A Magistrate's Guide to Pretrial Release

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I. Introduction. This section discusses setting, modifying, and revoking of conditions of pretrial release.

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 (G.S.).

B. 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).

Judicial officials should have a copy of the local pretrial release policy in hand when determining conditions of pretrial release.

II. Entitlement to Conditions of Pretrial Release.

A. General Rule: All Criminal Defendants Are Entitled to Conditions. As a general rule, all criminal defendants are entitled to have conditions of pretrial release set. Exceptions to the general rule are discussed in the next section.

B. Exceptions to the General Rule: When Defendants Are Not Entitled to Conditions.

1. Certain Fugitives. A fugitive defendant charged in another state with an offense punishable by death or life imprisonment under the laws of that state 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. STATE OF NORTH CAROLINA EXTRADITION MANUAL Art. IV § 4 (UNC Institute of Government 1987). These defendants should be committed to jail without conditions of release. The Governor's Extradition Secretary takes the position that defendants who have waived extradition should be treated similarly.

2. Involuntarily Committed Defendants Charged with Crimes. 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.*

3. 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. The statute requires that these determinations be made in conjunction with recommendations of the state or local health director.

4. **Methamphetamine Offenses.** G.S. 15A-534.6 authorizes judicial officials to deny pretrial release for specified methamphetamine offenses under certain conditions. The statute begins by requiring that in all cases where the defendant is charged with any violation of G.S. 90-95(b)(1a) (manufacture of methamphetamine) or G.S. 90-95(d1)(2)b (possession or distribution of precursor chemical knowing that it will be used to manufacture methamphetamine), the judicial official must, when determining conditions of release, consider any evidence that the defendant is in any way dependent on methamphetamine or has a pattern of regular illegal use of methamphetamine. It further 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 or distribution of precursor chemical knowing that it will be used to manufacture methamphetamine);
    - 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.

5. **Drug Trafficking Offenses.** G.S. 15A-533(d) provides that it is presumed (subject to rebuttal by the defendant) that there is no condition of release that will reasonably assure 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.

6. **Gang Offenses.** G.S. 15A-533(e) provides that it is presumed (subject to rebuttal by the defendant) that no condition of release will reasonably assure 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 street gang, as defined in G.S. 14-50.16;
    - 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 and not more than five years have passed since the date of conviction or the defendant's release for the offense, whichever is later.

7. **Military Deserters.** A military deserter is not entitled to have conditions of pretrial release. 10 U.S.C. 808. 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. Contact information for military authorities is provided on page 3 of the military form DD Form 553 (Deserter/Absentee Wanted by the Armed Forces) (available at: http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0553.pdf).

8. **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); G.S. 15A-1376 (parole).

9. **Probation Violators with Pending Felony Charges or Convictions Requiring Sex Offender Registration.** 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). There are two exceptions to this general rule. G.S. 15A-1345(b1) provides that if a probationer is arrested for violating probation and either (1) has a pending felony charge or (2) 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. If the judicial official finds that the defendant does not pose such a danger, the judicial official determines conditions as usual.

Probation Violators Not Entitled to Conditions Pending Revocation Hearing

- Arrested for violating probation *and*
- Either (1) has a pending felony charge *or*
  (2) 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, *and*
- A judicial official determines that probationer poses a danger to the public

If there is insufficient information to determine whether the defendant poses such a danger, then 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. 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, then the defendant must be brought before any judicial official, who must record that fact in writing and must impose

conditions of pretrial release.

To determine whether a probation violator has a pending felony charge, a statewide record search will need to be done. 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 following steps should be taken:

1. Search the on-line North Carolina Sex Offender Registry, http://sexoffender.ncdoj.gov/ and click on "Search the Registry." 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 is included in the Table below, apply the provisions on G.S. 15A-1345(b1), as discussed above.

When determining conditions for a person arrested for a probation violation who has a pending felony or prior conviction requiring sex offender reporting, the judicial official should check the special box on the Conditions of Release and Release Order form (AOC-CR-200) (online at: http://www.nccourts.org/Forms/Documents/54.pdf) *and* complete AOC-CR-272 (Detention of Defendant Arrested for Probation Violation with Pending Felony Or Prior Sex Offense) (side two) (online at: http://www.nccourts.org/Forms/Documents/1143.pdf).

Offenses Requiring Sex Offender Reporting

1. First-Degree Rape (14-27.2)
2. Second-Degree Rape (14-27.3)
3. First-Degree Sex Offense (14-27.4)
4. Second-Degree Sex Offense (14-27.5)
5. Sexual Battery (14-27.5A)
6. Attempted Rape or Sex Offense (14-27.6)
7. Intercourse/Sex Offense With Certain Victims (14-27.7)
8. Statutory Rape (13-15 Year Old by Certain Defendants) [14-27.7A(a)]
9. Sexual Servitude (14-43.13)
10. Incest (14-178)
11. Employing or Permitting Minor to Assist in Public Morality and Decency Offense (14-190.6)
12. Felony Indecent Exposure [14-190.9(a1)]
13. First-Degree Sexual Exploitation of Minor (14-190.16)
14. Second-Degree Sexual Exploitation of Minor (14-190.17)
15. Third-Degree Sexual Exploitation of Minor (14-190.17A)
16. Promoting Prostitution of Minor (14-190.18)
17. Participating in Prostitution of Minor (14-190.19)
18. Indecent Liberties with Children (14-202.1)
19. Computer Solicitation of Child (14-202.3)
20. Indecent Liberties with Student [14-202.4(a)]
21. Rape of Child by Adult Offender (14-27.2A)
22. Sex Offense w/Child by Adult Offender (14-27.4A)
23. Parent/Caretaker Prostitution [14-318.4(a1)]
24. Parent Commit/Allow Sexual Act [14-318.4(a2)]
25. Kidnapping When Victim Is a Minor (and defendant is not the minor's parent) (14-39)
26. Felonious Restraint When Victim Is a Minor (and defendant is not the minor's parent) (14-43.3)
27. Abduction of Child (and defendant is not the minor's parent) (14-41)
28. Attempt to commit an offense listed above
29. Solicitation to commit an offense listed above
30. Conspiracy to commit an offense listed above
31. Conviction in federal jurisdiction (including court martial) for offense substantially similar to offense listed above
32. Conviction from another state substantially similar to offense listed above
33. Any conviction from another state that requires registration in that state

10. **Out-of-State Probation Violators Covered by the Interstate Compact.** The general rule that probation violators are entitled to conditions of release does not apply to defendants who are arrested on out-of-state warrants for probation violations when the state that imposed the probation and is now seeking to violate the defendant has a supervision agreement in place with the State of North Carolina pursuant to the Interstate Compact for Adult Offender Supervision. 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 and rules govern. One of those statutes provides that such a defendant may be detained for up to fifteen days and is

not entitled to bail pending the required hearing. G.S. 148-65.8(a). Out-of-state warrants for probation violators covered by the Interstate Compact are supposed to go through the North Carolina Compact Administrator, which is part of the DOC Division of Community Corrections. If Interstate Compact offenders are processed in this way, the warrant will be presented with an "Authority to Detain and Hold" form, notifying the judicial official that the offender is not entitled to pretrial release. Sometimes, however, the other state fails to go through North Carolina's Compact Administrator. In these instances, it can be difficult to determine whether the person is covered by the Interstate Compact. When this happens, the judicial official can obtain the relevant information from a probation officer. Another alternative is to go to the DOC website, www.doc.state.nc.us and click on "Offender Search" and then on "Offender Information—Public Search." Enter the offender information and the search should indicate, in the offender Sentence History, whether the offender is subject to the Interstate Compact. If so, immediately contact a local probation officer or the Compact Administrator (Anne Precythe at 919.716.3139 or pal02@doc.state.nc.us).

11. **Capital Offenses.** A person charged with a capital offense is not entitled to conditions of pretrial release. Rather, the decision whether to set conditions for such a defendant is left to a judge's discretion. G.S. 15A-533(c).

III. Persons Authorized to Set Conditions of Pretrial Release.

A. General Rule. As a general rule, conditions of pretrial release are set by a judicial official G.S. 15A-532(a). (Typically, conditions are set by a magistrate or a district or superior court judge, but the term judicial official also includes clerks and appellate judges and justices. G.S. 15A-101(5)). The magistrate typically sets conditions at the initial appearance. Once the case is in district court, the magistrate should not set or modify conditions unless authorized to do so by a judge or the local pretrial release policy. Once the case is in superior court, neither a magistrate nor a district court judge should set or modify conditions unless authorized to do so by a superior court judge or the local pretrial release policy.

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

1. **Forty-Eight-Hour Rule Cases.** As discussed in Section VI.F.2 below, only a judge can set conditions of release for a defendant charged with certain domestic violence crimes in the first forty-eight 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 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 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(e).

4. **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 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(e).

IV. Conducting the Pretrial Release Hearing Remotely. G.S. 15A-532(b) provides that any proceeding to determine, modify, or revoke conditions of pretrial release in a noncapital case may be conducted by an audio and video transmission between the judicial official and the defendant in which the parties can see and hear each other. The statute requires that if the defendant has counsel, then the defendant must be allowed to communicate fully and confidentially with his attorney during the proceeding. G.S. 15A-532(b). It further provides that upon motion of the defendant, the court may not use an audio and video transmission. *Id.* Before such a transmission may be used, the procedures and type of equipment must be submitted to the Administrative Office of the Courts (AOC) by the senior resident superior court judge and must be approved by the AOC. *Id.*

A 2009 law (S.L. 2009-270) authorizes a pilot program for the use of videoconferencing or similar technology to conduct pretrial release proceedings for defendants in the custody of the DOC or local confinement facilities. At the time of publication, funding issues prevented the start of this pilot project.

V. Pretrial Release Options. G.S. 15A-534 provides that in determining conditions of pretrial release, a judicial official must impose at least one of the following five conditions listed immediately below. Because that statute authorizes imposition of at least one of these conditions, multiple conditions may be imposed.

1. *Release on written promise to appear*. This release involves no money. The defendant simply is released on his or her written promise to appear in court. 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 secures this condition of release. G.S. 15A-534(a) provides that if this condition is imposed, the defendant may elect to execute a secured appearance bond instead.

3. *Release on unsecured appearance bond*. G.S. 15A-534(a)(2). An unsecured bond is one that is backed only by the integrity of the defendant; it is not backed by assets or collateral.

4. *Release on secured appearance bond*. A secured appearance bond is one that is 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).

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.*

This condition may be imposed effective December 1, 2009, for offenses committed on or after that date. S.L. 2009-547. If it is imposed, the judicial official 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, the local pretrial release policy should address what should happen if the county lacks the available equipment or does not have a device immediately available for the defendant involved.

All of these release options are specified as options on the Conditions of Release and Release Order form (AOC-CR-200) (online at: http://www.nccourts.org/Forms/Documents/54.pdf). If the judicial official checks the release option for electronic house arrest, additional check boxes can be used to allow the defendant to leave for the purposes specified above.

Effective February 1, 2011, *see* S.L. 2010-94, G.S. 15A-534 provides that if a defendant is required to provide fingerprints pursuant to G.S. 15A-502(a1) or (a2), or a DNA sample pursuant to new G.S. 15A-266.3A or revised G.S. 15A-266.4, and (i) the fingerprints or DNA sample have not yet been taken or (ii) 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. As of the writing of this section, the AOC reports that it will modify the Conditions of Release and Release Order form (AOC-CR-200) to accommodate this legislative change.

In addition to the forms of release specified above, G.S. 15A-535(b) provides that in any county in which there is a pretrial release program, the senior resident superior court judge may, after consultation with the chief district court judge, order that defendants accepted by such programs for supervision must, with their consent, be released by judicial officials to supervision of such programs, and subject to their rules and regulations, as an alternative to release on a written promise, unsecured bond, or a custody release.

VI. Determining Appropriate Pretrial Release Conditions.

A. Factors to Consider. G.S. 15A-534(c) provides that in determining which conditions of release to impose, a judicial official must 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.

B. Evidence to Consider. G.S. 15A-534(g) provides that when imposing conditions of pretrial release, the judicial official must take into account all available evidence that he or she considers reliable and is not bound by the rules of evidence.

C. Special Considerations Regarding Secured Bonds and House Arrest with Electronic Monitoring.

1. Statutory Preference for Other Conditions. G.S. 15A-534(b) provides that a judicial official must impose a release on written promise to appear, a release on an unsecured appearance bond, or a custody release unless he or she determines that

- those forms of release will not reasonably assure the defendant's appearance;
- release under those conditions will pose danger of injury to any person; or
- release under those conditions is likely to result in the destruction of evidence, intimidation of witnesses, or subornation of perjury.

G.S. 15A-534(b) provides that when imposing a secured bond or house arrest with electronic monitoring, the judicial official must record, in writing, the reasons for doing so if required by the local policy on pretrial release issued by the senior resident superior court judge.

2. Specifying "Cash" or "Green Money Only" Secured Bond. 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." It is not clear whether this provision 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. Even if a cash bond is set, G.S. 15A-531(4) provides that a cash bond may be satisfied by the posting of a secured bond by a "bail agent" (also known as a surety bondsman) in all cases except child support contempt proceedings.

D. Restrictions. G.S. 15A-534(a) authorizes judicial officials to impose restrictions on travel, association, conduct, or place of abode. A judicial official is allowed to impose these restrictions no matter what type of pretrial release condition is set. Any restrictions imposed should be reasonable and related to the purpose of pretrial release. Restrictions should not be used as punishment. The restrictions should relate to reasons listed under G.S. 15A-534(b), such as:

- Assurance of defendant's appearance (travel)
- Danger of injury (conduct/association)
- Destruction of evidence (conduct/travel/association)
- Intimidation of witnesses (conduct/association)

The Conditions of Release and Release Order form (AOC-CR-200) (online at: http://www.nccourts.org/Forms/Documents/54.pdf) includes space to list restrictions.

E. Order and Notification to Defendant. G.S. 15A-534(d) provides that a judicial official authorizing pretrial release

- must issue an appropriate order containing a statement of the conditions imposed, if any;
- inform the defendant in writing of the penalties applicable to violations of the conditions of his release; and
- advise the defendant that his or her arrest will be ordered immediately upon any violation.

The order of release must be filed with the clerk and a copy given the defendant. The form that should be used for this purpose is AOC-CR-200 (online at: http://www.nccourts.org/Forms/Documents/54.pdf).

F. Special Cases. 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 for a defendant who is entitled to pretrial release. In some situations, however, the law limits that discretion. Section II.B above discussed situations where a defendant is not entitled to conditions. This section discusses situations where a defendant is entitled to conditions but the judicial official's discretion as to when and what conditions may be imposed is limited in some way.

1. Probationers.

a. Probation Violators with Pending Felony Charges or Convictions Requiring Sex Offender Registration. As discussed in section II.B.9 above, special pretrial release provisions apply when 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. As noted there, in certain circumstances, such a defendant is not entitled to release; in other circumstances such a defendant must be held for a period pending receipt of relevant information.

b. Probationer Charged with a Felony. G.S. 15A-534(d2) provides that when conditions of pretrial release are being determined for a defendant who is charged with a felony while on probation (supervised or unsupervised) for an earlier offense, the 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. This provision applies to any judicial official authorized to determine or review the defendant's eligibility for release. *Id.* If the defendant does not pose such a danger, he or she is entitled to release as in all cases. *Id.* If the defendant poses such a danger, the judicial official must impose a secured bond or a secured bond with electronic house arrest. *Id.*

When Probationer's Conditions Must Be a Secured Bond or Secured Bond Plus Electronic House Arrest

- Defendant is on probation,
- Is charged with a felony, and
- Poses a danger to the public

If there is insufficient information to determine whether the defendant poses a danger, then the judicial official must keep the defendant in custody until that determination can be made. *Id.* If a judicial official detains the defendant for this reason, he or she 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 ninety-six hours of arrest, when the defendant will be brought before a judge for a first appearance.

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

Whenever a judicial official is setting conditions of release for a person who has been charged with a felony while on probation, the judicial official should check the relevant box on the Conditions of Release and Release Order form (AOC-CR-200) (online at: http://www.nccourts.org/Forms/Documents/54.pdf) *and* complete form AOC-CR-272 (Detention of Probationer Arrested for Felony) (side one) (online at: http://www.nccourts.org/Forms/Documents/1143.pdf).

2. Domestic Violence Cases.

a. Forty-Eight-Hour Rule. In certain domestic violence cases, only a judge can determine the conditions of pretrial release in the first forty-eight hours after arrest. G.S. 15A-534.1(a). If a judge does not act within forty-eight hours, conditions must be set by a magistrate. G.S. 15A-534.1(b). This rule, known as the "Forty-Eight-Hour Rule," applies in all cases in which the defendant is charged with:

- an assault on, stalking, communicating a threat to, or committing a felony as provided in G.S. Ch. 14, Art. 7A, 8, 10, or 15 upon a current or former spouse or a person with whom the defendant lives or has lived as if married
- domestic criminal trespass, or
- a violation of a 50B order.

Effective October 1, 2010, new legislation (S.L. 2010-135) amended G.S. 534.1(a) to provide 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. The amended statute further provides that after setting conditions, the judge must return the report to the providing agency or department and may not unreasonably delay the determination of conditions to review the criminal history report. 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.

For a chart listing all offenses covered by the forty-eight-hour rule and clarifying the required relationship between the parties, go to the School of Government's Web page for magistrates, www.sog.unc.edu/programs/ncmagistrates/index.html, and click on "Domestic Violence: 48-Hour Rule Offense Chart."

i. **Defendant Brought to Magistrate After Arrest.** As noted above, only a judge can set conditions of pretrial release in the forty-eight-hour period after an arrest. Thus, when a defendant is brought before a magistrate after arrest for a covered domestic violence offense, the magistrate 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. To do this, the magistrate should use the Conditions of Release and Release Order Form (AOC-CR-200) (online at: http://www.nccourts.org/Forms/Documents/54.pdf), and check the box in the Order of Commitment portion of the form that states "Check in all domestic violence and stalking cases covered by G.S. 15A-534.1(b)." The magistrate then should enter an appropriate date and time as instructed on the form. As noted above, if a judge does not act within forty-eight hours, the magistrate sets conditions. G.S. 15A-534.1(b).

ii. **Defendant Brought to Judge Before Expiration of Forty-Eight Hours or to Magistrate After Expiration of Forty-Eight Hours.** When conditions are set by a judge within the forty-eight hour period or by a magistrate after expiration of the forty-eight hour period, the following rules apply to defendants charged with covered domestic violence offenses.

   (1) **Must Consider Defendant's Criminal History.** As noted above, 2010 legislation requires the magistrate or judge to obtain and consider the defendant's criminal history when setting conditions.

   (2) **Immediate Release Will Pose Danger.** Upon a determination that the defendant's immediate release will pose a danger of injury to the alleged victim or another person or is likely to result in intimidation of the alleged victim and upon a determination 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).

(3) Special Restrictions. G.S. 15A-534.1(a)(2) sets out special restrictions that may be imposed on defendants charged with the domestic violence crimes specified above. They 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.

The judicial official should use form AOC-CR-630 (online at: http://www.nccourts.org/Forms/Documents/1081.pdf) to impose these restrictions.

G.S. 15A-401(b)(2)f provides that a law enforcement officer may arrest a person without an arrest warrant if the officer has probable cause to believe that the person has violated pretrial release conditions imposed under G.S. 15A-534.1(a)(2). Upon making such an arrest, the law enforcement officer must take the person without unnecessary delay to a magistrate and the magistrate has the responsibility of setting new pretrial release conditions. If the defendant also is charged with a new domestic violence offense subject to G.S. 15A-534.1, the Forty-Eight-Hour Rule applies to the new offense.

3. Cases Involving Child Victims. G.S. 15A-534.4 sets out specific conditions that must be imposed on defendants charged with certain sex offenses or crimes of violence against child victims listed in the Table below. 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.

G.S. 15A-534.4(a). However, upon request of the defendant, the judicial official may waive one or both of conditions (1) and (2), if he or she makes written findings of fact that it is not in the best interest of the alleged victim that the condition be imposed. A judicial official should use form AOC-CR-631 (online at: http://www.nccourts.org/Forms/Documents/1082.pdf) for these cases.

Crimes Triggering G.S. 15A-534.4

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

4. **Prior Failures to Appear and Bond Doubling.** Special provisions apply when a defendant has been surrendered by a surety after a failure to appear (FTA) or arrested on an order for arrest (OFA) after a FTA. G.S. 15A-534(d1) provides if a defendant has failed to appear one or more times on the charges, the judicial official must, at a minimum, impose the conditions recommended in the OFA. If the OFA does not recommend conditions, the judicial official must set a secured bond of at least double the amount of the most recent bond (regardless of whether it was secured or unsecured). G.S. 15A-534(d1). If no bond was in place, the judicial official must set a secured bond of at least $500.00. *Id.* The judicial official also must impose restrictions on the defendant's travel, associations, conduct, or place of abode to ensure that the defendant appears as required. *Id.* The judicial official must indicate on the release order that (1) the defendant was arrested or surrendered after a FTA and (2) if appropriate, that the defendant has failed to appear on two or more occasions. *Id.*

5. **Communicable Disease Holds.** G.S. 15A-534.3 contains a special communicable disease hold. It provides that if the judicial official conducting the initial or first appearance finds probable cause to believe that a person was exposed to the defendant in a manner that poses a significant risk, through a nonsexual contact, of transmission of the AIDS virus or Hepatitis B, 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. To order a hold in these circumstances, the judicial official should use form AOC-CR-270, side two (online at: http://www.nccourts.org/Forms/Documents/842.pdf). The judicial official 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 judicial official should set pretrial release conditions that would be applicable after the defendant has been examined by public health officials, it would appear 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 again before the judicial official for the setting of conditions.

6. **Impaired Driving Holds.** G.S. 15A-534.2 contains a special detention provision that applies during the initial appearance in impaired driving cases.

   a. **Offenses Triggering the Hold.** The special impaired driving hold comes into play whenever a judicial official finds, at an initial appearance, probable cause to charge the defendant with an offense involving impaired driving, as defined by G.S. 20-4.01(24a). The covered offenses are listed in the Table below.

Offenses That Can Trigger an Impaired Driving Hold

- 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

   b. **Relevant Determination.** An impaired driving detention must be imposed when the judicial official finds probable cause to charge the defendant with one of the triggering offenses and finds, by clear and convincing evidence, that impairment of the defendant's physical or mental faculties presents a danger, if the defendant is released, of physical injury to himself or herself or others or damage to property. If so, the judicial official must order the defendant detained until one of the following events occurs:

      - The defendant's impairment no longer presents a danger of physical injury to himself, herself, or others or damage to property; or
      - A sober, responsible adult (eighteen years old or older) 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(b), (c).

   c. **Required Determination.** The determination under G.S. 15A-534.2 is not optional. G.S. 20-38.4 makes clear that once there is a finding of probable cause that the defendant committed a triggering offense, the judicial official must determine whether an impaired driving detention should 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 in which 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 judicial official 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 the impaired driving detention determination is required and not optional.

d. Notification of Rights and Listing of Persons to Contact. The offenses that trigger an impaired driving hold all are implied consent offenses. G.S. 20-16.2(a1); 4.01(24a). As such, G.S. 20-38.4 requires the judicial official conducting the initial appearance 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 the form must be filed with the case file.

G.S. 20-38.4(a)(4). G.S. 20-38.5 requires each chief district court judge, along with others, to 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.

The AOC form used to certify that the new procedures have been complied with and on which the defendant lists those people whom the defendant wishes to contact or appear at jail is AOC-CR-271 (online at: http://www.nccourts.org/Forms/Documents/993.pdf). This form should be used any time a defendant charged with an implied consent offense is confined to jail, even if only for a short time.

e. Written Findings Required. Whenever a judicial official orders a defendant detained under G.S. 15A-534.2, he or she must make written findings supporting the detention. *State v. Labinski,* 188 N.C. App. 120 (2008). AOC-CR-270, side one (online at: http://www.nccourts.org/Forms/Documents/842.pdf) should be used to make these findings.

f. Timing of the Detention Decision/Conditions Still Required. The judicial official should decide whether to detain the defendant under G.S. 15A-534.2 at the time of the initial appearance. If the judicial official detains a defendant under G.S. 15A-534.2, he or she 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. G.S. 15A-534.2(c). However, at the end of the twenty-four-hour period, the defendant still must satisfy the conditions of pretrial release before being released. *Id.*

h. Alcohol Testing. When determining whether or not a defendant remains impaired, a judicial official 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 Intoximeter or an approved alcohol screening device. G.S. 15A-534.2(d). If the test results indicate that the defendant's alcohol concentration is less than 0.05, the judicial official must determine that the defendant is no longer impaired, unless there is evidence that the defendant still is impaired from a combination of alcohol and some other impairing substance. G.S. 15A-534.2(d).

i. Release from Detention. A defendant must be released from the impaired driving detention upon the earliest of the following occurrences:

(1) 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;
(2) 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; or
(3) the maximum twenty-four-hour period for the detention has expired.

To release for one of these reasons, a judicial official should use form AOC-CR-270, checking the appropriate box under the section entitled "Release from Detention Order." 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. Note that a release to a sober, responsible adult for purposes of the impaired driving hold is not a custody release. If a judicial official wishes to impose a custody release, such a release must be separately ordered as a condition of pretrial release. See section V above (discussing pretrial release options).

The person ordering release from an impaired driving detention must be a judicial official; a jailer may not do so. Remember that release from an impaired driving detention is not the same as a release on conditions; even if the defendant is entitled to release from the impaired driving detention, he or she still must satisfy the conditions of pretrial release (for example, $500 secured bond) before he or she may be released.

7. Infractions. As a general rule, any person charged with an infraction may be required to post a bond to secure his or her appearance in court. G.S. 15A-1113(c). However, three exceptions virtually swallow this general rule. First, a North Carolina resident charged with an infraction cannot be required to post bond. *Id.* Second, 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. *Id.* Third, certain individuals charged with infractions subject to the Interstate Wildlife Violator Compact cannot be required to post a bond. G.S. 113-300.6.

If none of these exceptions apply and a person charged with an infraction can be required to post a bond, the charging officer may require the person to accompany the officer to the judicial official'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. G.S. 15A-1113(c). However, if a judicial official finds that the person is unable to post a secured bond, the judicial official *must* allow the person to be released by executing an unsecured bond. *Id.*

8. **Fugitives.** As noted in section II.B.1 above, a fugitive charged in another state with an offense punishable by death or life imprisonment has no right to pretrial release. Other such fugitives are entitled to "bail by bond, with sufficient sureties." G.S. 15A-736. Thus, it appears that no other form of release is authorized for these defendants.

G. 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. For a model policy on this issue, see http://www.sog.unc.edu/programs/judicial_authority_administration/documents/ModelPretrialReleasePolicies.pdf.

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, however, 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(a2). 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 above in section V, effective February 1, 2011, 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. This 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.

H. 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 (as amended by S.L. 2010-97) 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). However, G.S. 162-62 also provides that it 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 officers 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 is able to make that 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 per 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.

The model pretrial release policy pertaining to non-citizens (online at: http://www.sog.unc.edu/programs/judicial_authority_administration/documents/ModelPretrialReleasePolicies.pdf) addresses all of these issues.

VII. Modifications, Revocations, and Related Issues.

A. Modifications.

1. **Magistrate's Authority to Modify.** G.S. 15A-534(e) provides that a magistrate or a clerk may modify his or her pretrial release order at any time prior to the first appearance before the district court judge.

2. **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 to move to modify the conditions of release imposed on the underlying felony. For a discussion of this issue, see Jeff Welty, *North Carolina's Habitual Felon and Violent Habitual Felon Laws,* ADMIN. OF JUSTICE BULL. No. 2008/04, at 18 (June 2008) (available at http://www.sog.unc.edu/programs/crimlaw/documents/aojb0804.pdf).

B. 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." By its terms, this provision only authorizes a judge to revoke conditions of pretrial release.

C. 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).

VII. Term of a 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:

- a judge releases the obligor from the bond;
- the defendant is properly surrendered by a surety;
- the proceeding is terminated by voluntary dismissal by the state before forfeiture is ordered; or
- an indefinite prayer for judgment continued has been entered in district court.

G.S.15A-534(h).