

1.3 Eligibility for Pretrial Release

A. Noncapital Offenses

Generally. Under G.S. 15A-533(b), defendants charged with a noncapital offense are entitled to have pretrial release conditions determined except in specified circumstances. *See also State v. Labinski*, 188 N.C. App. 120 (2008) (subject to certain exceptions, a noncapital criminal defendant has the right to pretrial release under G.S. 15A-533). The exceptions are discussed *infra* § 1.4, Exceptions to Eligibility for Pretrial Release.

Probation violations. Generally, defendants charged with probation violations have the same right as other noncapital defendants to have conditions of release set pending a violation hearing. *See* G.S. 15A-1345(b); STEVENS H. CLARKE, *LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA* 180 (UNC Institute of Government, 2d ed. 1997). Courts sometimes set a bond to apply in the event the defendant violates a condition of probation. This practice has been questioned by the N.C. Court of Appeals and at most constitutes a recommendation should the defendant be arrested for a probation violation. *See State v. Hilbert*, 145 N.C. App. 440 (2001). Following arrest, the court must hold a preliminary hearing (essentially, a probable cause hearing) within seven working days unless a full revocation hearing is first held or the probationer waives the preliminary hearing. If the court fails to hold a timely preliminary hearing, the probationer ordinarily must be released pending the revocation hearing. *See* G.S. 15A-1345(c).

In 2009, the General Assembly created exceptions to the usual pretrial release rules in cases in which the defendant is on probation and is charged with a felony. *See infra* § 1.4C, Setting of Pretrial Release Conditions Delayed: Domestic Violence and Probation Cases; § 1.4E, Pretrial Release Conditions Denied: Capital, Probation, and Other Cases; and § 1.4F, Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases.

Infractions. A defendant charged with an infraction may not be incarcerated. *See* G.S. 15A-1113; ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* 82 (UNC School of Government, 4th ed. 2011) (describing rules for infractions); *see also Pulliam v. Allen*, 466 U.S. 522 (1984) (successful suit against magistrate for practice of setting secured bond on nonjailable offenses). Although a defendant charged with an infraction may initially be asked to post a bond in some circumstances, an unsecured bond must be set if the defendant is unable to post a secured one. *See* G.S. 15A-1113(c).

Interstate Wildlife Violator Compact. A defendant may not be arrested and required to post bond for offenses subject to the Interstate Wildlife Violator Compact. *See* John Rubin, *2008 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06, at 24–25 (UNC School of Government, Nov. 2008), available at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0806.pdf.

B. Capital Offenses

Defendants charged with a capital offense do not have the right to have pretrial release conditions determined; however, a judge (not a magistrate) has the discretion to authorize pretrial release. *See* G.S. 15A-533(c); *State v. Oliver*, 302 N.C. 28 (1981) (pretrial release of capital defendant within judge's discretion). In *State v. Sparks*, 297 N.C. 314 (1979), the court found that the judge acted within his discretion in denying bail for a defendant charged with first-degree murder even though he could not be tried capitally because North Carolina's capital scheme had been declared unconstitutional. *Sparks* may be limited to the unusual circumstances of that case and may not deny a defendant the right to have pretrial release conditions set in a first-degree murder case once the State has decided to proceed noncapitally.