

PRETRIAL RELEASE

Jessica Smith, UNC School of Government (April 2015)

Updated by Christopher Tyner (July 2023)

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I. Introduction.

This section discusses setting, modifying, and revoking conditions of pretrial release, as well as release after conviction in superior court. Some of the procedures discussed apply only at the initial appearance held before a magistrate. However, they are included because magistrates often come to judges with questions about pretrial release. Also, judges need to know the applicable law when adopting or revising local pretrial release policies. For more information about proceedings before magistrates, see JESSICA SMITH, *CRIMINAL PROCEEDINGS BEFORE NORTH CAROLINA MAGISTRATES* (2014).

A. Relevant Statutes.

The main statutory provisions on conditions of pretrial release are found in Article 26 (Bail) of Chapter 15A of the General Statutes.

B. Senior Resident Judge Must Issue Local Policy.

G.S. 15A-535 provides that the senior resident superior court judge must create and issue recommended pretrial release policies. The policy may include a requirement that judicial officials who impose secured bonds or house arrest with electronic monitoring record the reasons for doing so in writing. G.S. 15A-535(a).

If you are the senior resident judge, be sure to review your policy and make changes as needed. It is a good idea to review your policy annually at the end of a legislative session so that you can incorporate any legislative changes. All other judicial officials should have a copy of the local pretrial release policy in hand when determining conditions of pretrial release. The [School of Government Criminal Justice Innovation Lab](#) publishes a Model Bail Policy that can be used as a template when revising a local pretrial release policy.

II. Entitlement to Conditions of Pretrial Release.

A. General Rule: All Defendants Are Entitled to Conditions.

Unless the defendant falls within one of the exceptions listed in Section II.B., below, the defendant is entitled to have conditions of pretrial release.

B. Exceptions: Defendants Who Are Not Entitled to Conditions from a Magistrate.

In certain situations the defendant is not entitled to have conditions set or a magistrate or clerk is barred from setting conditions. Table 1, below, provides an “at-a-glance” listing of these special situations. The subsections that follow discuss these situations in more detail.

Table 1. When Defendant Is Not Entitled to Conditions from a Magistrate

1. Capital defendants
2. Defendants charged with certain noncapital offenses
3. Certain fugitives
4. Involuntarily committed defendants who commit crimes while committed
5. Certain drug trafficking offenders
6. Certain gang crime offenders
7. Certain offenses involving firearms
8. Violators of health control measures
9. Certain methamphetamine offenses
10. Military deserters
11. Parole violators
12. Probation violators with pending felony charge or sex offender status who pose a danger
13. Out-of-state probation violators covered by the Interstate Compact
14. Defendants subject to a “no release” order issued by a judge

1. **Capital Defendants.** It is within the discretion of a judge (and only a judge) to decide whether a defendant charged with a capital offense will be released before trial. G.S. 15A-533(c). North Carolina has only one offense that can qualify for capital punishment: first-degree murder. G.S. 14-17. In the unusual situation where a magistrate or clerk is faced with setting conditions for a defendant charged with a capital offense, the magistrate or clerk should commit the person to jail for a judge to determine the conditions of release at the first appearance.
2. **Defendants Charged with Certain Noncapital Offenses.** For offenses committed on or after October 1, 2023, new legislation provides that it is within the discretion of a judge (and only a judge) to decide whether a defendant charged with a noncapital offense listed in G.S. 15A-533(b) will be released before trial. S.L. 2023-75, Secs. 2.(a), (b) (modifying G.S. 15A-533(b) and providing effective date). The following offenses are listed in G.S. 15A-533(b) by the new legislation:
 - G.S. 14-17 (First or second degree murder) or an attempt to commit first or second degree murder;
 - G.S. 14-39 (First or second degree kidnapping);
 - G.S. 14-27.21 (First degree forcible rape);
 - G.S. 14-27.22 (Second degree forcible rape);
 - G.S. 14-27.23 (Statutory rape of a child by an adult);
 - G.S. 14-27.24 (First degree statutory rape);
 - G.S. 14-27.25 (Statutory rape of person who is 15 years of age or younger);
 - G.S. 14-27.26 (First degree forcible sexual offense);
 - G.S. 14-27.27 (Second degree forcible sexual offense);
 - G.S. 14-27.28 (Statutory sexual offense with a child by an adult);
 - G.S. 14-27.29 (First degree statutory sexual offense);
 - G.S. 14-27.30 (Statutory sexual offense with a person who is 15 years of age or younger);
 - G.S. 14-43.11 (Human trafficking);
 - G.S. 14-32(a) (Assault with a deadly weapon with intent to kill inflicting serious injury);
 - G.S. 14-34.1 (Discharging certain barreled weapons or a firearm into occupied property);
 - First degree burglary pursuant to G.S. 14-51;
 - First degree arson pursuant to G.S. 14-58;
 - G.S. 14-87 (Robbery with firearms or other dangerous weapons).

If a magistrate or clerk is faced with setting conditions for a defendant charged with a listed offense, the magistrate or clerk should commit the person to jail for a judge to determine the conditions of release at the first appearance.

3. **Certain Fugitives.** A fugitive defendant charged in another state with an offense punishable by death or life imprisonment has no right to pretrial release. G.S. 15A-736. Also, a fugitive arrested on a governor's warrant has no right to pretrial release. ROBERT L. FARB, STATE OF NORTH CAROLINA EXTRADITION MANUAL 57 (3d ed. 2013). These defendants

should be committed to jail without conditions of release being set. *Id.* at 43.

4. **Involuntarily Committed Defendants Who Commit Crimes While Committed.** There is no right to pretrial release for a defendant who is alleged to have committed a crime while involuntarily committed or while an escapee from commitment. G.S. 15A-533(a). Such a defendant should be returned to the treatment facility in which he or she was residing at the time of the alleged crime or from which he or she escaped. *Id.*
5. **Certain Drug-Trafficking Offenders.** G.S. 15A-533(d) provides that it is presumed (subject to rebuttal by the defendant) that no condition of release will reasonably assure both the appearance of the defendant as required and the safety of the community if a judicial official finds:
 - reasonable cause to believe that the defendant committed a drug-trafficking offense;
 - the drug-trafficking offense was committed while the defendant was on pretrial release for another offense; and
 - the defendant has been convicted of a Class A through Class E felony or a drug-trafficking offense and not more than five years have passed since the date of conviction or the defendant's release from prison, whichever is later.

If all of these facts are found, only a district or superior court judge may set pretrial release conditions after finding that there is a reasonable assurance that the defendant will appear and that the release does not pose an unreasonable risk of harm to the community. G.S. 15A-533(g).

6. **Certain Gang Crime Offenders.** G.S. 15A-533(e) provides that it is presumed (subject to rebuttal by the defendant) that no condition of release will reasonably assure both the appearance of the person as required and the safety of the community if a judicial official finds:
 - reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with, any criminal gang, as defined in G.S. 14-50.16A(1);
 - the offense was committed while the person was on pretrial release for another offense; *and*
 - the defendant has a previous conviction for a gang offense under G.S. 14-50.16 through -50.20 or has received an enhanced sentence for a previous conviction pursuant to G.S. 15A-1340.16E, and not more than five years have passed since the date of conviction or the defendant's release for the offense, whichever is later.

If all of these facts are found, only a district or superior court judge may set pretrial release conditions after finding that there is a reasonable assurance that the defendant will appear and that the release does not pose an unreasonable risk of harm to the community. G.S. 15A-533(g).

7. **Certain Offenses Involving Firearms.** G.S. 15A-533(f) provides that there is a rebuttable presumption that no condition of release will reasonably assure both the appearance of the person as required and the safety of the community if a judicial official finds:

- reasonable cause to believe that the person committed a felony or Class A1 misdemeanor offense involving the illegal use, possession, or discharge of a firearm; *and*
- the offense was committed while the person was on pretrial release for another felony or Class A1 misdemeanor offense involving the illegal use, possession, or discharge of a firearm; *or*
- the person previously has been convicted of a felony or Class A1 misdemeanor offense involving the illegal use, possession, or discharge of a firearm and not more than five years have elapsed since the date of conviction or the person's release for the offense, whichever is later.

If all of these facts are found, only a district or superior court judge may set pretrial release conditions after finding that there is a reasonable assurance that the defendant will appear and that the release does not pose an unreasonable risk of harm to the community. G.S. 15A-533(g).

8. **Violators of Health Control Measures.** G.S. 15A-534.5 provides that if a judicial official conducting an initial appearance finds by clear and convincing evidence that a person arrested for violating an order limiting freedom of movement or access issued pursuant to G.S. 130A-475 (incident involving nuclear, biological, or chemical agents) or G.S. 130A-145 (quarantine and isolation authority) poses a threat to the health and safety of others, the judicial official must deny pretrial release. The judicial official must order that the person be confined in a designated area or facility. This pretrial confinement ends when a judicial official determines that the confined person does not pose a threat to the health and safety of others. G.S. 15A-534.5. The statute requires that these determinations be made in conjunction with the recommendation of the state health director or local health director. *Id.*
9. **Certain Methamphetamine Offenses.** G.S. 15A-534.6 authorizes judicial officials to deny pretrial release for specified methamphetamine offenses under certain conditions. The statute provides that a rebuttable presumption arises that no conditions of release would assure the safety of the community if the State shows, by clear and convincing evidence, that:
 - the defendant was arrested for a violation of G.S. 90-95(b)(1a) (manufacture of methamphetamine) or G.S. 90-95(d1)(2)b (possession of precursor chemical knowing that it will be used to manufacture methamphetamine) *and*
 - the defendant is dependent on or has a pattern of regular illegal use of methamphetamine and the violation was committed or attempted to maintain or facilitate the defendant's dependence or use. G.S. 15A-534.6.
10. **Military Deserters.** A military deserter is not entitled to have conditions of pretrial release set by a magistrate. *Huff v. Watson*, 99 S.E. 307 (Ga. 1919). The deserter should be committed to the local detention facility without setting conditions of pretrial release. Military authorities should be contacted as soon as possible to take custody of the deserter.

11. **Parole or Post-Release Supervision Violators.** A person taken into custody for a violation of parole or post-release supervision under structured sentencing is not subject to the provisions on pretrial release. G.S. 15A-1368.6 (post-release supervision); -1376 (parole).
12. **Probation Violators with Pending Felony Charge or Sex Offender Status Who Pose a Danger.** As a general rule, when a defendant has been convicted in North Carolina, put on probation, and later arrested for a probation violation that occurs in North Carolina, he or she is entitled to conditions of release. G.S. 15A-1345(b). However, G.S. 15A-1345(b1) provides that if a probationer is arrested for violating probation and either
- has a pending felony charge *or*
 - has been convicted of an offense that requires registration under the sex offender registration statutes or that would have required registration but for the effective date of the registration program,

the judicial official must determine whether the probationer poses a danger to the public before imposing conditions of release and must record that determination in writing. If the judicial official determines that the probationer poses such a danger, the judicial official must deny the probationer release pending the revocation hearing. G.S. 15A-1345(b1). If the judicial official finds that the defendant does not pose such a danger, the judicial official determines conditions as usual. *Id.* The procedure for handling the situation where there is insufficient information to make the required determination is discussed in Section IV.B.5.b., below.

One consequence of this law is that every time a person is brought before a judicial official on an arrest for a probation violation the judicial official will need to know whether the person has a pending felony charge and whether he or she is or could be subject to the sex offender registration program. To determine whether a probation violator has a pending felony charge, the judicial official must do a statewide record search. To determine whether a defendant is subject to the sex offender registration program or could be subject to that program but for its effective date, the judicial official should take the following steps:

1. Search the on-line North Carolina Sex Offender Registry, <https://sexoffender.ncsbi.gov>. If the probation violator's name appears, he or she is subject to G.S. 15A-1345(b1), as discussed above. If the person's name does not appear, go to step 2.
 2. Determine the probation violator's prior convictions. If any one of those prior convictions require registration under the sex offender registration statutes, the magistrate should apply the provisions of G.S. 15A-1345(b1), as discussed above.
13. **Out-of-State Probation Violators Covered by the Interstate Compact.** The general rule that probation violators are entitled to conditions of release, G.S. 15A-1345(b), does not apply to certain defendants who are arrested on out-of-state warrants for probation violations. The exception to the general rule requiring conditions of release applies to those defendants when the state that imposed the probation and is now seeking to find the defendant in violation of probation has a supervision

agreement in place with the State of North Carolina pursuant to the Interstate Compact for Adult Offender Supervision (Interstate Compact). G.S. Chapter 148, Article 4B. Unlike other out-of-state offenders, out-of-state probation violators covered by Interstate Compact supervision agreements are not dealt with through extradition; rather, the Interstate Compact statutes govern. One of those statutes, G.S. 148-65.8(a), provides that such a defendant may be detained for up to fifteen days and is not entitled to bail pending the required hearing. Upon committing the defendant to custody, if a probation/parole officer was not the arresting officer, the presiding judicial official should notify the local chief probation or parole officer of the arrest as soon as feasible or ensure that such notification is made, so that the local probation office can notify North Carolina's Interstate Compact office of the arrest.

14. **Judge's Order.** The only other situation in which a magistrate can deny a defendant conditions of pretrial release is when expressly ordered to do so by a judge in an order for arrest. Note that a DCI-PIN message that says "no bond" is not a basis for denying pretrial release conditions unless the magistrate can verify that it was ordered by a judge.

III. Persons Authorized to Set Conditions of Pretrial Release.

A. General Rule.

Subject to the exceptions discussed below, any judicial official is authorized to determine a defendant's eligibility for and conditions of release when presiding over a proceeding where determination or review of pretrial release is required or authorized, and at which the defendant's conditions of release are within the subject matter jurisdiction of that judicial official. G.S. 15A-532. These settings generally will include, but are not limited to:

- **Initial appearances.** Presided over by any judicial official (typically magistrates).
- **First appearances.** Presided over by district or superior court judges (and clerks or magistrates under certain circumstances where a judge is not available pursuant to G.S. 15A-601(e), as modified by S.L. 2022-6 and S.L. 2022-47).
- **Bail hearings.** Presided over by judges of the trial division.

See Section X. below for information about modifying and revoking conditions of release.

B. Exceptions: When Only a Specific Judicial Official May Set Conditions.

1. **Forty-Eight-Hour and Twenty-Four-Hour Rule Cases.** As discussed in Sections IV.B.1-4 below, only a judge can set conditions of release for defendants charged with certain crimes in the first forty-eight or twenty-four hours after arrest.
2. **Capital Offenses.** It is within the discretion of a judge (and only a judge) to decide whether a defendant charged with a capital offense will be released before trial. G.S. 15A-533(c). If a person brought before a magistrate is charged with a capital offense, the magistrate must commit the person to jail for a judge to determine the conditions of release at the first appearance.
3. **Certain Noncapital Offenses.** As noted in Section II.B.2 above, for offenses committed on or after October 1, 2023, it is within the discretion of a judge (and only a judge) to decide whether a defendant charged

with a noncapital offense listed in G.S. 15A-533(b) will be released before trial. S.L. 2023-75, Secs. 2.(a), (b) (modifying G.S. 15A-533(b) and providing effective date). If a person brought before a magistrate is charged with a listed offense, the magistrate must commit the person to jail for a judge to determine the conditions of release at the first appearance.

4. **Certain Drug Trafficking Offenses.** As noted in Section II.B.5 above, G.S. 15A-533(d) provides a rebuttable presumption of no release for drug trafficking offenders if certain findings are made. If the relevant findings are made, only a district or superior court judge may set pretrial release conditions after determining that there is a reasonable assurance that the defendant will appear and that the release does not pose an unreasonable risk of harm to the community. G.S. 15A-533(g).
5. **Certain Gang Offenses.** As noted in Section II.B.6 above, G.S. 15A-533(e) provides a rebuttable presumption of no release for gang-related offenders if certain findings are made. If the relevant findings are made, only a district or superior court judge may set pretrial release conditions after determining that there is a reasonable assurance that the defendant will appear and that the release does not pose an unreasonable risk of harm to the community. G.S. 15A-533(g).
6. **Certain Firearm Offenses.** As noted in Section II.B.7 above, G.S. 15A-533(f) provides a rebuttable presumption of no release for certain defendants who commit crimes with firearms. If the relevant facts are found, only a district or superior court judge may set pretrial release conditions after determining that there is a reasonable assurance that the defendant will appear and that the release does not pose an unreasonable risk of harm to the community. G.S. 15A-533(g).

IV. Time for Determining Conditions.

A. **General Rule: Initial Appearance and First Appearance.**

Normally, conditions are first set at the initial appearance, which typically is presided over by a magistrate. See JESSICA SMITH, *CRIMINAL PROCEEDINGS BEFORE NORTH CAROLINA MAGISTRATES 16-17* (2014). If a defendant is so unruly and disruptive as to impede the initial appearance, or is grossly intoxicated, unconscious, or otherwise unable to understand the procedural rights afforded by the initial appearance, the judicial official may delay the initial appearance temporarily and order the defendant temporarily confined. G.S. 15A-511(a)(3). Delay for this reason delays the entire initial appearance, not just the setting of conditions of release. North Carolina law requires a first appearance, which typically is presided over by a district court judge, for defendants charged with felony offenses and for defendants charged with misdemeanor offenses and held in custody. G.S. 15A-601(a). A first appearance generally must occur within 72 hours after the defendant is taken into custody. G.S. 15A-601(c). At the first appearance, the presiding judicial official must review the conditions of pretrial release imposed at the initial appearance or determine the defendant's eligibility for pretrial release in the first place if an initial appearance has not been held or if conditions were not set at the initial appearance. G.S. 15A-605.

B. **Exceptions: Delaying the Setting of Conditions.**

In certain situations, the law requires a delay in the setting of conditions. Those situations are discussed in the subsections that follow. Note that Section IX.B.

below discusses when a defendant's release may be delayed, even if he or she has satisfied the conditions of pretrial release.

1. **Forty-Eight-Hour Rule for Domestic Violence Cases.** Whenever a defendant is charged with
 - an assault on, stalking, communicating a threat to, or committing a felony as provided in G.S. Chapter 14, Articles 7B (Rape & Other Sex Offenses), 8 (Assaults), 10 (Kidnapping & Abduction), or 15 (Arson & Other Burnings), upon a current or former spouse, a person with whom the defendant lives or has lived as if married, or a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50B-1(b)(6),
 - domestic criminal trespass, *or*
 - a violation of a 50B order,

only a judge can set conditions of pretrial release in the forty-eight-hour period after an arrest. G.S. 15A-534.1. Thus, when a defendant is brought before a magistrate or clerk for an offense covered by this provision, the magistrate or clerk should hold an initial appearance and order the defendant held for the next available session of district or superior court to have conditions of release determined by a judge. If a judge does not act within forty-eight hours, a magistrate sets conditions. G.S. 15A-534.1(b).

Practice Pointer. Form AOC-CR-200 includes a section in the "Order of Commitment" portion where the magistrate or clerk conducting the initial appearance can order that the defendant be presented to a judge at the first available session of District or Superior Court and enter an appropriate date and time for the defendant to be presented to a magistrate if no judge is available within forty-eight hours.

G.S. 15A-534.1(a) provides that when setting conditions in forty-eight-hour rule cases, the judge must direct a law enforcement officer or district attorney to provide the defendant's criminal history report and must consider that history when setting conditions. After setting conditions, the judge must return the report to the providing agency or department. *Id.* A judge may not unreasonably delay the determination of conditions to review the criminal history report. *Id.* These requirements appear to apply to magistrates who set conditions in forty-eight-hour rule cases when a judge has not acted within the forty-eight hour period.

- a. **Other Domestic Violence Holds.** G.S. 15A-534.1(a)(1) provides for a separate domestic violence hold that may be ordered for defendants subject to the forty-eight-hour rule when conditions actually are set in these cases. The statute provides that upon a determination that (1) the defendant's immediate release will pose a danger of injury to the alleged victim or any other person or is likely to result in intimidation of the alleged victim and (2) that the execution of an appearance bond will not reasonably assure that

such injury or intimidation will not occur, a judicial official may retain the defendant in custody for a reasonable period of time while determining conditions of pretrial release. G.S. 15A-534.1(a)(1).

2. Forty-Eight-Hour Rule for Threat of Mass Violence Cases. Whenever a defendant is charged with

- communicating a threat of mass violence on educational property in violation of G.S. 14-277.6, or
- communicating a threat of mass violence at a place of religious worship in violation of G.S. 14-277.7,

only a judge can set conditions of pretrial release in the forty-eight-hour period after an arrest. G.S. 15A-534.7(a). Thus, when a defendant is brought before a magistrate or clerk for an offense covered by this provision, the magistrate or clerk should hold an initial appearance and order the defendant held for the next available session of district or superior court to have conditions of release determined by a judge. If a judge does not act within forty-eight hours, a magistrate sets conditions. G.S. 15A-534.7(b).

Practice Pointer: Form AOC-CR-200 includes a section in the “Order of Commitment” portion where the magistrate or clerk conducting the initial appearance can order that the defendant be presented to a judge at the first available session of District or Superior Court and enter an appropriate date and time for the defendant to be presented to a magistrate if no judge is available within forty-eight hours.

G.S. 15A-534.7(a) provides that when setting conditions in forty-eight-hour rule cases, the judge must direct a law enforcement officer or district attorney to provide the defendant’s criminal history report and must consider that history when setting conditions. After setting conditions, the judge must return the report to the providing agency or department. *Id.* A judge may not unreasonably delay the determination of conditions to review the criminal history report. *Id.* These requirements appear to apply to magistrates who set conditions in forty-eight-hour rule cases when a judge has not acted within the forty-eight hour period.

a. Other Threat of Mass Violence Holds. G.S. 15A-534.7(a)(1) provides for a separate domestic violence hold that may be ordered for defendants subject to the forty-eight-hour rule when conditions actually are set in these cases. The statute provides that upon a determination that (1) the defendant’s immediate release will pose a danger of injury to persons and (2) that the execution of an appearance bond will not reasonably assure that such injury will not occur, a judicial official may retain the defendant in custody for a reasonable period of time while determining conditions of pretrial release. G.S. 15A-534.7(a)(1).

3. Forty-Eight-Hour Rule for Defendants Charged with a New Offense

while on Pretrial Release. For offenses committed on or after October 1, 2023, new legislation provides that only a judge may determine conditions of pretrial release in the forty-eight-hour period after an arrest of a defendant charged with a new offense while on pretrial release for another pending proceeding. G.S. 15A-533(h) (enacted by S.L. 2023-75, Sec. 2.(a)). Thus, when a defendant is brought before a magistrate or clerk for an offense covered by this provision, the magistrate or clerk should hold an initial appearance and order the defendant held for the next available session of district or superior court to have conditions of release determined by a judge. If a judge does not act within forty-eight hours, a magistrate must set conditions in accordance with G.S. 15A-534. *Id.* It does not appear that the provisions related to review of a defendant's criminal history and risk assessment apply when a magistrate sets conditions in these cases, though there is no case law on the issue. *See id.* (magistrate shall set conditions "in accordance with G.S. 15A-534").

The statute provides that when setting conditions in these cases, the judge must direct a law enforcement officer, pretrial services program, or district attorney to provide the defendant's criminal history report and risk assessment, and the judge must consider the criminal history when setting conditions. *Id.* After setting conditions, the judge must return the report to the providing agency or department. *Id.* A judge may not unreasonably delay the determination of conditions to review the criminal history report. *Id.*

The provisions of new G.S. 15A-533(h) do not apply to new offenses that are violations of Chapter 20 of the General Statutes, other than a violation of G.S. 20-138.1 (impaired driving); G.S. 20-138.2 (impaired driving in a commercial vehicle); G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol); G.S. 20-138.2B (operating a school bus or certain other vehicles after consuming alcohol); G.S. 20-138.5 (habitual impaired driving); or G.S. 20-141.4 (felony and misdemeanor death by vehicle, felony serious injury by vehicle, aggravated offenses, repeat felony death by vehicle). S.L. 2023-75, Sec. 2.(a).

4. Twenty-Four-Hour Rule for Defendants Charged with Riot, Looting, or Trespass During Emergency Offenses. For offenses committed on or after December 1, 2023, whenever a defendant is charged with

- a riot or inciting a riot offense in violation of G.S. 14-288.2, or
- a looting or trespass during an emergency offense in violation of G.S. 14-288.6,

new legislation provides that only a judge may determine conditions of pretrial release in the twenty-four-hour period after an arrest. G.S. 15A-534.8 (enacted by S.L. 2023-6, Sec. 4). Thus, when a defendant is brought before a magistrate or clerk for an offense covered by this provision, the magistrate or clerk should hold an initial appearance and order the defendant held for the next available session of district or superior court to have conditions of release determined by a judge. If a judge does not act within twenty-four hours, a magistrate sets conditions. G.S. 15A-534.8(b).

New G.S. 15A-534.8 provides that when setting conditions in these cases, the judge must direct a law enforcement officer or district attorney to provide the defendant's criminal history report and must consider that history when setting conditions. G.S. 15A-534.8(a). After setting conditions, the judge must return the report to the providing agency or department. *Id.* A judge may not unreasonably delay the determination of conditions to review the criminal history report. *Id.* These requirements appear to apply to magistrates who set conditions in these cases when a judge has not acted within the twenty-four-hour period. See G.S. 15A-534.8(b) (the magistrate "shall act under [the provisions of G.S. 15A-534.8]").

a. **Other Riot, Looting, and Trespass During Emergency Holds.** New G.S. 15A-534.8(a)(1) provides for a separate hold that may be ordered for riot, looting, or trespass during emergency defendants subject to the twenty-four-hour rule when conditions actually are set in these cases. The statute provides that upon a determination that (1) the defendant's immediate release will pose a danger of injury persons and (2) that the execution of an appearance bond will not reasonably assure that such injury will not occur, a judicial official may retain the defendant in custody for a reasonable period of time while determining conditions of pretrial release. G.S. 15A-534.8(a)(1).

5. **Probation Cases.**

a. **Defendant Charged with Felony while on Probation and Judicial Official Cannot Assess Danger.** When conditions of pretrial release are being determined for a defendant who is charged with a felony while on probation for an earlier offense, the presiding judicial official must determine whether the defendant poses a danger to the public (and make a written record of that determination) before imposing conditions of pretrial release. G.S. 15A-534(d2). If the defendant does not pose such a danger, he or she is entitled to release as in any other case. G.S. 15A-534(d2)(2). If the defendant poses such a danger, the judicial official must impose a secured bond or a secured bond with electronic house arrest. G.S. 15A-534(d2)(1). However, if there is insufficient information to determine whether the defendant poses a danger, the judicial official must keep the defendant in custody until that determination can be made. G.S. 15A-534(d2)(3). If a judicial official detains the defendant for this reason, the judicial official must make a written record, at the time of the detention, of the following:

1. the fact that the defendant is being held pursuant to G.S. 15A-534(d2);
2. the basis for the decision that additional information is needed to determine whether the defendant poses a danger to the public and the nature of the necessary information; and
3. a date, within seventy-two hours of arrest or ninety-six hours if the courthouse is closed for transactions for a period longer than 72 hours, when the defendant will be

brought before a judge for a first appearance. G.S. 15A-534(d2)(3).

If the necessary information is provided to the court at any time before the first appearance, the first available judicial official must set the conditions of pretrial release. *Id.*

One consequence of this statute is that every time a defendant is brought before a judicial official for an initial appearance on a felony charge, the judicial official must determine whether the defendant is on probation for an earlier offense. If so, this statutory procedure must be followed. Form AOC-CR-272 (Side One) is designed to be used in these cases.

b. Probation Violator who has Pending Felony or is Sex Offender and Judicial Official Cannot Assess Danger. When conditions of pretrial release are being determined for a probationer who is arrested for violating probation and either

- has a pending felony charge *or*
- has been convicted of an offense that requires registration under the sex offender registration statutes or that would have required registration but for the effective date of the registration program,

the presiding judicial official must determine whether the probationer poses a danger to the public (and make a written record of that determination) before imposing conditions of release. G.S. 15A-1345(b1). If the probationer does not pose such a danger, the judicial official should determine the conditions of release as in any other case. G.S. 15A-1345(b1)(2). If the probationer poses such a danger, he or she must be denied release. G.S. 15A-1345(b1)(1) If there is insufficient information to determine whether the defendant poses such a danger, the judicial official must detain the defendant in custody for no more than seven days from the date of the arrest to obtain sufficient information to make that determination. G.S. 15A-1345(b1)(3). If the defendant has been held seven days from the date of arrest and the court has been unable to obtain sufficient information to determine whether the defendant poses a danger to the public, the defendant must then be brought before any judicial official, who must record that fact in writing and must impose conditions of pretrial release. *Id.*

One consequence of this statute is that every time a person is brought before a judicial official for the setting of conditions of pretrial release for a probation violation, the official will need to determine whether he or she has a pending felony charge and whether he or she is or could be subject to the sex offender registration program. If so, this statutory procedure must be followed. Form AOC-CR-272 (Side 2) is designed to be used in such cases. For a discussion of how to determine whether a probationer has a pending felony charge or is or could be subject to the sex offender registration program, see Section II.B.12.,

above.

V. Conducting the Pretrial Release Hearing Remotely.

The initial appearance and other proceedings to determine, modify, or revoke conditions of release may be conducted by an audio and video transmission in which the parties, the presiding official, and any other participants can see and hear each other. See *generally* G.S. 7A-49.6. The judicial official must safeguard the constitutional rights of those persons involved in the proceedings and preserve the integrity of the judicial process. G.S. 7A-49.6(a). If a defendant is represented by counsel during such a remote proceeding, the defendant must be able to communicate fully and confidentially with counsel. G.S. 7A-49.6(b). The videoconferencing application used to conduct remote proceedings must be approved by the Administrative Office of the Courts. G.S. 7A-49.6(j).

VI. Selecting Pretrial Release Options.

A. Five Core Options.

G.S. 15A-534(a) provides that when determining conditions of pretrial release, a judicial official must impose at least one of the five conditions discussed below.

Pretrial Release Options
<ul style="list-style-type: none"> • Written promise to appear • Custody release • Unsecured bond • Secured bond • House arrest with electronic monitoring

1. **Written Promise to Appear.** This release involves no money. The defendant simply is released on his or her written promise to appear in court. See *generally* G.S. 15A-534(a)(1).
2. **Custody Release.** A custody release is a release to a designated person or organization that agrees to supervise the defendant. G.S. 15A-534(a)(3). Like a release on a written promise to appear, no money is involved. If this condition is imposed, the defendant may elect instead to execute a secured appearance bond. G.S. 15A-534(a). Note that a custody release is not the same as a release to a sober responsible adult in connection with an impaired driving hold. See Section IX.B.2. (discussing impaired driving holds).
3. **Unsecured Bond.** An unsecured bond is a bond backed only by the integrity of the defendant, not by assets or collateral. See *generally* G.S. 15A-534(a)(2).
4. **Secured Bond.** A secured appearance bond is a bond backed by a cash deposit in the full amount of the bond, by a mortgage, or by at least one solvent surety. G.S. 15A-534(a)(4). Note that while setting the amount of a secured bond at a level higher than what a defendant can meet is not *per se* excessive, setting the amount higher than a level reasonably calculated to address pretrial risks, see Sections VI.C.2. and VI.C.3., is excessive and unconstitutional. *United States v. Salerno*, 481 U.S. 739,

754-55 (1987) (“bail must be set by a court at a sum designed to ensure [a legitimate governmental interest] and no more”).

G.S. 15A-534(a)(4) provides that in determining conditions of pretrial release, a judicial official may “[r]equire 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.” Additionally, G.S. 15A-531(4) provides that “[a] bail bond signed by any surety . . . is considered the same as a cash deposit for all purposes of this Article.” In light of G.S. 15A-531(4), it is not clear whether G.S. 15A-534(a)(4) allows a judicial official who designates a secured bond as the condition of release to also dictate which type of secured bond—e.g., cash bond—that a defendant may post. The issue may be addressed in the local pretrial release policy.

5. **House Arrest with Electronic Monitoring.** In this form of pretrial release, the defendant is required to remain at his or her residence unless the court authorizes departure for employment, counseling, a course of study, or vocational training. G.S. 15A-531(5a). The defendant must be required to wear a device which permits the supervising agency to electronically monitor compliance with the condition. *Id.*

If this condition is imposed, the magistrate also must impose a secured appearance bond. G.S. 15A-534(a). Because imposing this condition in the absence of available equipment will result in a hold, if the county lacks the available equipment or does not have a device immediately available for the defendant involved, the magistrate should check with the chief district court judge before imposing this condition.

- B. **Release to Pretrial Release Program.** In counties that have pretrial release programs, the senior resident superior court judge may order that defendants who both consent to be released to the program and are accepted into the program be released to the program when a written promise, unsecured bond, or custody release has been ordered. G.S. 15A-535(b).

C. **What to Consider When Setting Conditions.**

1. **Local Procedure.** When setting conditions of pretrial release, magistrates should follow the written pretrial release policy issued by the senior resident superior court judge. Note that G.S. 15A-535(a) provides that the senior resident superior court judge must create and issue recommended pretrial release policies. Magistrates should obtain a copy of their written local procedures.
2. **Purpose of Conditions of Pretrial Release.** The purpose of conditions of pretrial release is to make sure that the defendant appears in court when required and does no harm while on release. Magistrates should keep these purposes in mind when deciding which conditions to impose.
3. **Statutory Preference for Written Promise, Unsecured Bond and Custody Release.** The statutory scheme expresses a preference for written promises, unsecured bonds, and custody releases. In fact, the statute states that a judicial official must impose these conditions unless he or she determines that such a 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.” G.S. 15A-534(b). If the

judicial official so finds, he or she must impose a secured bond or house arrest with electronic monitoring (and secured bond) and record the reason for doing so if required by local policy. *Id.*

4. **Relevant Factors.** G.S. 15A-534(c) provides that in determining which conditions of release to impose, a magistrate must, on the basis of available information, take into account
- 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 intoxicated to such a degree that he or she would be endangered by being 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 the issue of pretrial release.

For defendants charged with violating G.S. 90-95(b)(1a) (manufacture of methamphetamine) or G.S. 90-95(d1)(2)b (possession of precursor chemical knowing that it will be used to manufacture methamphetamine), the magistrate must also consider any evidence that the person "is in any manner dependent upon methamphetamine or has a pattern of regular illegal use of methamphetamine." G.S. 15A-534.6.

As discussed in Section IV.B.1 above, G.S. 15A- 534.1(a) provides that in forty-eight-hour rule domestic violence cases, the judicial official must consider the defendant's criminal history report when setting conditions. As discussed in Section IV.B.2 above, G.S. 15A- 534.7(a) provides that in forty-eight-hour rule threat of mass violence cases, the judicial official must consider the defendant's criminal history report when setting conditions. As discussed in Section IV.B.3 above, new G.S. 15A-533(h) requires judges to consider the defendant's criminal history report when setting conditions within the forty-eight-hour period after arrest for a defendant charged with a new offense while on pretrial release for a pending proceeding. Also, as discussed in Section IV.B.4 above, new G.S. 15A-534.8(a) provides that in twenty-four-hour rule riot, looting, and trespass during emergency cases, the judicial official must consider the defendant's criminal history report when setting conditions.

5. **Relevant Evidence.** G.S. 15A-534(g) provides that when imposing conditions of pretrial release a magistrate must take into account all available evidence that he or she considers reliable. The magistrate is not bound by the rules of evidence when making this determination. G.S. 15A-534(g).

D. Defendants Who Refuse to Identify Themselves.

Sometimes defendants refuse to identify themselves. Without knowing a defendant's identity, it is almost impossible for a judicial official to determine what conditions of pretrial release should be imposed. The judicial official will not be able to determine, among other things, whether the defendant has a record, has previously failed to appear, or what connections the defendant

has with the community that are relevant to flight risk. It would be helpful if all local bond policies provided guidance to magistrates and others for dealing with defendants who refuse to identify themselves. The [School of Government Criminal Justice Innovation Lab's Model Bail Policy](#) can be used as a template for local pretrial release policy provisions addressing this issue.

If the relevant local policy does not address the situation, a judicial official probably may delay the initial appearance while a law enforcement officer completes an investigation into the defendant's identity. Such an investigation may not be feasible in all cases, particularly when the crime is not a serious one. (Note that if a person (1) is charged with an offense involving impaired driving, as defined in G.S. 20-4.01(24a), or driving while license revoked when the revocation is for an impaired driving revocation, as defined in G.S. 20-28.2, and (2) cannot be identified by a valid form of identification, then the arresting officer must have the person fingerprinted and photographed. G.S. 15A-502(a6). This requirement does not necessarily result in an identification of the person, but it does impose additional duties on law enforcement.) If the judicial official delays the initial appearance to allow the officer to investigate and the officer's investigation is unsuccessful or cannot be done quickly, the judicial official should consider the other option set out below; a judicial official should not allow an indefinite delay of the initial appearance.

A second option for dealing with a defendant who refuses to identify himself or herself is to hold the initial appearance, set conditions in light of the potential flight risk associated with a person who will not identify himself or herself, and include as a condition of pretrial release that either the defendant adequately identify himself or herself or that there is an adequate identification of the defendant. In counties without a written policy or formal advice addressing this procedure, it is recommended that magistrates contact a judge before using this option. Also, as discussed in Section VII.E., G.S. 15A-534 provides that if a defendant is required to provide fingerprints or a DNA sample and the fingerprints or DNA sample have not yet been taken or the defendant has refused to provide those items, the judicial official must make the collection of the fingerprints or DNA sample a condition of pretrial release. The fingerprint requirement may facilitate identification.

Regardless of which procedure is used, it is probably not permissible and it is not advisable to require a defendant to produce a United States government-issued picture identification. Also, any reasonable form of identification may be satisfactory even if the defendant does not have any written form of identification—for example, when a responsible member of the community vouches for the defendant's identity.

E. When the Discretion is Limited.

As a general rule, and subject to local bond policy, the law gives judicial officials a great deal of discretion to determine the appropriate conditions of pretrial release. In some situations, however, the law or a judicial order requires a judicial official to impose certain conditions, forbids the judicial official from imposing certain conditions, or allows the judicial official to consider special conditions. This section discusses those special situations.

- 1. Infractions.** A North Carolina resident charged with an infraction cannot be required to post an appearance bond. G.S. 15A-113©(2). A person

charged with an infraction who is not a North Carolina resident may be required to post an appearance bond. G.S. 15A-1113©. The charging officer may require the person to accompany the officer to the magistrate's office to determine if a bond is necessary to secure the person's court appearance and, if so, what kind of bond is to be used. *Id.* However, if a magistrate finds that the person is unable to post a secured bond, the magistrate *must* allow the person to be released by executing an unsecured bond. *Id.* There are two situations where a person who is not a North Carolina resident cannot be required to post an appearance bond:

1. A person charged with an infraction cannot be required to post an appearance bond if the person is licensed to drive by a state that is a member of the motor vehicle nonresident violator compact, the charged infraction is subject to the compact, and the person executes a personal recognizance required by the compact. G.S. 15A-1113©(1).
2. Certain individuals charged with infractions that are subject to the Wildlife Violator Compact cannot be required to post a bond. G.S. 113-300.6, Art. III.

2. **Prior Failures to Appear and Bond Doubling.** When conditions of pretrial release are being imposed on a defendant who has failed to appear for the charges to which the conditions apply, the judicial official must, at a minimum, impose the conditions recommended by the Order for Arrest (OFA). G.S. 15A-534(d1). If no conditions are recommended in the OFA, the judicial official must require a secured bond that is at least double the amount of the most recent previous bond (secured or unsecured) for the charges or, if no bond has yet been set, a secured bond of at least \$1,000. *Id.* In these situations, the judicial official also must impose such restrictions on the defendant's travel, associations, conduct, or place of abode to assure that the defendant will not again fail to appear. *Id.* In addition, the judicial official must indicate on the release order that the defendant was arrested or surrendered after failing to appear as required under a prior release order. *Id.* If available information indicates that the defendant has failed on two or more prior occasions to appear to answer the charges, the magistrate must note that on the release order. *Id.*

Practice Pointers: If the defendant has been arrested on an OFA after a failure to appear (FTA), it is best to check for a prior surrender by the surety for the same failure to appear. If that has happened and a new release order has been entered and a new bond set, re-release the defendant on the bond already posted and attempt to have the OFA recalled. If the defendant has not already been surrendered by a surety for the same FTA, set conditions of release as described above.

If the defendant has been surrendered by a surety after an FTA, it is best to check to see whether the defendant already has been arrested by a law enforcement officer for

the same FTA. If so, and a new release order has been entered and new bond posted, re-release the defendant on the bond already posted. If the defendant has not already been arrested, try to recall any outstanding OFA so that the defendant will not be re-arrested for the same FTA. Then, set conditions of release as described above.

Failure to Appear and Bond Doubling—Examples

Example 1: Defendant is brought to the magistrate on an OFA after a failure to appear. In the OFA, the judge specified a \$5,000 secured bond. The magistrate should impose a \$5,000 secured bond.

Example 2: Defendant is brought to the magistrate on an OFA after a failure to appear. The judge's OFA is silent on conditions. The prior bond on the charges is \$1,000 unsecured. The magistrate must impose a bond of at least double the bond and make it secured.

Example 3: Defendant is brought to the magistrate on an OFA after a failure to appear. The judge's OFA is silent on conditions. The defendant had previously been released on a custody release. The magistrate must impose a secured bond of at least \$1,000 secured.

3. **Defendants Already on Pretrial Release and Bond Doubling.** When conditions of pretrial release are being determined for a defendant who is charged with an offense and the defendant is currently on pretrial release for a prior offense, the judicial official may require the execution of a secured bond of at least double the amount of the most recent previous bond (secured or unsecured) for the charges or, if no bond has yet been required for the charges, in the amount of at least \$1,000. G.S. 15A-534(d3).
4. **Order of a Judge.** If the judge has ordered that certain conditions of pretrial release be imposed—for example, in an OFA—the magistrate should impose those conditions as ordered.

VII. Other Conditions.

In addition to the pretrial release options discussed above, other restrictions and conditions are permitted and, in some cases, required.

A. Restrictions on Travel, Association, Etc.

G.S. 15A-534(a) authorizes judicial officials to impose restrictions on travel, associations, conduct, or place of abode. Judicial officials are allowed to impose these restrictions no matter what type of pretrial release condition they set. Any restrictions imposed must be reasonable and related to the purpose of pretrial release. Restrictions should not be used as punishment.

B. Domestic Violence Cases.

Special restrictions may be imposed on a defendant who is charged with an offense covered by the 48-hour rule for domestic violence cases, discussed above in Section IV.B.1. The special restrictions include that the defendant:

- stay away from the home, school, business, or place of employment of the alleged victim;
- refrain from assaulting, beating, molesting, or wounding the alleged

- victim;
- refrain from removing, damaging, or injuring specifically identified property;
- may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge;
- abstain from alcohol consumption, as verified by the use of a continuous alcohol monitoring system of a type approved by the Division of Community Supervision and Reentry of the Department of Adult Correction, and that any violation of this condition be reported by the monitoring provider to the district attorney.

G.S. 15A-534.1(a)(2). Form AOC-CR-630 is designed to be used for this purpose.

C. Threat of Mass Violence Cases.

Special restrictions may be imposed on a defendant who is charged with an offense covered by the 48-hour rule for threat of mass violence cases, discussed above in Section IV.B.2. The special restrictions include that the defendant:

- stay away from the educational property or place of religious worship against which the threat was communicated;
- stay away from any other educational property or place of religious worship unless permission to be present is granted by the person in control of the property.

G.S. 15A-534.7(a)(2). Form AOC-CR-660 is designed to be used for this purpose.

D. Riot, Looting, and Trespass During Emergency Cases.

A special restriction may be imposed on a defendant who is charged with an offense covered by the 24-hour rule for riot, looting, and trespass during emergency cases, discussed above in Section IV.B.4. The special restriction is that the defendant:

- stay away from the specific locations or property where the offense occurred.

G.S. 15A-534.8(a)(2) (enacted by S.L. 2023-6, Sec. 4; effective for offenses committed on or after December 1, 2023).

E. Certain Cases Involving Child Victims.

Under G.S. 15A-534.4, specific conditions must be imposed on a defendant who is charged with certain sex offenses or crimes of violence against child victims listed in Table 2. G.S. 15A-534.4(a). If the defendant is charged with one of those crimes, the judicial official must impose conditions that the defendant:

- (1) stay away from the victim's home, temporary residence, school, business, or place of employment;
- (2) refrain from communicating or attempting to communicate with the victim, except as specified in an order entered by a judge with knowledge of the pending charges; and

- (3) refrain from assaulting, beating, intimidating, stalking, threatening, or harming the alleged victim.

Id. However, upon request of the defendant, the judicial official may waive one or both of conditions (1) and (2) if the judicial official makes written findings of fact that it is not in the best interest of the alleged victim that the condition or conditions be imposed. G.S. 15A-534.4(b). Form AOC-CR-631 is designed for these cases.

Table 2. Child Abuse Crimes Triggering G.S. 15A-534.4

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- Felonious or misdemeanor child abuse
 - Taking indecent liberties with a minor in violation of G.S. 14-202.1
 - Rape or any other sex offense in violation of G.S. Chapter 14, Article 7B against a minor victim
 - Incest with a minor in violation of G.S. 14-178
 - Kidnapping, abduction, or felonious restraint involving a minor
 - Transporting a child outside the state with intent to violate a custody order, as prohibited by G.S. 14-320.1
 - Assault or any other crime of violence against a minor
 - Communicating a threat against a minor
-

F. Prior Failures to Appear and Bond Doubling.

As noted in Section VI.E.4, above, when conditions of pretrial release are being imposed on a defendant who has failed to appear for the charges to which the conditions apply, the judicial official also must impose such restrictions on the defendant's travel, associations, conduct, or place of abode to assure that the defendant will not again fail to appear. G.S. 15A-534(d1).

G. Fingerprints and DNA Samples.

If the defendant is required to provide fingerprints pursuant to G.S. 15A-502(a1), (a2), (a4), or (a6), or a DNA sample pursuant to G.S. 15A-266.3A or G.S. 15A-266.4, and

- the fingerprints or DNA sample have not yet been taken *or*
- the defendant has refused to provide the fingerprints or DNA sample,

the judicial official must make the collection of the fingerprints or DNA sample a condition of pretrial release. G.S. 15A-534(a).

H. Continuous Alcohol Monitoring.

The judicial official may include as a condition of pretrial release that the defendant abstain from alcohol consumption, as verified by the use of a continuous alcohol monitoring system of a type approved by the Division of Adult Correction of the Department of Public Safety, and that any violation of this condition be reported by the monitoring provider to the district attorney. G.S. 15A-534(a). Form AOC-CR-242 is designated for ordering this condition of release.

VIII. The Pretrial Release Order.

The judicial official authorizing pretrial release must issue an order stating the conditions imposed. G.S. 15A-534(d). The official also must inform the defendant in writing of the

penalties that will apply to violations of release conditions and advise the defendant that his or her arrest will be ordered immediately upon any violation. *Id.* The order must be filed with the clerk, and a copy must be given to the defendant and any surety who is executing the bond for the defendant's release. *Id.* Form AOC-CR-200 is designed for this purpose.

IX. Releasing a Defendant.

A. Generally.

Subject to the exceptions noted below, a defendant must be released when he or she has satisfied the conditions of release. G.S. 15A-537(a). A written promise to appear or a custody release is satisfied by having the defendant and the custodian sign the appropriate sections of the Conditions of Release and Release Order form (AOC-CR-200). However, when a bond is set—whether secured or unsecured—an appearance bond is required. In addition, as noted above, imposition of electronic monitoring as a condition also requires a secured bond. The procedures for taking an appearance bond are detailed and technical. They are not covered here but are fully addressed by AOC legal staff in a memorandum included as an appendix to JESSICA SMITH, CRIMINAL PROCEEDINGS BEFORE NORTH CAROLINA MAGISTRATES (2014). Form AOC-CR-201 is the appearance bond form.

B. Exceptions: When Release Is Delayed.

The general procedure for initial appearances is to conduct the initial appearance without delay, make a probable cause determination and if probable cause is found, inform the defendant of his or her rights, and set conditions of pretrial release. Section IV.B. above discusses certain exceptions to this general procedure where either the initial appearance is delayed or the setting of conditions of release is delayed. This section discusses another type of exception: when the judicial official holds the initial appearance, sets conditions of pretrial release, but delays the defendant's release. Only two situations fall within this exception; both are discussed below.

1. **Communicable Disease Holds.** Under G.S. 15A-534.3, if a judicial official finds probable cause to believe that a person was exposed to the defendant in a manner that poses a significant risk, through nonsexual contact, of transmission of the AIDS virus or Hepatitis B infection, the judicial official must order the defendant detained for a reasonable period, not to exceed twenty-four hours, for investigation by public health officials and testing, if required by those officials under G.S. 130A-144 and -148. AOC-CR-270, side two, is used for this purpose.

Note that magistrates can contact a public health official for advice on whether the person was in fact exposed to the defendant in a manner posing a significant risk of transmission when deciding whether probable cause exists to justify detaining the defendant.

Although G.S. 15A-534.3 does not address whether the magistrate should set pretrial release conditions that would be applicable after the defendant has been examined by public health officials, it would be wise to do so. That way, once the public health officials have completed their investigation and testing, the defendant will not have to be brought back before a magistrate for the setting of pretrial release conditions.

2. **Impaired Driving Holds.** G.S. 15A-534.2 contains a special detention

provision that applies when a judicial official finds probable cause to charge the defendant with an offense involving impaired driving. Those offenses, defined in G.S. 20-4.01(24a), are listed in Table 3. (Note that an offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses listed in Table 3 also is defined as “an offense involving impaired driving.” That type of offense is not included in the table below because it will not be the underlying offense for an initial appearance before a North Carolina judicial official.)

Table 3. Offenses Involving Impaired Driving

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- Impaired driving under G.S. 20-138.1
 - Impaired driving in a commercial vehicle under G.S. 20-138.2
 - Habitual impaired driving under G.S. 20-138.5
 - Any death by vehicle or serious injury by vehicle offense under G.S. 20-141.4, when based on impaired driving or a substantially similar offense under previous law
 - First- or second-degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18, when based on impaired driving or a substantially similar offense under previous law
-

- a. Relevant Determination.** An impaired driving detention must be imposed when a magistrate finds both probable cause to charge the defendant with an offense involving impaired driving offense and clear and convincing evidence that if the defendant is released his or her physical or mental impairment presents a danger of physical injury to himself or herself or others or of damage to property. G.S. 15A-534.2(b). The determination under G.S. 15A-534.2 is not optional. G.S. 20-38.4(a)(3) makes it clear that once there is a finding of probable cause that the defendant committed a triggering offense a magistrate must determine whether an impaired driving detention must be imposed. Before enactment of G.S. 20-38.4, some magistrates reported that impaired driving detentions were not done in their counties out of concern that the underlying criminal case would have to be dismissed on a “*Knoll* motion.” This concern stemmed from a belief that the North Carolina Supreme Court’s decision in *State v. Knoll*, 322 N.C. 535 (1988), invalidates a magistrate’s authority to order a detention of impaired drivers under G.S. 15A-534.2. This suggestion, however, is incorrect. *Knoll* involved situations where magistrates failed to follow statutory procedures, including failing to advise defendants of their rights and declining to release them to appropriate adults. Cases since *Knoll* suggest that if a magistrate complies with G.S. 15A-534.2, no *Knoll* violation will be found. In any event, G.S. 20-38.4 now makes it clear that magistrates are required to make the impaired driving detention determination.
- b. Detention Ordered.** If the judicial official finds probable cause that the defendant committed a triggering offense and clear and convincing evidence that the defendant’s impairment presents a danger as described above, the judicial official must order the defendant detained until the first of the following events occurs:

- the defendant’s impairment no longer presents a danger of

physical injury to himself or herself or others or of damage to property *or*

- a sober, responsible adult is willing and able to assume responsibility for the defendant until the defendant's physical and mental faculties are no longer impaired.

G.S. 15A-534.2(c).

c. Notification of Rights and Listing of Persons to Contact.

When conducting an initial appearance in an implied consent case (this category of cases includes offenses involving impaired driving as well as other offenses for which a defendant may be required by statute to submit to a test of his or her breath or bodily fluid), G.S. 20-38.4 requires a magistrate to

1. inform the person in writing of the established procedure to have others appear at the jail to observe the person's condition or to administer an additional chemical analysis if the person is unable to make bond and
2. require anyone unable to make bond to list everyone he or she wishes to contact, along with their telephone numbers, on a form setting forth the procedure for contacting the persons listed; a copy of that form must be filed with the case file.

G.S. 20-38.4(a)(4). Implied consent offenses are listed in Table 4 below. Each chief district court judge must adopt procedures indicating how family, friends, and specified others can gain access to a defendant who has been arrested for an implied consent offense and is unable to obtain pretrial release from jail.

G.S. 20-38.5(a)(3). Magistrates need to obtain these written procedures so that they can provide a copy of them to defendants as required by the statute. The form used to list contacts and memorialize that notice has been provided is AOC-CR-271.

Table 4. Implied Consent Offenses

-
- Impaired driving (G.S. 20-138.1)
 - Impaired driving in a commercial vehicle (G.S. 20-138.2)
 - Habitual impaired driving (G.S. 20-138.5)
 - Death by vehicle or serious injury by vehicle (G.S. 20-141.4)
 - First- or second-degree murder (G.S. 14-17) or involuntary manslaughter (G.S. 14-18) when based on impaired driving
 - Driving by a person less than 21 years old after consuming alcohol or drugs (G.S. 20-138.3)
 - Violating no-alcohol condition of limited driving privilege (G.S. 20-179.3(j))
 - Impaired instruction (G.S. 20-12.1)
 - Operating commercial motor vehicle after consuming alcohol (G.S. 20-138.2A)
 - Operating school bus, school activity bus, child care vehicle, ambulance or other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol (G.S. 20-138.2B)
 - Transporting an open container of alcohol (G.S. 20-138.7(a))
 - Driving in violation of restriction requiring ignition interlock, if reasonable grounds to believe alcohol consumed (G.S. 20-17.8(f))
-

d. Effect of the Detention. Once the defendant meets one of the

two conditions above (impairment no longer a danger or release to sober, responsible adult), the defendant still must satisfy the conditions of pretrial release set by the judicial official before he or she can be released. G.S. 15A-534.2(c).

- e. **Written Findings Required.** Whenever a judicial official orders a defendant detained under G.S. 15A-534.2, the judicial official should make written findings to support the detention. Form AOC-CR-270, side one, should be used for this purpose.
- f. **Timing of the Detention Decision.** A judicial official should decide at the time of the initial appearance whether to detain the defendant under G.S. 15A-534.2. If a defendant is detained under G.S. 15A-534.2, the judicial official still must determine the conditions of pretrial release. G.S. 15A-534.2(b).
- g. **Maximum Period of the Detention.** A defendant may not be detained under G.S. 15A-534.2 for longer than twenty-four hours, even if he or she never meets one of the two conditions. However, at the end of the twenty-four-hour period, the defendant still must satisfy the conditions of pretrial release before being released. G.S. 15A-534.2(c).

When making the determination of whether or not a detained defendant remains impaired, the magistrate may request that the defendant take periodic tests to determine his or her alcohol concentration. G.S. 15A-534.2(d). The testing instrument may be an instrument acceptable for making preliminary breath tests under G.S. 20-16.3) or evidentiary chemical analysis (currently the Intoximeter, Model Intox EC/IR II). If the defendant takes a test and the results indicate that his or her alcohol concentration is less than 0.05, the magistrate must determine that the defendant is no longer impaired, unless there is evidence that the defendant is still impaired from a combination of alcohol and drugs. G.S. 15A-534.2(d).

- h. **Release From Detention.** A magistrate must release a defendant from the impaired driving detention if
 1. the maximum twenty-four-hour period for the detention has expired;
 2. the defendant's physical and mental faculties are no longer impaired to the extent that the defendant presents a danger of physical injury to the defendant or others or of damage to property; *or*
 3. a sober, responsible adult appears and is willing and able to take custody of the defendant until the defendant's physical and mental faculties are no longer impaired so as to present a danger of physical injury to the defendant or others or of damage to property.

G.S. 15A-534.2(c). Form AOC-CR-270 should be used to effectuate the release, checking the appropriate box under the section titled "Release from Detention Order." Note that if the release is to a sober, responsible adult, that person's name should be listed on the form, and he or she should sign where indicated.

Also note that a release to a sober, responsible adult for this purpose is not the same as a custody release, discussed in Section VI.A.2., above. In a custody release, the custodian agrees to supervise the defendant while on pretrial release; the sober responsible adult merely agrees to take custody of the defendant until he or she is no longer impaired so as to present a danger of injury or damage. Finally, once the impaired driving detention ends the defendant still must satisfy any conditions of pretrial release that have been set in the release order before he or she can be released.

C. Noncitizens and Pretrial Release.

A judicial official has no authority to hold an arrestee simply because he or she is not a United States citizen. G.S. 162-62(a) provides that whenever a person charged with a felony or an impaired driving offense is confined to a jail or a local confinement facility, the person in charge of the facility must attempt to determine if the prisoner is a legal resident of the United States by questioning the person and/or examining documents. If the prisoner's status cannot be determined, the person in charge must, if possible, make an inquiry to the Immigration and Customs Enforcement of the United States Department of Homeland Security (ICE). G.S. 162-62(b). However, G.S. 162-62(c) also provides that the statute cannot be construed to deny bond to a prisoner or prevent the prisoner from being released from confinement when the prisoner is otherwise eligible for release. Of course, citizenship status may be relevant in determining conditions of pretrial release, such as when the arrestee has no contacts in the community and was planning on returning to his or her home country shortly, thus creating a flight risk.

Another immigration issue sometimes arises when the arresting officer informs a judicial official that there is an ICE detainer or that ICE is "interested" in the defendant. One of ICE's responsibilities is detaining and removing noncitizens who are not legally present in the country. An ICE detainer refers to a document issued by ICE, frequently to a local jail, asking the jailer to hold a person for up to forty-eight hours so that ICE can take custody of that person. For example, suppose a defendant is in jail on a \$5,000 secured bond. Normally, when the defendant posts the bond, he or she must be released. However, if an ICE detainer is in place, the jailer will hold the defendant for up to forty-eight hours after the defendant makes bond so that ICE can take custody. When an officer brings a defendant to a judicial official and an ICE detainer is in place, the judicial official should follow the normal procedure for conducting the initial appearance and setting conditions of pretrial release. There is no special hold to implement, and the judicial official is not authorized to hold the defendant. The detainer is in place, and if the defendant meets his or her conditions of pretrial release, the jail will hold the defendant pursuant to the detainer. However, the fact that a detainer is in place may affect the judicial official's decision about appropriate conditions. For example, if the defendant is facing deportation, there may be an elevated flight risk.

Likewise, when an officer brings a defendant to a judicial official and informs the official that ICE is "interested" or is "investigating whether a detainer should issue," the official should follow the normal procedure for conducting an initial appearance and setting conditions of pretrial release. There is no special hold to implement, and the official is not authorized to hold the defendant for this

purpose. However, in this situation the official may learn of facts that will be relevant to the determination regarding the appropriate conditions of pretrial release.

A jurisdiction's local pretrial release policy may address these issues with more specific detail.

X. Modifications and Revocations.

A. Authority to Modify.

1. **Magistrate or Clerk.** A magistrate or clerk may modify his or her pretrial release order at any time before the first appearance before a district court judge. G.S. 15A-534(e). If a magistrate or clerk believes there are compelling reasons to modify another magistrate or clerk's pretrial release order, it is best, if possible, to consult with the other magistrate or clerk before making the modification. As a general rule, once the first appearance has occurred, the case is within the judge's jurisdiction and only a judge can modify the bond. There are, however, two important exceptions to this general rule. First, if a judge issues an OFA—for example, for failure to appear—the magistrate has jurisdiction to set conditions. The second situation when a magistrate may modify a bond after a defendant has appeared in court is when a defendant has been arrested by an officer for violating a pretrial release order. Officers have authority to arrest in these situations under G.S. 15A-401(b)(2)f, and such an arrest triggers the requirements of an initial appearance. G.S. 15A-501(2); -511(a)(1).
2. **District Court Judge.** G.S. 15A-534(e) provides that except when conditions of release have been reviewed by a superior court judge pursuant to G.S. 15A-539, see Section X.B.2 below, at or after the first appearance, a district court judge may modify his or her own pretrial release order or one entered by a magistrate or clerk at any time prior to:
 - In a misdemeanor case tried in the district court, the noting of an appeal; and
 - In a case in the original trial jurisdiction of the superior court, the binding of the defendant over to superior court after the holding, or waiver, of a probable cause hearing.

A plain reading of the statute suggests that a district court judge cannot modify conditions after the defendant appeals for a trial de novo. However, other statutes create some confusion on this issue, suggesting that a district court judge retains authority to modify conditions after notice of appeal. Specifically, (1) G.S. 7A-290 provides that “[t]he original bail shall stand pending appeal, unless the judge orders bail denied, increased, or reduced”; (2) G.S. 15A-1431(e) provides that “[a]ny order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order”; and (3) G.S. 15A-1431(f1) provides that “the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility, pending the trial de novo in superior court”. For a more complete discussion of this issue, see Alyson Grine, [*I Want a New Trial! Now What? A District Court Judge's Authority to Act Following Entry of Notice of Appeal for Trial De Novo \(Part II\)*](#), N.C. CRIM. L., UNC SCH. OF GOV'T. BLOG (FEB. 23, 2010); AND

JOHN RUBIN, PHILLIP R. DIXON JR., AND ALYSON GRINE, NORTH CAROLINA DEFENDER MANUAL VOL. 1 PRETRIAL (2d ed. 2013) Ch. 1 at 32-34.

3. **Superior Court Judge.** G.S. 15A-534(e) provides that after a case is before the superior court, a superior court judge may modify his or her own release order as well as one by a magistrate, clerk, or district court judge, at any time prior to the time set out in G.S. 15A-536(a) (release after conviction in superior court, see Section XIII below).

B. Motions to Modify and Related Issues.

1. **Defendant's Motion to Modify.** A person who is detained or objects to his or her conditions of release which were imposed or allowed to stand by order of a district court judge may apply in writing to a superior court judge to modify the order. G.S. 15A-538(a).
2. **Prosecutor's Motion to Modify.** G.S. 15A-539(a) provides that a prosecutor may at any time apply to an appropriate district or superior court judge for modification or revocation of an order of release.
3. **Substitution of Sureties.** The power to modify a bond includes the power to substitute sureties. G.S. 15A-538(b). Substitution or addition of acceptable sureties may be made at the request of any obligor on a bond or, in the interests of justice, at the request of a prosecutor pursuant to a motion to modify under G.S. 15A-539. *Id.*
4. **Source of Money or Property Posted.** On the State's motion or sua sponte, a district or superior court judge may, for good cause shown, conduct a hearing into the source of money or property to be posted for any defendant who is about to be released on a secured appearance bond. G.S. 15A-539(b). The court may refuse to accept offered money or property as security for the bond that, "because of its source, will not reasonably assure the appearance of the person as required." *Id.* The State has the burden of proving, by a preponderance of the evidence, the facts supporting the court's decision to refuse to accept the offered money or property as security for the bond.
5. **Habitual Felon.** Sometimes a person charged with a felony later is indicted as a habitual felon. There is some question about whether a separate bond may be imposed because of a habitual felon indictment (the argument against such a practice is that habitual felon is a status, not a crime). Given that uncertainty, the better practice appears to be for the State, if it desires modified conditions of release, to request modification of the conditions of release imposed on the underlying felony. For a discussion of this issue, see Jeffrey B. Welty, [*North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*](#), ADMIN. OF JUSTICE BULL. No. 2013/07, at 20-21, UNC School of Government (August 2013).

C. Revocations.

G.S. 15A-534(f) provides that "[f]or good cause shown any judge may at any time revoke an order of pretrial release." If the defendant already has been released from custody when the judge revokes an order of pretrial release and the defendant is not before the court at the time of entry of the revocation, the judge may issue an order for the defendant's arrest. G.S. 15A-305(b)(5). G.S. 15A-534(f) provides that upon application of any defendant whose order of pretrial release has been revoked, the judge must set new conditions of pretrial release.

D. Evidence Considered.

When modifying and revoking orders of release, a judicial official must take into account all available evidence that is reliable and is not bound by the rules of evidence. G.S. 15A-534(g).

XI. Term of the Bond.

A defendant is covered by a bond until judgment is entered in district court from which no appeal is taken, or until judgment is entered in superior court. G.S. 15A-534(h). However, the bond ends earlier if:

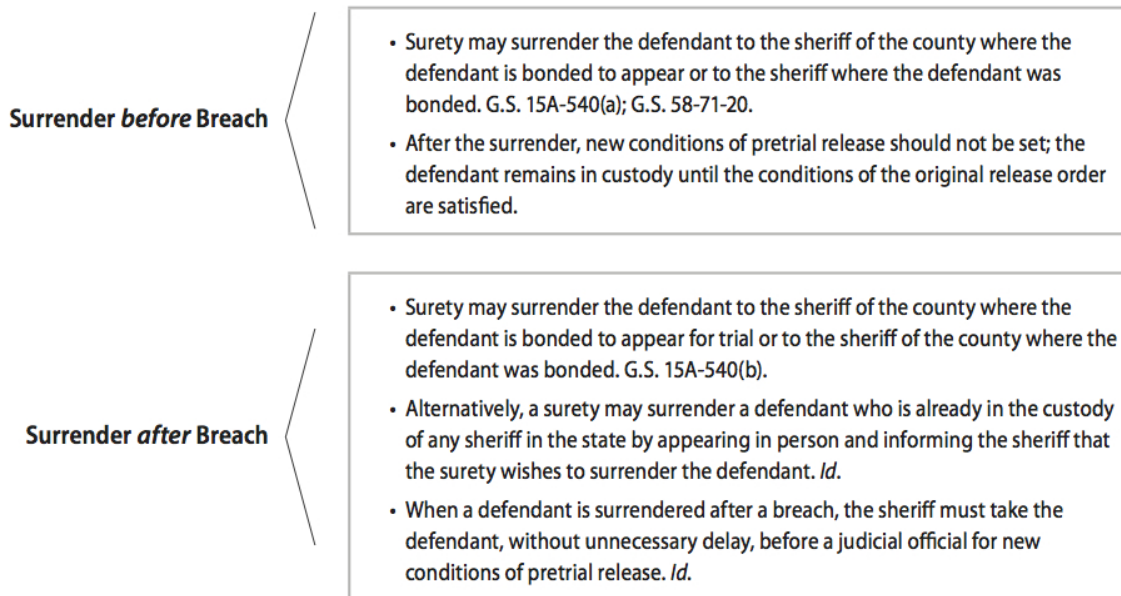
1. a judge releases the obligor from the bond,
2. the defendant is properly surrendered by a surety,
3. the proceeding is terminated by voluntary dismissal by the state before forfeiture is ordered, or
4. an indefinite prayer for judgment continued has been entered in district court.
5. the court has placed the defendant on probation pursuant to a deferred prosecution or conditional discharge.

Id.

XII. Surrender of Defendant by Surety.

A surety may arrest a defendant for the purpose of surrender. G.S. 15A-540; G.S. 58-71-30. Although G.S. 58-71-30 permits a judicial official to issue an OFA for a defendant when a surety makes a written request on a certified copy of the bond, a magistrate should not do so without consulting with his or her chief district court judge or senior resident superior court judge. It ordinarily would not be a good practice to issue an OFA under such circumstances; this is additionally true as G.S. 58-71-30 may conflict with G.S. 15A-305, which only authorizes the issuance of an OFA on certain grounds. Note that G.S. 58-71-195 provides that if there is a conflict between the provisions of G.S. Chapter 58 and G.S. Chapter 15A, the provisions of G.S. Chapter 15A govern. The procedures for surrendering a defendant vary depending on whether the surrender is done before or after a breach of conditions of a bail bond. Figure 1 presents the relevant rules.

Figure 1. Surrender by Surety.



XIII. Release After Conviction in Superior Court.

A. Release Is Authorized.

A defendant whose guilt has been established in superior court and is either awaiting sentence or has filed an appeal may be released on conditions. G.S. 15A-536(a).

B. Appropriate Conditions.

If a judge orders a defendant's release after conviction in superior court, he or she must impose conditions set out in G.S. 15A-534(a) (see Section VI.A., above) that will reasonably assure the presence of the defendant when required and provide adequate protection to persons and the community. G.S. 15A-536(b). If no single condition can provide the required assurance, the judge may impose a custody release in addition to any other condition and may also, or instead of a custody release, place restrictions on the defendant's travel, associations, conduct, or place of abode. *Id.*

C. Factors to Be Considered.

In determining what conditions of release to impose, the judge must, on the basis of available information that is reliable, consider the appropriate factors set out in G.S. 15A-534(c) (see Section VI.C., above). G.S. 15A-536(c), (f). The judge is not bound by the rules of evidence. G.S. 15A-536(f).

D. Order Required.

When authorizing release in these circumstances, a judge must issue an order

- containing a statement of the conditions imposed, if any;
- informing the defendant in writing of the penalties applicable to violations of the conditions of his release; and
- advising the defendant that his arrest will be ordered immediately upon any such violation.

G.S. 15A-536(d). The order of release must be filed with the clerk and a copy given the defendant. *Id.*

E. Modification and Revocation of Release After Conviction.

- 1. Authority to Modify or Revoke.** A release order may be modified or revoked by any superior court judge who has ordered the release of a defendant after conviction or, if that judge is absent from district, by any other superior court judge. G.S. 15A-536(e).
- 2. Entitlement to Hearing.** If the defendant is placed in custody as the result of a revocation or modification, the defendant is entitled to an immediate hearing on whether he or she is again entitled to release and, if so, upon what conditions. *Id.*
- 3. Evidence Considered.** In modifying and revoking orders of release the judge must take into account all evidence available that is reliable and is not strictly bound by the rules of evidence. G.S. 15A-536(f).

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