BAIL POLICIES FOR
THE JUDICIAL DISTRICT TWENTY NINE-B

G.S. 15A-535(a) provides that the Senior Resident Superior Court Judge of each judicial district shall from time to time publish the bail policies for the district. The policies set out below shall, unless and until revised, constitute those policies, and they supersede and replace any and all previously issued bail policies for Judicial District 29B. These policies are a supplement to the bond statutes, and are intended to assist the magistrates and others who may be called upon to set conditions of pre-trial release. In most instances, the statutes will provide the answer to whatever questions arise. However, the statutes do not address the issue of what bond is reasonable and what bond is excessive. That issue arises because of a provision which appears in both the federal and the state constitution, saying: "Excessive bail shall not be required." Bail is excessive if it is higher than what is reasonable under the circumstances. Under the North Carolina bail statutes there are only two types of circumstances to consider: assuring the defendant's presence in court, and preventing harm to persons, property, or evidence pending trial.

Release on bail is **not allowed** in extradition cases after a Governor's Warrant has been received. Release on bail is allowed, but not required, in two other instances: capital case's and cases where someone is charged with a crime committed while he or she was an inmate (escaped or not) of an insane asylum. In all other cases, some condition of pre-trial release must be set. These conditions can include positive requirements (such as daily check-ins) and prohibitions (such as forbidding the defendant from going to specified places, possessing a firearm, operating a motor vehicle, or leaving the country), either instead of money bail, or in addition to it. If non-money conditions are appropriate, they can be tailored to circumstances, always with an eye to the two statutory factors: assuring the defendant's presence in court and preventing harm.

The bond statutes require the use of the least restrictive bond that will reasonably get the defendant to court while protecting the public. If the defendant will probably come to court, and will probably not pose a danger of destruction of property, tampering with (or threatening) witnesses, or destruction of evidence, then a recognizance bond—a written promise to appear, in other words—is appropriate. Next up, in order of restrictive ness, is an unsecured bond—a written promise by the defendant to be liable in a specified amount if he or she does not appear. A slightly more restrictive (because it is usually more difficult for the defendant to arrange) requirement is a custody release to some responsible person. Yet more restrictive is a secured bond, and most restrictive is a cash bond. Note that an unsecured money bond is better than a mere recognizance bond, only to the extent that the defendant is going to be able to pay the money if he defaults and is caught. In practice, an unsecured bond and a recognizance bond amount to the same thing, and if a recognizance release is not appropriate, an unsecured bond is also (almost always) not appropriate.

If a defendant has on record an instance of failure to appear in court that is a reasonable indication that he or she should have a secured bond, or a cash bond. It is not an absolute indicator, since people have, on occasion, been given the wrong court date (or something similar). However, since this excuse is true much less often than it is given, the magistrate should

consider it as he or she does all self-serving statements, i.e., consider that it might be true, but then decide whether he or she believes it. If there is a failure to appear on a defendant's record, not explained to the magistrate's satisfaction, the magistrate is reasonable in setting a substantial bond, and the more failures to appear there are, the higher the bond can be set without being excessive.

In the same way, a defendant's record of convictions can speak to the other consideration in setting bond: whether the defendant is a danger, pending trial. A defendant who is charged with larceny whose record of convictions says he or she is a thief, or a defendant charged with assault whose record says he or she is likely to do it again, soon, should not necessarily be treated the same way as a defendant with a clean record. Depending on how old the convictions are, the magistrate may give them more or less weight, but if there seems to be a pattern there, it is the policy of this District that the magistrate is reasonable to be concerned, and that the concern can be reflected in the type and amount of bond that is set. Note that a record of pending charges can also be considered, but caution should be used. The maxim that a person is presumed to be innocent until proven guilty places the burden of proof on the State in a criminal trial. It does not mean that a magistrate must overlook a developing pattern of misconduct; only that the magistrate should keep in mind that the charges may or may not mature into convictions.

Ideally, the magistrate or judge would have immediate access to every defendant's complete conviction history. In the instances when that is actually so, the official setting bond should consider the matter in light of that history. That involves not only the factors discussed in the previous two paragraphs, but also this: with this defendant's record, where will he or she fall on the Structured Sentencing grid? This is relevant because with misdemeanors, except for Class A1 crimes, a defendant without prior convictions cannot be given active time. A defendant with a conviction history, on the other hand, is a potential jail candidate, and assuming that he or she knows how the system works, is a greater flight risk than someone with no such record, and the higher the potential active sentence, the higher the risk of flight. The magistrate can reasonably take this into account, and should do so.

Unfortunately, it will very often happen that the official will not have access to the defendant's record. It is appropriate, if such a record can be obtained within a reasonable time, for the official to defer setting the bond until the record can be examined. But if no record is at hand or reasonably obtainable, the official is required to do the best that can be done, with the information available. It is helpful to judges, who must later consider a defendant's motion for bond modification, to know what information the magistrate had initially, and if the record was not available when the bond was first set, the magistrate should so note in the file. And if, in that situation, the defendant tells the magistrate that he or she has no prior record, the magistrate should make a particular note of that statement in the file, so that a judge who may later have to consider a bond motion can compare the actual record with the earlier claim.

In addition to the factors already discussed, the magistrate should take into account the defendant's connections with the community, or lack of them. Some of the factors important to this consideration are the following:

1. Does the magistrate know the defendant, personally or by reputation, to be reliable or unreliable person?
2. Does the arresting officer know the defendant, personally or by reputation, to be a reliable or unreliable person?
3. Does the defendant live in the area, and if so, for how long? Does he or she own a resident, or is it a rental? Is his or her car registered locally? (Whether a defendant is from out of state is especially relevant to misdemeanors, since as a rule North Carolina does not extradite out-of-state misdemeanors who fail to appear.)
4. Is the defendant regularly employed, and if so, for how long? Does it seem likely that he or she has accrued benefits that will be forfeited if he or she disappears?
5. What is the defendant's mental state? (A drunk, enraged, irrational or disoriented defendant should **never** be released on his or her own recognizance or with an unsecured bond though a custody release to a sober, responsible adult may be appropriate, depending on circumstances.)

The answer to these questions will give the magistrate some guidance in deciding whether to set a bond higher than, lower than or within, the normal range discussed below. A defendant with (few or no) local connections is subject to the same temptations to flee that any defendant has, with fewer pressures in the other direction, and the magistrate is entitled to take this into account.

General Statute 15A-534(b) requires that an official setting bond record his or her reasons for imposing a more stringent bond than a custody release, to the extent provided in these policies. Secured or cash bonds, in amounts up to the amounts set out below, are hereby defined as reasonable, and a secured bond that is equal to, or less than, the amount shown for the offense class does not have to be explained. Officials setting bonds greater than those shown must indicate the reason in writing. That reason need not be one of those discussed above, but should in any event relate to the two broad reasons for having a bond, mentioned at the outset of these policies. Note well: the amounts listed below are not suggested bonds, or minimum bonds, or maximum bonds. They represent the high end of the range of presumptively reasonable bonds, but if there is a reason (recorded in the file) why a bond should be set at a higher figure, it can and should be so set; there is no maximum limit. A bond may be set for less than the amount shown below, without explanation.

Infractions (if applicable: see GS 15A-1113(c))	$	100
Class 3 misdemeanor	$	100
Class 2 misdemeanor	$	300
Class 1 misdemeanor	$	500
Driving While Impaired (<u>not</u> felony DWI)	$	1,000
Class A1 misdemeanor	$	4,000

Class I felony	$ 6,000
Class H felony	$ 8,000
Class G felony	$ 15,000
Class F felony	$ 20,000
Class E felony	$ 40,000
Class D felony	$ 60,000
Class C felony	$ 80,000
Class B1 or B2 felony	$ 100,000
Class A felony	Bond to be set only by a judge.

The requirement that bonds which are set above the amounts set out above be explained, applies only to the money amount. Additional requirements or restrictions set as a condition of pre-trial release must be in writing, but shall be deemed self-explanatory, and are in the sound discretion of the official setting the bond. A magistrate before whom a defendant is brought on account of an alleged violation of the provisions of an earlier pre-trial release order may have his or her bond substantially increased, both in type and in money amount, if the magistrate believes that the violation has indeed occurred, and that belief, noted in the file, is sufficient explanation for a departure from the bond amounts set out above.

In cases where a person is charged with trafficking in controlled substances, that alone is grounds for a magistrate to set a bond above the upper limit for the felony level charged if he or she believes it is appropriate.

The use of a fictitious name, or of someone else's name, is a tactic that persons sometimes use to avoid a record in their own name, or to avoid being held accountable for a record (or outstanding warrants) they already have in their own name. If a magistrate has reasonable doubt as to the truth of a defendant's stated identity, the magistrate may, and should, take these doubts into account in setting a bond, and may set a bond above the upper limit for the crime charged. The reason for the higher bond should be noted in the file. In some Spanish-speaking countries, persons have two "last" names: their father's name followed by their mother's. It is the first of the names that comes closest to our idea of a last name. It sometimes happens that a Hispanic person will be identified by the second name, which causes confusion. While this confusion is sometimes the result of an innocent misunderstanding, a magistrate who believes it is deliberate may reasonably consider that the person is trying to conceal his or her real identity. Identity is important because our sentencing statutes rely on a person's prior record, and the potential sentence someone faces if convicted is an important fact to consider in setting bond, as is a record of failures to appear.

Except for instances when bond conditions are believed to have been violated, and the old bond increased as discussed above, a bond once set by a judge shall not be altered by a clerk or magistrate unless it is done with the knowledge and consent of a judge of the appropriate trial division. This limitation is subject to the failure to appear exception noted below. Such consent of the judge shall be noted in writing, with a notation of how and when it was given (e.g.,

"authorized by Judge Smith by telephone, 8:35 p.m."). Judges of the District Court division are hereby expressly authorized, but not required, to give telephone instructions for the setting of initial bonds in "domestic violence" cases during the 48-hour period when the magistrate is not authorized to do so. The magistrate must speak directly to the judge (on the telephone) in such cases, and the magistrate receiving such telephone authorization shall be deemed to act, not for him or herself, but as agent of the district judge. Note: this should be a rare situation, and unless the judge is, at a minimum, informed of the defendant's criminal history, the judge should decline to set any such long-distance bond. Note to jailers and magistrates: defendants must never, ever, be advised to contact a judge as to their bond. Their attorneys, whose licenses are at risk if they act improperly, may do so, but no defendants, their families or friends.

Occasionally in dealing with persons arrested for failure to appear in court, our magistrates become aware that the defendant was jailed locally or in some other jail or prison when they missed their court date. Magistrates are delegated authority to change a secured bond to an unsecured bond or to a lower secured bond if **all** of the following apply:

1. The bond on the failure to appear was not set by a superior court judge whose term in the county is still in session. If the term is still in session, a motion for bond modification should be addressed to the presiding superior court judge.
2. The defendant is charged with misdemeanors, or felonies not more serious than H class.
3. The magistrate is completely satisfied that the defendant was incarcerated at the time he or she failed to appear in court. It is not the burden of the magistrate to determine whether the defendant was so incarcerated.
4. The magistrate feels otherwise comfortable, after dealing with the defendant, that the bond should be modified. The magistrate is not required to modify any failure to appear bond.

The reason for the modification must be noted in the court file.

A corollary is that district court judges are delegated the authority to modify any bond set by a superior court judge when the above circumstances apply, and they may also review any bond modification made by a magistrate.

Everything that has been stated above applies to persons accused of a crime, who are awaiting trial. The situation is very different with a person who has been tried, convicted, sentenced, place on probation, and who, according to the probation officer, has violated the terms of probation. In setting the bond for pre-hearing release on an alleged probation violation, the magistrate should consider the nature of the violation: failure to pay restitution is a violation, and so is fleeing the state, but the bond set for the money violation should generally be smaller than the bond for the absconder, all else being equal. The length of the suspended sentence is certainly a factor to consider. In any event, the schedule of bond ranges set out above does not apply to probation violation cases. The conviction upon which the probation is based is sufficient reason for setting a secured or cash bond if the magistrate considers it appropriate, and the amount of such bond is within the sound discretion of the magistrate.

These policies are hereby established as the Bail Policies for Judicial District 29B, by the undersigned Senior Resident Superior Court Judge, after consultation with the Chief District Judge, this the 13 day of April, 2007.

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Mark E. Powell
Senior Resident Superior Court Judge

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Robert S. Cilley
Chief District Court Judge