

1.4 Exceptions to Eligibility for Pretrial Release

A. Generally

The setting of bail may be delayed or denied only if authorized by statute and within constitutional limits. *See United States v. Salerno*, 481 U.S. 739 (1987) (discussing circumstances in which preventive detention, without bond, is permissible). The drafters of G.S. Chapter 15A decided initially to steer clear of provisions allowing bail to be delayed or denied based on predictions of future dangerousness. *See* Official Commentary to G.S. 15A-534 (observing that drafters “steered clear of the preventive detention controversy”). Over the years, however, statutory exceptions to the right to pretrial release have multiplied; and, as a practical matter, pretrial release is sometimes delayed or denied without statutory authorization. For an in-depth discussion of potential constitutional limits on preventive detention, see 4 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 12.3, at 41–79 (3d ed. 2007) [hereinafter LAFAYE, *CRIMINAL PROCEDURE*].

By the time counsel appears in the case, some of these obstacles to pretrial release will have passed and release conditions will have been set. If a client is still being held without release conditions, counsel should make a motion to set conditions; many of the exceptions to pretrial release apply only to the setting of conditions by the magistrate at initial appearance. (The discussion below is organized from the perspective of when a magistrate may delay or deny pretrial release conditions.) The delay or denial of pretrial release conditions in some circumstances may warrant other relief as well. Provisions and practices delaying or denying pretrial release conditions have not been tested extensively other than in impaired driving and domestic violence cases (*see infra* § 1.11, Dismissal as Remedy for Violations) and may warrant challenge by defense counsel.

B. Initial Appearance Delayed

Inability to understand procedural rights. If the defendant is unable to understand his or her procedural rights, is unconscious, or is so unruly that he or she disrupts and impedes the proceeding, a magistrate may briefly postpone the initial appearance and setting of pretrial release conditions. *See* G.S. 15A-511(a)(3). This statute authorizes a brief delay only, as its effect is to deprive the defendant of other protections afforded at initial appearance, including the advisement of charges and of the right to communicate with counsel.

Defendants unwilling or unable to identify themselves. When a defendant fails to identify himself or herself, a magistrate may decide to conduct a further inquiry, including asking law enforcement to conduct a further investigation, which may have the effect of delaying the setting of pretrial release conditions. Although not specifically authorized by statute, a short delay incidental to this investigation may be permissible. If a magistrate lacks identifying information about the defendant, he or she may take that factor into account in determining the conditions of release to impose. *See* Smith at 21–22, available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf>.

A magistrate may not insist on official United States or North Carolina identification as a condition of release; any reasonable form of identification should be sufficient, even if not in writing (for example, a member of the community might vouch for the defendant's identity). *Id.* Improper insistence on official U.S. or N.C. identification may work a particular hardship on noncitizen clients. If a noncitizen client is still in custody because of such a condition when you enter the case, make a motion to the court to determine whether the client has produced sufficient identification for release. For a discussion of other pretrial release issues affecting noncitizen clients, see *infra* "Noncitizens and detainees" in § 1.4G, Circumstances Not Justifying Delay or Denial of Pretrial Release; § 1.9H, Post-Release Issues Affecting Noncitizen Clients.

C. Setting of Pretrial Release Conditions Delayed: Domestic Violence and Probation Cases

Domestic violence offenses. For certain domestic violence offenses, a defendant may be held in custody for up to 48 hours after arrest so that a judge can set conditions of pretrial release. If a judge is not available within 48 hours of arrest, a magistrate must proceed to set pretrial release conditions. *See* G.S. 15A-534.1. Note that G.S. 15A-534.1 does *not* authorize a 48-hour hold on defendants arrested for the specified offenses. A defendant must be brought before a judge at the earliest opportunity, and the failure to do so may warrant dismissal. *See State v. Thompson*, 349 N.C. 483 (1998). Litigation over this provision is discussed *infra* in § 1.11B, Domestic Violence Cases.

G.S. 15A-534.1(a)(1) also provides that a judge may delay release for a reasonable period of time, even after the defendant is brought before the judge, if the defendant's immediate release would pose a danger to a domestic violence victim or another person. *See State v. Gilbert*, 139 N.C. App. 657 (2000) (permissible for judge to delay release by additional five hours). This type of hold predated the General Assembly's enactment of the 48-hour provision and, as a practical matter, should now be rarely used because the defendant will already have been held for some time before having pretrial release conditions set.

Probationer charged with felony if insufficient information about danger. For this category of probationers, a magistrate or other judicial official must delay setting conditions if there is insufficient information about whether the defendant poses a danger to the public. *See* G.S. 15A-534(d2). "Danger" is not defined in the statute. The judicial official must record the basis for his or her decision that additional information is needed, the nature of the information needed, and a date, within 96 hours of arrest, for the defendant to be brought before a judge. If sufficient information is provided before the first appearance, the first available judicial official must set pretrial release conditions. (If the person is found to be a danger, a secured bond is required, as described in subsection F., below.) If a pretrial release determination has been delayed until the defendant's first appearance, the judge at first appearance must set conditions. It does not appear that the judge may further delay the determination. If there is insufficient information about dangerousness, which is presumably the State's burden to show, the judge must set pretrial release conditions as in other cases.

Probation violation by probationer who has pending felony charge or is subject to sex offender registration, if insufficient information about danger. For this category of probationers, a magistrate or other judicial official must delay setting conditions if there is insufficient information about dangerousness. G.S. 15A-1345(b1). “Danger” is not defined in the statute. Denial of release for this reason may last no longer than seven days. After seven days, if sufficient information has not been provided to determine dangerousness, the defendant must be brought before any judicial official to determine conditions of release. It does not appear that the judicial official may further delay the determination. If there is insufficient information about dangerousness, which presumably is the State’s burden to show, the judicial official must set conditions of release as in other cases. If a person is found to pose a danger, release conditions may be denied as described in subsection E., below.

D. Pretrial Release Conditions Set but Release Delayed: Impaired Driving and Other Cases

Impaired driving. A defendant charged with an impaired driving offense is entitled to have pretrial release conditions set. However, if the magistrate finds by clear and convincing evidence that the defendant’s impairment presents a danger of physical injury or damage to property, the magistrate must delay release until either: (1) the defendant is no longer impaired to the extent that he or she presents such a danger; *or* (2) a sober responsible adult assumes responsibility for the defendant. The defendant may be detained for this reason no longer than 24 hours. Once condition (1) or (2) is met and the defendant has satisfied any conditions of pretrial release, such as the posting of bond, the defendant must be released. *See* G.S. 15A-534.2. If release is improperly delayed or denied, grounds may exist for dismissal of the charges. For a further discussion of this type of case, see *infra* § 1.11A, Impaired Driving Cases.

Testing for AIDS or Hepatitis B. A defendant may be detained for up to 24 hours for AIDS or hepatitis B testing in accordance with the requirements of G.S. 15A-534.3. In such cases, a magistrate ordinarily will conduct the initial appearance and set pretrial release conditions and will order the defendant held for up to 24 hours for the testing to be conducted.

E. Pretrial Release Conditions Denied: Capital, Probation, and Other Cases

Capital offenses. *See* G.S. 15A-533(c); *see also supra* § 1.3B, Capital Offenses.

Certain other offenses. For the following offenses, North Carolina statutes establish a rebuttable presumption that no condition of pretrial release would assure the safety of the community if the conditions set forth in the applicable statute apply:

- certain drug trafficking offenses (G.S. 15A-533(d));
- certain gang offenses (G.S. 15A-533(e)); and
- certain methamphetamine offenses (G.S. 15A-534.6).

For the drug trafficking and gang offenses, if the statutory conditions apply, only a judge (not a magistrate) may release the person and only on finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community. *See* G.S. 15A-533(e).

Legislative note: Effective for proceedings to determine pretrial release conditions on or after December 1, 2013, S.L. 2013-298 (S 316) adds new G.S. 15A-533(f), which creates a rebuttable presumption that no condition of release will reasonably assure the defendant's appearance and the community's safety if a judicial official finds reasonable cause to believe the defendant committed a felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm, and the official also finds that (1) the offense was committed while the defendant was on pretrial release for another felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm, or (2) the defendant has previously been convicted of a felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm and not more than five years have elapsed since the date of conviction or the defendant's release for the offense, whichever is later. If the statutory conditions apply, only a judge (not a magistrate) may release the person and only on finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community.

Violation of certain health control measures. If a person violates certain health control measures and poses a threat to the health and safety of others, the judicial official must deny pretrial release until the person no longer poses a threat. *See* G.S. 15A-534.5.

Probation violation by probationer who has pending felony charge or is subject to sex offender registration, if probationer poses danger to public. For this category of probationers, if the person is found to be a danger, the judicial official must deny release conditions pending the violation hearing. G.S. 15A-1345(b1). "Danger" is not defined in the statute. As a general rule, a person charged with a probation violation is entitled to a preliminary hearing under G.S. 15A-1345(c). That statute provides that if the hearing is not held within seven working days of arrest, the probationer is entitled to be released to continue on probation pending a hearing. For probationers who have a pending felony or are subject to sex offender registration, however, G.S. 15A-1345(c) states that they must be held until the final violation hearing if they have been denied release on the ground of dangerousness. This provision may conflict with due process principles, which require that probationers be afforded a preliminary hearing "as promptly as convenient after arrest." *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (parolees); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (applying principle to probationers).

Fugitives. A fugitive from another state has a limited right to pretrial release. G.S. 15A-736 states that a judge or magistrate may allow bail if the defendant is not charged with an offense punishable by death or life imprisonment in the state where the offense was committed. Once a governor's warrant issues, a defendant does not appear to have a right to pretrial release regardless of the nature of the charges. *See* ROBERT L. FARB, STATE OF NORTH CAROLINA EXTRADITION MANUAL at 57 (UNC School of Government, 3d ed.

2013) (interpreting case law as barring pretrial release after issuance of governor's warrant).

Interstate Probation Compact. An out-of-state probationer who is subject to the Interstate Compact for Adult Supervision (G.S. 148-65.4 through G.S. 148-65.9) is not subject to the rules on extradition of fugitives. Under current practice, a probationer charged with a violation is committed to jail to await a hearing, unless waived, before an administrative officer of the Division of Community Correction, at which the administrative officer determines whether the probationer should be returned to the originating state. The hearing must take place within 15 days of arrest. *See* G.S. 148-65.8. The probationer does not receive release conditions pending the hearing, does not appear before a judge, and at present does not receive appointed counsel to assist him or her in preparing for the hearing, in determining whether to waive the hearing, or in challenging untimely hearings. For a further discussion of appointment of counsel for probationers subject to the compact, see *infra* "Interstate compact for adult offender supervision" in § 12.4C, Particular Proceedings.

Post-release supervision or parole violations. A person taken into custody for a violation of post-release supervision or parole is not subject to the provisions on pretrial release. *See* G.S. 15A-1368.6 (post-release supervision); G.S. 15A-1376 (parole).

Involuntary commitment. A defendant who commits an offense while subject to a valid inpatient involuntary commitment order does not have a right to pretrial release; rather, the defendant is returned to the treatment facility where he or she was residing. *See* G.S. 15A-533(a); G.S. 122C-254; *cf. infra* § 2.8E, Disposition of Criminal Case While Defendant Incapable to Proceed (person who is incapable of proceeding but not subject to inpatient involuntary commitment order may have pretrial release conditions set).

Federal offenses. A local officer may arrest a person for a federal offense and take the person before a North Carolina magistrate or judge, who may set pretrial release conditions in accordance with usual state procedures. In limited circumstances, the North Carolina judicial official may order the person temporarily detained without setting release conditions. *See* 18 U.S.C. 3041, 3142.

Military deserters. Military deserters are not entitled to pretrial release conditions. *See Huff v. Watson*, 99 S.E. 307 (Ga. 1919). *But cf.* G.S. 127A-54(b) (military personnel in the North Carolina National Guard who are placed in pretrial confinement in a local confinement facility pending a court martial are entitled to pretrial release in the same manner as if charged with a violation of state criminal law).

F. Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases

In some circumstances, a magistrate at initial appearance is required by statute to set certain pretrial release conditions. In all of these instances, counsel may still make a later motion to reduce or modify bond.

- If a person fails to appear, and he or she is arrested on an order for arrest (OFA) or surrendered by a surety, the magistrate must, at a minimum, impose the conditions in the OFA. If the OFA does not require particular conditions, the magistrate must set a secured bond in at least twice the amount of the previous bond, regardless of whether the previous bond was secured or unsecured. If there was not a previous bond, the magistrate must set a secured bond of at least \$500. G.S. 15A-534(d1). [Legislative note: Effective for proceedings to determine pretrial release conditions on or after December 1, 2013, the minimum amount is \$1,000 if there was not a previous bond. S.L. 2013-298 (S 316).] If the person is surrendered by a surety before he or she is arrested, the OFA should be recalled because the person has already been taken into custody and had new pretrial release conditions set; if the OFA is not recalled, the person may be wrongfully rearrested.
- If a probationer is charged with a felony and is found to be a danger, the magistrate must impose a secured bond. G.S. 15A-534(d2).
- If a person is placed on electronic house arrest, the magistrate must set a secured bond. G.S. 15A-534(a).
- In certain cases involving child victims, the magistrate must impose specified restrictions on the defendant's conduct, such as stay-away conditions. G.S. 15A-534.4.
- If fingerprints or a DNA sample have not been collected from the defendant as required by certain statutes, the magistrate must make collection a condition of pretrial release. G.S. 15A-534(a).

Legislative note: Effective for proceedings to determine pretrial release conditions on or after December 1, 2013, S.L. 2013-298 (S 316) adds new G.S. 15A-534(d3) to provide that when a defendant is currently on pretrial release for a prior offense, the judicial official must require a secured appearance bond in an amount at least double the amount of the most recent prior secured or unsecured bond for the charges or, if no bond has yet been required for the charges, in the amount of \$1,000.

G. Circumstances Not Justifying Delay or Denial of Pretrial Release

Common violations. Magistrates sometimes delay or deny release when there is no statutory authority for doing so. They may misapply the provisions described above or may delay or deny release without authority. Some common errors are as follows:

- Magistrates sometimes do not set pretrial release conditions if a person who is charged with an offense in another county is arrested in the magistrate's county. There is no authority for the magistrate in the arresting county to wait for the defendant to be transported to the charging county for the setting of release conditions; the magistrate in the arresting county must set pretrial release conditions, which are valid throughout the state, regardless of where the offense occurred. See Smith at 18–19, available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf>; see also G.S. 7A-273(7) (initial appearance before magistrate may be held anywhere in state).
- Magistrates sometimes do not set pretrial release conditions if a person is arrested based on an electronic “hit” (via the Division of Criminal Information/Police

Information Network) and the paperwork is not then available. A law enforcement officer may arrest a person if there is an outstanding warrant but the officer does not then have the paperwork. *See* G.S. 15A-401(a)(2) (arrest by officer pursuant to warrant not in possession of officer). There is no authority, however, for a magistrate to delay setting conditions to await the arrival or service of paperwork. *See* Smith at 18–19.

- Electronic hits sometimes say “no bond,” particularly in cases in which it is alleged that a probationer is an “absconder.” There is no authority for delaying or denying bond to an in-state probationer except in the circumstances described in subsections C., E., and F., above.

Noncitizens and detainers. Magistrates sometimes delay or deny pretrial conditions in cases in which they believe the defendant is not a citizen. Magistrates have no role in addressing citizenship matters. If Immigration and Customs Enforcement (ICE) has filed a detainer, the jail may detain the defendant for up to 48 hours (excluding weekends and holidays) after the defendant satisfies pretrial release conditions. 8 C.F.R. 287.7. The jail, not the magistrate, is responsible for implementing the 48-hour detainer, and the magistrate may not delay or deny conditions to give ICE more time to file a detainer or assume custody of the defendant. Under G.S. 162-62, when a person charged with a felony or impaired driving offense is confined to jail, the person in charge of the facility must attempt to determine whether the inmate is a legal resident and must make inquiry to ICE if the inmate’s status cannot be determined. However, the statute provides that “[n]othing in this section shall be construed to deny bond to a prisoner or to prevent a prisoner from being released from confinement when that prisoner is otherwise eligible for release.” G.S. 162-62(c).

If the magistrate has set conditions but the jail refuses to release a noncitizen client, consider filing a petition for writ of habeas corpus. A sample petition, with supporting documents, is available on the non-capital motions bank on the IDS website, www.ncids.org.

For a discussion of other pretrial release issues that may affect noncitizen clients, see *supra* “Defendants unwilling or unable to identify themselves,” in § 1.4B, Initial Appearance Delayed, and *infra* § 1.9H, Post-Release Issues Affecting Noncitizen Clients.