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Securing the Release of People in Custody in North Carolina During the COVID-19 Pandemic

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This bulletin analyzes five potential mechanisms for securing the release of people in custody in North Carolina during the COVID-19 pandemic:

- federal habeas,
- state habeas,
- appeal bonds,
- joint motions for appropriate relief (MARs), and
- parole reviews "in the interests of justice."

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Federal and State Habeas Claims

The Right to a Meaningful Remedy

COVID-19 represents a significant threat to the health and lives of people incarcerated in North Carolina, and it has left advocates across the state searching for legal mechanisms to protect their clients in custody. In recognition of this threat, the North Carolina Department of Public Safety (DPS) has begun releasing some people from custody who are pregnant or aged 65 and older with underlying health conditions. However, no obvious remedy exists for people who appear to meet DPS criteria but are not chosen for release, or for younger people with medical conditions that make them uniquely vulnerable to the effects of the disease. Attorneys are finding existing legal doctrines inadequate in the face of a highly contagious virus for which population density is a principal aggravator. Capturing the dilemma now facing many courts, one judge recently queried what might be done "if confinement itself is the unconstitutional

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'condition of confinement'?" *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo. Apr. 24, 2020).

Claims related to the dangers of prison life are generally litigated as civil actions under 42 U.S.C. § 1983. *Farmer v. Brennan*, 511 U.S. 825, 845–46 (1994); *see generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In addition to damages, remedies can include orders to restore constitutionally acceptable conditions. *Farmer*, 511 U.S. at 845. However, a "constitutional wrong" requires a "realistic" and practical remedy, *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 339–40 (2009), and early cases suggest many courts have found traditional remedies a poor match for the virus. As of the first week of June, the four biggest clusters of known COVID-19 outbreaks in the United States were all linked to correctional facilities. *See* *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, June 3, 2020.

As a matter of both state and constitutional law, the exposure of inmates to a serious, communicable disease is a violation of rights that requires an adequate remedy. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding Eighth Amendment prohibits officials from "ignor[ing] a condition of confinement that is . . . likely to cause serious illness . . . the next week or month or year"); N.C. Const. art. I, § 18 (stating "every person for an injury done him in his . . . person . . . shall have remedy by due course of law").[1] The transmissibility of COVID-19, however, has made it difficult for courts to fashion orders capable of ensuring constitutional and

1. While conditions-of-confinement challenges brought under the U.S. Constitution are generally evaluated under the Eighth Amendment, that is not always the case. In claims brought by pretrial detainees, some courts now apply a more plaintiff-friendly "objective standard to evaluate . . . prison conditions." *See Estate of Vallina v. Cty. of Teller Sheriff's Office*, 757 F. App'x 643, 646–47 (10th Cir. 2018) (unpublished) (noting that the Second, Seventh, and Ninth Circuits use this standard, while the Fifth, Eighth, and Eleventh Circuits still use the Eighth Amendment subjective deliberate indifference standard); *People ex rel. Stoughton v. Brann*, No. 451078/2020, 2020 WL 1679209, at *1 (N.Y. Sup. Ct. Apr. 6, 2020) (citing the Due Process protections of the Fifth and Fourteenth Amendments in granting state habeas relief to group of pretrial detainees endangered by COVID-19 on Rikers Island). The reason for this change is rooted in the U.S. Supreme Court's 2015 opinion in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which considered an excessive force claim brought by a pretrial detainee but also discussed conditions-of-confinement challenges. A divide exists as to whether the opinion controls conditions-of-confinement claims by pretrial detainees or is limited to excessive force. *Kingsley* held that excessive force, while properly evaluated for "convicted prisoners" under the Eighth Amendment's Cruel and Unusual Punishment Clause, should be analyzed for "pretrial detainees under the Fourteenth Amendment's Due Process Clause." *Id.* at 2475. The Court noted that the "language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all . . . ." *Id.* The opinion cited extensively to *Bell v. Wolfish*, 441 U.S. 520 (1979), a conditions-of-confinement case, and stated that "a pretrial detainee can . . . prevail by showing that the [challenged] actions [related to conditions of confinement] are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *Kingsley*, 135 S. Ct. at 2475 (quoting *Bell*, 441 U.S. at 561). The Court cited language in *Bell* that indicated that in "appl[ying] this . . . objective standard to evaluate a variety of prison conditions," the *Bell* Court "did not consider the prison officials' subjective beliefs." *Id.* (quoting *Bell*, 441 U.S. at 541–43). While the Fourth Circuit does not appear to have squarely addressed the proper standard for conditions cases brought by pretrial detainees post-*Kingsley*, it did cite to *Kingsley* approvingly in a case that considered whether "the imposition of disciplinary segregation without a hearing violated [a pretrial detainee's] procedural due process rights." *See Dilworth v. Adams*, 841 F.3d 246, 248, 251–52 (4th Cir. 2016). As a result, pretrial detainees in North Carolina threatened by COVID-19 may face a lower bar to challenging the conditions of their confinement than those who have been convicted.

habitable conditions in prisons. *See generally Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 1916883 (S.D. Tex. Apr. 20, 2020) (detailing unique challenge of creating remedy for dangers posed by COVID-19 in a prison setting).

This reality has prompted some advocates and courts to look to habeas relief as a means of protecting the lives of people in custody. This section analyzes the viability of state and federal habeas proceedings as a means of relief for North Carolina prisoners affected by the COVID-19 pandemic. The contours of habeas law are evolving fast during the COVID era. Early opinions suggest that the remedy is more likely to be granted in cases involving people with pre-existing health conditions that make them acutely vulnerable to the disease, who are housed in facilities with significant outbreaks that authorities have struggled to contain.[2]

Federal Habeas Corpus

The U.S. Supreme Court has never directly ruled whether federal habeas is an appropriate vehicle to challenge one's confinement in unconstitutional conditions. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862–63 (2017); *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 498–99 (1973). In the absence of clarity, the Federal Circuit Courts of Appeal have split on the issue. *See Camacho Lopez v. Lowe*, No. 3:20-cv-563, ____ F. Supp. 3d ____, ____, 2020 WL 1689874, at *5 (M.D. Pa. Apr. 7, 2020) (collecting cases).

The Fourth Circuit has "never addressed . . . in a published decision" whether "conditions-of-confinement claims are . . . cognizable in habeas proceedings," *Wilborn v. Mansukhani*, 795 F. App'x 157, 163–64 (4th Cir. 2019). Unpublished decisions by federal district courts within the circuit, a number of them quite recent, have reached different conclusions. *Compare Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020) (finding that habeas claim "seeking release because of unconstitutional conditions of treatment is cognizable") *with Toure v. Hott*, No. 1:20-CV-395, 2020 WL 2092639, at *7–8 (E.D. Va. Apr. 29, 2020) (stating "disagree[ment] with the reasoning of *Coreas*" and detailing "reasons to believe the Fourth Circuit would . . . hold § 2241 is an inappropriate means to challenge one's conditions of confinement"). The *Toure* court seems to reflect the weight of the unpublished district court opinions in the Fourth Circuit.

The science of COVID-19 could cause a reevaluation of the equities. Some courts that have historically rejected habeas as a "means for remedying condition of confinement constitutional violations" have indicated that, should a record show that "conditions . . . cannot be modified to reasonably eliminate [COVID-19] risks, [they] may find [the] argument for habeas relief persuasive." *A.S.M. v. Donahue*, No. 7:20-CV-62 (CDL), 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020). They have observed that "the general principle eschewing habeas relief as a [remedy] . . . rests on the assumption that eliminating the contested confinement conditions is possible without releasing the detainee from detention." *Id.*

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2. One North Carolina judge, citing failures with testing and actions in contradiction of CDC guidelines, determined that officials had acted with deliberate indifference to the safety of those in custody and granted a preliminary injunction to a coalition of civil rights groups that sued on their behalf. See Bench Memo, *NAACP v. Cooper*, 20-CVS-500110 (Wake Cty. Sup. Ct. June 8, 2020) (memorializing oral order finding deliberate indifference by state officials and granting preliminary injunction against state prison system). The case did not involve habeas relief. Instead, the groups petitioned the court for a writ of mandamus and sought declaratory and injunctive relief and the appointment of a special master. *See* Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus, *NAACP v. Cooper,* 20-CVS-500110 (Apr. 20, 2020).

The "unprecedented circumstances" and "unique context in which litigation over COVID-19 arises . . . [and] the sudden threat to mortality from the spread of the virus in a congregate setting" has "cast . . . doubt" on the viability of long-established judicial doctrines used to adjudicate conditions-of-confinement claims. *Money v. Pritzker*, No. 20-CV-2093, 2020 WL 1820660, at *9 (N.D. Ill. Apr. 10, 2020). This development may mean that attorneys could find success with federal habeas petitions on behalf of people who are endangered because of age, pre-existing conditions, a COVID-19 outbreak at their facility, or a combination of factors.

One court recently observed that there was "good authority" for the argument that "release from custody is the only effective remedy available under . . . circumstances [where], for all practical purposes, there is no way [someone] can avoid infection in [] close quarters," while also noting that "none of the potentially applicable precedents was decided with [the realities of a pandemic] in mind." *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo. Apr. 24, 2020). Courts confronting the threat of COVID-19 in prisons are finding § 1983 inadequate "as a method of vindicating constitutional claims that sound in the 'core of habeas.'" *Camacho Lopez v. Lowe*, No. 3:20-CV-563, 2020 WL 1689874, at *5–6 (M.D. Pa. Apr. 7, 2020), *as amended* (Apr. 9, 2020), *for text, see* No. 3:20-CV-563, 2020 WL 1812445 (M.D. Pa. Apr. 9, 2020). Some have concluded that the "extraordinary conditions" occasioned by COVID-19 "warrant a habeas remedy." *Id*.

Federal Habeas Class Relief

It is possible that the exigencies of the pandemic may warrant broader, class wide relief. Habeas class actions are uncommon, but the U.S. Supreme Court has never foreclosed them, despite having had several opportunities. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring); *Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984); *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979); *Middendorf v. Henry*, 425 U.S. 25, 30 (1976); *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969). Perhaps the most famous case involving the mass release of prisoners began as a conditions-of-confinement case, but "[a]fter years of litigation, [when] it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison population," ultimately transformed into "the functional equivalent of 46,000 writs of habeas corpus." *Brown v. Plata*, 563 U.S. 493, 500 (2011); *id.* at 560 (Scalia, J., dissenting).

As more prisons become afflicted with COVID-19, and as courts, officials, and advocates struggle to identify alternative means for them to meet their constitutional obligations, habeas relief, even class relief, could emerge as a solution. A coalition of civil rights organizations, including the ACLU of North Carolina, is presently attempting to make that case with a complaint filed on May 26, 2020, in the Eastern District of North Carolina on behalf of people incarcerated at the Federal Correctional Complex in Butner, NC, where, as of the date of filing, nine people had died of COVID-19. *See* Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 and Class Action Complaint for Injunctive and Declaratory Relief, *Hallinan v. Scarantino*, 5:20-hc-02088-FL (E.D.N.C. May 26, 2020).

A federal district court in Ohio, acting in response to a similar emergency habeas class petition, recently held that, "[a]gainst a backdrop where approximately one out of every four Elkton inmates . . . tested positive for COVID-19, [the prison] must move inmates out." *See* Order, *Wilson v. Williams*, No. 4:20-cv-00794-JG (N.D. Ohio May 19, 2020). The court directed the State of Ohio to make immediate expanded use of home confinement, compassionate release, and transfer to other facilities to significantly reduce the prison population. *Id*. On May 26, 2020, the U.S. Supreme Court denied a government request to stay the order. *See* Adam

Liptak, *Supreme Court Refuses to Stop Order to Move Inmates From Virus-Ravaged Prison*, N.Y. Times, May 26, 2020. However, on June 5, the Court reversed itself, granting a second government request for a stay. *See* Dan Sewell, *Supreme Court Delays Federal Prison Inmates' Release in Ohio*, Associated Press, June 5, 2020.

State Habeas Corpus

State habeas claims could emerge as a remedy in North Carolina, as they have in other states, for those seeking review of conditions of confinement.[3] *See, e.g., Bergamaschi v. Cuomo*, No. 20 CIV. 2817 (CM), 2020 WL 1910754, at *4 (S.D.N.Y. Apr. 20, 2020) (stating that "numerous" prisoners have "petition[ed] for a writ of habeas corpus in [New York's trial-level courts], . . . and many [have been] granted"). One virtue of the North Carolina habeas statute, at least for advocates, is that application for the writ can be made to "any one of the superior court judges," irrespective of the county of conviction or incarceration, and proceedings generally move quickly. *See* Chapter 17, Section 6(2) of the North Carolina General Statutes (hereinafter G.S.); *State v. Miller*, 97 N.C. 451, 451 (1887). The procedures for applications for the writ are relatively straightforward and are detailed in G.S. 17-7, requiring a general explanation as to why the person's "imprisonment or restraint is alleged to be illegal." G.S. 17-7(4). Orders from state habeas proceedings under Chapter 17 are not appealable, although they are reviewable by certiorari. *See State v. Niccum*, 293 N.C. 276, 278 (1977) (calling rule "firmly established" and stating that the "remedy, if any, is by petition for certiorari addressed to the sound discretion of the appropriate appellate court").

Some sources, including the *North Carolina Superior Court Judges' Benchbook,* state only the general rule from G.S. 17-4 that the writ is to be denied if it is determined the applicant is incarcerated "by virtue of . . . order, judgment or decree of a competent tribunal," *See, e.g.,* Jessica Smith, *Habeas Corpus* 1 (Mar. 2014), *in* North Carolina Superior Court Judges' Benchbook (stating "habeas is not the proper procedure for challenging a detention pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction"). However, well-recognized exceptions to the general rule exist. *See* 2 Julie Ramseur Lewis & John Rubin, North Carolina Defender Manual § 35.4C, State Habeas Corpus: Scope of Writ (2d ed. 2012). G.S. 17-4 must be read in conjunction with G.S. 17-33, which provides that applicants can avail themselves of the writ if one of the enumerated conditions are present. *State v. Leach*, 227 N.C. App. 399, 411 n.6 (2013); *see also Hoffman v. Edwards*, 48 N.C. App. 559, 561–62 (1980) (citations omitted) (stating that while "[t]raditionally, the writ of habeas corpus was thought to issue only to ascertain whether the court . . . had jurisdiction of the matter or . . . exceeded its power, . . . it is clear now that . . . habeas corpus jurisdiction is much broader"). One situation where a court may exercise habeas jurisdiction is "[w]here, though the original imprisonment was lawful, yet by some . . . event, which has taken place afterwards, the party has become entitled to be discharged." G.S. 17-33(2); *see also In re Harris*, 241 N.C. 179, 181 (1954) (recognizing this provision); *In re Imprisonment of Stevens*, 28 N.C. App. 471, 473–74 (1976) (same).

Medically vulnerable prisoners who are unable to socially distance might argue that an outbreak of COVID-19 in their facility constitutes an "event" that has "entitled [them] to be discharged"—at least from that facility. G.S. 17-33(2). The North Carolina Court of

3. State habeas relief is not available to those detained pursuant to federal authority, including those detained by state officials in accordance with 287(g) immigration agreements. *Chavez v. McFadden*, No. 437PA18, 2020 WL 3025855, at *9 (N.C. June 5, 2020) (citing *In re Tarble*, 80 U.S. 397, 409 (1871)).

Appeals, citing G.S. 17-33(2), has indicated that people may apply "for the issuance of a writ of habeas corpus when the applicant, although originally incarcerated in a lawful manner," can demonstrate "some clear constitutional violation has occurred." *Leach*, 227 N.C. App. at 411 & n.6. At least two federal courts evaluating the provision in the context of parole have agreed. *See Bey v. Hooks*, No. 5:15-HC-2097-FL, 2018 WL 2465471, at *4 (E.D.N.C. June 1, 2018) (citing *Warren v. Smith*, No. 5:13-HC-2220-D, 2015 WL 631331, at *3–4 (E.D.N.C. Feb. 12, 2015); *Cook v. Smith*, No. 1:08CV300, 2011 WL 1230793, at *2 (M.D.N.C. Mar. 28, 2011)).

Certain events, such as the commitment of far more people to a facility than it was built to hold, have been found so disruptive to the provision of prisoner healthcare as to amount to "a systemic violation of the Eighth Amendment" for which the only solution is "a reduction in the prison system population." *Brown v. Plata*, 563 U.S. 493, 500 (2011). Any such event in North Carolina prisons would likely also violate Article I, Section 27 of the North Carolina Constitution, which "mirrors the Eighth Amendment," *State v. Hill*, 262 N.C. App. 113, 120 (2018), and "historically has [been] analyzed . . . the same." *State v. Green*, 348 N.C. 588, 603 (1998).

Prison outbreaks of COVID-19, if not adequately controlled, might be "events" significant enough to warrant habeas relief. *Cf. Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating Eighth Amendment violation lies where "official knows of and disregards an excessive risk to inmate health"); *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (stating failure to provide prisoners with adequate "medical care, and reasonable safety . . . transgresses . . . the Eighth Amendment"). State habeas thus may provide a remedy for people endangered by the virus. Relief might be an order for home confinement, transfer to a prison hospital or safer correctional facility, or something in between. The statutes offer courts the discretion and authority to set terms other than unconditional release. *See* G.S. 17-38 (stating those "set at large upon any writ of habeas corpus" may be "detained . . . by the legal order or process of the court"); *see also State v. Leach*, 227 N.C. App. 399, 411 n.6 (2013) (stating there is no merit to argument that "the only relief available in a habeas corpus proceeding is discharge from incarceration"). Because of this flexibility, some courts, considering such a petition for perhaps the first time and under unprecedented circumstances, may find the remedy appropriate.

Appeal Bonds

Appeal bonds are another mechanism that advocates might consider using during the COVID-19 pandemic as a means of deferring their clients' entry into the prison system or getting them out of custody. They are available to any person who has filed and has pending an appeal of their conviction. The relevant statute provides that a "defendant whose guilt has been established in the superior court and is either awaiting sentence or has filed an appeal from the judgment entered may be ordered released upon conditions[.]" G.S. 15A-536(a). When considering a request for an appeal bond, a judge is to "take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials." G.S. 15A-536(f).

The request for release pending appeal is normally made in court by trial counsel on conviction, but the statutes also permit appellate counsel at a later date to apply to the superior court to set release conditions or to ask for reconsideration of a denial of an appeal bond. The bonds have an intuitive appeal in cases in which the active sentence imposed is measured in

months. Without one, a defendant may otherwise serve his entire sentence before having a conviction vacated. *Cf. Ellis v. United States*, 79 S. Ct. 428, 428 (1959) (admitting to bail, in the U.S. Chief Justice's capacity as Circuit Justice for the Court of Appeals for the District of Columbia, a defendant who otherwise "might of necessity serve more than the minimum term of his sentence before there is an adjudication in the Court of Appeals"). Appeal bonds are also available for, and have sometimes been granted to, people convicted of serious felony offenses.

In seeking an appeal bond, attorneys might argue that defendants committed to custody during the height of the COVID-19 pandemic, particularly those with acute medical conditions that make them especially vulnerable, face exposure to an unreasonable risk of infection. Attorneys can point to the state's suspension of transfers to the Division of Adult Corrections, which reflects its concern about the effects of an increase in population density. Ames Alexander and Gavin Off, *Hoping to Slow Coronavirus Spread, NC Prisons Sharply Limit Inmate Movements*, Charlotte Observer, Apr. 6, 2020. Attorneys seeking appeal bonds also might argue the inequity of committing someone to an active sentence at a time when jail-prison transfers have been suspended and people lack the ability to avail themselves of earned time as they normally would in a state prison. *See* James M. Markham, *An Update on Prisons and Jails as the Courts Expand Operations*, N.C. Crim. L. Blog (UNC School of Government, June 3, 2020) (discussing "legitimate concern" of "some sentenced inmates stuck in a holding pattern in the jails . . . serving more time than they would if promptly transferred").

The little case law on appeal bonds provides that the decision to grant or deny post-trial bond is in the discretion of the superior court. *State v. Sparks*, 297 N.C. 314, 320–21 (1979); *State v. Crabtree*, 66 N.C. App. 662, 665 (1984); *State v. Keaton*, 61 N.C. App. 279, 283 (1983). Advocates seeking a bond can assure the court that a delay in executing a sentence of imprisonment in no way precludes its subsequent enforcement. *State v. Vickers*, 184 N.C. 676 (1922); *State v. Cockerham*, 24 N.C. 204 (1842). To the extent a court may be concerned about the impact of a convicted defendant's release on public safety, it has the authority to impose "conditions" on an appeal bond, including electronic monitoring. The court may require as a condition of the bond that defendants await their active sentence on home confinement. Home confinement would not constitute credit against the sentence. *State v. Jarman*, 140 N.C. App. 198, 207 (2000).

Across the country, attorneys for federal defendants in custody are seeking, and in some cases obtaining, temporary release from prison under the federal appeal bond statute, citing the dangers posed by COVID-19. *See, e.g., Clark v. Hoffner*, No. 16-11959, 2020 WL 1703870, at *5 (E.D. Mich. Apr. 8, 2020) (granting bond to defendant who received life sentence for 2003 murder conviction, citing COVID-19 outbreak); Emergency Motion for Appeal Bond, *United States v. Xiulu Ruan*, Appeal No. 17-12653-D (11th Cir. April 2, 2020). Advocates in North Carolina might consider doing the same. Unlike in the federal system, there are no statutory preconditions in North Carolina to the court granting an appeal bond.[4] Rather, the power to release a defendant pending disposition on appeal is vested solely in the discretion of the court. *See* G.S. 15A-536(a).

4. Appeal bonds, historically, have been favored in the federal system. *Cf. Rhodes v. United States*, 275 F.2d 78, 82 (4th Cir. 1960) (stating that "normally bail should be allowed pending appeal, and it is only in an unusual case that denial is justified"). Under common law, "[d]oubts whether [bail] should be granted or denied [were] always . . . resolved in favor of the defendant." *Herzog v. United States*, 75 S. Ct. 349, 351 (1955). The law did "not require applicants for bail to show that they [were] entitled to a reversal. And it [was] not the duty of the judge hearing such application to pass upon the merits of the case." *United States v. Motlow*, 10 F.2d 657, 663 (7th Cir. 1926). In 1966, Congress passed federal bail reform with

It is difficult to determine how frequently appeal bonds are granted in North Carolina, but they have been issued even in serious felony cases before the pandemic. In 2018, for example, a defendant in Catawba County convicted of serious sexual offenses and sentenced to 600 to 840 months active imprisonment entered oral notice of appeal in open court, was granted an appeal bond, and was released from custody. *See* Appellate Entries, *State v. Mize*, 16-CRS-50126-50127 (May 15, 2018) (allowing "execution of a secured bond in the amount of $100,000" and directing defendant to have "no contact with prosecuting witnesses"); *State v. Mize*, 836 S.E.2d 783 (N.C. Ct. App. 2020). The circumstances of the case suggest the bond may have been granted largely on account of the defendant's advanced age. For older defendants or people whose health is most likely to be compromised by an active prison sentence, the case illustrates the potential appeal bonds hold as a means of keeping people out of custody during the pandemic, and for those now in custody, as a means of securing their release.

Joint Motions for Appropriate Relief

Another tool that attorneys might consider when attempting to secure the release from custody of people who are particularly vulnerable to COVID-19 is a "Joint" (sometimes called "Consent") Motion for Appropriate Relief (MAR). MARs can provide a means to amend a sentence of imprisonment or vacate a criminal conviction. *See* G.S. 15A-1417. In 2012, legislative changes to the state MAR statute "authorized the court to grant a MAR if the State and defendant consent." *See* John Rubin, Motions for Appropriate Relief, *Relief from a Criminal Conviction* (2018 ed.); Jessica Smith, *Motions for Appropriate Relief* 14 (Aug. 2017), *in* North Carolina Superior Court Judges' Benchbook. The legislative change that made this possible was the addition of language to the statute permitting parties to an action to enter "into . . . an agreement as to any aspect, procedural or otherwise, of a motion for appropriate relief." G.S. 15A-1420(e). In the years since, many attorneys, often working in Clean Slate clinics, have filed MARs with the consent of district attorneys on behalf of people seeking to improve their employment prospects by vacating old criminal convictions. These motions are also available to people serving active sentences. *State v. Chevallier*, 824 S.E.2d 440, 448 (N.C. Ct. App. 2019).

As of June 1, at least sixteen people in North Carolina are known to have had orders issued for their release in response to MARs filed pursuant to G.S. 15A-1420(e) and based on concerns about their personal safety in the face of the pandemic. Judges in Durham, Orange, and Wake Counties have granted such motions. The motion in Orange County did not cite any of the grounds for relief in G.S. 15A-1415(b), resting instead on the State's stipulation that the defendant had not received the benefit of mitigation factors at sentencing. All of the motions

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the Bail Reform Act of 1966, "with the express purpose of assuring 'that all persons, regardless of their financial status, . . . not needlessly be detained . . . pending appeal[.]' " *United States v. Provenzano*, 605 F.2d 85, 90 n.13 (3d Cir. 1979) (quoting Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214). It was not until the Bail Reform Act of 1984 that a more demanding standard was enacted at the federal level, requiring defendants to demonstrate "that the[ir] appeal 'raise[d] a substantial question of law or fact likely to result in reversal or an order for a new trial.' " *United States v. Giancola*, 754 F.2d 898, 899 (11th Cir. 1985) (quoting 18 U.S.C. § 3143). While federal appeal bonds have become harder to obtain because of Congressional bail reform, North Carolina has never deviated from the common law standard statutorily. North Carolina does not have a "substantial question of law" standard; the power to release a defendant pending disposition on appeal is vested in the discretion of the court. *See* G.S. 15A-536(a).

in Durham cited to G.S. 15A-1415(b)(8). Under that provision, a defendant may seek relief on the grounds that the "sentence imposed . . . is . . . invalid as a matter of law." Attorney Ben Finholt, Director of the Just Sentencing Project at North Carolina Prisoner Legal Services, who brought the motions in Durham, argued that the continued in-custody service of the particular sentences, under the "specific and wholly unique circumstances" of the COVID-19 pandemic, violated the Eighth Amendment to the United States Constitution and Article I, § 27 of the North Carolina Constitution. *See* Motion for Appropriate Relief, *State v. McDonald*, No. 97-CRS-10365 (April 2020); Virginia Bridges, *Durham DA, Judge OK Early Release of Convicted Drug Traffickers over COVID-19 Concerns*, News & Observer, Apr. 9, 2020. All people released so far had served a significant majority of their sentences and had release dates between 2020 and 2022.

Various formulations have been proposed and adopted with respect to who should be considered for release pursuant to a joint MAR, with some suggesting people aged 65 or older or those who have served 75 percent of their sentences as especially appropriate candidates. *Id.* The rationale behind most of the sentence modifications that have been granted is essentially that the risk from the continued service of the small proportion of the sentence yet to be served, as compared to the potential health consequences of contracting COVID-19 and likelihood of catching it in a particular prison environment, is so disproportionate as to be constitutionally suspect. *Cf. Graham v. Florida*, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment."). There is precedent in North Carolina for these kinds of sentence modifications. *See, e.g., State v. Wilkerson*, 232 N.C. App. 482, 490–91 (2014) (rejecting "State's argument that . . . trial judges have no authority to grant postconviction sentencing relief on Eighth Amendment grounds"); *State v. Stubbs*, 232 N.C. App. 274, 279 (2014) (affirming ability of trial courts to modify sentences that the court determines are "unconstitutionally excessive under . . . the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution").

In the case of the modifications in Durham, attorney Finholt obtained consent from District Attorney Satana Deberry, who said she agreed to join the motions "in the interests of justice." *See* Bridges, *Durham DA, Judge OK Early Release*. Deberry described her decision as consistent with her civic responsibility as an elected official to help "reduc[e] the spread of COVID-19 and protect[] vulnerable people," a population that she said "includes the people who work and live in state prison." *Id.; cf. Branti v. Finkel*, 445 U.S. 507, 519 n.13 (1980) (noting "the broader public responsibilities of . . . a prosecutor"). Deberry's county and nearby Caswell County have each had correctional staff die of COVID-19 in recent weeks, while the federal facility at Butner, which sits on the Durham-Granville County line, has suffered one of the most deadly outbreaks of any prison in the country.

A few district attorneys have publicly questioned whether they have the power to seek these sentencing modifications. *Id.* However, multiple courts have granted the motions and issued orders for release. *See, e.g.*, Consent Order Regarding Sentencing, *State v. McDonald*, No. 97-CRS-10365 (April 2020); *see also State v. Chevallier*, 824 S.E.2d 440, 448 (N.C. Ct. App. 2019) (stating "the failure to raise [an] issue [on appeal] . . . does not prevent the parties to th[e] action from entering into an agreement for appropriate relief under N.C. Gen. Stat. § 15A-1420(e)"). Advocates for people in prison who are genuinely imperiled by COVID-19—particularly those who have served a substantial majority of their sentence and who are in facilities where there have been outbreaks—might consider seeking consent from their local district attorney on a Joint Motion for Appropriate Relief in support of their client's release.

Petitions for Unscheduled Parole Review "In the Interests of Justice"

Approximately 2,000 of the 31,000+ people in North Carolina prisons, primarily those convicted and sentenced between 1981 and the 1994 Fair Sentencing reforms, remain eligible for release via the state's Parole Commission. *See Hunt v. Rand*, No. 5:10-CT-3139-FL, 2011 WL 3664340, at *1 (E.D.N.C. Aug. 18, 2011) (stating that "Section 15A–1371(b)(2) was repealed in 1994 . . . but remain[s] effective for prisoners convicted of crimes that occurred prior to the Structured Sentencing Act"), *aff'd*, 461 F. App'x 327 (4th Cir. 2012). Due to the age of their convictions, parole-eligible people also tend to be among the cohort of those incarcerated who are most vulnerable to the effects of COVID-19. The state's four parole commissioners, appointed by the governor, vote on decisions for parole in the course of their annual, bi-annual or tri-annual review of individual files, which are prepared by prison case managers and reflect the views of interested parties, who can include victims, district attorneys, the local sheriff of the person's home county, and, if they have one, the prospective parolee's attorney.

The state's parole statute can be challenging to parse. Some of the operative language in the current law is found in recent session laws that have yet to be published in the current edition of the General Statutes. The law provides that most eligible people are entitled to have their case considered by the state Parole Commission at least once a year, with the exception of those convicted of sexually violent offenses, who are to receive review every two years, and those convicted of first- or second-degree murder, who are to receive review every three years. Importantly, for purposes of the COVID-19 pandemic, "the [Parole] Commission may give more frequent parole consideration *if it finds that exigent circumstances or the interests of justice demand it*." *Atwater v. Butler*, No. 5:15-CT-3229-FL, 2018 WL 4623634, at *2–3 (E.D.N.C. Sept. 26, 2018) (emphasis added) (quoting S.L. 2015-228, § 1 (DE 65-14), *amending* G.S. 15A-1371(b)), *aff'd*, 764 F. App'x 397 (4th Cir. 2019); *Perry v. Perry*, No. 5:16-CT-3290-FL, 2019 WL 1440269, at *3–4 (E.D.N.C. Mar. 29, 2019) (quoting S.L. 2008-133, § 1, *amending* G.S. 15A-1371(b)). While it appears the Commission has rarely acted pursuant to its authority to grant people more frequent consideration "in the interests of justice," it is known to have exercised the authority on at least one occasion this year, voting to release a Greensboro man, John Coleman, otherwise not scheduled for review, who was sentenced to life in 1969, after receiving a petition on his behalf and evidence that called his fifty-year-old conviction into question. *See generally* Motion for Immediate Consideration of Parole, *State v. Coleman* (on file with author).

The "exigent circumstances" and "interests of justice" language only became part of the statute in recent years. It appears to have been added during the passage of the session laws that reduced the frequency of parole reviews for people convicted of certain sex and homicide offenses to help the law withstand challenges on *ex post facto* grounds. *See Atwater*, 2018 WL 4623634, at *3; *Perry*, 2019 WL 1440269, at *8. The addition of this language, as the *Coleman* case illustrates, provides advocates an opportunity to petition the Commission for an unscheduled parole review of eligible people who, either because of their health, the conditions in their facility, or some combination of the two, are uniquely endangered by COVID-19. In recent months, many courts around the country have invoked similar provisions to take action to protect vulnerable people. *E.g., Marlowe v. LeBlanc*, No. CV 18-63-BAJ-EWD, 2020 WL 1955303, at *3 (M.D. La. Apr. 23, 2020) ("Because . . . COVID-19 . . . [has the] ability to spread with great rapidity . . . [in] prisons, the interests of justice demand action by the Court on an

emergency basis."); *United States v. Roeder*, No. 20-1682, 2020 WL 1545872, at *3 (3d Cir. Apr. 1, 2020) ("In light of the exigent circumstances surrounding the COVID-19 pandemic . . . we were compelled to grant relief . . .").

Most people are without representation during parole reviews, and the overall process for seeking parole is rather opaque. Unlike in most states, potential parolees in North Carolina are not entitled to meet or interact with the parole commissioners. *See* Dashka Slater, *Can You Talk Your Way Out of a Life Sentence?*, N.Y. Times Magazine (Jan. 1, 2020) (identifying North Carolina and Alabama as the two states where "inmates are not even allowed to be present for the [parole] hearing"). However, applicants are permitted to be represented by counsel, and attorneys for parole applicants and other interested parties may, on request, meet in person with one of the four commissioners for half an hour and bring up to four witnesses. They also may submit written materials for consideration by the whole Commission.

Information about the Parole Commission's decisions can also be difficult to come by. However, as of this writing, at least one person is known to have been released due to the advocacy of attorneys who raised concerns about his vulnerability to COVID-19. The man, given a life sentence in 1991 for second-degree murder, had previously been approved for a Mutual Agreement Parole Program contract by the Commission and was otherwise scheduled to be released in 2021. Other attorneys are actively working on getting more cases before the Commission in the near future. At the same time, the Commission is reported to be accelerating its review of people believed to be acutely vulnerable to COVID-19. Attorneys representing parole-eligible people with special vulnerabilities to the virus who have not been notified of an unscheduled parole review should consider filing a petition asking the Commission to exercise its authority to grant one.