

1.10 Release Pending Appeal

A. Appeal from District Court Conviction

District court's authority to modify. When a defendant appeals a district court conviction to superior court, the pretrial release conditions in place in district court remain in effect pending a trial de novo unless modified. G.S. 15A-1431(e). In other words, a bond in superior court is not an appeal bond but rather a continuation of the defendant's pretrial release conditions pending trial de novo. *See generally State v. Sparrow*, 276 N.C. 499, 507 (1970) (when a defendant appeals and exercises his or her right to be tried by a jury, the district court conviction "is completely annulled and is not thereafter available for any purpose").

The statutes raise a jurisdictional question about the district court judge's authority to modify a bond of a defendant who has requested a trial de novo. The pertinent statutes conflict on this question. *Compare* G.S. 15A-534(e)(1) (district court judge may modify pretrial release order until "noting of an appeal") *with* G.S. 7A-290 and 15A-1431(c) (if defendant appeals, clerk transfers case to superior court ten days after date of district court judgment).

As a result of the conflict in the statutes, three interpretations have arisen as to district court judges' authority to modify pretrial release conditions after an appeal: (1) the judge loses authority over the case as soon as the defendant appeals; (2) the judge loses authority at the end of that day's session even if the defendant appeals during the session (by analogy to the limits on the judge's authority to modify judgments after the end of the session, discussed *infra* in § 10.8B, Session and Term: Length, Type, and Assignment); or (3) the judge loses authority at the expiration of ten days from the date of the judgment in district court.

Because of this uncertainty, some defense attorneys have adopted the practice of filing appeals with the clerk of court on or shortly before the tenth day following the district court's judgment when they are concerned about how a district court judge may react to an appeal. *See* G.S. 15A-1431(c), (d) (providing that within ten days of entry of judgment, notice of appeal may be given in writing to clerk if defendant has not yet complied with judgment). In some districts, the clerk of court will notify the district court judge that an appeal has been filed, who then reviews the defendant's bond. Assuming the district court has the authority to modify the defendant's bond after the giving of appeal and before the expiration of ten days from judgment, there are a number of potential constraints on this practice. First, the district court would appear to have no jurisdiction to act after ten days have passed from the date of the judgment even if the clerk notifies the district court of the appeal within ten days. (The State may still apply to a superior court judge to modify the bond if necessary.) Second, there does not appear to be authority for the defendant automatically to be held in custody pending the holding of a hearing in district court to review pretrial release conditions; the conviction itself does not provide a basis for the defendant's detention because, once appealed, the conviction is vacated. Third, the district court may not have the authority to review and modify the

defendant's bond *ex parte* and without at least notice and an opportunity to be heard by counsel for the defendant. *Cf.* N.C. State Bar, 2001 Formal Ethics Opinion 15 (2002) (prosecutor may not apply *ex parte* for bond modification or revocation); *see also* 2 NORTH CAROLINA DEFENDER MANUAL § 21.1 (Right to Be Present) (UNC School of Government, 2d ed. 2012). Fourth, the defendant has a statutory and constitutional right to appeal for a trial *de novo* before a jury; any increase in bond because of the defendant's exercise of those rights is considered presumptively vindictive for the reasons discussed below.

In some districts, judges have set anticipatory bonds, to take effect if the defendant appeals. Generally, however, a court may not make an anticipatory ruling on bond or other matters; rather, the courts have indicated that if a judge wishes to address the possibility, he or she must do so in the form of a recommendation only. *See Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229 (1960) (stating generally that courts have no power to enter anticipatory judgments); *State v. Hilbert*, 145 N.C. App. 440 (2001) (disapproving of setting of anticipatory bond in probation judgment in event defendant violates; if judge addresses matter at time of probationary judgment, better practice would be to make recommendation only). Such a recommendation would not affect the defendant's release conditions, which would remain the same until a judge, considering the issue after the filing of appeal, modified the conditions. An anticipatory ruling, even in the form of a recommendation, also could have an impermissible chilling effect on the defendant's exercise of his or her rights, discussed next.

Constitutional limits. The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 24 of the North Carolina Constitution guarantee defendants in criminal cases the right to a trial by jury. Pursuant to G.S. 7A-290 and G.S. 15A-1431(b), defendants have a statutory right to appeal a district court conviction to superior court for trial *de novo*. This statutory right to appeal for trial *de novo* provides the mechanism by which defendants in misdemeanor cases assert their constitutional right to trial by jury. It is impermissible for a court to increase a defendant's bond because of a defendant's invocation of his or her statutory right to appeal and, thus, constitutional right to a trial by jury. *See Blackledge v. Perry*, 417 U.S. 21 (1974) (person convicted of offense in district court in North Carolina is entitled to pursue right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one; due process requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered trial division process); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (due process prohibits judge from increasing sentence on retrial to discourage appeal; very threat of such a punitive policy serves to chill the exercise of basic constitutional rights), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *see also In re Renfer*, 345 N.C. 632 (1997) (Judicial Standards Commission recommended removal of district court judge from office for, among other things, improperly raising defendant's bond in response to appeal).

Note: For a further discussion of these issues, see Alyson Grine, *I Want a New Trial! Now What? A District Court Judge's Authority to Act Following Entry of Notice of Appeal for Trial De Novo (Parts I & II)*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG

(Feb. 22 & 23, 2010), <http://nccriminallaw.sog.unc.edu/?p=1081> & <http://nccriminallaw.sog.unc.edu/?p=1086>. For a sample motion raising these issues, see the non-capital trial motions bank on the IDS website at www.ncids.org.

B. Appeal from Superior Court Conviction

Once a defendant's guilt is established in superior court, the judge may (but is not required to) set conditions of release pending sentencing or appeal. *See* G.S. 15A-536(a) (release after conviction in superior court); *see also* G.S. 15A-1353(b) (order setting release conditions pending appeal must be forwarded to agency having custody of defendant); G.S. 15A-1451(a) (confinement is stayed when defendant appeals to appellate division and has been released on bail). The court does not automatically consider setting release conditions; defense counsel must affirmatively move for release. If the superior court initially denies release, appellate counsel later may apply to the superior court to set release conditions. In exceptional cases, counsel may be able to obtain relief from the court of appeals (for example, if a superior court judge denies or sets a high bond on appeal of a case involving a probationary sentence). A sample motion for bond pending appeal appears in the non-capital trial motions bank on the IDS website at www.ncids.org.

Legislative note: Effective for confinement imposed as punishment for criminal contempt on or after December 1, 2013, S.L. 2013-303 (H 450) establishes bail deadlines when notice of appeal is given from an order of a clerk, magistrate, district court judge, or superior court judge. As amended, G.S. 5A-17 provides that a person found in criminal contempt who has given notice of appeal may be retained in custody for not more than 24 hours from the time of imposition of confinement without a bail determination being made by a judicial official (district court judge if confinement is imposed by clerk or magistrate, superior court judge if confinement is imposed by district court judge; and superior court judge other than superior court judge who imposed confinement). If the designated judicial official has not acted within 24 hours, any judicial official is required to hold the bail hearing.
