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**MEMORANDUM**

**TO:** Superior Court Judges
District Court Judges
Magistrates
Clerks of Superior Court
District Attorneys
Public Defenders

**FROM:** Troy Page
Associate Counsel

**DATE:** November 22, 2011

**RE:** Pretrial Release Legislation - December 2011

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The 2011 General Assembly enacted two bills concerning pretrial release, both effective December 1, 2011. The first authorizes the imposition of abstinence from alcohol and continuous alcohol monitoring (CAM) as a condition of release for certain impaired driving defendants with prior impaired driving convictions. The second bill does not concern the setting of conditions of release directly, but instead authorizes warrantless arrests that will require judicial officials to enter new release orders after such arrests.

## I. Alcohol Abstinence and Continuous Alcohol Monitoring (CAM) as a Condition of Release

Effective for offenses committed on or after December 1, 2011, S.L. 2011-191 (HB 49, Laura's Law) amends G.S. 15A-534, Procedure for determining conditions of pretrial release, to add a new subsection (i):

> (i) In addition to any other condition of pretrial release, the judicial official authorizing pretrial release may order any defendant (i) charged with an offense involving impaired driving, as defined by G.S. 20-4.01(24a), and (ii) having a prior conviction for an offense involving impaired driving that occurred within seven years before the date of the offense for which the defendant is being placed on pretrial release to abstain from alcohol consumption as verified by an approved continuous alcohol monitoring system for the period of pretrial release or until this condition is removed by entry of order of a court of competent jurisdiction.

S.L. 2011-191 provided no other statutory criteria for imposition of the new condition, did not define an "approved" CAM system, and did not address the costs of pretrial CAM systems. Therefore the NCAOC interprets the new provision as follows:

- any criteria for imposition of abstinence and CAM as a condition of release - other than the current offense charged and the defendant's prior record - must be determined locally;
- "approved" CAM systems for the purposes of pretrial release are not limited to those approved by the Department of Correction, and the court may not require that the Division of Community Corrections monitor a pretrial defendant with its post-conviction CAM resources; and
- there is no statutory authority to tax the costs of pretrial CAM to the defendant, and the clerks have no authority to receipt or disburse such costs if taxed to the defendant.

*Criteria for Imposition of Abstinence and CAM for Pretrial Release*

The new subsection (i) provides that a judicial official may impose abstinence from alcohol with CAM as a condition of pretrial release "in addition to" other conditions of release. It is not an alternative to the five existing forms of pretrial release (written promise, custody release, unsecured bond, secured bond, or house arrest with electronic monitoring), at least one of which must be imposed in every release order; it is an optional condition imposed in addition to one of those types of release. Because S.L. 2011-191 is effective only for offenses committed on or after December 1, 2011, the new condition may not be imposed in a release order for an offense occurring before that date (*e.g.*, as a modification to an existing release order in an ongoing case). The new abstinence condition is discretionary. A judicial official "may" (not "shall") impose it for an eligible defendant.

The only statutory criteria for imposition of abstinence-plus-CAM as a condition of pretrial release are that the offender presently be charged with an offense involving impaired driving listed in G.S. 20-4.01(24a) and that the present offense occur within seven years after the date of offense for a prior offense involving impaired driving from the same list for which the defendant was convicted.[1] The present charge does not have to be for the exact same offense as the prior conviction in order for the condition to be imposed.

The statute is silent concerning other criteria for imposition of the new condition, so it may be imposed based solely upon the criteria described above: a present charge of an offense involving impaired driving for a defendant with a qualifying prior conviction. In the event that judicial officials believe it appropriate to consider other factors when deciding whether or not to impose the condition, senior resident superior court judges may wish to consider providing guidance to local judicial officials for its imposition in their local bond policies, adopted in consultation with the chief district court judge(s) of the superior court district pursuant to G.S. 15A-535(a). In fashioning any such guidance, judges may wish to address CAM in the context of traditional considerations for conditions of release under G.S. 15A-534(b) and (c), such as public safety, the defendant's history of failures to appear, and his or her resources (which may be of paramount importance, if the court disagrees with the analysis below that the costs may not be recouped from the defendant). Local policies for the use of CAM also should address approved vendors or systems (see below), the entity responsible for monitoring the CAM system and reporting a defendant's compliance or lack thereof to the court, and the appropriate response(s) to non-compliance with the abstinence condition.

Form AOC-CR-200 (Conditions of Release and Release Order) has been amended to provide an option for the new abstinence condition and verification by CAM. The new form will be available on the NCAOC website and in NCAWARE by December 1, 2011.[2]

*"Approved" CAM Systems*

The new condition of release requires the use of an "approved" CAM system, but this appears to require local approval, only. G.S. 15A-1343.3 directs the Department of Correction to establish regulations for post-conviction use of CAM systems,[3] which appears to exclude approval of CAM systems for pretrial use from DOC's authority, and no other statute addresses the evaluation or approval of CAM systems. The court

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[1] G.S. 20-4.01 is available online at: http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_20/GS_20-4.01.html. The offenses involving impaired driving are listed in subsection (24a):

- Impaired driving, G.S. 20-138.1;
- Impaired driving in a commercial vehicle, G.S. 20-138.2;
- Habitual impaired driving, G.S. 20-138.5;
- Any offense under G.S. 20-141.4 based upon impaired driving (which means any offense for vehicular death or injury under that statute except for misdemeanor death by vehicle under subsection (a2));
- First- or second-degree murder, G.S. 14-17, or involuntary manslaughter, G.S. 14-18, based upon impaired driving; and
- Substantially similar offenses to those listed above, committed in another jurisdiction (*i.e.*, another State).

Note that the definition of an offense involving impaired driving also includes certain repealed or superseded offenses substantially similar to impaired driving, but because the new condition of release may be imposed only for offenses occurring on or after December 1, 2011, it may not be imposed for a present prosecution under those former statutes.

[2] A related form, AOC-CR-922M (Release Order For Juvenile Transferred To Superior Court For Trial) will not include a pre-printed option for the abstinence-plus-CAM condition, given that a criterion for imposition of the new condition (a prior conviction for an offense involving impaired driving) makes it an almost practical impossibility that a juvenile eligible for transfer from juvenile court to superior court for trial as an adult would qualify for the new condition of release. In the event a court determines that the new condition is valid for a transferred juvenile, the condition may be imposed in the free-text space available on the AOC-CR-922M.

[3] Although G.S. 15A-1343.3 refers only to DOC's approval of CAM systems for offenders "on probation" and to monitor alcohol abstinence when imposed "as a condition of probation," DOC's approval authority also includes CAM systems for parolees. See G.S. 15A-1374(b)(8b).

therefore is not limited to the vendors or technologies approved by DOC when using CAM for pretrial release. However, while the court is not bound by DOC's approval of vendors or technologies, neither may the court require that DOC (through the Division of Community Corrections (DCC)) provide supervision of defendants on pretrial CAM without DCC's consent or explicit statutory authority to do so.[4] As a result, imposing CAM as a condition of pretrial release requires that the court select the provider and technology and, unless DCC consents to monitor the defendant's compliance, that the court employ an entity other than DCC to do so.

*Costs of Pretrial CAM*

The new G.S. 15A-534(i) does not specify the source of payment for a CAM system used to monitor a defendant's pretrial abstinence from alcohol. However, given other statutory provisions that specify costs of pretrial release that may be taxed to the defendant, it appears that a defendant may not be required to pay the costs of CAM for pretrial release. Neither does the statute provide for payment by the State, and no funds were appropriated for that purpose, so the State may not bear the costs of pretrial CAM.

There currently are only two provisions for payment of the costs of pretrial release by a defendant. The first is G.S. 7A-304(a)(5), which provides that a defendant who received "pretrial release services" from a county agency shall, upon conviction, be assessed a one-time fee of $15.00 for those services.

The second provision for taxing pretrial release costs to the defendant is G.S. 7A-313.1, enacted effective July 1, 2011, which authorizes a county providing pretrial "electronic monitoring" to collect a fee from certain defendants for such monitoring.[5] However, effective October 1, 2011, Section 2 of S.L. 2011-245 (SB 311, Pretrial Release Violation/Arrest, Section 1 of which is covered by the next section of this memo), amended G.S. 15A-101.1(3a) to define "electronic monitoring" as monitoring via an electronic device that "actively monitors, identifies, tracks, and records a person's location."[6] By limiting the definition of "electronic monitoring" to only location-tracking devices (*e.g.*, cellular phone-based or satellite-based monitoring, such as global positioning systems), the General Assembly has excluded CAM from the systems for which costs may be taxed to the defendant under G.S. 7A-313.1.[7]

Other than the two statutes described above, the only statutory provisions for the imposition of CAM apply to offenders convicted of impaired driving offenses and have no application to pretrial defendants.[8] Those post-conviction statutes also contain the only authorization for the clerk of superior court to receive and disburse payment for CAM systems, so in the event that a court interprets the new G.S. 15A-534(i) differently

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[4] State v. Gravette, 327 NC 114 (1990).

[5] *See* S.L. 2011-378. The new G.S. 7A-313.1 limits the county's fee to the lesser of the daily jail fee that otherwise would be incurred under G.S. 7A-313 or the actual cost of the electronic monitoring, and it prohibits collection of monitoring fees from a defendant "who is determined to be indigent and entitled to court-appointed counsel." This statute appears to be the General Assembly's response to the unintended limitations of G.S. 7A-304(a)(5) after electronic monitoring was authorized for pretrial release in 2009, as described in the NCAOC's memo, "Pretrial Release and Bond Forfeitures – 2009 Legislation and New/Amended Forms," November 19, 2009, available on the NCAOC intranet at https://cis1.nccourts.org/intranet/aocapps/crimprod/documents/legalmemos/memo-2009bondlegislation.pdf.

[6] The definitions in G.S. 15A-101.1 apply to Chapters 7A, 15, 15A, and "all other provisions of the General Statutes that deal with criminal process or procedure."

[7] Some emerging technologies monitor both the subject's location and his/her physical status (*e.g.*, consumption of alcohol). It is unclear, however, whether or not the use of such a device for pretrial release would allow assessment of its costs against the defendant, unless the court used it to monitor the defendant's compliance with "house arrest with electronic monitoring" as a condition of the defendant's release under G.S. 15A-534(a)(5). When imposed, that condition must require that the defendant remain "at his or her residence" unless authorized by the court to leave home for specific purposes, suggesting that it may not be used for general monitoring of the defendant's movements. If the court elects to impose both house arrest with electronic monitoring and abstinence from alcohol as conditions of release, and requires that the defendant wear one of these dual-purpose devices, the defendant may not be taxed with the costs of the device unless it meets the criteria of G.S. 7A-313.1: (i) it is provided by a county "that provides the personnel, equipment, and other costs"; (ii) the defendant is not found to be indigent and entitled to court-appointed counsel; and (iii) the costs taxed to the defendant do not exceed the lesser of the daily jail fees under G.S. 7A-313(a) or the actual costs of the monitoring. Any fees assessed under that authority would be paid directly by the defendant to the county, not to or through the clerk of superior court.

[8] Note that G.S. 20-179(h2) currently provides that if the court determines (when sentencing an offender for an impaired driving offense) that "the defendant should not be required to pay the costs of [CAM], the court shall not impose [CAM] unless the local governmental entity responsible for the incarceration of the defendant … agrees to pay the costs of the system." Effective for offenses committed on or after December 1, 2011, S.L. 2011-191 repeals subsection (h2) entirely, the impact of which is unclear. By removing the prohibition against imposing CAM without a clear source of payment, the amended G.S. 20-179 appears to give the court discretion to impose CAM as a condition of probation and also waive the CAM fees for the offender without requiring that some other entity (*i.e.*, local government) pay them. On the other hand, the intent of the repeal of subsection (h2) may have been to require that convicted offenders always pay the costs of CAM when it is imposed. Unless and until the General Assembly or appellate division provide further clarification, the NCAOC defers to the judgment of the sentencing courts about the effect of the repeal of G.S. 20-179(h2), but as noted herein, the assessment of post-conviction costs for CAM has no bearing on their assessment for pretrial release.

from the analysis above and concludes that the defendant may be taxed with the costs of pretrial CAM, any such costs must be paid directly by the defendant to the vendor or other agency providing the monitoring.

## II. Warrantless Arrest for Violation of Conditions of Pretrial Release

Effective for violations of pretrial release conditions occurring on or after December 1, 2011, S.L. 2011-245 (SB 311, Pretrial Release Violation/Arrest) amends G.S. 15A-401, Arrest by law-enforcement officer. Specifically, the bill amends G.S. 15A-401(b), which currently provides that an officer may arrest a defendant without a warrant when the defendant has violated a pretrial release order "entered under G.S. 15A-534.1(a)(2)," concerning pretrial release only for defendants charged with certain domestic violence offenses.

As of December 1, 2011, G.S. 15A-401(b) will provide that officers may arrest defendants without a warrant for violation of a pretrial release order "entered under G.S. 15A-534 or G.S. 15A-534.1(a)(2)." The addition of G.S. 15A-534 to this provision makes the continuing reference to G.S. 15A-534.1 superfluous, because all release orders are entered "under G.S. 15A-534," pursuant to subsection (d) of that section. Conditions of release imposed pursuant to other statutes are supplemental to the conditions of release imposed pursuant to G.S. 15A-534.[9] As a result, the amended G.S. 15A-401 apparently will allow a warrantless arrest for violation of any condition of release contained in a release order to which the defendant currently is subject.[10] The NCAOC interprets this expanded scope of warrantless arrests to require the following of the courts:

- The judicial official before whom the defendant is brought upon arrest must determine whether or not there is probable cause to believe that a condition of the defendant's release actually has been violated.
- If so, the official should set new conditions of release for the defendant, superseding the prior release order.
- If new conditions of release are set, the clerk may need to take additional steps to release a bond posted for the defendant under the prior release order.

*Initial Appearance Is Required Upon Warrantless Arrest for Pretrial Release Violations*

An officer making a warrantless arrest must "without unnecessary delay" take the defendant before a judicial official for an initial appearance.[11] At the initial appearance following a warrantless arrest, a judicial official must "determine whether there is probable cause to believe that a crime has been committed and that the person arrested committed it."[12] If the official does not find such probable cause, the person must be released.[13] If probable cause is found, the official must issue a magistrate's order charging the offense.[14]

In the context of a warrantless arrest for violation of a condition of pretrial release that does not constitute an independent criminal offense, there is no "crime" committed, so there is no reason to issue a magistrate's order. However, the requirement of a determination of probable cause appears to apply; the judicial official must determine that there is probable cause to believe that a condition of release actually was violated.[15] As with an initial appearance for a substantive offense, if the official does not find such probable cause, the person must be released.[16] If the official finds probable cause to believe that a condition of release

[9] *See*, *e.g.*, the closing phrase of G.S. 15A-534.1(a): "The following provisions shall apply *in addition to* the provisions of G.S. 15A-534:" (emphasis added).
[10] This interpretation of the amended statute should not be construed as legal advice by the NCAOC to law-enforcement officials about the scope of their authority under G.S. 15A-401. The NCAOC does not and can not provide legal advice to law enforcement officials. This interpretation is provided only to give context to the NCAOC's advice to judicial officials resulting from that interpretation. Law-enforcement officials with questions about the scope of their authority should consult with their agencies' counsel.
[11] G.S. 15A-501(2) and 15A-511(a)(1). Although G.S. 15A-511(a) refers to taking the defendant before a "magistrate," any judicial official (justice, judge, magistrate or clerk) may conduct an initial appearance, so this memo will use the more generic "judicial official."
[12] G.S. 15A-511(c)(1).
[13] G.S. 15A-511(c)(2).
[14] G.S. 15A-511(c)(3).
[15] To hold otherwise would allow the defendant's release to be revoked on a mere, unsubstantiated (or false) allegation of violation of a condition of release. Therefore the judicial official at initial appearance should follow the same standard as the official would apply to a finding of probable cause that an offense occurred under G.S. 15A-304(d): "sufficient information, supported by oath or affirmation, to make an independent judgment that there is probable cause to believe" that the defendant violated a condition of release.
[16] G.S. 15A-511(c)(2).

was violated, there will be no new magistrate's order for a substantive offense, but G.S. 15A-511(e) then requires that the official determine conditions of release.

*Judicial Official at Initial Appearance Should Set New Conditions of Release*

As noted above, G.S. 15A-511(e) requires that the judicial official conducting an initial appearance must determine conditions of release. When a defendant is arrested without a warrant for violation of a condition of release, the official may not defer the setting of conditions of release to another official,[17] nor may the official order that the defendant be held without conditions of release (*i.e.*, a "no bail" order).[18]

A release order entered after arrest for violation of a condition of release effectively revokes and supersedes the prior release order. The new release order therefore should be a complete release order, rather than a mere modification of the prior order. It must impose at least one of the five forms of pretrial release under G.S. 15A-534(a), along with any appropriate, additional restrictions on the defendant's conduct.[19]

*A New Release Order Exonerates a Bond Posted under the Prior Release Order*

As noted above, a new release order entered after warrantless arrest for violation of a condition of release effectively revokes and supersedes the previous release order. This does not cause the forfeiture of any bond posted under the prior release order. Forfeiture occurs only upon order of the trial court after the defendant has failed to appear as required by the bond. G.S. 15A-544.3(a). Instead, the superseding release order appears to render the prior release order a nullity, which in turn relieves the defendant and any surety from any monetary bond obligation posted to satisfy the prior release order.[20]

The release of any prior bond obligation means that any cash bond posted should be refunded, either to the defendant (if no other party signed the Appearance Bond as surety) or to the surety (if they did). If a bond was posted by a licensed surety (professional bondsman or insurance company), the clerk does not need to take any action; the bond obligation of that surety simply ceases and is no longer subject to forfeiture. The clerk should not give the surety the bond paperwork or any of its attachments (*i.e.*, the bondsman's gold seal or the insurance company's power of attorney certificate); the prior bond remains a record of the court, even though the surety's obligation under that bond has terminated. Any deed of trust to real property that was recorded to satisfy the bond under the superseded release order should be cancelled with the relevant Register of Deeds.

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[17] A magistrate, clerk, or district court judge setting conditions of release for the defendant arguably violates G.S. 15A-534(e) when the defendant's case currently is proceeding in a higher division of the trial courts. That subsection provides that judicial officials have no jurisdiction over a defendant's conditions of release after the defendant's case has progressed to the next tier of the trial division. However, to read G.S. 15A-534(e) as controlling in this limited scenario (when the defendant is arrested for violation of a condition of release and brought before a judicial official who otherwise would be deprived of jurisdiction by that subsection) would require that the official inform the arresting officer that the official has no jurisdiction to revoke or modify the existing release order, that the order therefore remains in effect, and that the officer must release the defendant immediately under the same conditions of release. "Statutory interpretation begins with the cardinal principle … that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, and what it seeks to accomplish." State v. Stanley, ___ N.C. App. ___, 697 S.E.2d 389, 390 (2010). By amending G.S. 15A-401 to allow warrantless arrest for violation of any condition of release, the General Assembly apparently intended that the violating defendant be brought back to the courts for review of the efficacy of the current conditions. To hold that G.S. 15A-534(e) prohibits that review by most judicial officials would render the arrest a mere "catch and release" with no consequences for the defendant's conduct, contrary to that apparent intent.

[18] Similar to the analysis in the preceding footnote, to read the combination of the amended G.S. 15A-401(b) and 15A-534(e) to permit a "no bail" order is inconsistent with the apparent legislative intent in the statutes governing the right to pretrial release, particularly G.S. 15A-533(b), which provides that any defendant charged with a noncapital offense must have conditions of release set under G.S. 15A-534. When the General Assembly has wished to create exceptions to G.S. 15A-533(b) and thereby deny a release for particular defendants or cases, whether as a general "no bail" requirement or a temporary delay in determining conditions of release, it has done so expressly. *See, e.g.*, G.S. 15A-533(c) (allowing pretrial release in capital cases is discretionary, and allowed only on order of a judge); G.S. 15A-534(d2) (setting conditions for a probationer arrested for a new felony may be delayed for as long as 96 hours if judicial official can not determine whether or not defendant "poses a danger to the public"); and G.S. 15A-1345(b1)(1) (no bail for arrest on probation violation with a pending felony or prior conviction of reportable sex offense, if judicial official determines that probationer poses a danger to the public). Because the General Assembly did not provide for "no bail" or delaying the determination of conditions of release upon warrantless arrest for violation of a condition of release, it appears that the defendant still is entitled to determination of conditions at the initial appearance.

[19] The senior resident superior court judge may wish to provide guidance to local officials about appropriate conditions for the new release order in the local bond policy promulgated under G.S. 15A-535(a).

[20] If the new release order imposes a monetary bond, the defendant will have to satisfy that bond anew; any bond posted under the prior release order is released by its revocation and will not "carry over" to the new release order.

## III. Conclusion

Court officials with questions or concerns about the pretrial release changes described herein should feel free to contact me at Troy.D.Page@nccourts.org or at 919-890-1323. Questions about the use of NCAOC's automated systems such as NC AWARE in setting the new abstinence condition of release should be directed to the NCAOC's Court Services Analyst for the official's county. Law enforcement officers and officials of other agencies with questions about the impact of the legislation described herein should consult their agencies' counsel.

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