

1.2 Required Proceedings

At a number of points during the life of a case, the court must consider the defendant's eligibility for pretrial release. Whenever feasible, counsel should be prepared to present information on the defendant's behalf.

A. Initial Appearance

By the time counsel is appointed, the defendant ordinarily will have appeared at least once before a judicial official on the question of pretrial release. On arrest, the defendant must be taken without unnecessary delay before a magistrate or other judicial official for an initial appearance. *See* G.S. 15A-501(2); G.S. 15A-511. An initial appearance before a magistrate is required on arrest in both misdemeanor and felony cases. *See* G.S. 15A-511 (requirements of initial appearance). In most instances, the magistrate must set conditions of pretrial release. Defense counsel ordinarily has no input at this stage of the case; however, counsel who already represents the client may be able to speak with the magistrate who holds the initial appearance and thereby avoid a later bond motion. Errors made by a magistrate, such as holding a defendant without bond, may provide grounds for relief for a defendant in some circumstances. *See infra* § 1.4, Exceptions to Eligibility for Pretrial Release; § 1.11, Dismissal as Remedy for Violations. For a detailed discussion of magistrates' responsibilities at initial appearance, see Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08 (UNC School of Government, Dec. 2009) [hereinafter Smith], available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf>.

B. Misdemeanors

Generally. Unless local practice provides otherwise, a judge does not automatically review pretrial release conditions in a misdemeanor case. Typically, at initial appearance the magistrate sets a trial date in district court, which may be a week or more away. At the first trial date, the district court may appoint counsel and continue the case but does not necessarily reconsider pretrial release conditions. By the time counsel learns of appointment, the defendant may have served as much time as he or she could receive if convicted. Counsel therefore should consider moving for a bond reduction immediately after appointment or for the court date to be moved up if, for example, the defendant plans to enter a plea of guilty for time served.

Legal limits on delay. Delays in the appointment of counsel for an indigent defendant in a misdemeanor case may result in longer pretrial incarceration and may violate statutory and constitutional requirements, although the remedy for a violation is not clear.

In its 2008 decision in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the U.S. Supreme Court held that the right to counsel attaches at initial appearance before a magistrate. Although the Court did not require that a defendant have counsel at the initial appearance, it stated that counsel must be appointed within a reasonable time thereafter. North Carolina's statutes also require early inquiry into the appointment of counsel for

in-custody defendants, in misdemeanor as well as felony cases. G.S. 7A-453 states that for defendants who have been in custody for 48 hours without having counsel appointed, the authority having custody of the defendant must notify the designee of the Office of Indigent Defense Services (IDS) in counties designated by IDS—that is, the Public Defender in districts with a public defender office—and the clerk of court in all other counties. The Public Defender or clerk must take steps to ensure appointment of counsel, who then can act to protect the client’s rights, such as moving to modify pretrial release conditions. In practice, however, many districts may not be following the statute’s requirements—for example, the custodian may not have a procedure in place for reviewing whether inmates have counsel and for notifying the Public Defender or clerk.

Practical solutions. Different districts may have procedures that expedite the appointment of counsel and the consideration of pretrial release conditions by a judge, but such procedures are not in place statewide. Some public defender offices have a system for reviewing the jail list to determine whether new inmates have counsel and to ensure that counsel is appointed. Some judicial districts hold first appearances for misdemeanors, although first appearances are not statutorily required. Some magistrates at initial appearance advise defendants of their *Rothgery* rights, telling them they have a right to have counsel appointed if they qualify and noting any request for counsel on the release order or other form; it is unclear, however, whether such an advisement leads to expedited appointment of counsel. In 2009, the General Assembly revised G.S. 7A-146(11) and G.S. 7A-292(15) to provide that chief district court judges may authorize magistrates who are licensed attorneys to appoint counsel in noncapital cases for defendants entitled to counsel at state expense, but most magistrates are not attorneys.

C. Felonies

First appearance. After the initial appearance in a felony case, the defendant ordinarily appears before a district court judge for a first appearance. For an in-custody defendant, the first appearance must occur within 96 hours of arrest or at the next regular session of district court, whichever is earlier. At the first appearance, the district court judge (or clerk of court if no district court judge is available) appoints counsel and reviews the conditions of pretrial release. *See generally* G.S. 15A-601 through G.S. 15A-606 (requirements of first appearance).

The prosecutor may argue that he or she is not prepared for or on notice of a hearing on bond, but counsel should resist any further delay by pointing out that it is mandatory for the court to review the defendant’s eligibility for release at first appearance. *See* G.S. 15A-605.

In some instances, appointed counsel will enter the case early enough to represent an indigent defendant at first appearance. For example, under G.S. 7A-452(a), the Public Defender for the judicial district may appoint himself or herself to represent a defendant, subject to approval by the court; or, counsel already may represent the defendant on another matter. In an effort to reduce jail overcrowding, some places (such as Durham County through the Public Defender’s office) may have a “bond attorney” to represent

indigent defendants at first appearance. *See also infra* § 1.5D, Pretrial Services Programs (some pretrial services programs recommend pretrial release conditions at or before first appearance).

Probable cause hearing. In felony cases, the defendant is entitled to a probable cause hearing before a district court judge within fifteen working days of the first appearance. If the judge finds probable cause to bind the defendant over to superior court, he or she must review the defendant's conditions of pretrial release. *See* G.S. 15A-614. Counsel should be prepared to cite this provision because the State may argue, erroneously, that the district court no longer has jurisdiction to modify bond once it has found probable cause.

In many judicial districts, probable cause hearings seldom occur so the district court does not necessarily reconsider the defendant's eligibility for release. The probable cause stage of a case still may afford the opportunity to obtain more favorable pretrial release conditions. For example, counsel may want to argue for release or a lower bond if the probable cause hearing is continued over the defendant's objection, especially where contrary to statute. For a further discussion of probable cause hearings, see Chapter 3, Probable Cause Hearings.

Cases initiated by indictment. Some felony cases begin by indictment, with the defendant arrested under an order for arrest. *See* G.S. 15A-305(b)(1). On the defendant's arrest, the magistrate still must hold an initial appearance and determine pretrial release conditions; however, if the superior court has specified a bond amount in the order for arrest, it is unlikely that the magistrate will lower the bond.

The defendant is entitled to a first appearance thereafter, at which a judge must review pretrial release conditions. The first appearance may take place in superior court because, on indictment, the case is within the superior court's jurisdiction. As a practical matter, however, the district court holds first appearances in some districts and reviews pretrial release conditions. The defendant does not receive a probable cause hearing when the case begins by indictment.

Potential speedy trial grounds for release. Although North Carolina no longer has a speedy trial statute, there is an older statute prohibiting lengthy pretrial incarceration. If a defendant is incarcerated in jail on a felony warrant and demands a speedy trial in open court, the defendant must either be indicted during the next term of court or be released from custody, unless the State's witnesses are not available. Similarly, if an incarcerated person accused of a felony demands a speedy trial and is not tried within a statutorily set period (two terms of court, provided the two terms are more than four months apart), the person is entitled to release from incarceration. *See* G.S. 15-10; *State v. Wilburn*, 21 N.C. App. 140 (1974). For a further discussion of speedy trial, *see infra* Chapter 7, Speedy Trial and Related Issues.