

NORTH CAROLINA
ORANGE COUNTY

FILED
2010 JUL -4 A 9:28
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CRIMINAL FILE NO: C. [REDACTED]

STATE OF NORTH CAROLINA

VS.

[REDACTED]

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**SUPERSEDING
MOTION TO DISMISS**

NOW COMES the defendant, [REDACTED] by and through counsel, and hereby moves the Court, pursuant to the Jury Trial Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution; Article I §§19 and 24 of the North Carolina Constitution; and N.C.G.S. §§ 15A-951 and, 954, N.C.G.S. 15A-534 et. seq., and North Carolina v. Pearce 394 U.S. 711 (1969), to dismiss the above captioned charges. In support of this motion, defendant shows the following:

1. The attached affidavit of attorney Dana Graves is tendered in support of this motion and incorporated herein by reference.
2. Defendant is charged in [REDACTED] with Assault on a Female and Interference with Emergency Communications; in [REDACTED] he is charged with Violation of a Domestic Violence Protection Order.
3. The three offenses were called for trial in Orange County District Court on February 26, 2010 before the Honorable [REDACTED]. At the time of trial Defendant's bond was \$1000 cash or secured in [REDACTED] and \$1000 unsecured in [REDACTED]. The Defendant was out of custody, had appeared at all required court proceedings, and had obeyed a court order prohibiting contact with the prosecuting witness for almost three months.
4. The Defendant was found guilty of all offenses and sentenced to 150 days in the Department of Corrections in [REDACTED] and a consecutive 60 days in [REDACTED] [REDACTED] for a total of 210 days.
5. Notice of Appeal to the Superior Court was given in open court. Judge [REDACTED] immediately modified the conditions of Defendant's pre-trial release, increasing the Defendant's bond to \$25,000.00 secured, with no written findings to support such a modification and without giving the Defendant an opportunity to address bond. Consequently, Mr. [REDACTED] was taken into custody.
6. A release order dated February 26, 2010 states that Defendant's bond amounted to \$25,000 secured. In the "additional information" section of the release order, the following language appears: "this is an appeal bond (\$25,000 total) – release date:

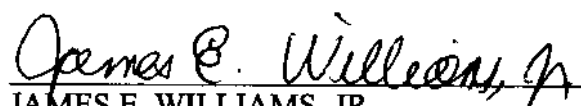
09/24/2010.” On September 24, 2010, the Defendant would have served a total of 210 days in custody.

7. 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 N.C.G.S. 7A-290 and N.C.G.S. 15A-1431(b), Defendant had a statutory right to appeal his district court conviction and sentence 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. See, N.C. Const., Art. I §24.
8. It was not constitutionally permissible for the Court to respond to Mr. [REDACTED] invocation of his statutory right to appeal and, thus, his constitutional right to a trial by jury, by increasing his bond prior to trial de novo. Whether actually vindictive or not, the fear of vindictiveness may unconstitutionally deter a defendant’s exercise of his right to appeal; due process thus requires that a defendant be freed of apprehension of such a retaliatory motive., *Blackledge v. Perry*, 4176 U.S. 21 (1974); *North Carolina v. Pearce* 395 U.S. 711 (1969).
9. The modification of Defendant’s bond from \$1,000 unsecured to \$25,000.00 secured upon Defendant’s giving of notice of appeal bond resulted directly in Defendant’s confinement and significantly harmed Defendant’s fundamental right to liberty; thus dismissal is the appropriate remedy. *State v. Thompson*, 349 N.C. 483 (1998).
10. Pursuant to N.C.G.S. § 15A-534(e)(1) and Section 6.2 of the Pre-Trial Release Policy of District 15B a “... district court judge may modify a pretrial release order ... at any time prior to... the noting of an appeal” to the Superior Court. Once the Defendant gave notice of appeal to Superior Court the District Court no longer had authority to modify the bond.
11. According to N.C.G.S. 15A-534(b), a judicial official must impose conditions (1), (2), or (3) in subsection (a) when setting the conditions of pretrial release, none of which require posting a secured bond, unless specific findings are made.
12. N.C.G.S. 15A-534(b) further states that a secured bond may be imposed only if a less onerous form of pretrial 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.”
13. According to N.C.G.S. 15A-534(b), a judicial official who imposes a secured bond “must record the reasons for so doing in writing to the extent provided in the policies and requirements issued by the senior resident superior court judge, pursuant to N.C.G.S. 15A-535(a).”

14. Pursuant to N.C.G.S. 15A-535(a), Senior Resident Judge Carl Fox issued a Pre-Trial Release Policy of District 15B on February 2, 2006. Section 3.4 of the local policy indicates a secured bond should only be imposed in cases in which the judicial official makes a written determination on the appropriate form that less restrictive conditions of pre-trial release are inappropriate. The policy also states the written findings should be attached to the "Appearance Bond for Pre-Trial Release" form.
15. Upon information and belief, the \$25,000 bond in this case was set in a manner inconsistent with N.C.G.S. 15A-535(a) and 3.4 of the local bail policy, in that it appears no written findings were made as to why a \$25,000 secured bond was necessary nor was such a form attached to the Defendant's release order.

WHEREFORE, Defendant respectfully moves the Court to dismiss the charges against him for violations of his constitutional right to due process.

Respectfully submitted this the 2nd day of June 2010


JAMES E. WILLIAMS, JR
ATTORNEY FOR THE DEFENDANT

OFFICE OF THE PUBLIC DEFENDER
15-B JUDICIAL DISTRICT
200 North Greensboro Street, Suite D-16
Carrboro, North Carolina 27510
(919) 968-0200

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned attorney served a copy of the forgoing Motion on the State of North by hand delivering the same to the Office of the District Attorney, Hillsborough, N.C. 27278.

James E. Williams, Jr

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

ORANGE COUNTY

FILE NO: [REDACTED]

STATE OF NORTH CAROLINA)

VS.)

AFFIDAVIT SUPPORTING
MOTION TO DISMISS

[REDACTED]
DEFENDANT)

I, Dana M. Graves, after being duly sworn, depose and say the following:

1. That I am an attorney licensed to practice in the State of North Carolina, currently employed as an Assistant Public Defender for Defender District 15B.
2. That I have been appointed to represent [REDACTED] who is charged in the above captioned cases with assault on a female, interference with emergency communications, and violation of a domestic violence protective order.
3. That on February 26, 2010 I represented Mr. [REDACTED] during a trial in Orange County District Court, before the Honorable [REDACTED]
4. That Mr. [REDACTED] case was the last matter heard that day.
5. That Mr. [REDACTED] was found guilty of all offenses and sentenced to 150 days in the Department of Corrections in [REDACTED] and a consecutive 60 days in [REDACTED] for a total of 210 days.
6. That after being sentenced I spoke with Mr. [REDACTED] in the conference room in the Battle Courtroom about his options, including his right to appeal his convictions and sentence to Superior Court.
7. That Mr. [REDACTED] chose to exercise his right to appeal to Superior Court.
8. That after speaking with Mr. [REDACTED] I went back into the courtroom.
9. That at that time I returned to the courtroom, the clerk was still present, as well as Assistant District Attorney [REDACTED]
10. That Judge [REDACTED] was in chambers when I entered the courtroom.
11. That after a few moments Judge [REDACTED] emerged from chambers and I informed him that Mr. [REDACTED] was exercising his right to appeal his conviction to Superior Court.

12. That Judge [REDACTED] immediately set an "appeal bond" of \$25,000 cash or secured, without providing any written or oral findings about why the bond was being imposed.
13. That immediately after setting the bond, Judge [REDACTED] exited the courtroom.

Further affiant sayeth not.

Respectfully submitted, this the 1st day of June 2010.



DANA M. GRAVES

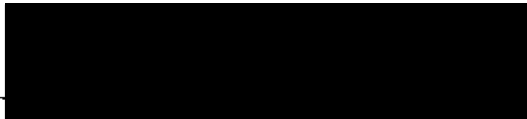
OFFICE OF THE PUBLIC DEFENDER
15B JUDICIAL DISTRICT
200 N. Greensboro Street, Suite D16
Carrboro, North Carolina 27510
Telephone: (919) 968-0200

Sworn and subscribed before me this 1st day of JUNE, 2010.

JONATHAN V. ALEXANDER
Jonathan V. Alexander, Notary Public
My commission expires: 3/15/2012

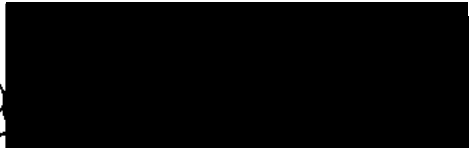
**Orange County Jail
Temporary Commitment Form**

Inmate:



File #

222



On the 26th day of Feb received 210 days

_____ months in Orange County District/Superior Court.

Signed commitment orders will be sent to the jail at a later time.

N Hamilton

Deputy CSC /Asst. CSC/Clerk of Superior Court

Transporting Officer

Credit for time served: 0 Days _____ Months

Release Conditions: _____

Appeal Bond \$25,000⁰⁰ Total

Rel. 9/24/10

STATE OF NORTH CAROLINA

 ORANGE County

File No. [REDACTED]
 In The General Court Of Justice
 District Superior Court Division

STATE VERSUS
 Name And Address Of Defendant
 [REDACTED]

**CONDITIONS OF RELEASE
 AND RELEASE ORDER**
 G.S. Chapter 15A, Art. 25, 26

Amount Of Bond
 \$ 25,000.00

Offenses And Additional File Numbers
 APPEAL BOND: [REDACTED]

Location Of Court District Superior Date _____ Time AM PM

To The Defendant Named Above, you are ORDERED to appear before the Court as provided above and at all subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear. The defendant has been advised of charge(s) against him/her and his/her right to communicate with counsel, family and friends.

Your release is authorized upon execution of your:
 WRITTEN PROMISE to appear UNSECURED BOND in the amount shown above
 CUSTODY RELEASE SECURED BOND in the amount shown above

You will be arrested if you violate the following restrictions:

Your release is not authorized.
 The defendant was arrested or surrendered after failing to appear as required under a prior release order.
 This was the defendant's second or subsequent failure to appear in this case.
 Your release is subject to the conditions as shown on the attached AOC-CR-270. Other: _____

Additional Information
 THIS IS AN APPEAL BOND (\$25,000 TOTAL); RELEASE DATE: 09/24/2010

Date: 02/26/2010 Signature Of Judicial Official: *Mahe Bond*
 G STEPHENS

Magistrate Deputy CSC Assistant CSC Clerk Of Superior Court District Court Judge Superior Court Judge

ORDER OF COMMITMENT

To The Custodian Of The Detention Facility Named Below, you are ORDERED to receive in your custody the defendant named above who may be released if authorized above. If the defendant is not sooner released, you are ORDERED to:
 produce him/her in Court as provided above. hold him/her for the following purpose:
 RELEASE DATE 09-24-2010

[Check in all domestic violence and stalking cases covered by G.S. 15A-534.1(b)] produce him/her at the first session of District or Superior Court held in this county after the entry of this Order or, if no session is held before (enter date and time 48 hours after time of arrest) _____
 AM PM produce him/her before a magistrate of this county at that time to determine conditions of pretrial release.

Name Of Detention Facility: ORANGE COUNTY JAIL Date: 02-26-2010 Signature Of Judicial Official: [REDACTED]

WRITTEN PROMISE TO APPEAR OR CUSTODY RELEASE

I, the undersigned, promise to appear at all hearings, trials or otherwise as the Court may require and to abide by any restrictions set out above. I understand and agree that this promise is effective until the entry of judgment in the District Court from which no appeal is taken or until the entry of judgment in Superior Court. If I am released to the custody of another person, I agree to be placed in that person's custody, and that person agrees by his/her signature to supervise me.

Date _____ Signature Of Defendant _____ Signature Of Person Agreeing To Supervise Defendant _____

Name Of Person Agreeing To Supervise Defendant (Type or Print) _____ Address Of Person Agreeing To Supervise Defendant _____

DEFENDANT RELEASED ON BAIL

Date _____ Time AM PM Signature Of Jailer _____

Court *copy*

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF ORANGE 2010 JUL 19 SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA ORANGE COUNTY, C.S.C.
BY [Signature]

vs.

[Redacted]

[Redacted]

Defendant.

MEMORANDUM OPINION AND ORDER

These matters come before this Court on defendant [Redacted] superseding motion to dismiss, heard in Orange County Superior Court on June 15, 2010. Present at the hearing was [Redacted] Assistant District Attorney, counsel for the State; James Williams, Public Defender, and Dana Graves, Assistant Public Defender, counsel for the Defendant; and the defendant. The Court has fully reviewed and considered the record proper in this case, including the filings, arguments, and submissions of all sides.

Based on consideration of the matters noted above, the Court notes the following findings of fact, legal precepts involved, and conclusions of law:

FINDINGS OF FACT

1. The defendant was charged with Assault on a Female and Interference with Emergency Communications in [Redacted] and charged with a Violation of a Domestic Violence Protection Order in [Redacted]
2. On February 26, 2010, the defendant appeared for trial in Orange County District Court before the Honorable [Redacted] on the three offenses. At the time of the trial, the defendant's bond was \$1000 cash or secured in [Redacted] and \$1000 unsecured in [Redacted]

3. The defendant was found guilty of all offenses and sentenced to 150 days in the North Carolina Department of Corrections in [REDACTED] and a consecutive 60 days in [REDACTED] for a total of 210 days.
4. After being sentenced, the defendant met with his attorney, Dana Graves, in the conference room near the Battle Courtroom to discuss his options, including his right to appeal his convictions to Superior Court.
5. At the conclusion of this discussion, the defendant and his attorney returned to the courtroom, where the clerk and Assistant District Attorney [REDACTED] [REDACTED] were still present.
6. Judge [REDACTED] emerged from chambers several moments later, at which time, in open court, the defendant gave Notice of Appeal to Superior Court.
7. Judge [REDACTED] immediately and *sua sponte* modified the conditions of the defendant's pre-trial release, increasing the defendant's bond to a total of \$25,000.00 secured on both cases.
8. The increase in the bond was not accompanied by written findings in support of the modification. In addition, the court solicited neither the State nor the defendant to address a modification of the bond. The defendant was subsequently taken into custody.
9. A bond modification entered sometime prior to the district court trial, raising the bond to \$1000 secured in [REDACTED] was accompanied by written findings.
10. At the time of the trial in district court the defendant was not in custody and, by the evidence before the Court, had appeared at all required court proceedings. In addition, the defendant was in compliance with the order prohibiting contact with the prosecuting witness for approximately three months preceding the trial.
11. Neither the State nor the defendant requested to be heard on the modification of the bond:
12. After the modification of the bond the defendant was confined for approximately ten hours, until the new bond was posted.
13. The release order dated February 26, 2010 states that the defendant's bond amounted to a total of \$25,000.00 secured. In the "additional information"

section of the release order, the following language appears: "this is an appeal bond (\$25,000 total) – release date 9/24/2010."

14. On September 24, 2010, the defendant would have served a total of 210 days in custody.

LEGAL DISCUSSION

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 24 of the North Carolina Constitution guarantee a defendant's right to a jury trial in criminal cases. Article I, § 24 of the N.C. Constitution also provides that a defendant has the right to appeal for a trial de novo in misdemeanor cases because the General Assembly may remove the jury requirement in misdemeanor cases. The section states: "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." N.C. Const., Art. I § 24.

North Carolina General Statutes § 7A – 290 and § 15A – 1431(b) also provide a defendant with the opportunity to appeal a misdemeanor conviction for a trial de novo. N.C. Gen. Stat. § 7A – 290 provides:

Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon expiration of the 10-day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket. The original bail shall stand pending appeal, unless the judge orders bail denied, increased, or reduced.

N.C. Gen. Stat. § 7A – 290. The pertinent part of N.C. Gen. Stat. § 15A – 1431(b) provides that "[a] defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law." N.C. Gen. Stat. § 15A -1431(b).

According to N.C. Gen. Stat. § 15A – 534(a)(b) the procedure for determining the conditions of pretrial release requires the judicial official to impose at least one of the

five conditions contained in section (a) and include reasons for imposing condition (4) or (5) in subsection (a) to the extent required by the senior resident superior court judge pursuant to G.S. 15A - 535(a). N.C. Gen. Stat. 15A - 534(a)(b) provides:

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

(1) Release the defendant on his written promise to appear.

(2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.

(3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.

(4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 58-74-5, or by at least one solvent surety.

(5) House arrest with electronic monitoring.

If condition (5) is imposed, the defendant must execute a secured appearance bond under subdivision (4) of this subsection. If condition (3) is imposed, however, the defendant may elect to execute an appearance bond under subdivision (4). The judicial official may also place restrictions on the travel, associations, conduct, or place of abode of the defendant as conditions of pretrial release.

(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).

N.C. Gen. Stat. § 15A - 534(a)(b).

As mentioned in the previously referenced statute, N.C. Gen. Stat. § 15A – 535(a) provides:

(a) Subject to the provisions of this Article, the senior resident superior court judge for each district or set of districts as defined in G.S. 7A-41.1(a) in consultation with the chief district court judge or judges of all the district court districts in which are located any of the counties in the senior resident superior court judge's district or set of districts, must devise and issue recommended policies to be followed within each of those counties in determining whether, and upon what conditions, a defendant may be released before trial and may include in such policies, or issue separately, a requirement that each judicial official who imposes condition (4) or (5) in G.S. 15A-534(a) must record the reasons for doing so in writing.

N.C. Gen. Stat. § 15A – 535(a). Pursuant to N.C.G.S. § 15A – 535(a), the Pre-Trial Release Policy of District 15B, issued on February 2, 2006, indicates that a written determination by the judicial official that less restrictive conditions of pre-trial release are inappropriate should accompany the imposition of a secured bond and be attached to the "Appearance Bond for Pre-Trial Release" form. See, Pre-Trial Release Policy of District 15B, § 3.4. See also, §§2 and 3, Pre-Trial Release Policy Order dated February 2, 2006.

In addition, the Court notes other relevant and guiding principles:

1. In two cases arising out of North Carolina, the Supreme Court of the United States has ruled that the introduction of a more severe charge after an appeal and the imposition of a greater punishment after an appeal are both unconstitutional under due process without an indication by the judge of the facts resulting in the decision to change the charge or punishment. See *Blackledge v. Perry*, 417 U.S. 21 (1974); See *North Carolina v. Pearce*, 395 U.S. 711 (1969).
2. The North Carolina Supreme Court decided that dismissal was an appropriate remedy when a constitutional violation of procedural due process deprived the defendant of liberty unreasonably. See *North Carolina v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998).

3. N.C. Gen. Stat. § 15A – 954(a)(4) authorizes a court to dismiss charges against a criminal defendant when that defendant's constitutional rights have been violated resulting in irreparable prejudice.

CONCLUSIONS OF LAW

1. The Court has the requisite jurisdiction to address the matters presented in defendant's motions.
2. The defendant had a statutory right to appeal his conviction and sentence to the Superior Court for a trial de novo. N.C. Gen. Stat. § 7A – 290 and § 15A – 1431(b).
3. The defendant also had a Constitutional right to appeal his conviction and sentence to the Superior Court for a trial de novo. U.S. Const. Amends. VI and XIV; N.C. Const., Art. I § 24.

I. Failure to make findings violated due process

4. The imposition of a penalty on the defendant for exercising the right to appeal would be a violation of due process of law *See Blackledge v. Pearce*, 417 U.S. at 25. To avoid vindictiveness against the defendant for exercising the right to appeal the judge must include specific findings for the imposition of what could be considered a penalty. *Id.*
5. The increase in the amount of the secured bond from \$1000 to \$25,000, without the inclusion of specific findings by the judge, amounts to the imposition of a penalty on the defendant for exercising the right to appeal for a trial de novo.
6. There is no evidence that the bond modification in district court was, in fact, actually vindictive. However, whether vindictive or not, the fear of vindictiveness may unconstitutionally deter a defendant's exercise of his right to appeal, thus due process requires the removal of the apprehension of such retaliatory motive. *Id.* at 28; *North Carolina v. Pearce*, 395 U.S. at 725. The absence of specific findings by the judge to increase the bond to \$25,000 fails to remove the apprehension of a retaliatory motive.

7. The increase in the bond to \$25,000 resulted in the defendant being taken into custody and confined for about ten hours, thus depriving the defendant of liberty unreasonably.

II. Failure to make findings violated N.C.G.S. § 15A – 534(b), 535(a), and Local Policy

8. N.C.G.S. § 15A – 534(b) requires that the judicial official impose a secured bond only if that official determines that any lesser form of pre-trial 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.
9. N.C.G.S. § 15A – 534(b) additionally requires that the judge include the reasons for imposing a secured bond to the extent required by the local policy developed by the senior resident Superior Court judge. The local policy of District 15B requires that the imposition of a secured bond be accompanied by a written determination that less restrictive means of pre-trial release are inappropriate and that these written findings should be attached on the appropriate form.
10. Therefore, the failure to include findings for imposing a secured bond of \$25,000 in this case resulted in the bond being set in a manner inconsistent with the requirements of N.C.G.S. § 15A – 534(b) and local pre-trial release policy, thus resulting in the violation of the defendant's right to due process and deprivation of the defendant's liberty.

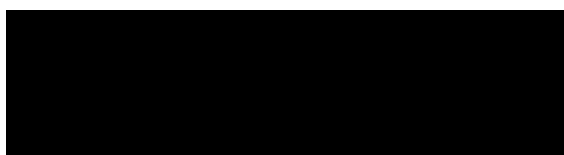
III. Defendants' Remaining Arguments

11. Because it is not necessary to the disposition of the case, the Court specifically declines to address Defendants' remaining argument as to whether the District Court judge had the authority to modify the bond after the defendant gave notice of appeal.

Based on the foregoing and in an exercise of the Court's informed discretion, IT IS ORDERED, ADJUDGED, and DECREED that the motion to dismiss the charges is GRANTED, and the charges against the defendant are hereby dismissed.

This ORDER was entered out of session with the prior consent on the record of all sides.

This, the 13 day of July, 2010.

A large black rectangular redaction box covers the signature of the Superior Court Judge. A horizontal line extends from the right side of the box.

Superior Court Judge