Chapter 4
Pretrial Release

4.1 Scope of Chapter

"The bail determination is crucial to the legitimacy of the criminal process." THE ABELL FOUNDATION, THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM vi (2001). Pretrial detention not only results in loss of liberty pending resolution of a case, it also may increase the chances of conviction and further incarceration. Pretrial release determinations thus have a huge impact on defendants' cases and lives.

There are two primary ways in which racial minorities may be at a disadvantage in the context of pretrial release. First, pretrial release decisions may be affected by implicit or explicit racial biases of court actors. Second, Black and Latino defendants are more likely to live in poverty and therefore less able to satisfy financial conditions of release. Thus, non-White defendants may be more likely to remain in pretrial confinement than their White counterparts in cases in which a secured bond is imposed. The strategies discussed in this chapter are aimed at addressing these two ways in which pretrial release determinations may produce racially disparate outcomes.

State and federal constitutional provisions guarantee equal protection and due process and prohibit excessive bail. North Carolina statutes state generally that pretrial release is favored and make money bail a last resort. Lawyers can rely on these protections in at least three contexts: (1) arguing for more favorable pretrial release conditions at bond reduction hearings; (2) seeking relief in some cases following an unlawful pretrial release decision; or (3) working with other court actors in implementing systemic changes to address any disparities in pretrial detention. The legal bases for these claims and strategies for raising them are discussed *infra* in § 4.3, Legal Restrictions, and § 4.4, Pretrial Advocacy Strategies.

4.2 Overview

A. Increased Reliance on Pretrial Detention

On an average day, there are approximately 440,000 unconvicted accused people in American jails awaiting action on criminal charges, accounting for approximately 60% of all jail inmates. Todd D. Minton & Daniela Golinelli, Bureau of Justice Statistics, *Jail Inmates at Midyear 2013—Statistical Tables*, 2014, at 1. Nationally, the number of people who remain in jail pretrial rather than obtain pretrial release is increasing, the number of people released on their own recognizance is decreasing, and the percentage of defendants with financial conditions attached to their conditions of pretrial release is on the rise. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS, 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 3 (2007). Defenders therefore need to be prepared to advocate for pretrial release on behalf of their clients. *See generally* Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012) (concluding that 25% more pretrial detainees could be released than are currently being released).

B. Race and Pretrial Detention

Historically, studies examining the relationship between race and pretrial decisions and outcomes showed differing results. *See, e.g.,* Marvin D. Free, Jr., *Race and Presentencing Decisions: The Cost of Being African American*, *in* RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 137, 140–41 (Marvin D. Free Jr. ed., 2003) (of 25 studies on the role of race in bail determinations, 17 concluded that race influenced bail determinations and/or pretrial release decisions, but eight did not find evidence for the

hypothesis that race influences such decisions). However, recent studies (discussed below), employing a variety of methodologies, have found that race plays a role in both pretrial release decisions and pretrial release outcomes. *See DeWolfe v. Richmond*, 76 A.3d 1019, 1023 (Md. 2013) (recognizing that "studies show that the bail amounts are often improperly affected by race"); *see also* Marvin D. Free, Jr., *Race and Presentencing Decisions: The Cost of Being African American*, *in* RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 137, 139 (Marvin D. Free Jr. ed., 2003) ("Studies using more recent data were more likely than those using older data to reflect racial disparities [in bail and pretrial release decision-making].").

A 2003 analysis of administrative data collected by the State Courts Processing Statistics (SCPS) program of the Bureau of Justice Statistics considered bail determinations in more than 30,000 cases and found that: (1) Black and Hispanic defendants were over 20% more likely to be denied bail—that is, to be subjected to preventive detention—than White defendants; (2) Hispanic defendants were 39% more likely than White or Black defendants to have financial requirements attached to the conditions of their release; (3) Black defendants were 66% more likely than White defendants to be detained pretrial; and (4) Hispanic defendants were 91% more likely than White defendants to be detained pretrial. Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 894–96 (2003). This study concluded that Hispanic defendants suffer a "triple disadvantage at the pretrial release stage, [as] they are the group most likely to have to pay bail, the group with the highest bail amounts, and the group least able to pay bail." *Id.* at 899–900 (internal quotation omitted).

Another study using SCPS data from 1990 to 2000 also found racial and ethnic disparities in decisions to deny bail and impose secured bonds. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005). This study concluded that, "when there is disparity in the treatment of Black and Latino defendants with similar legal characteristics, Latinos always receive the less beneficial decisions." *Id.* at 186. Still another examination of SCPS data concluded that Latinos are placed on monetary bail at a higher rate than White and Black defendants. DAVID LEVIN, PRETRIAL JUSTICE INSTITUTE, PRETRIAL RELEASE OF LATINO DEFENDANTS (2008).

In a study of five large metropolitan counties, two researchers found "evidence of substantial judicial bias" against Black people in bail setting in two of the counties examined. SHAWN D. BUSHWAY & JONAH B. GELBACH, TESTING FOR RACIAL DISCRIMINATION IN BAIL SETTING USING NONPARAMETRIC ESTIMATION OF A PARAMETRIC MODEL 37 (Nat'l Sci. Found., Working Paper No. SES0718955, 2011). Researchers studying the bail bond market in New Haven, Connecticut concluded that courts routinely "overdeter" Black and male Hispanic defendants from fleeing after release on bail by setting bail at higher levels and that commercial bail bondsmen recognize this difference and charge lower rates for Black and male Hispanic defendants. Ian Ayers & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994).

Race also may play a role in a defendant's ability to access pretrial diversion programs. Generally, when an offender completes a pretrial diversion program, his or her charges are dropped. Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210, 211 (2013). Approximately 8% of the people arrested and charged with felonies each year are selected by prosecutors for pretrial diversion programs. *Id.* (citing Bureau of Justice Statistics data). A recent analysis of SPCS data uncovered racial disparities in pretrial diversions granted to men charged with felonies in metropolitan counties. According to the study, "[o]verall, prosecutors are more likely to grant pretrial diversions to White defendants than they are to grant these diversions to Black, Latino, or Asian and Native American defendants with similar legal characteristics." *Id*. at 228.

Studies such as these led one scholar to conclude: "[M]any of the problems in bail determinations that create dysfunction and arbitrariness in bail determinations—the lack of relevant background information on the defendant and the over-reliance on money bonds—also contribute to racial disparities in bail outcomes among African American and white defendants." Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 955 (2013).

C. The Relationship between Race and Other Factors (Socioeconomic Status, Age, Gender, Employment, and Homelessness) in Pretrial Release Decisions

Various factors may contribute to racial disparities in pretrial release decisions and outcomes. One factor identified by researchers is the use of secured bonds or other financial conditions of release. *See* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 15 (2012). Studies have found that secured bonds affect racial and ethnic minorities in particular because such defendants are more likely to be low-income.

> Among defendants required to pay bail, the odds of detention for black and Hispanic defendants are more than twice those for white defendants. That is, controlling for the amount of bail (and other legal and contextual factors), black and Hispanic defendants are significantly less able to post bail. These results suggest that bail is particularly prohibitive for minority defendants.

Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003). *See also* Jonathan Zweig, Note, *Extraordinary Conditions of Release Under The Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 556 (2010) (noting that some wealthy defendants may avoid pretrial detention by paying for special conditions of release, while "defendants who pose equivalent risks, but who cannot afford to pay for extraordinary terms of in-home detention, are detained in conditions that are often worse than those in which convicted criminals are held").

In addition, where a bond is initially too high for a person to satisfy, a defendant with financial means is more likely to be able to retain private counsel to seek a bond modification and may even be able to secure release on the day of arrest. In contrast, a low-income person charged with the same offense may remain in jail because he or she cannot hire counsel to seek a modification right away. When a judge appoints counsel for an indigent defendant at the first appearance, the bond is typically not addressed until a subsequent court date. The defendant may wait in jail, for example, while the Office of the Public Defender assigns his case to a particular assistant public defender, the attorney has time to visit the jail to conduct an intake interview, and the attorney then moves for a bond modification. *See infra* § 4.4A, Enter the Case at the Earliest Possible Opportunity.

Other non-statutory factors, such as age, also may have an influence on racial disparities in pretrial release. For example, in Minnesota, one of the factors judicial officials once considered in determining whether a defendant was a flight risk was whether the defendant was under age 21 at the time of his arrest. Research revealed that this factor was not a significant predictor of pretrial offending or flight risk but *was* strongly correlated with race. In other words, judicial officials considering the age of defendants in setting pretrial release conditions were unknowingly contributing to racial disparities. ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 31 (2d ed. 2008).

Certain other factors considered in pretrial release decisions, such as a defendant's employment status, may be correlated with race. *See* G.S. 15A-534(c) (listing employment as factor for judicial officials to consider in determining conditions of release). For example, since African Americans generally have higher rates of unemployment than Whites, African American defendants may be at a disadvantage when employment status is a factor in a judicial official's pretrial release decision. At the end of 2012, the African American unemployment rate in North Carolina was 17.3 percent compared to 6.7 percent for Whites. MARY GABLE & DOUGLAS HALL, ECONOMIC POLICY INSTITUTE, ONGOING JOBLESSNESS IN NORTH CAROLINA: UNEMPLOYMENT RATE FOR AFRICAN AMERICANS FOURTH IN NATION, MORE THAN DOUBLE THE STATE'S WHITE RATE 1 (2013); *see also* United States Dep't of Labor, *Bureau of Labor Statistics Economic News Release*, Table A-2: Employment Status of the Civilian Population by Race, Sex, and Age, BLS.GOV (showing higher rates of unemployment among African Americans). Defenders therefore need to be prepared to present other indicia comparable to employment, such as community ties, ongoing responsibilities (such as caring for a child), and other factors.

Similarly, if homelessness is considered in making pretrial release decisions, minorities are at a disadvantage because of their higher representation in the homeless population. *See, e.g.,* Ralph De Costa Nunez, *Homelessness: It's About Race, Not Just Poverty*, CITY LIMITS, March 2012 (nationally, members of Black families are over seven times more likely to seek refuge in a homeless shelter than members of White families). Anecdotal evidence suggests that some judicial officials may be reluctant to release homeless

defendants, perhaps in reliance on an assumed correlation between homelessness and flight risk.

Some studies have considered the ways in which race interacts with multiple factors in the pretrial release setting, such as age, gender, and socioeconomic status. One study found a correlation between race and pretrial release decisions when the interaction between race and such factors was considered. The study concluded that African Americans were at a disadvantage relative to White defendants in terms of bail amounts and likelihood of release on their own recognizance (the equivalent of a written promise to appear in North Carolina); and that African Americans males aged 18–29 received the highest bail amounts of all defendants. John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41 (2012).

Other studies have considered the relationship between gender and race. In one study, researchers concluded that White women were more likely than White men to receive bail below the amounts recommended in a bail schedule, but Black women were not treated any differently than Black men. E. Britt Patterson & Michael J. Lynch, *Biases in Formalized Bail Procedures, in* RACE AND CRIMINAL JUSTICE 365 (Michael J. Lynch & E. Britt Patterson eds., 1991). Another study concluded that White mothers benefited from having children for pretrial release determinations, while Black mothers who had children did not obtain any advantage. Gayle S. Bickle & Ruth D. Peterson, *The Impact of Gender-Based Family Roles on Criminal Sentencing*, 38 SOC. PROBS. 372 (1991). A later study found that White female defendants received more advantageous pretrial release decisions than male, minority defendants and were the most likely to be released pretrial. Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222 (2004). Another study concluded that the odds of release for White women "were not significantly different than [those] of White and Black males," but that Black Women were the least likely group to be detained pretrial. Tina L. Freiburger & Carly M. Hilinski, *The Impact of Race, Gender, and Age on the Pretrial Decision*, 35 CRIM. JUST. REV. 318, 330 (2010) (suggesting that judicial consideration of family obligations might be responsible for the increased likelihood of release for Black women).

D. Defendants Detained Pretrial Achieve Worse Outcomes

The United States Supreme Court has described the pretrial process as "perhaps the most critical period of the [criminal] proceedings." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Defendants detained pretrial are at a number of disadvantages in comparison to those who are released pretrial.

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.

> Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker v. Wingo, 407 U.S. 514, 532–33 (1972) (addressing speedy trial rights).

Studies have found a link between pretrial detention and case outcomes. 78% of defendants detained pretrial—contrasted with 60% of defendants released pretrial—are ultimately convicted. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS, 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2008). Studies have also found that pretrial detainees are more likely to plead guilty, be convicted of a felony, receive a sentence of incarceration, and receive longer sentences compared with people who are released pretrial. *See* GERARD RAINVILLE & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000 24 & Table 24 (2003) ("Seventy-seven percent of the defendants who were detained until case disposition were eventually convicted of some offense, compared to 55% of those released pending disposition"); *Campbell v. McGruder*, 580 F.2d 521, 531 (D.C. Cir. 1978) (noting that a defendant who is not incarcerated pending trial "stands a better chance of not being convicted or, if convicted, not receiving a prison sentence") (quotation omitted); *United States v. Gallo*, 653 F. Supp. 320, 337–38 (E.D.N.Y. 1986) (citing studies indicating that detention likely increases the chances of conviction at trial); Cassia Spohn & Dawn Beichner, *Is Preferential Treatment of Female Offenders a Thing of the Past? A Multisite Study of Gender, Race, and Imprisonment*, 11 CRIM. JUST. POL'Y REV. 149 (2000).

Defendants who are detained pretrial may feel pressure to accept a plea bargain because of the adverse consequences of remaining in jail. *See* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 13 (2012). Jailed defendants who ultimately receive a non-custodial sentence or prevail at trial also experience the adverse consequences faced by defendants incarcerated following a conviction: difficulty keeping or finding a job, lower wages, greater likelihood of recidivism, and even lower likelihood of marriage. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005). One scholar has suggested that there may be a link in some cases between pretrial detention and wrongful convictions. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1130 (2005) (positing "a positive correlation between the falsity of the accusation and the suspect's need to assist in the defense. It might be precisely when the wrong person has been charged that factual development, alibis, and hard-to-find evidence are the most vital to the case.").

Given the influence of pretrial detention on ultimate case outcomes, the pretrial release determination may be one of the most important stages of a criminal case for addressing racial disparities. *See* Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT'L STUD. 261, 262 (2007) ("Focusing on sentencing decisions may obscure this important moment of disparate punishment.").

E. Other Factors that May Contribute to Racial Disparities in Bail Determinations

Delayed representation. The U.S. Supreme Court has recognized that counsel plays a vital role at bail hearings. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970) ("[C]ounsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as . . . bail."); *see also* Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right To Counsel At Bail Proceedings*, 1998 U. ILL. L. REV. 1, 6 (1998) (observing that lawyers representing defendants in bail proceedings play a crucial role in "protecting [a client's] due process right against an unreasonable denial of liberty during pretrial detention"). Empirical studies have also demonstrated the importance of legal representation at this stage in a criminal case. In a comparison of indigent defendants accused of nonviolent offenses, the 4,000 people who were represented by counsel at bail hearings were over two and a half times more likely to be released on their own recognizance and over four times more likely to have their bail reduced than were unrepresented defendants. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for The Right Of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1752–53 (2002). A previous study found that early representation of defendants resulted in earlier pretrial release, less time spent in jail pretrial, and an increased likelihood of release on personal recognizance. ERNEST J. FAZIO ET AL., U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, EARLY REPRESENTATION BY DEFENSE COUNSEL FIELD TEST: FINAL EVALUATION REPORT (1985).

The Maryland Court of Appeals recently observed that, even when an attorney represents a defendant at a first appearance held just a day or two after the defendant's initial appearance, the decision made when the defendant appeared pro se at his or her initial appearance often sets the course for subsequent pretrial decisions. *DeWolfe v. Richmond*, 76 A.3d 1019, 1031 (Md. 2013) (holding that the state constitution guarantees an indigent defendant's right to state-furnished counsel at an initial hearing before a District Court Commissioner). In an earlier proceeding in the same case, the Maryland Court of Appeals considered a study finding that, in roughly 50% of all cases in the analyzed sample, judges presiding over bail review hearings maintained bail conditions set at initial appearances. *DeWolfe v. Richmond*, 76 A.3d 962, 977 (Md. 2012).

Since defendants frequently are not represented by counsel at initial appearances, the judicial official (usually a magistrate in North Carolina) may not have all the facts relevant to the bail determination. The Maryland court observed about the process in that state:

> As numerous briefs to this Court pointed out, the failure of a Commissioner to consider all the facts relevant to a bail determination can have devastating effects on the arrested individuals. Not only do the arrested individuals face health and safety risks posed by prison stays, but the arrested individuals may be functionally illiterate and unable to read materials related to the charges. Additionally, they may be employed in low wage jobs which could be easily lost because of

> incarceration. Moreover, studies show that the bail amounts are often improperly affected by race.

DeWolfe v. Richmond, 76 A.3d 1019, 1023 (Md. 2013); *see also* John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41, 67 (2012) (observing that biases may influence "initial court appearances if judges attempt to assess an offender's risk for flight and dangerousness to the community with little available information at hand, leading to considerations of criminal stereotypes"). Since people of color are more likely to be represented by appointed counsel, they are more likely to be unrepresented at the initial appearance before a magistrate and first appearance before a judge. *See* CHRISTOPHER HARTNEY & LINH VUONG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 14 (2009) (reporting that African Americans are nearly five times as likely as Whites to rely on appointed counsel). G.S. 7A-453 states that for defendants who have been in custody for 48 hours without appointment of counsel, the authority having custody of the defendant must notify the designee of the Office of Indigent Defense Services (IDS) in counties designated by IDS (the public defender in districts that have public defender offices) and the clerk of court in all other counties, who must then take steps to ensure appointment of counsel. This statutory provision may not be followed consistently, however. For a discussion of possible strategies for counteracting these circumstances, see *infra* § 4.4, Pretrial Advocacy Strategies.

Wide discretion and limited information. Criminologists reviewing evidence of disparities in pretrial release have identified several factors that contribute to the phenomenon. In addition to those discussed in subsection D., above, scholars have considered the interaction of discretion, limited information, and implicit bias on such decisions. One scholar observed:

> Legal decision making is complex, repetitive, and often constrained by information, time, and resources in ways that may produce considerable ambiguity or uncertainty for arriving at a "satisfactory" decision. As an adaptation to these constraints, a "perceptual shorthand" for decision making emerges that allows for more simple and efficient processing of cases by court actors. . . . [L]egal agents may rely not only on the defendant's current offense and criminal history, but also on stereotypes linked to the defendant's race, ethnicity, gender, or social class. On the basis of these stereotypes, judges may project behavioral expectations about such things as the offender's risk of recidivism or danger to the community. Once in place and continuously reinforced, such patterned thinking and acting are resistant to change and may result in the inclusion of racial and ethnic biases in criminal case processing.

Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41

CRIMINOLOGY 873, 880–81 (2003) (internal citation omitted).

These concerns, applicable to many decision-making stages of the criminal justice process, may be especially acute in the context of bail determinations, where officials making bail determinations may not be lawyers, defendants may not be represented by counsel, the decision-maker may have little information about the defendant, and the decision-maker generally does not have to record the reasoning for his or her pretrial release determination. Judges making pretrial release determinations at first appearances may be disinclined to modify bail conditions imposed by a magistrate because they also may have limited information. For example, if there is a high secured bond, a judge may assume the magistrate knew something worrisome about the case or the defendant and may not want to disturb the decision. One scholar opined:

> The lack of background information on the arrestee, the scant legal restrictions placed on bail determinations, and the overall lack of formality and accountability of the bail determination process create the "perfect storm" for arbitrary bail determinations and offer very little protection against the consideration of race or any other impermissible factor when making bail determinations.

Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 934 (2013).

4.3 Legal Restrictions

A. Protections against Excessive Bail

The North Carolina Constitution and the United States Constitution prohibit the imposition of excessive bail. N.C. CONST. art. I, § 27; U.S. CONST. amend. VIII. The United States Supreme Court has held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose [of assuring the presence of defendant at trial] is 'excessive' under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *see also State v. Jones*, 295 N.C. 345, 355 (1978) (relying in part on *Stack*, court notes that primary purpose of appearance bond is to assure defendant's presence at trial). While bail will not be held unconstitutionally excessive "merely because the defendant is unable to pay it," *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966), "[i]t would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom," and "in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (application for bail pending certiorari denied by Justice Douglas, sitting in capacity as Circuit Justice, without prejudice to hearing on application in federal district court or court of appeals).

The constitutional prohibitions against excessive bail do not guarantee a right to bail in all cases, but instead require that, if monetary bail is set, it shall not be excessive. *See,*

e.g., United States v. Salerno, 481 U.S. 739 (1987); *State v. Hocutt*, 177 N.C. App. 341 (2006) (constitutional and statutory right to reasonable bail does not prohibit courts from denying bail altogether in some instances; pursuant to G.S. 15A-533(c), the trial court had discretion to deny bail to defendant charged with first degree murder). Although North Carolina statutes deny pretrial release in some cases, the general rule is that a defendant is entitled to conditions of pretrial release. 1 NORTH CAROLINA DEFENDER MANUAL Ch. 1 (Pretrial Release) (2d ed. 2013). If your client remains in jail because of an inability to post bond, you may wish to consider raising a claim of excessive bail in reliance on article I, section 27 of the N.C. Constitution and the Eighth Amendment of the U.S. Constitution. This is a race-neutral claim, but it is a potential tool for obtaining bail relief. Claims of excessive bail may be raised in a bond reduction hearing, appeal of a pretrial release order, motion to dismiss, or post-conviction challenge.

Attorneys may not be given a great deal of time to argue constitutional claims in bond reduction hearings. One strategy for getting the court to consider such claims is to prepare a template memorandum of law, which can be particularized and submitted to the judge in a bond reduction hearing. In raising a claim of unconstitutionally excessive bail in a bond reduction hearing or on an appeal of a pretrial release order, attorneys should be prepared to demonstrate that:

- bail was not set in accordance with the requirements in G.S. 15A-534, *see infra* § 4.3D, Protections Created by State Law;
- bail was set in an amount substantially higher than is generally required for the charge or charges at issue in the case, without evidence justifying such a departure from general practices;
- factors relevant to defendant's risk of flight weigh in favor of a bond reduction or unsecured bond;
- bail was set at an amount intended to assure that the defendant would not gain his freedom.

See Stack v. Boyle, 342 U.S. 1 (1951) (bail was excessive in violation of the Eighth Amendment where: (1) it was not fixed by proper methods; (2) it was set far in excess of that usually set for defendants charged with similar offenses, without justification for such a departure; and (3) defendants submitted substantial evidence concerning financial resources, family relationships, health, prior criminal records, and other matters weighing in favor of lower bail); *Murphy v. State*, 807 So. 2d 603 (Ala. Crim. App. 2001) (bond set far in excess of amount recommended for offenses charged, without justification, constituted excessive bail in violation of the U.S. and Alabama Constitution).

In the post-conviction context, claims of unconstitutionally excessive bail must demonstrate prejudice, must be particularized, and may not be sustained by unsupported allegations. *State v. Jones*, 295 N.C. 345, 356 (1978)*; State v. O'Neal*, 108 N.C. App. 661, 666 (1993). The defendant must present evidence demonstrating how the excessive bail interfered with his right to present a defense. *Jones*, 295 N.C. 345, 356; *see also McCabe v. North Carolina*, 314 F. Supp. 917 (M.D.N.C. 1970). To support a motion to dismiss, a defendant may need to show irreparable or irretrievable prejudice to his rights.

See generally 1 NORTH CAROLINA DEFENDER MANUAL § 1.11 (Dismissal as Remedy for Violations) (2d ed. 2013). This is an undeveloped area of case law in North Carolina and nationwide. Claims of unconstitutionally excessive bail may not succeed at the trial level but, over time, they may lead to development of useful case law. To preserve post-conviction claims of excessive bail, as well as to support such claims at the trial level, it is important for trial attorneys to develop a record showing the ways in which the client's pretrial detention, caused by excessive bail, impeded his ability to assist in the preparation of his defense. *See infra* "State law creates right to pretrial release conditions" in § 4.3D, Protections Created by State Law. A claim of excessive bail will be strengthened by evidence that:

- The defendant has not been able to take counsel to places relevant to the investigation of charges, and counsel has not been able to find these places on his or her own.
- The defendant was unable to assist counsel in locating witnesses, who became less available and/or less willing to speak during the time the defendant was confined.
- Potential defense witnesses refused to speak to counsel outside of the presence of the defendant, because the attorney was unfamiliar to them or belonged to a different race or socioeconomic background.
- Witnesses sought by the defendant could only be identified by sight and not by name and, therefore, could not be located while the defendant was detained.
- The defendant's relationships suffered as a result of pretrial detention, which had a negative impact on his ability to procure witnesses.
- The defendant was unable to assist counsel in investigation of other possible suspects.
- The defendant was placed in a jail located a considerable distance from counsel, resulting in fewer visits with counsel.
- The defendant had limited phone use, limited ability to communicate privately over the phone while in jail, and therefore limited ability to contact potential witnesses.
- Limited jail visitation hours interfered with the defendant's ability to plan a defense with counsel.

B. Equal Protection

Race-based equal protection challenges to pretrial decisions. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution recognize the right to equal protection under the law. Under the intent doctrine, a defendant raising an equal protection claim must show that the challenged state action was motivated by a discriminatory purpose and had a discriminatory effect on a specific racial group. *See supra* § 2.3, Equal Protection Challenges to Police Action. While this doctrine poses a significant hurdle for defendants seeking relief on equal protection grounds, it is not insurmountable.

Where such evidence exists, an equal protection claim may be based on direct evidence that a defendant's race or ethnicity played a role in an unfavorable pretrial release decision—for example, where a magistrate's notes justifying a bond determination reveal

assumptions about gang membership or immigration status. In cases without direct evidence of discriminatory purpose, counsel should consider framing equal protection challenges to the use of race in pretrial release decisions in accordance with *Castaneda v. Partida*, 430 U.S. 482 (1977) (finding that evidence of discriminatory impact was sufficient to sustain a prima facie claim of intentional discrimination in grand jury selection). Under *Castaneda*, a defendant makes out a prima facie equal protection claim in a challenge to grand jury selection if he demonstrates that: (1) he belongs to a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied"; (2) the group is underrepresented in the grand jury process, as established by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time"; and (3) "a selection procedure that is susceptible of abuse . . . supports the presumption of discrimination raised by the statistical showing." *Id.* at 494.

Defendants raising equal protection challenges to racial discrimination in the setting of pretrial release conditions should distinguish their claims from those rejected in *McCleskey v. Kemp*, 481 U.S. 279 (1987). In that case, the defendant's claim that capital sentencing decisions were unconstitutionally influenced by race was rejected in part because of the difficulty of attributing intent to the diffuse group of decision-makers, namely, jurors in capital trials over a period of several years. In contrast, pretrial decisions are made by repeat players (judicial officials) applying statutory factors and therefore can be measured against one another more easily. Additionally, the wide discretion afforded judicial officials in setting pretrial release conditions may result in a "procedure that is susceptible of abuse" within the meaning of *Castaneda*. These characteristics provide support for arguing that evidence of disparities in the setting of pretrial conditions should be sufficient to demonstrate a prima facie case of discriminatory intent when the defendant is "a member of a historically disadvantaged class that has been overrepresented in the population of [pretrial jail detainees] . . . over a significant period of time." Perry L. Moriearty, *Combating The Color-Coded Confinement Of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 332 (2008) (suggesting this approach for equal protection claims challenging racial disparities in the pretrial detention of juveniles).

Attorneys concerned that race may be playing an unlawful role in the setting of pretrial release conditions should consider partnering with social scientists, academics, or other court actors to perform statistical analyses, described *infra* in § 4.4C (Present Findings about Race at Bond Hearings). If an analysis reveals racial disparities in the setting of pretrial release conditions, counsel may introduce it in support of an equal protection challenge.

Equal protection challenges to pretrial release decisions may be raised in a bond reduction hearing, appeal of a pretrial release order, motion to dismiss, or post-conviction challenge. In a bond reduction hearing, an attorney raising an equal protection challenge to an unfavorable pretrial release condition should present evidence in support of the claim and submit a supporting memorandum of law. *See infra* § 4.4, Pretrial Advocacy Strategies.

The following questions should be considered when investigating equal protection claims relating to pretrial release decisions:

- Did the factors considered by the judicial official setting pretrial conditions—factors mandated by statute, judicial district policy, or neither—have an adverse impact on racial and ethnic minorities?
- Is there anecdotal evidence suggesting that racial or ethnic minorities receive less advantageous pretrial release decisions than similarly situated White defendants? Such evidence may serve as an indication that further investigation is necessary. *See supra "*Case study: A judge reflects on implicit bias" in § 1.3D, Implicit Bias.
- Is there statistical evidence suggesting that minority defendants fare worse in the setting of pretrial release conditions? *See infra* § 4.4C, Present Findings about Race at Bond Hearings.
- Are diversion programs, alternatives to detention, and pretrial services programs available for all defendants, regardless of race or ethnicity? Are there any programs that are restricted to English speakers? Are all court actors aware of those programs, and are they administered equitably?
- Are interpreters available at first appearances, bond reduction hearings, and pretrial services interviews, not only for Spanish-speaking defendants but for all defendants with limited English language skills?
- Are representatives from minority communities and grassroots organizations encouraged to participate in identifying and developing pretrial diversion programs that could be used as an alternative to pretrial detention in appropriate cases? *See supra* § 4.2B, Race and Pretrial Detention (discussing pretrial diversion programs).
- Does the discussion of pretrial release conditions in bond hearings focus on flight risk and the risk of pretrial offending, or do other reasons predominate?
- Are there substance abuse programs in jail that are only available to English language speakers? Is participation in these programs viewed positively at bail reduction hearings, so that defendants who do not have the opportunity to participate in such programs are: (1) less likely to have a claim of changed circumstances justifying reconsideration of pretrial release conditions; and (2) less likely to obtain release on a bond reduction motion?
- Are forms used in the pretrial process accessible and available in your client's language?
- Is there a delay in the appointment of counsel for indigent defendants? G.S. 7A-453 states that for defendants who have been in custody for 48 hours without appointment of counsel, the authority having custody of the defendant must notify the designee of the Office of Indigent Defense Services (IDS) in counties designated by IDS (the public defender in districts that have public defender offices) and the clerk of court in all other counties, who must then take steps to ensure appointment of counsel. This statutory provision may not be followed consistently, however. Delays in appointment of counsel for indigent defendants may have a disproportionate impact on minority defendants, who are more likely to rely on appointed counsel.

If counsel determines that there is insufficient evidence to raise an equal protection challenge based on race, the above questions still may be useful in identifying grounds for modifying pretrial release for minority clients.

Poverty-based equal protection challenges to pretrial decisions. In a study of felony defendants in state courts in the 75 largest counties in the United States, the Bureau of Justice Statistics concluded that 5 of 6 defendants detained until case disposition between 1990 and 2004 remained in jail because they did not satisfy the financial conditions attached to their release, not because they were denied bail. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS, 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007). Nationwide in 2012, the Black poverty rate was 35% and the Latino poverty rate was 33%, while the White poverty rate was 13%. The Henry J. Kaiser Family Foundation, *Poverty Rate by Race/Ethnicity*, KFF.ORG (2012). Poverty-based equal protection challenges, while not directly about racial disparities, may provide relief to minority clients unable to satisfy monetary release conditions.

North Carolina judicial officials are also required by statute to take into account the defendant's financial resources when determining which conditions of release to impose. G.S. 15A-534(c). This statutory provision provides defendants with some protection against pretrial detention resulting from the inability to afford secured bond.

Defendants raising poverty-based equal protection challenges to pretrial release decisions have argued that the Equal Protection Clause prohibits setting bail in an amount that an indigent defendant cannot meet. *See, e.g.,* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.2(a), (b) (3d ed. 2007) (discussing equal protection challenges by indigent defendants to unaffordable bail amounts). Courts generally have not been sympathetic to broad claims that unaffordable bail violates the equal protection rights of indigent defendants. *See id.* Some authority exists in support of such an argument, however. Justice Douglas, in reliance on the U.S. Supreme Court's holding that "an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence," observed that it "raises considerable problems for the equal administration of the law" when "an indigent [is] denied freedom where a wealthy man [is] not, because he does not happen to have enough money to pledge for his freedom." *Bandy v. United States*, 81 S. Ct. 197, 197–98 (1960) (acting on bail application in his capacity as Circuit Justice), (quoting *Griffin v. Illinois*, 351 U.S. 12 (1956)); *see also* Jonathan Zweig, Note, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 557 (2010) (arguing that "taking into account an arrestee's access to funds to pay for bail conditions violates the Equal Protection Clause because it conditions access to a fundamental right—pretrial release—on the basis of wealth"). Additional authority is discussed below where applicable.

Poverty-based equal protection challenges to bail may be raised in bond reduction hearings, appeals of pretrial release determinations, motions to dismiss, or post-

conviction challenges. *See supra* § 4.3A, Protections Against Excessive Bail. The following factors may support a challenge to unaffordable bail:

- Is there evidence that the judicial official required a secured bond in violation of G.S. 15A-534(b)? In other words, did the judicial official fail to give priority to nonfinancial release conditions, in violation of statutory and constitutional requirements? In some judicial districts, the pretrial release policy will require the judicial official to record the reasons for finding that less restrictive pretrial release conditions were not appropriate. If the judicial official's written findings or statements suggest that less restrictive pretrial release conditions should have been imposed, you may raise a claim that the secured bond was set in violation of North Carolina statutes and the U.S. and N.C. Constitutions. *See Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc) ("in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternative forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint"); *Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979) (poverty-based equal protection challenge to bail prompted court to examine availability of non-financial release; case remanded to trial court with instructions to consider alternative forms of release).
- Is there evidence that your client's bail was set according to a bond schedule, without regard to the statutory considerations that must be taken into account when setting pretrial release conditions pursuant to G.S. 15A-534(c)? If so, the automatic application of a bond schedule may violate both the statutory requirement of individual consideration of the defendant's circumstances as well as equal protection. *See Ackies v. Purdy*, 322 F. Supp. 38, 41–42 (S.D. Fla. 1970) ("not only is there no compelling interest in incarcerating the poor man because he cannot make the master bond bail, but the classification fails to meet the traditional test for equal protection"; court finds that master bond schedule creates two categories of defendants: those able to afford bond and secure release and those unable afford bond and therefore detained "for extended periods of time").
- Is there evidence that secured bonds are generally set in excess of any schedule of secured bond amounts in your judicial district's pretrial release policy? *See, e.g.,* Johanna Hawfield Foster, *Striving for Equity in Criminal Justice: An Analysis of Variability of Bail Bonds in the Tenth Judicial District of North Carolina* (finding that, in the Tenth Judicial District, mean bail exceeded the upper limit of the bond's suggested policy guidelines by at least 30 percent) in the Race Materials Bank at www.ncids.org (select "Training & Resources"). This information could be submitted as evidence supporting a bond reduction motion, appeal of a pretrial release determination, motion to dismiss, or post-conviction challenge. In addition, consider alerting supervising judicial officials in your district about this departure from suggested bond amounts and the consequences for low-income, minority defendants.
- Has the court delayed a bond hearing at the prosecutor's request or granted the prosecutor's request for some period of notice before a hearing? If so, the defendant may have an equal protection claim because, as observed by one court about such a procedure in that state, a "defendant with financial means who is charged with a noncapital violent felony . . . can obtain immediate release simply by posting bail,"

but "an indigent defendant charged with a relatively minor misdemeanor who cannot obtain release by cash bail, a bail bond, or property bail, must remain incarcerated for a minimum of three days, and perhaps longer, before being able to obtain judicial public bail." *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994) (72-hour notice to prosecutor before judicial bail hearing violated equal protection). Under these circumstances, the relief sought would be an immediate opportunity to be heard on a bond modification motion.

- Is there evidence that your client was denied house arrest and release from pretrial custody because of an inability to pay for electronic monitoring? If so, your client may have a claim of a statutory and equal protection violation. *See* G.S. 7A-313.1 (county may not collect an electronic house arrest fee from a defendant who is indigent and entitled to court-appointed counsel); *see generally* Jonathan Zweig, Note, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 556 (2010). In this instance, the defendant should file a bond reduction motion seeking either a more favorable pretrial release order or a waiver of the fee for electronic monitoring. Similarly, an equal protection claim may arise if your client was denied pretrial release because of an inability to pay for continuous alcohol monitoring (CAM), for which no state funding exists. *See* G.S. 15A-534(a) (authorizing abstinence from alcohol verified by CAM as a condition of pretrial release for any criminal offense committed on or after December 1, 2012).
- Did the court require the posting of cash because the judicial official employed a variant of the term cash, such as "U.S. currency," "cash money," or "green money," and your client remained in jail because he was not able to come up with cash? This practice may violate equal protection because it places indigent defendants at a substantial disadvantage vis-à-vis more affluent defendants who are able to pay the full bail amount, and violates statutory provisions allowing the posting of bond by a surety bondsman in lieu of cash. *See* G.S. 15A-531(4) (bail bond signed by a surety is considered the same as a cash deposit in all cases except those involving child support contempt).
- Did the court set the bond in an amount intended to result in detention, as it is too low for bail bondsmen to service and too high for the defendant to pay?
- Was your client in pretrial custody as a result of an inability to post bond for an offense for which the maximum penalty was a fine? If so, his detention may violate his right to equal protection of the law. *See Robertson v. Goldman*, 369 S.E.2d 888 (W. Va. 1988). In these circumstances, a detained defendant should seek release on a written promise to appear or unsecured bond. Some judicial districts have adopted bond policies providing that if a defendant is arrested for a Class 3 misdemeanor, the judicial official should generally set an unsecured bond to avoid detaining defendants for an offense that may carry no jail time. *See* John Rubin, *Appointment of Counsel for Class 3 Misdemeanors*, SOG.UNC.EDU (November 2013); *see also Robertson v. Goldman*, 369 S.E.2d 888, 892 (W. Va. 1988) (ordering lower court officials to cease "practice of jailing indigents facing charges which do not carry a potential jail term solely because they are unable to post bond").

C. Due Process

Federal and state due process protections guarantee criminal defendants a fundamental right to freedom before trial, which may be restricted only when the government has a compelling interest. *See United States v. Salerno*, 481 U.S. 739, 747 (1987); *see also Ackies v. Purdy*, 322 F. Supp. 38, 41 (S.D. Fla. 1970) ("The right to pretrial release under reasonable conditions is a fundamental right."). For example, the government's compelling interest in public safety defeated a due process challenge to preventive detention provisions of the federal Bail Reform Act. *Salerno*, 481 U.S. 739, 749 (holding that "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling").

The case of *Kinney v. Lenon,* 425 F.2d 209 (9th Cir. 1970), is an example of a successful due process challenge to a pretrial release decision. In that case, a juvenile who was detained pretrial for charges arising out of a fight at school claimed that "there were many potential witnesses to the fight, that he cannot identify them by name but would recognize them by sight, that [his] attorneys are white though he and the potential witnesses are black, that his attorneys would consequently have great practical difficulty in interviewing and lining up the witnesses, and that [the juvenile] is the sole person who can do so." *Id*. at 210. In a candid assessment of the role of race in the juvenile's due process claim, the court observed that "[i]t would require blindness to social reality not to understand that these difficulties [in convincing wary potential witnesses to testify] may be exacerbated by the barriers of age and race. Yet the alternative to some sort of release for appellant is to cast the entire burden of assembling witnesses onto his attorneys, with almost certain prejudice to appellant's case." *Id.* The court held that his pretrial confinement interfered with his constitutional right to compulsory process to obtain witnesses on his own behalf and that release of the juvenile was necessary to ensure "his due-process right to a fair trial." *Id.* This case illustrates the type of evidence that lawyers may present when claiming that a client's pretrial detention violates due process.

Practice note: A due process claim along the above lines can be raised in a bond reduction motion or an appeal of a pretrial release determination. In both instances, the defendant would seek more favorable pretrial release conditions that would allow her to participate fully in the preparation of her defense. If the claim is raised in a post-conviction challenge, the defendant would need to demonstrate prejudice resulting from her inability to assist in the preparation of her defense. The trial attorney should preserve the record for a potential post-conviction claim by presenting factual evidence demonstrating the hurdles faced by the attorney in collecting evidence and interviewing witnesses without the assistance of the defendant. *See supra* § 4.3A, Protections Against Excessive Bail (also discussing potential basis for motion to dismiss).

D. Protections Created by State Law

State law creates right to pretrial release conditions. G.S. 15A-531 through 15A-547.1 contain the basic provisions on pretrial (and posttrial) release for criminal charges. *See also* G.S. 15A-1345(b), (b1) (release conditions in probation cases); 1 NORTH CAROLINA

DEFENDER MANUAL Ch. 1 (Pretrial Release) (2d ed. 2013). These provisions reflect a preference for release on conditions other than a secured bond. Conditions other than a secured bond or house arrest—including release on a written promise to appear, unsecured bond, and custodial release—must be imposed unless none of these conditions will reasonably assure the appearance of the defendant or the judicial official finds a risk of injury to any person, destruction of evidence, subornation of perjury, or intimidation of potential witnesses. G.S. 15A-534(b). Generally, North Carolina defendants charged with a noncapital offense must be accorded their right to pretrial release conditions. G.S. 15A-533(b). A judicial official cannot deny a bond to such a defendant for preventive detention except as otherwise expressly provided by law. *See* John Rubin, *Exceptions to Pretrial Release Procedures: A Guide for Magistrates*, SOG.UNC.EDU (Aug. 2011).

These statutory provisions should be relied on when seeking favorable pretrial release determinations in first appearances and bond reduction hearings. When making a motion to dismiss or raising a post-conviction challenge to a pretrial release determination in violation of G.S. 15A-534, attorneys will need to demonstrate prejudice resulting from a violation. *See 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); *see also infra* § 4.4A, Enter the Case at the Earliest Possible Opportunity (including list of circumstances to consider in supporting claim of interference with a right to present a defense).

Pursuant to G.S. 15A-535(a), the senior resident superior court judge, in consultation with the chief district court judge or all district court judges in the district, must issue pretrial release policies. Attorneys should obtain a copy of the pretrial release policy for their judicial district and review it to determine what additional guidance it provides to judicial officials in making pretrial decisions, whether it contains a suggested bond schedule, and whether it requires magistrates to document in writing the reasons for imposing secured bonds or other restrictive pretrial release conditions. *See* G.S. 15A-534(b) (when ordering house arrest or secured bond, the judicial official "must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge"); *see also, e.g.,* Administrative Order Setting 10th Judicial District Pretrial Release Policies (requiring magistrates to record reasons supporting any secured release imposed outside of the recommended guidelines for the offense class) in the Race Materials Bank at www.ncids.org (select "Training & Resources"). If the district's policy requires written reasons to support a secured bond or house arrest, attorneys should obtain copies of the magistrate's justification in preparation for a bond reduction motion.

Statutory preference for summons over arrest warrant. G.S. 15A-303 sets forth the procedures for a criminal summons, and G.S. 15A-304 sets forth the procedures for a warrant for arrest. The latter statute authorizes a warrant if a judicial official concludes that the person at issue should be taken into custody in light of such factors as "failure to appear when previously summoned, facts making it apparent that a person summoned

will fail to appear, danger that the person accused will escape, danger that there may be injury to person or property, or the seriousness of the offense." G.S. 15A-304(b). Likewise, the Official Commentary to G.S. 15A-303 states:

> The appropriate use of the criminal summons is in any case in which it appears that it is not necessary to arrest the defendant and take him into custody in order to ensure his appearance in court. This should be true in many misdemeanors and a number of felonies. If the defendant simply is directed to appear in court on the appropriate date, the entire machinery of arrest, processing, and bail can be avoided with resultant savings to the system of criminal justice. This section is separated from the warrant provisions (unlike the present statute), and placed first, in order to call it to the attention of readers of the statutes and encourage its use.

These provisions express a preference for a summons over an arrest warrant in appropriate cases and the avoidance of pretrial custody, among other things.

Judicial pretrial release determinations should not be based on a defendant's actual or perceived immigration status. A defendant's perceived immigration status may play a role in Latinos generally receiving the worst outcomes at the pretrial release stage. *See* Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 895 (2003). Judicial officials generally have no role in addressing citizenship matters. A defendant's immigration status is not a factor listed in G.S. 15A-534(c) as relevant to the determination of conditions of pretrial release, and a defendant's immigration status typically is not included in the information provided to judicial officials during an initial appearance or a first appearance. However, anecdotal evidence suggests that judicial officials may at times delay or deny pretrial release in cases in which they believe the defendant is in the United States unlawfully. In cases in which a client may be perceived as undocumented, it is especially important to stress family and community ties when advocating for favorable conditions of release, so as to counter any stereotypes that may be associated with noncitizens who are undocumented.

Future legislation may require judicial officials to take a defendant's immigration status into consideration in making pretrial release determinations. Pursuant to the Reclaim NC Act, S.L. 2013-418, the Department of Public Safety recently reported to the Chairs of the Joint Legislative Oversight Committee on Justice and Public Safety regarding, among other things, establishing a rebuttable presumption against the pretrial release of individuals without documentation who are charged with serious crimes and/or requiring a secured appearance bond as a condition of pretrial release. *See* Memorandum from Frank L. Perry, Secretary of the Department of Public Safety, *Study and Recommendation Regarding Immigration Measures* (Mar. 2014) (assessing potential changes). No such requirements are currently part of North Carolina law.

Relevance of immigration status to defendants in pretrial detention facilities. Under G.S. 162-62, when a person charged with a felony or impaired driving offense is confined to a jail or other detention facility, the person in charge of the facility must attempt to determine whether the inmate is a legal resident and, where possible, make inquiry to Immigration and Customs Enforcement (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). *See* John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01 at 33–34 (UNC School of Government, Jan. 2008) (describing implications of this law, including Fifth Amendment right not to answer possibly incriminating questions that could lead to criminal prosecution).

A defendant's conditions of pretrial release may be complicated by the involvement of ICE, which may choose to issue a "detainer" or "hold" on the individual. Such a detainer is a request to the jail to notify ICE that the individual is to be released and to hold the individual for up to 48 hours (excluding weekends and holidays) beyond the time the detainee would ordinarily be released in order for ICE to take custody of the person. 8 C.F.R. § 287.7. Thus, ICE may take custody of the defendant as soon as a state bond is paid or a defendant is released on a written promise to appear. The jail, not the magistrate, is responsible for implementing the 48-hour detainer, and neither the jail nor a magistrate may delay or deny release to give ICE more time to file a detainer or assume custody of the defendant. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 1.4G (Circumstances Not Justifying Delay or Denial of Pretrial Release) (2d ed. 2013). It should be noted that a detainer is simply a request and is not mandatory or binding.

Anecdotal evidence suggests that, in practice, ICE may not always pick up an individual subject to a detainer within the 48-hour period, and some individuals may be held unlawfully past the expiration of the 48-hour detainer. *See, e.g.*, *Case Description: Quezada v. Mink*, ACLU.ORG (last visited Aug. 7, 2014); *Quezada v. Mink Complaint*, ACLU.ORG (last visited Aug. 7, 2014). Failure to release a detainee after the expiration of the 48-hour detainer is unlawful and could expose the detention facility to liability for false imprisonment and constitutional violations. *See id.*; *see also* SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA § 7.3 (Immigration Detainer) (2008). If a defendant is detained beyond the 48-hour detainer period, counsel should consult with the defendant to determine whether or not the defendant wants to seek release, either by contacting counsel for the sheriff or jail and pressing for release or by filing a writ of habeas corpus seeking release. There may be circumstances in which a client does not wish to do so. A sample petition for writ of habeas corpus, with supporting documents, is available on the non-capital motions bank on the IDS website, www.ncids.org. *See also* 1 NORTH CAROLINA DEFENDER MANUAL § 1.4G (Circumstances Not Justifying Delay or Denial of Pretrial Release) (2d ed. 2013).

Defense attorneys should be aware of the many ways in which a defendant may be affected by an ICE detainer:

- The detainee may be adversely affected when seeking bond on the state charges.
- After ICE takes custody of the defendant, he or she may be moved out of state and consequently unable to participate adequately in the defense of his or her state criminal charges, as it is difficult for defense counsel to communicate with a detainee in an ICE detention center.
- Any time spent in an ICE detention center will not count as jail credit toward any eventual sentence of imprisonment in the defendant's criminal case.
- The defendant may be deported before resolution of his or her criminal case.
- A defendant who posts bond or family members who post bond may end up forfeiting the bond if the defendant is transferred into ICE custody.

To protect the rights of clients who are under ICE detainers and facing removal proceedings, you will need to determine whether they want to contest the criminal charges, whether they want to contest the immigration deportation, and whether they want to be released from custody before deportation proceedings. If they want to do any of these three things, you should advise them not to post their state bond until they have either consulted with an immigration attorney or you are prepared to seek an immigration bond on their behalf since, as soon as they post their state bond, they may be transferred to ICE custody and also moved to an out-of-state detention facility. *See generally* SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA Ch. 7 (2008) (explaining eligibility for immigration bond).

Defendants without identification. A magistrate may not insist on official U.S. 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). *See* JESSICA SMITH, CRIMINAL PROCEEDINGS BEFORE NORTH CAROLINA MAGISTRATES 17-18 (UNC School of Government, 2014). 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.

4.4 Pretrial Advocacy Strategies

A. Enter the Case at the Earliest Possible Opportunity

Defendants achieve better pretrial release outcomes when they are represented by an attorney at the earliest possible opportunity. *See supra* § 4.2E, Other Factors that May Contribute to Racial Disparities in Bail Determinations. In North Carolina, while defendants with retained counsel are typically represented at their first appearance before a judge (and potentially at their initial appearance before a magistrate), the point at which appointed counsel enters a defendant's case varies around the state. Indigent defendants usually are not represented by counsel at initial appearances or first appearances. Some districts have experimented with assigning a "bond attorney" from the Public Defender's

office to represent defendants at first appearances, but this practice appears to be relatively uncommon. Even when appointed counsel is present for a defendant's first appearance, counsel may have had little opportunity to obtain information in support of a motion to modify bond. If the appearance is conducted via audio-video feed between the courtroom and jail, counsel's ability to obtain needed information may also be limited (although counsel must be given an opportunity to communicate with the client in confidence). *See* G.S. 15A-532 (during the video transmission, "[i]f the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding"). If release is not obtained at the first appearance, counsel should try to set the matter for the first possible court date for a bond hearing or ask the judge to leave the matter open until an afternoon session of court so that counsel (or an intern or investigator) can learn more about the client and confirm information such as place of residence and ties to the community. Where appointed counsel does not represent defendants at first appearances, it is especially important to return to court for a bond reduction hearing as soon as possible after entering the case.

When client is detained pretrial, consider moving for a speedy trial. When counsel is unable to secure a client's pretrial release, it may be advantageous to move for a speedy trial. The United States Supreme Court has held that a defendant's incarceration before trial is a relevant consideration in determining whether a defendant has been afforded his constitutional right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972). Violation of the constitutional right to a speedy trial results in the dismissal of all charges. Although North Carolina no longer has a speedy trial statute, there is an older statute prohibiting lengthy pretrial incarceration. *See* G.S. 15-10. 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 released from custody, unless the State's witnesses are not available. *Id*. 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 id.*; *State v. Wilburn*, 21 N.C. App. 140 (1974). *See also generally* 1 NORTH CAROLINA DEFENDER MANUAL §7.1F (Pretrial Release) (2d ed. 2013).

Practice note: Pretrial diversion provides an opportunity for defendants to avoid both conviction and the "broad array of social and economic outcomes associated with felony convictions, including [negative] employment, income, family stability, and mental health [consequences]." Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210, 211 (2013). Counsel should investigate the availability of local pretrial diversion programs and, where available, coordinate with any pretrial services program in the district as early as possible both to explore the possibilities of pretrial diversion and to increase the likelihood of an early, favorable decision on pretrial release. *See* North Carolina Dep't of Public Safety, *County Resource Guide*, NCDPS.GOV (last modified June 3, 2014). A pretrial services program may interview the defendant before the first appearance and may provide the defender with a copy of the report and recommendations, which will furnish some basic information at first appearance.

B. Counter Potential Racial Stereotypes in Pretrial Release Arguments

Studies have found that, where discretion is greatest and information limited, implicit and explicit biases are most likely to have an impact on decision-making. *See supra* § 1.3E, Discretionary Decision-Making and the Cumulative Nature of Disparities. Judicial officers enjoy wide discretion in setting pretrial release conditions and often must make decisions with limited information about the evidence and the defendant. In recent years, researchers have found that negative stereotypes about Black and Latino defendants can play a role in pretrial release decisions. *See, e.g.,* Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005). In North Carolina, pretrial decisions can be based on such subjective considerations as "character" and a catch-all for "any other evidence relevant to issue of pretrial release." G.S. 15A-534(c). Judicial district policies may include other subjective factors, such as "negative attitude or lack of cooperation by the defendant." *See* Administrative Order Setting 10th Judicial District Pretrial Release Policies in the Race Materials Bank at www.ncids.org (select "Training & Resources").

The argument on pretrial release is counsel's first opportunity to distinguish the client from possible stereotypes that may influence a judge in his or her exercise of discretion. Accordingly, you should be aware of stereotypes that may be in operation and be prepared to present information countering potential preconceptions about your client. *See generally* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 1 Appendix 1-1 (Interview Checklist for Bond Hearing) (2d ed. 2013); *see also* NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL 2–6 (2004). In your first interview with your client, ask questions aimed at discovering the realities of her life. For example, if you ask your client whether she is employed, she may say no, but, on further questioning, may reveal that she takes care of her niece after school or cares for her elderly grandmother. Such information allows you to present a picture of your client's life beyond impersonal statements about, for example, her county of residence and how long she has lived there. Information gathered by any pretrial services program in your district may also be useful in this regard; counsel should make an effort to review any materials prepared by pretrial services in preparing a request to modify pretrial conditions.

While defense counsel usually presents the information rather than offering testimony, counsel can tender relatives, employers, teachers, clergy members, or friends to the court and prosecutor for questioning. The presence of supportive family or community members can have a powerful influence even if they do not intend to speak. Counsel also can present documentary evidence to help the court see the client as a complex individual. For example, counsel may tender report cards, performance reviews, or reference letters from community leaders. (The rules of evidence do not apply at pretrial release hearings. *See* G.S. 15A-534(g).) When possible, have the client dress in his or her own neat, clean clothing for the bond hearing rather than appear in a jail jumpsuit, which will aid the judge in seeing the client as a fully dimensional individual. *See* Jenny

Montgomery, *Dressing Defendants*, THE INDIANA LAWYER (May 23, 2012) (quoting former president of the National Association of Criminal Defense Lawyers who indicated that "the bottom line is we know people judge a book by its cover," and these judgments influence "the fundamental fairness [of the] process").

C. Present Findings about Race at Bond Hearings

Evidence of racial disparities in pretrial decisions or outcomes, even when insufficient to meet the legal standard of an equal protection claim, may be persuasive when representing a client at a first appearance or on a bond reduction motion. Counsel can make the court aware of the growing body of scholarship finding that African American and Latino defendants receive less favorable treatment at the pretrial release stage than their White counterparts. *See supra* § 4.2, Overview. Counsel should inform the court of any disparity applicable to the case—for example, a codefendant who received more favorable conditions, was similarly situated to the defendant, and was White. *See supra "*Case study: A judge reflects on implicit bias" in § 1.3D, Implicit Bias.

Either independently or in partnership with other attorneys or researchers, you may be able to conduct research into pretrial release decisions in your geographic area broken down by race. *See infra* § 4.5A, Policies, Forms, Practices, and Criteria Influencing Pretrial Decisions. This may involve information obtained from databases, or simply an observational study of first appearances and bond modification hearings, whereby observers note the outcomes of such hearings and then pull the files associated with each of the cases observed to compile a record of pretrial release decisions. If such a study has been conducted in your district, or if you have the ability to conduct one, the data may persuade the court of the importance of guarding against bias in pretrial release decisions.

4.5 Policy Considerations

A. Policies, Forms, Practices, and Criteria Influencing Pretrial Decisions

Generally. Indigent defenders should coordinate with other court actors, including prosecutors, pretrial services programs, court officials, and police, to determine whether any practices, guidelines, forms, or policies employed in the pretrial release process may contribute to racial disparities in pretrial outcomes. A helpful starting point in determining whether pretrial practices in your county conform with best practices is to consult the protocols for pretrial decisions developed by the National Association of Pretrial Services Agencies (NAPSA), which aim to reduce the potential for disparities. NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, STANDARDS ON PRETRIAL RELEASE (3d ed. 2004).

Risk assessment tool in Minnesota's Fourth Judicial District. In Minnesota's Fourth Judicial District (covering Hennepin County and the City of Minneapolis), researchers recently evaluated the pretrial risk assessment tool utilized by the Community Corrections Pretrial Unit. This tool used certain factors to evaluate pretrial risk.

Researchers considered whether reliance on these factors resulted in racial disparities in pretrial detention. They concluded that three of the nine factors employed in evaluating risk—whether a weapon was used during the commission of the crime, whether the defendant lived alone, and whether the defendant was under age 21 when booked—bore little relation to flight risk or reoffending, but were strongly correlated with race. The court adopted a recommendation to eliminate these three factors correlating with race but not with risk, and put a new risk assessment tool in place. ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 11 (2d ed. 2008) (summarizing FOURTH JUDICIAL DISTRICT OF MINNESOTA RESEARCH DIVISION, FOURTH JUDICIAL DISTRICT PRETRIAL EVALUATION: SCALE VALIDATION STUDY (2006)). North Carolina statutes require magistrates to defer setting pretrial release conditions if they find that a person is charged with a felony or Class A1 misdemeanor involving a firearm and the person is currently on pretrial release for or has been convicted of another such offense. G.S. 15A-533(f). The statute does not preclude a judge from setting pretrial release conditions in these circumstances, however. G.S. 15A-533(g).

Bail reform by Duluth Racial Justice Task Force. In Saint Louis County (which includes the City of Duluth), Minnesota, a racial justice task force supported by the Criminal Justice Section of the American Bar Association's Racial Justice Improvement Project, spent two years evaluating and addressing racial disparities in bail and pretrial detention/release. *See* Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 946–55 (2013); ROBERT R. WEIDNER, RACIAL JUSTICE IMPROVEMENT PROJECT: PRETRIAL DETENTION & RELEASE DECISIONS IN ST. LOUIS COUNTY, MN, IN 2009 & 2010: INTERIM FINDINGS (2011). The task force consisted of the County Attorney (the county's chief prosecutor), the Chief Public Defender, the Deputy Chief of Police, a trial judge, a representative of the American Indian Commission, the head of probation/pretrial services, a representative from the local jail, and an administrative coordinator. The project was divided into three stages: investigation, education, and implementation. In the investigation stage, the task force:

- collected data from the court on bail determinations;
- retained a criminologist from a local university to analyze the data (he concluded that White defendants were twice as likely as defendants of other races to be released on their own recognizance, racial minorities were more likely to have money bond imposed, and the median bond imposed on African American defendants was twice that of the bond amounts set for White defendants);
- formed a subcommittee that met with each arraignment court judge in the county and asked them how they weighed the statutory factors governing bail determinations; and
- interviewed the probation office, which in Saint Louis County supervises defendants placed on supervised pretrial release, regarding their practices in arraignment court.

Based on its investigation, the task force concluded that: (1) judges typically make bail determinations without critical information relevant to the determination; (2) money

bonds are overused, and this practice has a disparate impact on African Americans and Native Americans; and (3) probation officers were imposing strict standards on defendants on supervised release that were more appropriate for post-conviction defendants on probation. The task force also concluded that certain logistical factors may contribute to disparities in bail determinations. For example, judges reported that probation officers, when advising the court regarding pretrial decisions, would tell the court when they would prefer not to supervise defendants who lived far from probation offices. Because of the distance between the probation office and the Native American reservation in the county, this recommendation resulted in the disproportionate pretrial confinement of Native Americans.

In the next stage of the project (education), task force members attended trainings on best practices in bail determinations and pretrial services, including conferences by the ABA Racial Justice Improvement Project and by the National Association of Pretrial Services (NAPSA). As a result of the NAPSA conference, the Duluth trial judge who attended concluded he had been overusing money bonds and changed his bail determination practices. Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 953 (2013). This stage of the project also included a day-long training by the task force for all judges and probation officers, including training on laws, pretrial release standards, best practices for imposing supervised release, and discussion of the task force's findings regarding racial disparities in local bail determinations.

The last stage of the task force project (implementation) involved the following initiatives:

- ensuring that judges have bail reports (reports prepared by the probation office including background information on each arrestee) in all felony cases before making bail determinations;
- improving risk assessment tools to reduce the risk of subjective biases;
- preparing a chart for judges to use when making pretrial release determinations that sets forth the range of available non-financial release options;
- expanding community release options;
- collecting data regularly to monitor racial disparities.

Owing in large part to the commitment and involvement of all local court actors, as well as support from national organizations and experts involved in pretrial release issues, the task force's work may serve as a model for other communities seeking to revise their bail determination practices. "Other jurisdictions faced with similar bail practices, and similar patterns of racial disparities, will likely find the formula successfully executed in Duluth to be [a] useful model for pretrial reform." *Id*. at 955.

North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System Pretrial Subcommittee. The North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (NCCRED), comprised of prosecutors,

defense attorneys, police chiefs, judges, and community advocates, is an organization aimed at reaching a consensus on the presence and causes of racial disparities in particular areas of the criminal justice system and making recommendations for reform that have the support of representatives of a broad range of criminal justice stakeholders. *See* North Carolina Advocates for Justice, *North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System*, NCAJ.COM (last visited July 23, 2014). The Commission's Pretrial Subcommittee (PTSC), funded in part by the American Bar Association's Racial Justice Improvement Project, is currently collecting data in an urban area, Guilford County, and a rural area, Halifax County, to examine whether there are disparate outcomes for minority defendants at the pretrial stage of the criminal process. *See* North Carolina Advocates for Justice, *NCCRED Pretrial Subcommittee*, NCAJ.COM (last visited July 23, 2014). The data collected includes bond amounts and conditions for defendants charged with Class H felonies. This effort involves data collection and analysis by race and ethnicity across a range of variables, including age, sex, economic status, employment, mental and physical health, case disposition, length of time in custody, bond amount, method of posting bond, criminal history, and failure to appear history. The PTSC currently expects that the collected data will be presented to the Commission as a whole in 2014. After that presentation, the Commission intends to explore the factors contributing to any racial disparities and try to identify an approach to eliminate or minimize them.

UNC MPA Student's Examination of Wake County Bail Determinations. A study undertaken by UNC School of Government Master of Public Administration (MPA) graduate student Johanna Hawfield Foster examined arrest data and jail admissions records in Wake County to determine whether race was playing a role in pretrial release determinations. She concluded that African American defendants pay 16 percent more in bail than White defendants. *See* Johanna Hawfield Foster, *Striving for Equity in Criminal Justice: An Analysis of Variability of Bail Bonds in the Tenth Judicial District of North Carolina* (also finding that, in the Tenth Judicial District, mean bail exceeded the upper limit of the bond's suggested policy guidelines by at least 30 percent) in the Race Materials Bank at www.ncids.org (select "Training & Resources"). Subsequently, the Tenth Judicial District adopted a policy of requiring magistrates to record reasons supporting any secured release imposed outside of the recommended guidelines for the offense class. *See* Administrative Order Setting 10th Judicial District Pretrial Release Policies in the Race Materials Bank at www.ncids.org (select "Training & Resources"). Lawyers seeking information on the racial and ethnic demographics of arrestees and pretrial jail detainees may consult the databases utilized in this study: a City County Bureau of Identification (CCBI) database with information regarding race, ethnicity, sex, place of resident, country of origin, employment, information on prior arrests, and court appearance history; and the County Sheriff's Office's database with bail bond amounts and charge descriptions. For assistance interpreting the data, you may wish to seek help from graduate students in public administration or political science who are capable of performing regression analysis to control for variables affecting pretrial release decisions.

Pretrial Release Project in Baltimore, Maryland. Another study of bail practices in a single locale was conducted by the Abell Foundation's Pretrial Release Project (PRP).

The study, which compared bail practices in the City of Baltimore to statewide averages, was authorized by the Maryland Court of Appeals following a request by the Maryland State Bar Association. Like the Duluth task force study discussed above, the PRP concluded that judicial officers were making bail determinations with insufficient information and relied too heavily on financial release; and that African American men were detained pretrial due to their inability to satisfy financial conditions of release at a "strikingly higher rate" than their representation in the overall population. THE ABELL FOUNDATION, THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM 28 (2001).

B. Collaborative Partnerships with Other Stakeholders in the Justice System

Defense attorneys and other stakeholders in the justice system may share overlapping interests in pretrial release procedures. For example, former Mecklenburg County Chief District Judge Lisa Bell, when interviewed about the county's new bail policy in 2010, observed that, because of better access to information under the new policy, "your incarceration isn't tied to your ability to pay money. People without means don't necessarily have a higher risk associated with them." Jeff Atkinson, *Mecklenburg Courts – New Bail Policy*, WBTV 3 NEWS (July 6, 2010) (reviewing new policy and finding that dangerous offenders, who present a greater risk to the community, will have higher bonds while defendants who pose little risk will have the opportunity to get out of jail). Additionally, many counties have a concern about the cost of pretrial detention. This concern presents opportunities for partnerships to reduce reliance on pretrial detention. Partnerships with stakeholders in the criminal justice system—including prosecutors, pretrial services officers, diversion programs, social service programs, faith-based organizations, local and state bar associations, and representatives from minority communities—may result in:

- development of training programs on issues of race in pretrial decision-making for all actors involved in the pretrial release process, including magistrates, judges, prosecutors, and defense attorneys;
- development of community education programs that help people understand how to navigate the pretrial process;
- public education campaigns regarding the importance of pretrial release;
- examination of the pretrial process to determine if racial disparities are present in pretrial release decisions, including release on a written promise to appear, setting of bail amounts, or consideration for diversion programs resulting in deferred prosecution;
- assignment of a bond prosecutor to the county jail to facilitate early risk assessments and the release of unnecessarily detained arrestees, as is currently done in Durham County;
- examination of the jail population to determine the percentage of the population detained pretrial because of an inability to post bond;
- development of additional community-based programs and resources that may be used as an alternative to pretrial detention when appropriate;

- funding for indigent people ordered to participate in fee-based pretrial programs such as continuous alcohol monitoring pursuant to S.L. 2012-146, as amended by S.L. 2012-194 (expanding authorization for the use of continuous alcohol monitoring (CAM));
- understanding of the importance of early release and the early involvement of defense counsel in the pretrial process, including consistent representation of defendants in bail hearings;
- development of standardized, evidence-based, validated risk assessments to determine who may safely be released into the community;
- development of increased oversight and accountability measures in the bail determination process, including the adoption of policies requiring magistrates to make written findings supporting bail and pretrial release determinations.