE LAW:

The "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."

Stack v. Boyle, 342 U.S. 1, 4 (1951)

Bail set before trial at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the defendant's presence at trial is excessive under the Eighth Amendment.

Stack v. Boyle, 342 U.S. 1, 5 (1951)

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

U.S. v. Salerno, 481 U.S. 739, 755 (1987).

"Whatever might be said of [a judge's] objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive."

US v. Jackson 390 US 570, 582 (1968) (citations omitted)

the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.

North Carolina v. Pearce, 395 U.S. 711, 724 (1969)

The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S., at 725. We think it clear that the same considerations apply here. **A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate[.]**

Blackledge v. Perry, 417 U.S. 21, 28 (1974).

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, see *North Carolina v. Pearce, supra*, at 738 (opinion of Black, J.), and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)

THE STATUTES:

§ 15A-534. Procedure for determining conditions of pretrial release

(a) In determining conditions of pretrial release a judicial official must impose at least one of the following conditions:

- (1) written promise to appear.
- (2) unsecured appearance bond.
- (3) custody release.
- (4) Secured appearance bond.
- (5) House arrest with electronic monitoring.

(b) The judicial official in granting pretrial release must impose condition (1), (2), or (3) in subsection (a) above unless he 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. Upon making the determination, the judicial official must then impose condition (4) or (5) in subsection (a) above instead of condition (1), (2), or (3), and **must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a).**

G.S. §15A-535(a) – requires Senior Resident Superior Court Judges to adopt pretrial release policies for the district. **THIS MEANS THE LOCAL POLICY HAS THE FORCE OF LAW.**

THE POLICY – some highlights:

§4.1 – expressly recognizes that “judicial official” includes judges and not merely magistrates.

§4.3.1 – Lists factors to be considered in setting bond. Provides that: “A defendant charged with an offense which cannot result in incarceration should not be placed under a secured bond.”

§4.3.2.3 – sets out the manner for calculating “maximum” amounts of secured bond, and then says “These maximums may be exceeded if the judicial official finds extraordinary circumstances, which he or she sets forth on the ‘Secured Appearance Bond Determination’ form.

The presumptive maximums: for class 2 and 3 misdemeanors, \$1,000; for Class 1 misdemeanors, \$5,000; for Class A1 misdemeanors, \$10,000.

II. WHAT CAN YOU DO?

A. Getting the Client out of Jail

FROM A SUPERIOR COURT JUDGE:

1. Obviously, once a case is in Superior Court (*i.e.*, after appeal de novo), a Superior Court Judge can modify the bond. G.S. §15A-534(e).
2. **G.S. §15A-538** Allows a defendant to apply in writing to a Superior Court Judge to modify a bond order entered by a District Court Judge, **while the case is still in District Court.**
 - No Case Law On This Statute
 - Allows the Defendant To Select The Judge, At Least From Judges Authorized To Hear Chambers Matters In The District
 - Do Not Do This Ex Parte, Even Though Statute Is Silent
 - Make Your Written Application As Complete As Possible. Spell out what the maximum would be under local bond policy §4.3.2.3. Explain which factors enumerated in §4.3.1 work in the client's favor and justify an even lower bond. If there is no written finding of an extraordinary reason for a higher bond, state that. If there is such a written finding, explain why the finding is either factually incorrect or does not justify a higher bond.
 - Relief appears to be discretionary.
 - Possible appellate review by certiorari. See, N.C.R.App.P. Rule 21
3. HABEAS CORPUS PETITION under G.S. Chapter 17.
 - Archaic and incomprehensible statutory language and pleading requirements
 - G.S. §17-1 mandates relief if defendant's restraint is "unlawful."
 - G.S. §17-6 allows the application to be made to any Superior Court Judge.
 - G.S. §17-35 -- proper relief is to "let such party to bail" if good bail is offered.
 - Appellate review by certiorari

BOTTOM LINE: there does not appear to be any clear advantage to using habeas instead of a 15A-538 request for modification.

FROM THE COURT OF APPEALS:

1. Habeas. G.S. §17-6 allows an application directly to any judge or justice in the Appellate Division
2. Certiorari review of a denial of modification under 15A-538 or from the denial of habeas in Superior Court.

BOTTOM LINE: IT WILL TAKE A TRULY EXTRAORDINARY CASE FOR OUR APPELLATE COURTS TO INVOLVE THEMSELVES IN MATTERS OF PRETRIAL BOND

B. WINNING THE CASE

1. **State v. Thompson**, 349 N.C. 483, 508 S.E.2d 277 (1998). Remedy for about 5 hours of unlawful detention (from Monday at 9:00 a.m. to approx 2:00 p.m.) w/out bond was dismissal of charges, citing G.S. §15A-954(a)(4)

2. **State v. Knoll**, **State v. Ferguson** -- dismissal where unlawful detention following arrest impedes defendant's ability to procure witnesses in his defense. These are DWI cases where timing was critical – witnesses could only be useful if given a chance to observe the defendant's condition at the relevant time.

3. **State v. Bryan Waters** 09 CRS 54037 and 54457, Orange County Superior Court. Dismissal for presumptively vindictive increase in the defendant's bond from \$1000 to \$25,000 upon giving notice of appeal for trial de novo.

Pleadings from the Waters case are attached to this handout

