

Step-by-Step Guide for Conducting an Initial Appearance for an Offense Involving Impaired Driving

Shea R. Denning, School of Government*

A. Determining Probable Cause

1. 15A-511(b) requires the magistrate to inform the defendant of:
 - a. The charges against the defendant;
 - b. The defendant's right to communicate with counsel and friends; and
 - c. The general circumstances under which the defendant may secure release
2. If a person is arrested without a warrant, the magistrate must determine whether there is probable cause to believe that a crime has been committed and that the person arrested committed it.
 - a. If a defendant is so unruly that he/she disrupts the proceedings, becomes unconscious, is grossly intoxicated, or is otherwise unable to understand the procedural rights afforded to him/her by the initial appearance, the magistrate may order him/her confined or otherwise secured. If so ordered, the magistrate's order must provide for an initial appearance within a reasonable time so that the defendant has an opportunity to exercise his/her rights. G.S. 15A-511(a)(3).
3. If the magistrate does not find probable cause, the magistrate must so inform the officer and the officer must release the person.
4. If probable cause exists, the magistrate must create a magistrate's order (AOC-CR-116) or sign the citation in appropriate space to create magistrate's order.

* The author wishes to note that she relied heavily on two sources in preparing these materials: Jessica Smith, Criminal Procedure for Magistrates, Administration of Justice Bulletin No. 2007/06 (November 2007); and an unpublished document entitled "DWI Procedure," written by Roger L. Greene, Randolph County Magistrate.

B. Post Probable Cause – CVRs and Vehicle Seizures

1. The magistrate accepts and examines the revocation report of the charging officer and chemical analyst. The magistrate signs this form if necessary. The magistrate keeps the original for the clerk and returns copies to the officer. (Note that CVRs apply to implied consent offenses, if certain conditions are met.)
2. If the defendant's license is to be revoked pursuant to G.S. 20-16.5 and the defendant is before the magistrate on the underlying charge, the magistrate must prepare an AOC-CVR-02 setting out the grounds for the revocation and ordering the license revoked.
 - a. The magistrate must NOT complete the AOC-CVR-02 if the defendant is not before the magistrate.
 - b. If the defendant surrenders his license, the magistrate must complete the supplemental findings on the reverse of the CVR-02 indicating the date and time of surrender.
 - c. If the defendant does not surrender his/her license or demonstrate that he or she is not licensed, do not enter any information on the back of AOC-CVR-02. A defendant who alleges that he or she has lost his or her license must submit an affidavit to the clerk of court.
3. Give the Defendant a copy of the Magistrate's Order(s) finding probable cause.
4. Give the Defendant a copy of the AOC-CVR-02. Tell the defendant that his/her license has been revoked for at least 30 days and that he/she has the right to appeal the revocation. Tell the defendant that the procedures for obtaining the return of his license or appealing the revocation are printed on the AOC-CVR-02.
5. The officer may present an Officer's Affidavit for Seizure and Impoundment, AOC-CVR-323. If so, the magistrate should review the affidavit and sign it as the official before whom the affidavit was sworn or affirmed and subscribed.
 - a. The Magistrate must complete the Findings and Order section of the form either seizing, ordering the vehicle to be seized, or denying the seizure.
 - b. The magistrate must give one copy of the form to the officer and turns the rest in to the clerk with the DWI file.

C. Setting Conditions for Release

1. The defendant must be before the magistrate in person or via audio and video transmission in which the parties can see and hear each other. G.S. 15A-532.

- a. If the defendant has counsel, the defendant must be allowed to communicate fully and confidentially with counsel during the proceeding.
- b. Upon motion by the defendant, the court may not use audio and video transmission.

2. A defendant charged with a noncapital offense must have conditions of pretrial release determined in accordance with G.S. 15A-534. [AOC-CR-200 is the form for ordering release and setting conditions.]

a. A judicial official must impose 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.

b. **If condition (3) is imposed, the defendant may elect to execute an appearance bond under (4).**

c. The judicial official may also place restrictions on the travel, associations, conduct, or place of abode of the defendant as conditions of pretrial release.

d. **The judicial official must impose conditions (1),(2),or (3) unless he determines that:**

1. **such release will not reasonably assure the appearance of the defendant as required;**
2. **will pose a danger of injury to any person; or**
3. **is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses**

. . . in which case he must impose condition (4) and must record the reasons for doing so in writing if required by the district's bond policy.

- e. In determining which conditions of release to impose, the magistrate must take into account
 - 1. The nature of the offense charged
 - 2. The weight of the evidence against the defendant
 - 3. The defendant's
 - i. Family ties
 - ii. Employment
 - iii. Financial resources
 - iv. Character
 - v. Mental condition
 - vi. Time of residence in the community
 - vii. Record of convictions
 - viii. History of flight to avoid prosecution or failure to appear at court proceedings, and
 - ix. Whether the defendant is intoxicated to such a degree that he/she would be endangered by being released without supervision,
 - x. And any other evidence relevant to the issue of pretrial release
- f. The magistrate authorizing pretrial release must
 - 1. issue an appropriate order containing a statement of the conditions imposed, if any;
 - 2. inform the defendant in writing of the penalties applicable to violations of the conditions of his/her release; and
 - 3. advise the defendant that his/her arrest will be immediately ordered upon any violation.
- g. The order must be filed with the clerk and a copy must be given to the defendant.

- h. If conditions of pre-trial release are imposed on a defendant who has failed to appear to answer one or more of the charges to which the conditions apply, the magistrate must at a minimum impose the conditions of pretrial release that are recommended in any order for arrest of the defendant based upon his most recent failure to appear.
 - 1. If the order for arrest contains no recommendations, the magistrate must require a secured appearance bond of at least double the amount of the most recent bond for the charges. If no bond has yet been required, the bond must be set at at least \$500.
 - 2. The magistrate must also impose such restrictions on the travel, associations, conduct, or place of abode of the defendant as will assure that the defendant will not again fail to appear.
 - 3. The magistrate must indicate on the release order that the defendant was arrested or surrendered after failing to appear as required under a prior release order. If the information available to the magistrate indicates that the defendant has failed on two or more prior occasions to appear to answer the charges, the magistrate must indicate that fact on the release order.
 - 4. A magistrate may modify a pretrial release order at any time before the first appearance before the district court judge.
 - 5. The magistrate must provide the defendant with the defendant's copy of the conditions of release and release order form (AOC-CR-200).

G.S. 15A-534.2 contains special rules governing the detention of impaired drivers. If the defendant is detained under those provisions, the magistrate must complete AOC-CR-270, which must be attached to AOC-CR-200. This must also be noted in the appropriate space in AOC-CR-200.

D. Detention of Impaired Drivers under G.S. 15A-534.2

1. Applies to initial appearances for ***offenses involving impaired driving***, which are:
 - a. Impaired Driving (20-138.1)
 - b. Habitual Impaired Driving (20-138.5)
 - c. Impaired Driving in a Commercial Vehicle (20-138.2)
 - d. Death by Vehicle Based Upon Impaired Driving (20-141.4)
 - e. 1st or 2nd degree murder under G.S. 14-17 based on impaired driving
 - f. Involuntary manslaughter under G.S. 14-18 based on impaired driving
 - g. Substantially similar offenses committed in another state or jurisdiction

2. If the magistrate finds **clear and convincing evidence** that **the impairment of the defendant's physical or mental faculties presents a danger, if he/she is released, of physical injury to the defendant or others or damage to property**, the magistrate must order that the defendant be held in custody and inform the defendant that he/she will be held in custody until:
 - a. The magistrate determines
 - i. that the defendant's physical and mental faculties are no longer impaired to the extent that he/she presents a danger of physical injury to himself or others or of damage to property if released; or
 - ii. A sober, responsible adult is willing and able to assume responsibility for the defendant until his/her physical and mental faculties are no longer impaired.
 - b. At the same time, the magistrate must determine the appropriate conditions for pretrial release in accordance with G.S. 15A-534 and as described in **Section C.** above.
 - c. The defendant may be denied pretrial release **for no longer than 24 hours** based upon his impairment posing a danger. After 24 hours, the defendant must be released **upon meeting the conditions of pretrial release set under G.S. 15A-534.2.**
 - d. In determining whether a defendant detained under G.S. 15A-534.2 remains impaired, the magistrate may request that the defendant submit to periodic tests to determine his alcohol concentration.
 - i. Preliminary breath test instruments as well as Intox EC/IR II may be used
 - ii. Magistrate must find that a defendant with BAC of less than .05 is no longer impaired – unless there is evidence that defendant is still impaired from a combination of alcohol and some other impairing substance or condition.

3. If the magistrate detains the defendant under G.S. 15A-534.2, he/she must complete AOC-CR-270.
 - a. The magistrate must specify reasons for detention in “Findings” section of form.
 - b. When the defendant is released from the detention order, the magistrate must complete the corresponding section of the form.
 - c. If release is to a sober, responsible adult, that person’s name must be entered on the form.
 - i. The sober, responsible adult must sign the form certifying that he or she is a sober, responsible person, age 18 or older, who is willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired.

E. Implied Consent Offense Notice

1. If the defendant is not going to be released immediately upon completion of the initial appearance, the magistrate must complete AOC-CR-271. The magistrate must also:
 - a. Inform the defendant in writing of the procedure to have witnesses appear at the jail to observe his condition or to administer an additional chemical analysis.
 1. This means that the magistrate must provide to the defendant -- along with AOC-CR-271 -- a copy of written local procedures explaining how the defendant may contact others and how others can observe the defendant at the jail and administer an additional chemical analysis.
 - b. Require the defendant to list all persons he wishes to contact and telephone numbers on AOC-CR-271
 - c. File a copy of AOC-CR-271 with the case file.
 1. If the defendant returns the AOC-CR-271, the magistrate must note the return and place the form in the file.
 2. If the defendant does not return the form, the magistrate must print a second copy and note in the space provided that the defendant failed to return the form and place a copy of the form in the file.