1.9 Post-Release Issues

A. Modification of Pretrial Release Conditions

On prosecutor's motion. Under G.S. 15A-539, the prosecutor may apply to an appropriate district or superior court judge for revocation or modification of a release order. *See also* G.S. 15A-534(f) (any judge may revoke release order for good cause). The prosecutor may not apply ex parte for revocation or bond modification. *See* N.C. State Bar, 2001 Formal Ethics Opinion 15 (2002) (so stating); *see also State v. Hunt*, 123 N.C. App. 762 (1996) (grand jury issued indictment against defendant who was represented by counsel on other charges, and prosecutor asked judge to issue arrest order and set bond for charges in indictment; court found that prosecutor's request was not improper ex parte contact since charges were new, implying that prosecutor may not proceed ex parte for bond modification on pending charges). Just as prosecutors usually insist on advance notice of a bond reduction hearing, defense counsel should request sufficient time (24 hours, for example) to investigate and prepare to meet a motion to modify or revoke.

The factors the judge must consider in initially setting pretrial release conditions (*see supra* § 1.6A, Factors) also may bear on a prosecutor's motion to revoke or modify. If the judge revokes a release order, the defendant has the right to have new conditions of pretrial release determined, and counsel should request that they be set. *See* G.S. 15A-534(f).

In habitual felon cases. In cases in which a person charged with a felony is later indicted as a habitual felon, judicial officials sometimes will issue an order for arrest and set additional release conditions when the defendant is taken into custody. This practice does not appear to be permissible. Being a habitual felon is a status, not a crime. If the prosecutor believes that stricter release conditions are appropriate in light of the habitual felon indictment, the proper practice would be for the prosecutor to make a motion, with proper notice to the defendant as in other cases, to modify the existing pretrial release conditions. *See also* Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07, at 19–21 (UNC School of Government, Aug. 2013) (favoring this approach), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf. In considering a request to modify pretrial release conditions, counsel should ask that the court consider the factors discussed *supra* in § 1.6A, Factors, and not rely solely on the nature of the charges. Counsel also may argue that the State made the court aware of the defendant's prior record when it previously set bond, and the State's subsequent charging decision does not constitute a change that warrants modification, particularly if the defendant has made his or her prior court appearances.

B. Consequences of Violation of Conditions

Generally. A judicial official may revoke a pretrial release order and issue an order for a defendant's arrest if (1) the defendant violates conditions in the order, such as a

requirement to stay away from a particular location; and (2) the judicial official has jurisdiction over the case. *See* G.S. 15A-534(d) (arrest may be ordered for violation); G.S. 15A-534(e) (describing when judicial official has jurisdiction to modify pretrial release order). Thus, if a defendant violates pretrial release conditions before he or she appears in court for the first time, a magistrate may revoke pretrial release and issue an order for arrest. *See* G.S. 15A-534(e). Thereafter, a judge at the level of court in which the case is then pending (district or superior) has jurisdiction to revoke release and issue an order for arrest.

Upon arrest, whether ordered by a magistrate or judge, the defendant must be taken before a magistrate for an initial appearance, at which the magistrate must set new pretrial release conditions. *See* G.S. 15A-511(a)(1).

Warrantless arrests. Effective for violations of pretrial release conditions occurring on or after December 1, 2011, G.S. 15A-401(b) authorizes law enforcement officers to make a warrantless arrest for any violation of a pretrial release order under G.S. 15A-534, the general provision on pretrial release. Officers may make a warrantless arrest on this basis regardless of whether the violation occurs in or out of their presence. *See* G.S. 15A-401(b)(1); G.S. 15A-401(b)(2)f.

G.S. 15A-401(b) also authorizes law enforcement officers to make a warrantless arrest for a violation of a pretrial release condition under G.S. 15A-534.1(a)(2), which sets out certain conditions that may be imposed in domestic violence cases, such as a "stay away" condition. These provisions predate the broader authorization for warrantless arrests, discussed immediately above, and now appear redundant. A defendant arrested for a violation of a pretrial release condition in a domestic violence case is *not* subject to the 48-hour law applicable to domestic violence offenses because the 48-hour requirements, in G.S. 15A-534.1, apply only when a defendant is *charged* with one of the offenses listed in that statute. A violation of pretrial release conditions is not itself a new offense, and pretrial release conditions must be set as in other cases. For a further discussion of pretrial release in domestic violence cases, including remedies for improper holds, see *infra* § 1.11B, Domestic Violence Cases.

Contempt. Some magistrates issue arrest warrants for contempt for violations of pretrial release conditions. This practice is improper. It is unclear whether violation of a pretrial release order would constitute a contempt at all. A pretrial release order authorizes release of the defendant on condition that he or she comply with the terms of the order. The remedy provided for a violation is revocation of release and the setting of new or modified conditions (higher bond, stricter conditions, etc.). *See* G.S. 15A-534(e), (f). There is no specific provision for contempt, unlike in other statutes. *See* G.S. 5A-11(a)(9a) (providing that a willful refusal to comply with a term of probation is a form of contempt as well as a ground for revoking probation); 18 U.S.C. 3148 (specifically authorizing contempt for violation of pretrial release conditions in federal criminal cases). *But see* G.S. 15A-546 (stating that article on bail does not affect exercise by court of its contempt powers); G.S. 5A-11(a)(3) (authorizing contempt for violation of court order).

Assuming that a violation of a pretrial release condition could be prosecuted as a contempt, it would be improper for a magistrate to issue an arrest warrant for the "offense" of criminal contempt (as a magistrate could do for criminal offenses in general). Specific procedures must be followed for contempt. If a violation of a pretrial release condition could be considered a contempt, it would be an indirect criminal contempt because committed outside the presence of the court; proceedings for indirect criminal contempt must begin with an order to show cause against the person (which may or may not be accompanied by an order for arrest). *See* G.S. 5A-15; G.S. 5A-16. Magistrates ordinarily have no authority to institute indirect criminal contempt proceedings. *See* G.S. 7A-292(2) (authorizing magistrates to punish for direct criminal contempt only); *cf.* G.S. 50B-4(a) (providing that an authorized magistrate may schedule a show cause hearing in district court for a violation of a domestic violence protective order in certain circumstances).

For a further discussion of contempt, including the right to counsel in contempt proceedings, see *infra* § 12.3D, Contempt.

Violation of conditions before release. In setting pretrial release conditions, some judges set conditions that purportedly apply while the defendant is still in custody—for example, a condition in a domestic violence case that the defendant not communicate with the victim before or after release from jail. Because conditions of pretrial release take effect only when the defendant is released, pre-release conditions may be unenforceable. Other procedures, such as a motion for and entry of a domestic violence protective order prohibiting the defendant from contacting the victim, may be necessary. *See State v. Orlik*, 595 N.W.2d 468 (Wis. Ct. App. 1999) (holding that statutes governing conditions of release did not authorize court to impose conditions, including no-contact order, on defendant who remained incarcerated pending trial; court had authority under other statutes to enter protective order for safety of victims and witnesses if supported by sufficient evidence and findings); *see also State v. Tavis*, 978 A.2d 465, 467–68 (Vt. 2009) (noting that state legislature amended pretrial release statute in response to earlier decision by court holding that "conditions of release under the prior statute were enforceable only when a defendant was, in fact, released from custody"; current statute specifies that a no-contact order takes effect immediately "regardless of whether the defendant is incarcerated or released"). *But cf. State v. Gandhi*, 989 A.2d 256 (N.J. 2010) (holding that compliance with court order is required, regardless of its deficiencies, until set aside; therefore, incarcerated defendant's violation of no-contact condition in bail order could be basis for elevating stalking offense to higher degree).

C. Consequences of Failure to Appear

Several consequences may follow from a defendant's failure to appear for court, including:

- issuance of order for arrest (G.S. 15A-305(b)(2));
- setting of secured bond in an amount required by statute (G.S. 15A-534(d1));
- surrender by surety (G.S. 15A-540);

- filing of criminal charge of failure to appear (G.S. 15A-543);
- forfeiture of bond (G.S. 15A-544.1 through G.S. 15A-544.8);
- contempt proceedings for failing to appear (G.S. 15A-546; G.S. 5A-11(a)(3)); and
- in motor vehicle cases, revocation of the defendant's license to drive (G.S. 20-24.1, 20-24.2).

In most instances, a failure to appear results in an order forfeiting any previous bond and an order for arrest; the defendant is then taken into custody by a law enforcement officer or surrendered by a surety (bail bondsman) on the bond. The bond amount following arrest or surrender is set by statute. If no bond is described in the order for arrest, the magistrate must set a bond in at least twice the previous amount of the bond and make it secured. If the defendant was not under bond, the magistrate must impose at least a $500 secured bond. 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).] Defense counsel may take some steps, discussed in subsection D., below, to address these consequences.

In motor vehicle cases in which the defendant fails to appear, the court may report the failure to the Division of Motor Vehicles, which will revoke the defendant's driver's license. *See* G.S. 20-24.1; G.S. 20-24.2. A defendant who has failed to appear and had his or her license revoked has the right to have the matter recalendared for trial. *See* G.S. 20-24.1(b1). This provision was added because in some districts the State would not recalendar the case, leaving the defendant's license revoked indefinitely, unless the defendant agreed to plead guilty. The cited statute gives the defendant the right to plead not guilty and proceed to trial, regardless of the passage of time. *See also Klopfer v. North Carolina*, 386 U.S. 213 (1967) (finding unconstitutional North Carolina's former nolle prosequi procedure, under which the prosecutor could take an indefinite dismissal with leave and the defendant had no means to obtain a dismissal or have the case restored to the calendar for trial).

D. Orders for Arrest

When a person on pretrial release fails to appear, the court may issue an order for the person's arrest. Defense counsel should consider the following steps if a client fails to appear.

- Try to avoid having the court issue an arrest order. Ask for time to find your client and get him or her to court that day.
- If the court orders the client's arrest, notify the client and ask him or her to contact you immediately.
- If you reach the client before he or she is arrested (or surrendered by a surety on the bond), make a motion to strike the arrest order and bond forfeiture and to reinstate the previous pretrial release conditions. Have your client present for the motion and be prepared to explain why he or she was unable to appear at the scheduled time—for example, the client was sick, was told the wrong court date, or otherwise was not at fault. A form motion to strike can be found in the non-capital trial motions bank at

www.ncids.org. In this situation, you should advise your client that he or she may be taken into custody upon entering the courtroom and will be taken to jail if the judge refuses to strike the order.

- If the client has been arrested and new pretrial release conditions have not been set, move to have pretrial release conditions set. *See* G.S. 15A-534(f) (upon application after revocation of pretrial release, defendant entitled to have new conditions determined). If conditions have already been set under G.S. 15A-534(d1), under which the magistrate must set a secured bond according to the minimums in that subsection, you may move to reduce the bond, showing why a reduction is appropriate.

E. Bond Forfeitures

Appointed counsel's role. Appointed counsel typically plays a limited role with respect to bond forfeitures for failure to appear. If counsel locates the client before arrest, counsel typically files a single motion asking the court to strike the order for arrest, reinstate the previous conditions of pretrial release, and strike the bond forfeiture. Because counsel usually makes this motion soon after a failure to appear, the motion ordinarily falls within the rules for striking forfeiture orders, discussed below.

After arrest, appointed counsel ordinarily is not involved in the question of bond forfeiture. Nevertheless, counsel may need to inform the client (or family members or others who have posted security) of the procedure for dealing with a bond forfeiture.

Striking forfeiture order. If the defendant (called the "principal") fails to appear, the court enters an order forfeiting the bond. *See* G.S. 15A-544.3. The forfeiture order must be served on the defendant and any surety listed on the bond by first-class mail within thirty days of entry of forfeiture. *See* G.S. 15A-544.4.

A forfeiture may only be set aside for one of the following reasons:

- the defendant's failure to appear has been stricken;
- the charges for which the defendant was under bond have been disposed;
- a surety has surrendered the defendant;
- an order for arrest has been served on the defendant;
- the defendant has died;
- the defendant was imprisoned in the North Carolina Division of Adult Correction or in a unit of the Federal Bureau of Prisons located in North Carolina at the time of the failure to appear; or
- the defendant was incarcerated anywhere else in the country and the district attorney for the county where the charges were pending received notice of this and the defendant remained in custody for ten days after receipt of the notice.

G.S. 15A-544.5(b). If one of the reasons listed in G.S. 15A-544.5(b) applies, the court must set aside the forfeiture.

The judge may enter an order setting aside a forfeiture at the time he or she strikes a failure to appear and recalls any order for arrest. *See* G.S. 15A-544.5(c); *see also* G.S. 15A-544(b) (forfeiture *must* be set aside if court strikes failure to appear and recalls order for arrest). Otherwise, the defendant or any surety may make a written motion to set aside a forfeiture within 150 days of notice of forfeiture, stating the applicable reason under G.S. 15A-544.5(b). *See* G.S. 15A-544.5(d)(1). The motion must be served on the district attorney and the attorney for the county board of education. *See* G.S. 15A-544.5(d)(2).

If neither the district attorney nor the local board of education files an objection to the motion by the twentieth day after it was served, the clerk must enter an order setting aside the forfeiture, "regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either." G.S. 15A-544.5(d)(4). Only if the district attorney or the board of education objects is a hearing held. *See* G.S. 15A-544.5(d)(5).

Relief from final judgment of forfeiture. If the forfeiture order is not set aside, it becomes a final judgment of forfeiture. *See* G.S. 15A-544.5(d)(7); G.S. 15A-544.6. The defendant or surety may only get relief from the final judgment if not given proper notice of forfeiture or other extraordinary circumstances exist. *See* G.S. 15A-544.8(b). A motion for relief must be filed within three years of the date the judgment of forfeiture became final. *See* G.S. 15A-544.8(c)(1).

Revocation of driver's license. In certain motor vehicle cases, an unvacated forfeiture of a cash bond may result in revocation of a defendant's license to drive. *See* G.S. 20-4.01(4a) (defining that event as a conviction); G.S. 20-24 (requiring that report of conviction be sent to DMV).

F. Surrender by Surety

Surrender of a defendant by a surety is governed by G.S. 15A-540 and G.S. 58-71-20 through G.S. 58-71-30. To the extent Chapter 15A and Chapter 58 conflict, Chapter 15A controls. *See* G.S. 58-71-195 (so stating). G.S. 58-71-30 allows a surety to request a judicial official to order the arrest of a defendant for the purpose of surrendering him or her, but a judicial official may issue the order only if it is authorized by G.S. 15A-305, which gives the grounds for orders for arrest. While a surety may surrender a defendant who has failed to pay the agreed-on premium to the surety (*see* G.S. 58-71-20), a private financial dispute of that kind would not appear to satisfy any of the grounds for issuance of an order for arrest (OFA) under G.S. 15A-305. If grounds exist for arrest under G.S. 15A-305 and the defendant has already appeared in court, a surety would have to request an arrest order from a judge, not a magistrate. *See supra* "Generally" in § 1.9B, Consequences of Violation of Conditions (discussing limits on magistrates' jurisdiction to revoke pretrial release conditions); *see also* Smith at 44–45 (cautioning magistrates about issuing orders for arrest on surety requests), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf.

If a surety decides to go off a bond and surrender the defendant before a failure to appear by the defendant, the original pretrial release conditions should remain the same,

although the defendant will have to arrange for a new surety or other security on the bond to obtain release. If a surety surrenders the defendant after a failure to appear, the defendant is entitled to have new conditions of pretrial release determined. *See* G.S. 15A-540(c). The rules on doubling and securing the bond come into play in that instance, however. *See supra* § 1.4F, Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases.

Sometimes confusion arises when a surety surrenders a defendant after an OFA has been issued for the defendant's failure to appear. If the surety surrenders the defendant *before* he or she is arrested by a law enforcement officer, the OFA is supposed to be stricken. The reason is that the surrender accomplishes the purpose of the OFA—that is, the defendant is returned to custody and new pretrial release conditions are set. If the OFA is still outstanding, counsel should move to strike it to prevent the defendant's rearrest. If a surety surrenders a defendant *after* the defendant is arrested by a law enforcement officer, there should be no effect on the defendant's pretrial release conditions, which a magistrate or other judicial official should have redetermined when the defendant was arrested.

G. Return of Security

G.S. 15A-534(h) provides that a bail bond is binding on the obligor until one of the listed circumstances occurs. Unless forfeited, cash or other security posted by a defendant must be returned to him or her in the described circumstances. *See also* G.S. 15A-547.1.

Generally, a bail bond terminates on conclusion of the proceedings at the trial level. *See* AOC Form AOC-CR-201, "Appearance Bond for Pretrial Release," Side Two (Mar. 2009) (so stating). If the defendant has posted cash, the clerk of court in some counties automatically sends the defendant a check. In other counties, the defendant must apply to the clerk for return of the money and must present the receipt previously issued by the clerk. *See also* G.S. 58-74-10 (providing for cancellation of mortgage executed as security on bond). Defendants posting a cash bond may not get their money back, however, if they have unpaid obligations in the case because the appearance bond form (AOC-CR-201) requires defendants to agree that any cash posted by them may be used to satisfy their obligations in the case. *See supra* § 1.5B, Types Requiring Security. For a further discussion of the procedures followed by clerks in returning cash bonds, see 1 JOAN G. BRANNON & ANN M. ANDERSON, NORTH CAROLINA CLERK OF SUPERIOR COURT PROCEDURES MANUAL at 20.15 (UNC School of Government, 2012).

Defendants who pay a percentage of the bond amount to a bondsman ordinarily do not get their money back at the end of the case. *Cf.* G.S. 58-71-20 (indicating that defendant is entitled to return of premium paid to bondsman who surrenders defendant before a breach except in specified circumstances). If the defendant's bond is reduced after the defendant and surety enter into an agreement, the surety is not required to return any portion of the premium to the defendant. *See* G.S. 58-71-16.

H. Post-Release Issues Affecting Noncitizen Clients

Noncitizen clients who have been arrested may be subject to a detainer by Immigration and Customs Enforcement (ICE). If a noncitizen client makes bond in the state criminal case but ICE has issued a detainer (also called a hold), the client is taken into custody by ICE on the client's release from jail and, unless released by ICE, may not be available to appear in and defend the criminal case. As a result, the client may be called and failed in the state criminal case, be the subject of an order for arrest, and, most important for this discussion, have the bond forfeited. If after making bond the client is never going to be able to appear in the criminal case, there is little benefit for the client or a family member to pay a bondsman to post bond. It also may be difficult for the client or a family member who posts cash or a property bond to set aside a forfeiture of the bond and obtain return of the security. *See* G.S. 15A-544.5(b) (setting forth reasons to set aside forfeiture).

In light of these concerns, if an ICE detainer has already been issued, it has been recommended that the client *not* post bond in the state criminal case unless concurrent arrangements are made for release from ICE custody (through an immigration bond or release on the client's own recognizance). Appointed counsel in the criminal case should coordinate with an immigration attorney about the possibility of obtaining pretrial release in the state criminal case and release from ICE custody. *See* North Carolina Justice Center & Southern Coalition for Social Justice, *Picked Up: A Guide for Immigrants Detained in North Carolina*, at 13 (2010), *available at* www.ncjustice.org/docs/PickedUpEng.pdf; *see also* SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA Ch. 7 (Procedures Related to Removal) (UNC School of Government, 2008), available at www.ncids.org (select "Training & Resources," then "Reference Manuals"). If the client is not contesting removal by ICE or does not want to proceed on the criminal charges, the client may want to post bond in the state criminal case and move ahead with the immigration case.