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.