1.6 Law Governing Judge's Discretion

Although judges have considerable discretion in specifying conditions of pretrial release, some constraints exist.

A. Factors

G.S. 15A-534(c) lists several factors that judicial officials must consider in setting pretrial release conditions. They are:

- the nature and circumstances of the offense charged;
- the weight of the evidence against the defendant;
- the defendant's family ties, employment, financial resources, character, and mental condition;
- whether the defendant is so intoxicated that he or she would be endangered if released without supervision;
- the length of the defendant's residence in the community;
- the defendant's record of convictions;
- the defendant's history of flight to avoid prosecution or failure to appear at court proceedings; and
- any other evidence relevant to pretrial release.

Judicial officials often concentrate on the nature of the offense in determining pretrial release. G.S. 15A-534(c), however, requires judicial officials to consider all of the above factors. *But cf. State v. Gilbert*, 139 N.C. App. 657 (2000) (although judicial official must consider these factors, burden is on the defendant to demonstrate that the judicial official did not do so); *State v. Haas*, 131 N.C. App. 113 (1998) (even if factors were all in defendant's favor, they did not mandate particular bond); *State v. Eliason*, 100 N.C. App. 313 (1990) (magistrate's failure to consider all factors did not warrant dismissal of charges). Studies have indicated that the seriousness of the charged offense does not necessarily predict whether the defendant will fail to appear for court or commit a new crime. *See, e.g.*, STEVENS H. CLARKE ET AL., REDUCING THE PRETRIAL JAIL POPULATION AND THE RISKS OF PRETRIAL RELEASE: A STUDY OF CATAWBA COUNTY, NORTH CAROLINA (UNC Institute of Government, 1988).

B. Restrictions on Activities

Generally. In addition to imposing one of the five types of pretrial release, a judicial official may place restrictions on travel, associations, conduct, and place of abode. *See* G.S. 15A-534(a) (general restrictions); G.S. 15A-534.1 (restrictions for certain domestic violence offenses); G.S. 15A-534.4 (restrictions for certain sex offenses and crimes of violence against children). The restrictions must be reasonable and must relate to the goals of pretrial release. *See* G.S. 15A-534(b) (identifying goals of pretrial release).

Practice note: Defense counsel should be prepared to suggest to the court and prosecutor suitable non-financial conditions in lieu of a secured bond.

Continuous alcohol monitoring. Effective for offenses committed on or after December 1, 2012, G.S. 15A-534(a) allows judicial officials to include as a condition of pretrial release for any criminal offense that the defendant abstain from alcohol consumption, as verified by the use of a continuous alcohol monitoring (CAM) system of a type approved by the Division of Adult Correction, and that any violation be reported by the monitoring provider to the district attorney. G.S. 15A-534.1, which prescribes special pretrial release procedures for domestic violence offenses, authorizes the same condition. The revisions to these statutes were part of a larger act authorizing CAM in a range of circumstances, including as a condition of probation, as part of a sentence for impaired driving, and in civil custody cases. 2012 N.C. Sess. Laws Ch. 146 (H 494), as amended by 2012 N.C. Sess. Laws Ch. 194 (S 847).

Previously, CAM was authorized as a pretrial release condition under G.S. 15A-534(i) for certain impaired driving offenses only; that statute was repealed with enactment of the broader authorization for CAM in amended G.S. 15A-534(a). Imposition of CAM as a pretrial release condition for offenses in which alcohol use is not a factor may raise constitutional issues. *See Berry v. District of Columbia*, 833 F.2d 1031 (D.C. Cir. 1987) (under Fourth Amendment, drug testing as condition of pretrial release is permissible only if it is based on individualized suspicion of drug use and is reasonably related to goals of pretrial release); *cf.* G.S. 15A-1343(a1)(4a), (b1)(2c) (CAM may be imposed as condition of probation in cases not involving impaired driving only when alcohol dependency or chronic abuse has been identified by a substance abuse assessment).

The CAM legislation does not provide for assessment of costs for CAM when imposed as a condition of pretrial release. *Cf. supra* § 1.5C, Electronic House Arrest (applicable statute provides for assessment of costs for EHA in specified circumstances); G.S. 15A-1343.3(b) (statute provides for payment of CAM costs to provider when CAM is imposed as condition of probation). The Administrative Office of the Courts has taken the position that in the absence of statutory authorization, costs may not be assessed for CAM as a condition of pretrial release. As a practical matter, however, the CAM provider is unlikely to agree to put a defendant on CAM unless the provider receives payment. A defendant's inability to pay may give counsel a basis for arguing for alternative conditions of release that do not impose a financial barrier to release.

C. Secured Bond as Last Resort

The judicial official must impose one of the less onerous types of pretrial release (written promise to appear, unsecured bond, or custody release) unless he or she determines that such release "will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses." G.S. 15A-534(b); *see also State v. Labinski*, 188 N.C. App. 120 (2008) (finding substantial statutory violation by setting of secured bond where there was no evidence that defendant would pose injury to

another person without a secured bond, but upholding denial of motion to dismiss charges because defendant was not prejudiced in preparation of her defense); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc) (incarceration of those who cannot afford money bail, without meaningful consideration of other forms of pretrial release, violates due process and equal protection); COMMISSION FOR THE FUTURE OF JUSTICE AND THE COURTS IN NORTH CAROLINA, WITHOUT FAVOR, DENIAL OR DELAY: A COURT SYSTEM FOR THE 21ST CENTURY at 54 (1996) (as part of recommendations for criminal justice system, Futures Commission recommended that officials setting conditions of pretrial release "should be encouraged to follow present law favoring release on conditions that do not require a secured bond"). If local policy requires it, a judicial official must make written findings when imposing a secured bond instead of other types of pretrial release. *See* G.S. 15A-535(a); *State v. O'Neal*, 108 N.C. App. 661 (1993) (lack of findings in record did not establish that court failed to consider appropriate factors in imposing secured bond).

D. Amount of Secured Bond

Some judicial districts have secured bond schedules, with recommended amounts for different offenses. The judicial official is still required to consider the facts of the particular case, however. The amount of a secured bond is supposed to be based primarily on the risk of nonappearance by the defendant, not on potential dangerousness or risk of harm; potential dangerousness is supposed to be taken into consideration in deciding whether to impose a secured bond at all. *See State v. Jones*, 295 N.C. 345 (1978) (relying in part on art. I, sec. 27 of the North Carolina Constitution, which prohibits excessive bail, court notes that primary purpose of appearance bond is to assure defendant's presence at trial); G.S. 15A-534 Official Commentary; *see also Stack v. Boyle*, 342 U.S. 1 (1951) (bail set in amount higher than reasonably necessary to assure defendant's appearance excessive under Eighth Amendment); 4 LAFAVE, CRIMINAL PROCEDURE § 12.2(a), (b), at 26–37 (discussing potential limits on amount of money bail and impact of defendant's poverty). Studies have indicated a weak relationship between the size of the bond and whether the defendant will appear in court. *See* STEVENS H. CLARKE & MIRIAM S. SAXON, PRETRIAL RELEASE IN DURHAM, NORTH CAROLINA (UNC Institute of Government, 1987) (so finding).

As a practical matter, judicial officials may set a high secured bond, one the defendant is unlikely to make, when they believe the defendant would pose a danger if released. Such a practice arguably amounts to a form of preventive detention not specifically authorized by statute. *See supra* § 1.4, Exceptions to Eligibility for Pretrial Release. It may be difficult, however, for a defendant to establish that a high bond was not for the purpose of assuring his or her appearance at trial. *See* 4 LAFAVE, CRIMINAL PROCEDURE § 12.3(a), at 41–42 (noting "sub rosa character" [covert nature] of high bail as a means of imposing preventive detention).

E. Type of Security

G.S. 15A-534(a) appears to provide that when a judicial official requires a secured bond, the judicial official may not dictate the type of security the defendant must provide. The statute allows the judicial official to choose among the five different forms of pretrial release (written promise to appear, unsecured bond, etc.); but, if the judicial official chooses a secured bond, a defendant may satisfy the bond by any of the indicated forms of security (cash, mortgage, or surety). Nevertheless, some judicial officials specify that defendants must post all cash to satisfy a secured bond. G.S. 15A-531(4) ameliorates the potential hardship of an all-cash bond by providing that a cash bond may be satisfied by the posting of a secured bond by a "surety bondsman" (a licensed agent of an insurance company) except in child support contempt proceedings. A "professional bondsman," however, may not post a secured bond when a cash bond is required. For a discussion of these two types of commercial bondsmen, see *supra* § 1.5B, Types Requiring Security. Check with the clerk of court for a list of surety and professional bondsmen registered to practice in your district. *See* G.S. 58-71-140 (surety and professional bondsmen must register with superior court clerk in counties where they write bail bonds).

Some districts require the posting of cash if the judicial official employs a variant of the term cash, such as "U.S. currency," "cash money," or "green money." This practice appears inconsistent with the above statutory provisions on the posting of bond by a surety bondsman in lieu of cash.

Legislative note: Effective December 1, 2013, S.L. 2013-139 (H 762) amends G.S. 15A-531(4) to provide that a bail bond signed by either a surety bondsman or a professional bondsman is the same as a cash deposit. (A cash bond in a child support contempt matter still must be satisfied by cash.)

F. Source of Funds for Secured Bond

The court may refuse to accept money or property offered as security where the State proves by the preponderance of the evidence that the security, because of its source, will not reasonably assure the appearance of the defendant. *See* G.S. 15A-539(b). This issue may arise, for example, in a drug case where the evidence shows that a "kingpin" is trying to post "drug money" for the release of a defendant who is a smaller player in the drug trade.