Getting Your Client Out of Jail

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Money Bail
- Intended as a way to ensure client’s appearance
- Now used to keep poor people in jail
- Fee of up to 15% (10% in other states)
- Only one other country uses money bail
  - The Philippines
- Eliminating/reducing money bail
  - Federal system and DC
  - New Jersey
  - California

Resources
- U.S. and NC Constitutions and Case Law
- Public Defender Manual and Litigating Race (available on UNC-SOG website)
- N.C.G.S. 15A-531 et. seq.
- Local pretrial release policy
- Other sources (PJI, Vera Institute, etc.)
Civil Rights Corps
https://www.civilrightscorps.org

**Case Law – U.S.**

- *Stack v. Boyle*, 342 U.S. 1, 4, 5 (1951)
  
  “This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”

  
  “The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.”

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

**Case Law – NC**

  
  - DWI – importance of timely opportunity to gather evidence

  
  - DV 48-hour hold unconstitutional as applied
  
  “[I]t is beyond question that . . . liberty, is a fundamental right.”

  - “The right to freedom prior to trial is reflected in the principle that there is a presumption of innocence in favor of the accused which is the undoubted law, axiomatic and elementary, and lies at the foundation of the administration of our criminal law.” (Internal citations omitted.)
From G.S. 15A-534(b)

- “The judicial official in granting pretrial release must impose condition (1) [written promise], (2) [unsecured bond], or (3) [custody release] . . . 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.”

(emphasis added)

From 15B Pretrial Release Policy

- “The policy of the State of North Carolina on bail is to impose the least restrictive nonmonetary form of pretrial release that will reasonably assure the defendant’s appearance in court” (emphasis added)

ABA Criminal Justice Section Standards on Pretrial Release

The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many circumstances, deprives their families of support.

Standard 10-1.1
ABA Criminal Justice Section
Standards on Pretrial Release

Financial conditions other than an unsecured bond should be imposed only when no less restrictive conditions of release will reasonably ensure the defendant’s appearance in court. The judicial official should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

Standard 10-5.3(a)

U.S. Department of Justice
(Previous Administration)

“Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.”

“As the Department of Justice set forth in detail in a federal court brief last year, and as courts have long recognized, any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment.”

Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Div., Dept. of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues (Mar. 14, 2016)

U.S. Department of Justice

“[T]he Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences – including and especially incarceration – on poor people without accounting for their indigence.”

“As a jurisdiction may not use a bail system that incarcerates indigent individuals without meaningful consideration of their indigence and alternative methods of assuring their appearance at trial.”

USDOJ Amicus Brief, Walker v. City of Calhoun, No. 16-10521 (11th Cir., Brief filed 8/18/2016)
Importance of Release
To Your Client and Family

- Psychological effects on client and family
- Financial burden on client’s family
  (loss of income + additional spending)
- Assistance with defense
- Treatment
- Contribution to society/family
- Jail issues

Importance of Release
To the Community

- Community picks up slack
  (housing, medical, food, transportation, care)
- Community pays for jail
- Reliability/trust in criminal justice system
  - More convictions
  - Worse sentences
  - More future criminal conduct
- Less integration into community after

Harm to Society

- More failures to appear
- Worse case outcomes
  - 14% less likely to be convicted if released
  - 4 times more likely to get jail sentence
  - 3 times longer jail sentences
  - 3 times more likely to be sentenced to prison
  - 2 times longer prison sentences
- More criminal activity
  - Before and AFTER case resolved
Racial Disparities
- African Americans are more likely to be stopped, searched, charged (including more serious charges), convicted, and incarcerated
- More likely to be given money bond (instead of written promise or unsecured bond)
- Higher bond amounts
- African Americans and Latinos are ~30% of U.S. population, but 50% of U.S. jail population
- African Americans are 3.5 times more likely to be jailed than whites

Harm to Justice
- Reduced reliability
  - Outcomes based on money and race
- Reduced trust in system
  - Especially for people of color

So the judge MUST release your client, right?
Factors Working Against You:
- Audience – open court
- Prosecutor
- Err on the side of caution
- Status quo versus change
- "Danger to community"

Money Bail Industry
- Backed by insurance companies
  - Rarely has to pay forfeitures
- Pays lobbyists to pass favorable laws
  - Tried many times to limit non-$ pretrial release
- Ties to ALEC (model legislation)
- Profit-motivated
- Very active

Pitfalls (15A-533)
- No right to pretrial release if:
  - In custody or should be in custody
- Rebuttal presumption against release if:
  - Charged with trafficking while on pretrial release, AND A-E felony conviction within 5 years
  - Gang involvement in new charge while on pretrial release, AND prior gang conviction within 5 years
  - Charged with felony/A1 involving firearm AND
    - On pretrial release for same, OR
    - Conviction for same within 5 years
Pitfalls (15A-534)

- Prior FTA on same charges
  - At least same release conditions as most recent OFA
  - If no release conditions in OFA, double bond
  - If no bond listed, bond at least $1000
- Charged with felony, already on probation
  - Determine “danger to the public”
  - Can hold to get information (96 hours from arrest)
- On pretrial release for previous charge
  - Magistrate’s discretion, but may double bond

Other Pitfalls

- DV cases (15A-534.1)
- Impaired Driving charges (15A-534.2)
- Communicable Diseases (15A-534.3)
- Sex Offenses (15A-534.4)
- Threat to Health/Safety of Others (15A-534.5)
- Manufacturing Meth charges (15A-534.6)
- Probation Violations??

Solutions to Pitfalls

- Talk with prosecutor
- Address at first appearances
- Judge can modify bond
  - Automatic bonds might violate 8th and 14th Amendments
  - Remember presumption of release
  - Remember reasons for allowing secured bonds
Get involved early

Information You Need
- From your client:
  - Details of offense conduct (use with caution)
  - Personal characteristics of client
    - Record (but check accuracy)
    - Family
    - Work/school
    - Ties to community (church, volunteer, etc.)
    - Treatment (use with caution)
    - Financial situation

More Information You Need
- Client’s future
  - Will live where? Work where?
  - Get client contact information
- Talk to investigating officer:
  - Get details of offense conduct
    (official state version)
  - Might say something about client
    (but think long-term)
Legal Considerations

- Other pending cases (including other counties)
- Credit issue if bond out on one
- Probation status
- PV about to be filed?
- Child support charges
- DV civil issues
- Possible additional charges
- Detainers

Possibilities

If Pretrial doesn't take your client (or you don't have Pretrial in your county):

Talk with prosecutor

Possible results:
- Reduce or unsecure bond
- Conditions to ensure appearance/safety
- Release to treatment facility
- Reduce or unsecure bond in exchange for no PC hearing
- Other – be creative

(First) Last Resort

File bond motion.

Have bond hearing.
**Bond Motion**

- Check local rules
- You choose date
- Bonds can go up
- Successive bond motions might be more difficult

**Preparation for Hearing**

- Characteristics of client
- Charged conduct
- Bond range from local guidelines
  - In 15B = personalized to client’s prior record level
- Consider witnesses and/or letters

**Bond Hearing**

- Judge must consider (G.S. 15A-534(c)):
  - Nature/circumstances of charged offense
  - Weight of evidence
  - Characteristics of your client: family ties, employment, finances, character, mental condition
  - Length of residence in community
  - Prior convictions
  - History of flight/PTAs
**Secured Bond only if other release conditions...**
- 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

15A-534(b)

**Remind Judge**
- Least restrictive possible to ensure appearance
- Lack of family resources shouldn’t keep someone in custody
- Judge must make findings unless written promise, unsecured bond, or custody release
  - 15B – findings must be in writing
  - 15B – only one bond for multiple charges
- Keeping bailable clients in jail increases convictions, custody sentences (and length), FTAs, and future criminal conduct

**Danger to Community (Theoretically)**

Only if the judicial official determines that none of the non-monetary conditions will assure the appearance of the defendant or protect against other possible harm may he impose the requirement that the defendant post a secured bond... [H]e dangerousness and potential for harm, other than the risk of non-appearance, are not factors to be considered in setting the conditions of release on the secured bail bond.

Official Commentary
15A-534 (emphasis added)
Danger to the Public  
15A-534(d2)  
- Shall be considered when on probation and charged with felony  
- Determination must be written  
- If danger exists, then secured bond or EHA  
- If not enough information to determine, then hold up to 96 hours for additional information  
(document hold and reasons in writing)

Change the Discussion  
- Judge's fear of what your client might do if released  
  - Hypothetical  
  - Emotional  
  
  VS

- Serious harm to client, family, and society if kept in jail  
  - Documented  
  - Fact-based  
  - Real

Our community pays and is harmed when we detain low/moderate risk people pretrial
Dealing with Risk Factors
(Realistically, you’ll have to)
- Prior record – explain, if needed/possible
- If MH/SA issues, address treatment plan
  - Use with caution
- Supervision
  - Family
  - Pretrial Services
  - Probation
  - GPS/SCRAM

Risk Assessments
- The Good
  - Fact-based, validated
  - Less racially biased than arbitrary decisions
  - Gives judge a reason to let your client out
- The Bad
  - May still be racially biased
  - Doesn’t account for personal factors
  - Could give judge a reason to keep your client in

Supervision Issues
- Over-supervision can lead to failure on pretrial
- Should be tailored to fit specific risk/need
- Should be least restrictive measure to address risk/need

Best method to decrease FTAs is reminders
Why your client should be out

- Default is release
- Lots of costs to society for keeping someone locked up, especially pretrial
- Your client is a better citizen out of jail than in
- Facts to support low risk of your client
- Can’t be kept in custody solely because of $
- Other reasons unique to your case/client

Successive bond motions

- Proceed with caution
- Nothing in statutes prohibiting lots of bond motions, BUT, not much point unless something has changed (client's circumstances, state of the law, state's case, passage of time)
- Strength of case can be an issue and can change

(Second) Last Resort

Talk to ADA (again)

Appeal bond to Superior Court (15A-538)
Advantages in Superior Court

- Court of record
- Opportunity to present case in writing
- Superior court judges not necessarily inclined to go along with district court judge determinations
- Maybe better chance to be heard
- Client can see you are working for him/her

(FINAL) Last Resort

For some cases...

Petition for Writ of Habeas Corpus
(Art. I, § 21 of NC Constitution)
N.C.G.S. §§ 17-1 through 17-46

Denied if...

- In custody per court order
- In custody per judgment/final order
- Delayed application during vacation
- No probable ground for relief in application
Advantages of Habeas Corpus

- Any superior court or appellate judge
- Anyone can file on behalf of person in custody
- Short time limits
- $2500 penalty if not granted when it should be
- Use as tool to get ADA to agree to release

Examples

- Held too long on ICE detainer
- Not given first appearance on misdemeanor
- Declared incapable of proceeding and charges dismissed

Be agents of truth and change