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The Pretrial Integrity Act

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During the 2023 legislative session, the North Carolina General Assembly made significant changes to the state's pretrial release laws in a bill informally known as the "Pretrial Integrity Act."[1] Its provisions, which took effect on October 1, 2023, most notably limit magistrates' authority to set conditions of release for defendants arrested for a new offense while on pretrial release and for defendants charged with certain high-level felony offenses, and makes pretrial release for defendants charged with the same high-level offenses discretionary. This bulletin details the newly enacted changes, how they are affected by different charging documents, the impact of the new provisions on existing pretrial release laws, and potential challenges in implementation.

I. New Statutory Provisions

A. Holds for Certain High-Level Felonies

G.S. 15A-533(c) has provided that if a defendant is charged with a capital offense, only a judge may determine whether the defendant may be released pretrial.[2] If the judge determines release is warranted, he or she sets conditions of release pursuant to G.S. 15A-534.[3] Before October 1, 2023, a defendant charged with a noncapital offense was ordinarily entitled to have conditions of release set by any judicial official.[4]

Effective for offenses committed on or after October 1, 2023, G.S. 15A-533(b) was amended to expand the list of offenses for which only a judge may set conditions of pretrial release. It now will apply to the following offenses:

- first- and second-degree murder, G.S. 14-17, and attempts to commit those offenses;
- first- and second-degree kidnapping, G.S. 14-39;
- first-degree forcible rape and sexual offense, G.S. 14-27.21 and -27.26;
- second-degree forcible rape and sexual offense, G.S. 14-27.22 and -27.27;
- statutory rape of and sexual offense with a child by an adult, G.S. 14-27.23 and -27.28;
- first-degree statutory rape and sexual offense, G.S. 14-27.24 and -27.29;
- statutory rape of and sexual offense with a person 15 years old or younger, G.S. 14-27.25 and -27.30;
- human trafficking, G.S. 14-43.11;
- assault with a deadly weapon with intent to kill inflicting serious injury, G.S. 14-32(a);
- discharging barreled weapons or a firearm into occupied property, G.S. 14-34.1;
- first-degree burglary, G.S. 14-51;
- first-degree arson, G.S. 14-58; and
- armed robbery, G.S. 14-87.[5]

1. S.L. 2023-75 (H.B. 813).
2. G.S. 15A-533(c) (right to pretrial release in capital and noncapital cases).
3. *Id.*
4. G.S. 15A-533(b) (2022), *amended by* S.L. 2023-75. (right to pretrial release in capital and noncapital cases).
5. *See* S.L. 2023-75, § 2.

A magistrate conducting an initial appearance after the arrest of a defendant charged with any of the above-listed offenses must deny conditions of release and order the defendant to be taken before a judge at the earliest reasonable opportunity. For any defendant charged with an offense not listed above, the existing rule of G.S. 15A-533(b) still applies: the defendant generally must have conditions of release set in accordance with G.S. 15A-534 by any judicial official.

For the listed offenses, the statute sets no time limit on when a judge must rule on pretrial release, although in-custody defendants are entitled to a first appearance before a judge within seventy-two hours after arrest.[6] There is no provision in G.S. 15A-533(b) for a magistrate to act when a judge has not acted.

1. Time of Offense

If a defendant is arrested for one of the listed offenses, and the offense is alleged to have been committed before October 1, 2023, then a magistrate presiding at the initial appearance is still authorized upon the arrest to set the conditions of release.

2. Inchoate Offenses

With a few exceptions, G.S. 15A-533(b) applies only to completed crimes and not inchoate versions of the listed offenses (solicitation, conspiracy, attempt). The list explicitly includes attempts to commit first- and second-degree murder but does not explicitly include attempts to commit any of the other offenses. This scheme indicates that the General Assembly did not intend to allow inchoate offenses to fall within the scope of the amended statute. The statute would, however, apply to attempts under G.S. 14-34.1 (discharging barreled weapons or a firearm into occupied property) and G.S. 14-87 (armed robbery) because those offenses encompass both completed acts and attempts as variants of the crime. If a defendant is arrested for conspiracy under G.S. 14-2.4, attempt under G.S. 14-2.5, solicitation under G.S. 14-2.6, or accessory after the fact under G.S. 14-7 in relation to any of the felonies listed under amended G.S. 15A-533(b), the magistrate should set conditions of release rather than holding the defendant for the judge to set conditions. These offenses are separate from the completed offenses and are not listed in the statute as ones for which only a judge may set conditions of pretrial release.

The pretrial procedures for a defendant charged under an alternative theory of principal liability—such as acting in concert, aiding and abetting, or accessory before the fact—should probably be conducted as if the defendant were charged with the offense itself. Under each of the theories of principal liability, a person arrested and charged for an offense is punished as provided for the underlying offense.[7] So, if a defendant is arrested as an alternate principal for any of the offenses listed under G.S. 15A-533(b), then a judge should be the judicial official to set conditions of pretrial release.

B. Holds under the Forty-Eight-Hour Provision

Also effective for offenses committed on or after October 1, 2023, new G.S. 15A-533(h) limits a magistrate's authority to set conditions of release for a defendant arrested for a new offense while on pretrial release for another pending proceeding.[8] In these cases, only a judge may

6. G.S. 15A-601(c) (first appearances).

7. *See* G.S. 14-5.2 (accessory before fact punishable as principal felon); State v. Small, 301 N.C. 407 (1980) (noting that principals in the first degree and those in the second degree are equally guilty of the offense committed and punished the same).

8. *See* S.L. 2023-75, § 2.

set conditions of release within the first forty-eight hours after arrest for the new offense. A magistrate may set conditions within the first forty-eight hours after arrest for new offenses involving violations of Chapter 20 of the General Statutes, except for Chapter 20 offenses involving impaired driving or death, namely

- impaired driving, G.S. 20-138.1;
- impaired driving in a commercial vehicle, G.S. 20-138.2;
- operating a commercial vehicle after consuming alcohol, G.S. 20-138.2A;
- operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol, G.S. 20-138.2B;
- habitual impaired driving, G.S. 20-138.5; and
- death or injury by vehicle, G.S. 20-141.4.

Procedures under new G.S. 15A-533(h) are substantially similar to the existing forty-eight-hour provisions under G.S. 15A-534.1 (pretrial release for certain domestic violence offenses) and G.S. 15A-534.7 (pretrial release for communicating a threat of mass violence on educational property or place of religious worship). For offenses subject to G.S. 15A-533(h), the judicial official (a judge in the first forty-eight hours and a magistrate thereafter) must direct a law enforcement officer, pretrial services program, or district attorney to provide a criminal history report and risk assessment, if available, for the defendant and must consider the defendant's criminal history when setting conditions of pretrial release. After conditions are set, the report must be returned to the entity that provided it. The judicial official may not unreasonably delay the determination of conditions of pretrial release for the purpose of reviewing the criminal history report. What constitutes an unreasonable delay is not defined in the statute, but this language suggests that where a criminal history report is unlikely to be promptly produced, conditions of release should be set even in its absence.

G.S. 15A-533(h) does not provide additional authorization for a judicial official to detain the defendant if the official determines the defendant is dangerous. In contrast, under G.S. 15A-534.1 and -534.7 a judicial official may detain a person for an additional reasonable period of time if the official determines "that the immediate release of the defendant will pose a danger of injury to persons" and "that the execution of an appearance bond as required by G.S. 15A-534 will not reasonably assure that such injury will not occur."[9]

1. Bond Considerations

The existing statutory provision regarding bond doubling is unchanged by the new law. When conditions of pretrial release are being determined for a defendant charged with an offense and currently on pretrial release for a prior offense, the judicial official may, but is not required to, impose a secured appearance bond in an amount at least double that of the most recent previous secured or unsecured bond for the charges.[10] If no bond has yet been required for the charges, the judicial official may impose a secured appearance bond of at least one thousand dollars.[11]

9. G.S. 15A-534.1(a)(1), -534.7(a)(1).
10. G.S. 15A-534(d3) (determining conditions of pretrial release).
11. *Id.*

2. Out-of-County Defendants

Being arrested on an out-of-county charge is not a basis for denying or delaying the setting of pretrial release conditions. In out-of-county arrests, a magistrate must conduct the initial appearance as usual, regardless of where the offense occurred. There is no authority to order that the person arrested be held for pickup by the charging county. Similarly, for offenses covered by G.S. 15A-533(h), an out-of-county defendant must be taken before a judge in the custodial county at the earliest reasonable opportunity within forty-eight hours after arrest.

If an out-of-county defendant satisfies pretrial conditions and is released, he or she then appears in court in the charging county on the court date provided to him or her. If an out-of-county defendant cannot satisfy conditions of release, the involved counties must coordinate the transportation of the defendant, since the first appearance must be held in the county where the charges are pending.[12]

3. Determination of Pretrial Release

To commit a criminal defendant to a detention facility pursuant to G.S. 15A-533(h), a magistrate must determine whether that defendant is on pretrial release. To learn this information, a magistrate can use the Criminal Justice Law Enforcement Automated Data Services (CJLEADS) database and conduct a statewide search of a defendant's criminal history, including pending proceedings. If the defendant has a pending criminal proceeding, the magistrate should determine what process was issued. If the proceeding was initiated by a citation or summons, the defendant would not have been out on pretrial release, and the magistrate may set conditions as usual.

4. Documentation of Holds

Form AOC-CR-200 (Conditions of Release and Release Order)[13] has been updated to include holds covered by the provisions of the Pretrial Integrity Act. Under the Order of Commitment section is a box to indicate charges covered by G.S. 15A-533(h), -534.1, -534.7, or -534.8. Because a single check box covers all these statutes, a judge or subsequent magistrate may not know under which one the defendant was being held. The magistrate holding the initial appearance should consider any local policies regarding documenting the appropriate statute but may want to note in the Additional Information box the specific statute being applied.

5. Time of Offense

Magistrates should note the alleged date of offense for the new charge for two reasons. First, the offense must be alleged to have been committed on or after October 1, 2023, for the Pretrial Integrity Act provisions to apply. If the date of the offense was before October 1, 2023, the magistrate has immediate authority to set conditions of release, regardless of whether the defendant was out on pretrial release. Second, to trigger G.S. 15A-533(h), the offense must be alleged to have been committed while the defendant was on pretrial release for another pending proceeding. This language signifies that the offense must have been committed *after* the defendant was arrested and released. Consider a defendant who commits two breaking or entering offenses. The defendant is arrested for one of the offenses and is released on pretrial

12. G.S. 15A-601(a) (first appearances).

13. N.C. Administrative Office of the Courts (AOC), form AOC-CR-200, Conditions of Release and Release Order, https://www.nccourts.gov/assets/documents/forms/cr200_1.pdf.

release. A later arrest for the other breaking or entering offense, if the offense is alleged to have been committed before the defendant's release, will not trigger G.S. 15A-533(h), since the offense was not alleged to have been committed while the defendant was on pretrial release for another pending proceeding. The defendant was merely arrested for the offense while on pretrial release. Even if there is a release order in effect, a defendant would not be considered to be on pretrial release until he or she has satisfied the conditions of release and is no longer in custody. As a result, if a defendant has a pending charge for which he or she is still in custody and gets served with another charge, G.S. 15A-533(h) does not apply, and a magistrate has immediate authority to set conditions for the new charge.

II. Types of Process and Pleadings

A. Charges Initiated by Citation or Summons

A citation may be used for any misdemeanor or infraction, though it is used most often for traffic cases.[14] A criminal summons may be used for any felony, misdemeanor, or infraction.[15] A criminal summons consists of a statement of the crime or infraction charged and an order directing the accused to appear in court and answer any charges. Neither a citation nor a criminal summons authorizes a law enforcement officer to take the defendant into custody, although a judge may issue an order for arrest for a defendant who fails to appear in court if the citation or summons charges a crime.[16]

There are two scenarios to consider when charges are initiated by citation or summons. One is when a defendant was initially charged by citation or summons, then commits a new offense and is arrested. Because citations and summonses do not authorize a law enforcement officer to take the defendant into custody, a defendant charged by either of those instruments cannot be considered to be on pretrial release for the charged offenses, since they were neither taken into nor released from custody. Accordingly, an arrest for a subsequent charge would not trigger the forty-eight-hour provision under G.S. 15A-533(h) because the defendant was not on pretrial release.

The second situation is when a defendant is on pretrial release and is charged with a new offense by citation or summons. In this scenario the defendant will not be taken into custody, and the forty-eight-hour provision will not apply.

B. Charges Initiated by Indictment

An indictment is used to charge a person with the commission of one or more criminal offenses.[17] Indictments can be returned for new charges and for charges initiated by a warrant or other process. If an indictment is returned for the same charge as an earlier arrest in the case and the defendant has been released from custody on pretrial release conditions, then an order for arrest should not be issued. Thus, a magistrate would be unlikely to encounter a

14. G.S. 15A-302(b) (citation).
15. G.S. 15A-303(a) (criminal summons).
16. G.S. 15A-302(f); -303(e)(2)–(3); -305(b)(3).
17. G.S. 15A-641(a) (indictments).

scenario in which a defendant is on pretrial release for a charge and is being arrested again after an indictment is returned for only that same charge. In these cases, the only requirement is to provide the defendant with notice of the indictment.[18]

If a charge is initiated by indictment, then the court may issue an order for arrest.[19] This arrest triggers G.S. 15A-533(h) only if the defendant was already out on pretrial release for another pending proceeding (that is, not the charges initiated by the indictment). In some cases, the district attorney might dismiss charges in district court before securing an indictment. An order for arrest may be issued if an indictment is later returned for the dismissed charges. If an order for arrest is issued and the defendant is on pretrial release as a result of another pending proceeding, then G.S. 15A-533(h) will apply, even if the defendant was already held for forty-eight hours when he or she was first arrested for the dismissed charges. While the law makes discretionary whether to issue an order for arrest on the indicted charges, it does not offer the same flexibility in following the necessary pretrial release procedures if the order for arrest is, in fact, issued.

If an indictment is returned for the same charge as an earlier arrest and charges additional offenses, then the court may issue an order for arrest and require new pretrial release conditions.[20] Generally, an indictment that charges additional offenses will add charges that are transactionally related to the original charges (i.e., part of the original criminal episode). Such offenses would not have been committed while the defendant was on pretrial release, so G.S. 15A-533(h) would not apply to them. In the rare circumstance that the additional offenses are alleged to have been committed while the defendant was on pretrial release from the earlier arrest, the pretrial release conditions for the new offenses would need to be set by a judge within the first forty-eight hours after arrest.

C. Orders for Arrest for Failing to Appear

If a defendant is on pretrial release and is later arrested for failing to appear in court, a magistrate ordinarily has authority to set conditions of release during the initial appearance. The reason is that failing to appear is not a new offense unless it is specifically charged as such, a relatively rare occurrence.[21]

Special bond rules apply when a defendant is arrested for failing to appear. The magistrate must at a minimum impose the conditions of pretrial release recommended in the order for the arrest.[22] If no conditions are recommended, the magistrate must require the execution of a secured appearance bond in an amount at least double that of the most recent previous secured or unsecured bond for the charges.[23] If no bond has yet been required for the charges, the secured bond must be at least one thousand dollars.[24] Once the defendant satisfies the conditions of release, he or she is considered to be on pretrial release. If the defendant is later arrested for a new offense, G.S. 15A-533(h) would apply and conditions of release for the new offense would need to be set by a judge within the first forty-eight hours of arrest.

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18. G.S. 15A-630 (notice to defendant of true bill of indictment).
19. *See* G.S. 15A-305(b)(1) (order for arrest may be issued when grand jury has returned indictment against a defendant who is not in custody and has not been released from custody on pretrial release).
20. *Id.*
21. *See* G.S. 15A-543 (penalties for failure to appear).
22. G.S. 15A-534(d1) (determining conditions of pretrial release).
23. *Id.*
24. *Id.*

III. Impact on Existing Pretrial Release Laws

A. Probation Violations

1. Probation Violation as New Offense

Under G.S. 15A-533(h), if a defendant is arrested for a new offense allegedly committed while the defendant was on pretrial release for another pending proceeding, a judge must be the official to set pretrial release conditions within the first forty-eight hours. A probation violation probably does not constitute a "new offense" within the meaning of G.S. 15A-533(h) because a probation violation alone is not a new offense.

An exception may be the probation violation based on the "commit no criminal offense" condition.[25] Even if the probation violation is based on the commission of a new crime, whether the probation violation itself would trigger G.S. 15A-533(h), or whether the offense on which the probation violation is based must be charged separately to trigger the statute, is uncertain. It seems to be the more reasonable interpretation that unless the latter has occurred, a probation violation will not subject a case to G.S. 15A-533(h). In other words, if a defendant out on pretrial release for a pending proceeding is arrested on an order for arrest for a probation violation, the magistrate will likely have the immediate authority to set release conditions at the initial appearance. If, however, charges are filed and the defendant is arrested on a warrant issued for the underlying offense, then G.S. 15A-533(h) applies, and the conditions of release for the new offense must be set by a judge within forty-eight hours after arrest.

2. Probation Violation as Pending Proceeding

G.S. 15A-533(h) likely applies to a person released in advance of a probation violation hearing who is charged for a new offense because "pending proceeding" probably includes probation violation proceedings. G.S. 15A-1345(b) provides that when a probationer is arrested for a probation violation, conditions of release are "set in the same manner as provided in G.S. 15A-534." If conditions of release are set for a probationer subject to the "danger to the public" review under G.S. 15A-1345(b1), the conditions likewise are "imposed as otherwise provided in Article 26." Given the language in these probation-related statutes, a defendant with pre-hearing conditions of release for a probation violation proceeding most likely is on "pretrial release" for the purposes of G.S. 15A-533(h). Thus, if a defendant is out on pretrial release for a probation violation and is arrested for a new offense allegedly committed while on pretrial release, G.S. 15A-533(h) applies, and the conditions of release for the new offense must be set by a judge within forty-eight hours of the arrest.

B. Pretrial Release for Impaired Driving Offenses

1. Implied Consent Offense Notice

Initial appearances for defendants charged with an offense involving impaired driving are governed by G.S. 15A-534.2 and 20-38.4. Pursuant to these provisions, if the defendant is unable to make bond, the magistrate must (1) inform the defendant in writing of the established procedure to have others appear at the jail to observe his or her condition or to administer an additional chemical analysis[26] and (2) require the defendant to list the name and telephone numbers of all people he or she wishes to contact, on a form that sets forth the procedure for

25. G.S. 15A-1343(b)(1) (regular conditions of probation).
26. G.S. 20-38.4(a)(4)a. (initial appearance for implied-consent offenses).

contacting the persons listed.[27] The names and telephone numbers should be provided on the form AOC-CR-271 (Implied Consent Offense Notice). If a defendant charged with an impaired driving offense and subject to G.S. 15A-533(h) has his or her initial appearance before a magistrate, then that defendant by definition initially will be "unable to make bond," since the magistrate is not authorized to set a bond within the first forty-eight hours of arrest. Therefore, the magistrate should provide the AOC-CR-271 form in any impaired driving case that triggers G.S. 15A-533(h).

2. Impaired Driving Hold

At the initial appearance for an impaired driving charge, generally a magistrate would determine the appropriate conditions of pretrial release in accordance with G.S. 15A-534.[28] If there is a finding of probable cause to believe a person is impaired, the magistrate must also consider whether the person is impaired to the extent that the provisions of G.S. 15A-534.2 should be imposed.[29] Because of the Pretrial Integrity Act, a magistrate is no longer authorized to set conditions of release in the first forty-eight hours after arrest for a defendant charged with an impaired driving offense and subject to G.S. 15A-533(h).

Although a magistrate cannot set conditions, he or she may still be required by statute to enter the impaired driving hold in these cases. Practically speaking, this hold may be futile since the defendant will be evaluated by another judicial official before being released. If the judge determines that the defendant is still too impaired to be safely released, the judge may maintain the hold for up to twenty-four hours after arrest. If no judge is available within the first twenty-four hours, the defendant likely will have to appear before the magistrate at the twenty-four-hour mark to have the hold lifted. The defendant would still remain in custody awaiting an appearance before a judge pursuant to G.S. 15A-533(h) for up to forty-eight hours after arrest.

3. Conditions of Release

After forty-eight hours, a magistrate may set conditions of release for a defendant charged with an impaired driving offense and subject to G.S. 15A-533(h). Because the offense is an impaired driving offense, the magistrate must set conditions in accordance with G.S. 15A-534.2, as discussed above. A magistrate would unlikely need to make determinations about the defendant's impairment at the forty-eight-hour mark because a hold can last only up to twenty-four hours following arrest.

Despite the delayed authority to set conditions of pretrial release, a magistrate may still be required to complete other tasks at the initial appearance, including considering whether the defendant's license is subject to civil revocation pursuant to G.S. 20-16.5, ordering that the vehicle driven by the defendant be seized and impounded, and informing the defendant of the procedure for having witnesses appear at the jail to observe his or her condition or perform additional chemical analyses.[30]

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27. G.S. 20-38.4(a)(4)b. (initial appearance for implied-consent offenses).

28. G.S. 15A-534.2(b) (detention of impaired drivers).

29. G.S. 20-38.4(a)(3) (initial appearance for implied-consent offenses).

30. For more on the magistrate's duties at an initial appearance for an implied-consent offense, see Shea Riggsbee Denning, The Law of Impaired Driving and Related Implied Consent Offenses in North Carolina (UNC School of Government, 2014).

C. Pretrial Release for Domestic Violence Offenses

As a special approach to setting conditions of pretrial release, a judge, rather than a magistrate, must set a defendant's pretrial release conditions during the first forty-eight hours after arrest for certain domestic violence offenses.[31] A defendant may be arrested on a charge that triggers the forty-eight-hour provision under both G.S. 15A-534.1 and 15A-533(h). In these situations, the statutes apply simultaneously, meaning that the defendant is subject to only one forty-eight-hour window. Additionally, both statutes authorize a magistrate to act after forty-eight hours. So, regardless of the statute applied, a magistrate is authorized to set conditions of release forty-eight hours after the arrest if a judge has not done so.

Because many of the felony offenses listed in G.S. 15A-533(b) are also covered in G.S. 15A-534.1, a defendant's conduct may fall within the scope of both statutes. In those situations, G.S. 15A-533(b) will control. The defendant will not be entitled to pretrial release by a magistrate, and a judge will have discretion to determine whether release is warranted for these offenses. Additionally, these cases will not be sent back before a magistrate to consider pretrial release. Sometimes in domestic violence cases, a delayed appearance before a judge—when a judge was available—can result in a dismissal of charges.[32] Because G.S. 15A-533(b) does not impose a time frame during which a judge must set conditions, there is no forty-eight-hour limitation as with G.S. 15A-534.1, and a defendant may not have the same *Thompson* remedy available for a delayed appearance.[33]

D. Other Offenses for Which a Judge Must Set Conditions

Like the forty-eight-hour rule in domestic violence cases, both G.S. 15A-534.7 and -534.8 provide that a judge—rather than a magistrate—must set a defendant's pretrial release conditions within a certain time frame after arrest for certain offenses. For cases in which a defendant is charged with communicating a threat of mass violence on educational property in violation of G.S. 14-277.6 or communicating a threat of mass violence at a place of religious worship in violation of G.S. 14-277.7, a judge must set a defendant's pretrial release conditions during the first forty-eight hours after arrest.[34] The arrest of a defendant on pretrial release who communicates a threat of mass violence will trigger the forty-eight-hour provision under both G.S. 15A-534.7 and G.S. 15A-533(h). In these situations, the statutes apply simultaneously, meaning that the defendant is subject to only one forty-eight-hour window. Additionally, both statutes authorize a magistrate to act after forty-eight hours. So, regardless of which statute is applied, a magistrate is authorized to set conditions of release forty-eight hours after the arrest if a judge has not done so.

Similarly, G.S. 15A-534.8, as enacted by S.L. 2023-6 (H.B. 40), provides a twenty-four-hour window during which a judge must set conditions of release for defendants arrested for rioting or looting under G.S. 14-288.2 or -288.6. This provision is effective for offenses committed on or after December 1, 2023. The arrest of a defendant on pretrial release who commits a rioting or looting offense will trigger both G.S. 15A-534.8 and -533(h). Where both statutes apply, the

31. G.S. 15A-534.1 (pretrial release for crimes of domestic violence).

32. *See* State v. Thompson, 349 N.C. 483, 492 (1998).

33. For more on pretrial release in domestic violence cases, see Brittany Bromell, *Pretrial Release in Criminal Domestic Violence Cases*, Admin. of Just. Bull. No. 2023/02 (UNC School of Government, 2023).

34. G.S. 15A-534.7 (pretrial release for communicating a threat of mass violence).

forty-eight-hour window under G.S. 15A-533(h) will prevail. The magistrate should note on the AOC-CR-200 that the defendant is being held pursuant to G.S. 15A-533(h). The magistrate is not authorized to set conditions until forty-eight hours after the arrest if a judge has not done so.

IV. Constitutional Challenges

A. Delayed Appearances for Defendants Arrested for Certain High-Level Felonies

Amended G.S. 15A-533(b) expands the list of offenses for which only a judge may consider conditions of pretrial release. While this revised statute does not impose a time frame during which a judge must set conditions (twenty-four hours, forty-eight hours, and so forth), defendants arrested for those offenses are entitled to a timely first appearance in accordance with G.S. 15A-601. These in-custody defendants must be brought before a district court judge within seventy-two hours of arrest or at the first regular session of district court in the county, whichever occurs first.[35] If the courthouse is closed for longer than seventy-two hours (for example, on holiday weekends), the first appearance before a district court judge must be held within ninety-six hours after arrest.

While a judge has discretion to determine whether release is warranted for the offenses listed in G.S. 15A-533(b), he or she does not have discretion to delay or deny a first appearance altogether. The failure to hold a timely first appearance and consider conditions, as required by G.S. 15A-601, could violate due process in the same way that a failure to meet the specific time limits in domestic violence cases has been found by our courts to violate due process.

Whether our courts would extend *Thompson* beyond the domestic violence context is uncertain. Also uncertain is whether the courts would find a violation of due process for delayed first appearances in situations where no specific time limits control when a judge must act. A third issue concerns whether a delay in the first appearance for these higher-level felonies, at which a judge may deny pretrial release altogether under G.S. 15A-533(b), is comparable to cases in which a defendant has the right to pretrial release conditions, such as in *Thompson*. While there are not yet clear answers to these questions, these defendants should be brought before a judge as soon as practicable to effectuate and reduce the risk of violating the defendants' rights.

Many counties offer court sessions dedicated to first appearances, during which a judge reviews defendants' conditions of release as set by the magistrate. During these sessions judges also set conditions of release for defendants who did not have conditions set by a magistrate at the initial appearance. While initial appearances and first appearances are different proceedings usually occurring at different times, G.S. 15A-601(b) permits a judge to consolidate these proceedings.

B. Delayed Appearances for Defendants Subject to the Forty-Eight-Hour Provision

Several pretrial release statutes now deviate from the procedure requiring that pretrial release conditions be determined without unnecessary delay as part of the defendant's initial appearance, typically before a magistrate.[36] Like new G.S. 15A-533(h), two of these statutes require that a judge, rather than a magistrate, set pretrial release conditions within a certain amount of time after arrest. For cases in which a defendant is charged with (1) certain domestic

35. G.S. 15A-601(c) (first appearances).
36. *See* G.S. 15A-511 (initial appearance procedures).

violence offenses, (2) communicating a threat of mass violence on educational property in violation of G.S. 14-277.6, or (3) communicating a threat of mass violence at a place of religious worship in violation of G.S. 14-277.7, a judge must set a defendant's pretrial release conditions during the first forty-eight hours after arrest.[37] Similarly, new G.S. 15A-534.8, as enacted by S.L. 2023-6 (H.B. 40), provides a twenty-four-hour window during which a judge must set conditions of release for defendants arrested for rioting or looting under G.S. 14-288.2 or -288.6. This new statute is effective for offenses committed on or after December 1, 2023.

In the domestic violence context, case law has held that the defendant must be brought before a judge at the earliest, reasonable opportunity under G.S. 15A-534.1.[38] A violation of the defendant's right to procedural due process occurs where the defendant is held without conditions of pretrial release and a judge was available to set them.[39] In those cases, the remedy for such violations is dismissal of the charges with prejudice.

The court in *State v. Thompson* did not require a showing of prejudice to preparation of the case; a violation of the requirements of the domestic violence statute supported dismissal. Outside of cases involving domestic violence under G.S. 15A-534.1, the courts have been reluctant to order dismissal for delays in setting pretrial release conditions without a showing of prejudice by the defendant.[40] However, our statutes provide that a trial court must dismiss a charge against a defendant if the court determines that a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution."[41]

According to a more recent case, a defendant can demonstrate prejudice by showing he or she would have been released earlier had he or she received a pretrial hearing. In *State v. Tucker*,[42] the defendant was arrested and indicted on several charges, resulting in a $250,000 bond. The defendant remained in custody on a kidnapping charge subject to G.S. 15A-534.1 for six months without having a pretrial release hearing before a judge. The defendant filed a motion to dismiss his kidnapping charge, arguing G.S. 15A-534.1 required dismissal. The kidnapping charge was consolidated with the other charges into one set of pretrial release conditions and a combined bond of $250,000. The defendant did not post bond and remained in custody.

On appeal, the Court of Appeals explained that the State's inadvertent failure to produce the defendant for the pretrial release hearing did not excuse the State. Rather, the absence of a flagrant constitutional violation was the relevant factor. The court noted that the defendant did not post bond after his initial arrest, and "even if the State had held a timely pretrial release hearing on the kidnapping charge, the defendant would not have been released."[43] As a result, the defendant could not show irreparable prejudice to the preparation of his case.

A defendant may be able to obtain *Thompson*-like dismissals for a violation of comparable time limits in new G.S. 15A-533(h), -534.7, and -534.8. Still, dismissal of the charges is a drastic remedy our courts may be unwilling to extend without a showing of prejudice, beyond the

37. *See* G.S. 15A-534.1, -534.7.

38. State v. Thompson, 349 N.C. 483 (1998).

39. *Id.*

40. *See*, *e.g.*, State v. Pruitt, 42 N.C. App. 240 (1979) (disapproving of failure to hold first appearance for defendant charged with felony and incarcerated for almost a month but finding no prejudice by the denial of his first appearance rights).

41. G.S. 15A-954(a)(4) (grounds for dismissal).

42. COA22-865, ___ N.C. App. ___ (Nov. 21, 2023).

43. *Id.* at 11.

domestic violence context. Even if they did, defendants held pursuant to G.S. 15A-533(b) or (h) who do not have an appearance or have a delayed appearance before a judge may have to show they would have been released earlier had they received a timely pretrial hearing. This showing may be difficult to make in cases in which the defendant has an extremely high bond, as in *Tucker*.

C. Denial of Release and *Salerno*

The setting of bail may be delayed or denied only if authorized by statute and within constitutional limits.[44] The best guidance on the constitutional parameters of a preventative detention scheme comes from the United States Supreme Court's decision in *United States v. Salerno*, in which the Court upheld the constitutionality of the preventative detention provisions of the federal Bail Reform Act. At the time the case was decided, the Bail Reform Act of 1984 allowed a federal court to detain an arrestee pending trial if the government demonstrated by clear and convincing evidence after an adversarial hearing that no release conditions would "reasonably assure . . . the safety of any other person and the community."[45] Although the *Salerno* decision did not fully define the constitutional parameters of a preventative detention scheme, it held that the federal statute "fully comports with constitutional requirements."[46]

Although neither the North Carolina Constitution nor the General Statutes expressly provide a procedure for it, several statutes in G.S. Chapter 15A, Article 26, authorize some degree of pretrial preventative detention. Given the procedures and parameters discussed in *Salerno*, it is unclear whether G.S. 15A-533(b), allowing pretrial detention for defendants charged with high-level felonies, is constitutional. The statute does not offer guidance on when judges can deny pretrial release and when they cannot. While the lack of detail is not dispositive on the issue of constitutionality, it can be argued that the statute is a substantial deviation from what was upheld in *Salerno*.

Conversely, G.S. 15A-533(b) may comport with *Salerno* because it permits judges to make individualized determinations about the right to pretrial release as opposed to requiring them to impose an automatic detention for defendants charged with these crimes. While the law does not track every issue addressed in *Salerno*, it may withstand a constitutional challenge in that it, among other factors: (1) serves a regulatory purpose in preventing danger to the community, rather than a penal purpose; (2) offers a prompt detention hearing, because defendants are entitled to a first appearance within seventy-two hours of arrest; and (3) is limited in its application to only a set list of offenses.[47]

44. *See* United States v. Salerno, 481 U.S. 739 (1987) (discussing circumstances in which preventative detention, without bond, is permissible).

45. *Id.* at 741.

46. *Id.*

47. For a more detailed discussion of these parameters, see Jessica Smith, *Bail Reform in North Carolina: Pretrial Preventative Detention*, N.C. Crim. L., UNC Sch. of Gov't Blog (Apr. 17, 2019).

V. Administrative Restructuring

Since a defendant's right to due process may be violated if he or she is not provided a timely first appearance before a judge, judicial officials must be vigilant in getting defendants to court. However, judges need not completely reschedule or restructure court sessions to accommodate defendants awaiting a first appearance before a judge.

In *State v. Jenkins*,[48] a domestic violence case, the defendant was arrested at 6:15 a.m. on a Friday and received a hearing before a judge at approximately 1:30 p.m. the same day. While the district court convened at 9:30 a.m. on Friday mornings, the afternoon session was typically devoted to bond hearings. The court of appeals held that no violation of the defendant's constitutional rights occurred even though the defendant was not brought before a judge at the first opportunity that morning. The court held that "[a]lthough defendant was detained for approximately seven hours, we find his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system."[49] Thus, where the delay is short and attributable to the normal pattern of scheduling in the county, the defendant is less likely to prevail on a claim that his or constitutional rights were violated.

The point still remains that a defendant should be seen at the earliest reasonable opportunity. Some districts have implemented the following measures to address the increase in hearings resulting from passage of the Pretrial Integrity Act:

- They hold first appearances twice per day rather than once per day. Some counties have opted to hold first appearances twice a day only on Mondays to accommodate defendants arrested over the weekend.
- They conduct audio-visual hearings with magistrates and defendants by Webex. It is not clear whether judges are conducting these hearings during court sessions or while in chambers when court is not in session.
- They ask magistrates to note recommended conditions of release instead of pre-setting them on the release order. This can be particularly useful given that magistrates are usually able to evaluate and make bond determinations based on the facts presented by the arresting officer or the private citizen who swears out charges.

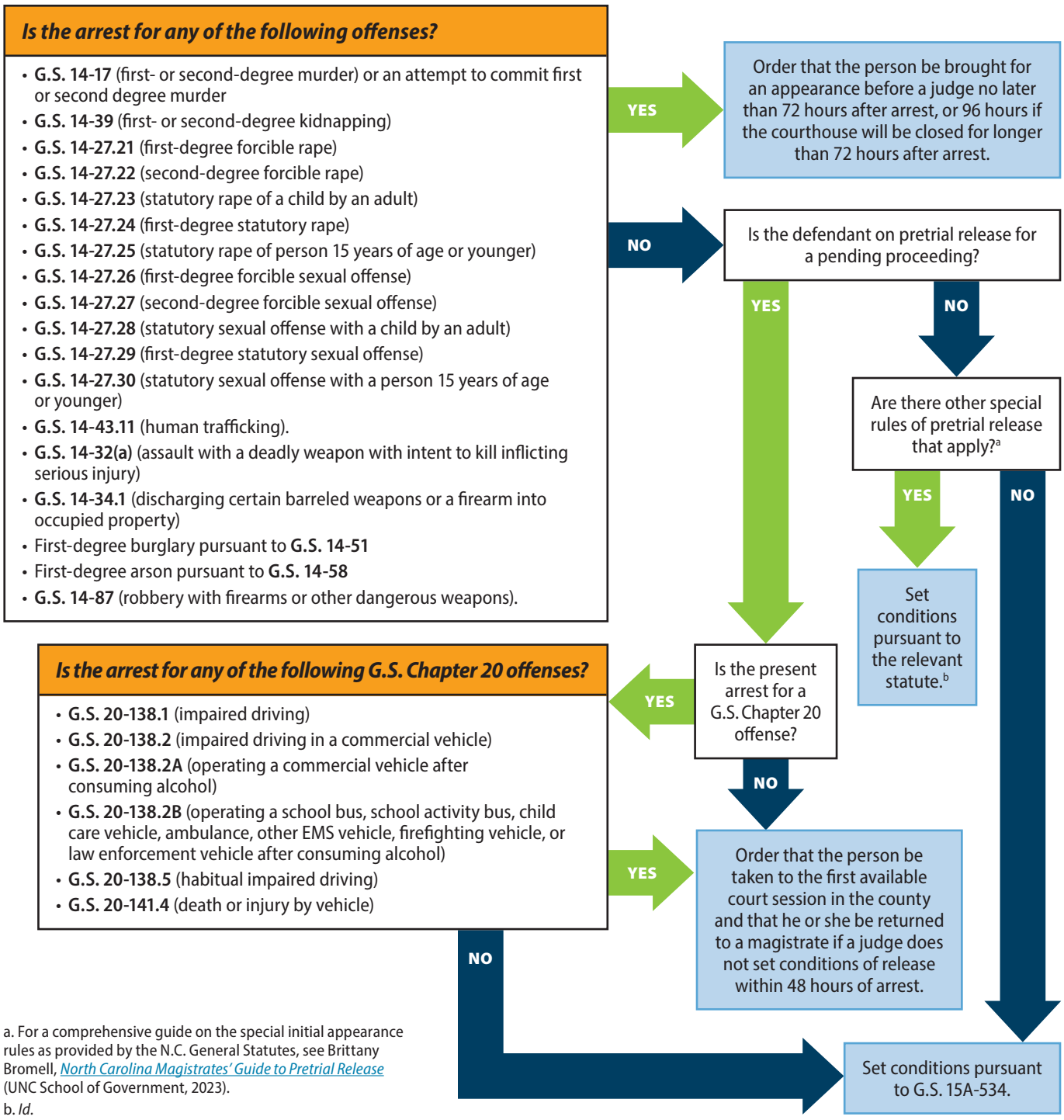
Additionally, some counties hold criminal court only one day per week. The General Statutes do not limit criminal proceedings to sessions of criminal court. In cases requiring a judge to set conditions of release, a judge presiding over a noncriminal session of court may do so.

48. 137 N.C. App. 367 (2000).
49. *Id.* at 371.

Applying the Pretrial Integrity Act

Brittany Bromell

The Pretrial Integrity Act of 2023 made significant changes to the state's pretrial release laws. The following flowchart sets out the new procedure for determining when and by whom conditions of pretrial release are to be set for newly arrested defendants.



a. For a comprehensive guide on the special initial appearance rules as provided by the N.C. General Statutes, see Brittany Bromell, *North Carolina Magistrates' Guide to Pretrial Release* (UNC School of Government, 2023).

b. *Id.*

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