

COVID-19, Pretrial Detention, and Bond Determinations

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The state of the COVID-19 pandemic, as well as the relative risk it poses to the health of criminal defendants, may play a significant role in the determination of bond conditions and whether a person remains in pretrial custody. Some defendants in other jurisdictions, citing the pandemic and the unique challenges it poses in the jail setting, have successfully challenged bond determinations by asserting that constitutional or statutory standards that preclude excessive bail or the denial of bail have been violated. These types of challenges may also be brought in the North Carolina criminal courts. The Supreme Court of North Carolina has recognized that criminal defendants may challenge bail as excessive or otherwise unconstitutional either through a “motion to reduce bond or exercise [of the] remedy of habeas corpus.”¹ A defendant may use either mechanism to raise arguments in support of a bond reduction.² Attorneys seeking bond or modification of bond should include in their motion each of the relevant statutory and constitutional grounds for relief.

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1. *State v. McCloud*, 276 N.C. 518, 532 (1970); *see also State v. Harrington*, 283 N.C. 527, 530–31 (1973) (“If the accused desires to challenge . . . the amount of bail fixed, he may apply to the court for the prerogative writ of habeas corpus.”); *State v. Herndon*, 12 S.E. 268, 269 (N.C. 1890) (“[A]ny person charged, but not convicted, of any crime whatever, may be admitted to bail, if the judge, upon hearing the testimony upon a writ of *habeas corpus* adjudges that upon the facts developed the petitioner is entitled to be released on bail.”); *cf. People ex rel. Nevins v. Brann*, 122 N.Y.S.3d 874, 882 (N.Y. Sup. Ct. 2020) (discussing COVID-19 and stating that a “defendant may . . . file a petition for a writ of habeas corpus ‘if it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated’” (internal citation omitted)).

2. G.S. 17-32 (stating that the “judge before whom the party is brought on a writ of habeas corpus shall . . . examine into the . . . restraint of such party, . . . and . . . do what to justice appertains in . . . bailing . . . such party”); *Ex parte Bailey*, 166 S.E. 165, 167 (N.C. 1932) (interpreting predecessor statute), *rev’d on other grounds, South Carolina v. Bailey*, 289 U.S. 412 (1933); *see also* G.S. 15A-547 (“Nothing in this Article [Bail] is intended to abridge the right of habeas corpus.”). A petition for writ of habeas corpus must be filed with a superior court or appellate court judge. *See* G.S. 17-6.

“Other Evidence Relevant to the Issue of Pretrial Release”

Arguments in support of motions to reduce bond typically involve the statutory factors. G.S. 15A-534(c) provides that, in addition to considering the nature of the offense, the weight of the evidence, community ties, and the other usual factors, judicial officials must take into account “any other evidence relevant to the issue of pretrial release.”³

As of this writing, there are no North Carolina appellate cases providing guidance about how COVID-19 should be considered with regard to the issue of pretrial release. However, appellate courts in other states that have considered the issue have found that the interest in pretrial release “is heightened by the widespread presence of COVID-19 in [a] jail”⁴ and that the risk of exposure has a material bearing on the issue, particularly for defendants detained for nonviolent offenses at a time when “the criminal process has been effectively suspended by a pandemic, the likes of which this nation has not seen in a century, perhaps ever.”⁵ As one court explained, “[i]ncarcerating a defendant under conditions that do not permit compliance with widespread health directives designed to halt the spread of the virus poses significant health risks not only to other inmates and to correctional facility staff, but also to the rest of the public.”⁶

The approach of federal courts also may be instructive. Federal courts have identified a number of “compelling reasons” related to the pandemic that weigh in favor of pretrial release.⁷ As one court observed,

The federal government currently anticipates more COVID-19 deaths in the United States, within the span of one year, than the nation’s total casualties during World War I. . . . In the context in which preliminary detention could be a death sentence, courts, more than ever, must take all reasonable steps to ensure that individuals are detained only when there is no legal and viable alternative.⁸

Faced with this reality and responsibility, the federal courts have made “individualized determination[s] as to whether COVID-19 concerns present . . . a compelling reason in a particular case that temporary release is necessary”⁹

Courts that have conducted these assessments have, among other things, considered the defendant’s age, the state of the pandemic, and relevant health issues.¹⁰ Bail has generally been deemed more appropriate for people held in jurisdictions and facilities with significant

3. *State v. Knoll*, 322 N.C. 535, 537 (1988) (discussing G.S. 15A-534(c)).

4. *State v. P.J.C.*, No. A-3271-19T6, 2020 WL 3494381, at *3 (N.J. Super. Ct. App. Div. June 29, 2020) (quoting *In re Request to Modify Prison Sentences, Expedite Parole Hearings, and Identify Vulnerable Prisoners*, M-1093-19, 084412, slip op. at 32 (N.J. June 5, 2020)).

5. *P.J.C.*, 2020 WL 3494381, at *3.

6. *Karr v. State*, 459 P.3d 1183, 1186 (Alaska Ct. App. 2020).

7. Under 18 U.S.C. § 3142(i), a person in custody pursuant to a detention order “may, by subsequent order, . . . [be] release[d] . . . for a[] compelling reason.”

8. *United States v. McDuffie*, 451 F. Supp. 3d 281, 286 (S.D.N.Y. 2020).

9. *United States v. Clark*, 448 F. Supp. 3d 1152, 1156–57 (D. Kan. 2020) (surveying cases involving the pandemic and the ways in which courts have addressed motions seeking release from custody or allowance of bond conditions because of COVID-19).

10. See, e.g., *United States v. Nkanga*, 452 F. Supp. 3d 91, 96 (S.D.N.Y. 2020) (granting bail and finding “the extraordinary circumstances that make this case an appropriate one for bail include the defendant’s age; his multiple health issues; the nature of the defendant’s offense; the precise timing of the sentencing

outbreaks.¹¹ Defendants' medical issues are typically central to the analysis and in some cases have been deemed significant enough to outweigh immigration or extradition detainers.¹² A number of courts have also cited factors unrelated to a particular defendant's health—such as access to counsel or public health in general—in decisions releasing them on bond.¹³

Constitutional Arguments

In addition to arguments that the exigencies of the pandemic constitute “other evidence relevant to the issue of pretrial release,” defendants might make a number of constitutional arguments. A defendant, for example, might challenge a bond determination as excessive under the Eighth Amendment of the U.S. Constitution or article I, section 27 of the N.C. Constitution by emphasizing the disproportionate risk of contracting the virus that a person faces when being held pretrial.¹⁴ To the extent that excessive bail has the effect of exposing someone to an unreasonable risk of illness, it may violate other provisions of the Amendment and article. Some judges have taken the view that “[t]o subject citizens . . . to the lethal threat of COVID-19

proceeding . . . in relation to the emerging COVID-19 pandemic; and the conclusions already reached by the Court in previous aspects of this litigation regarding the defendant's health issues, and apparent lack of dangerousness or risk of flight”).

11. *See, e.g., Cristian A.R. v. Decker*, 453 F. Supp. 3d 670, 689 (D.N.J. 2020) (granting habeas relief for immigration detainees and the “remedy of release on bail” for people “vulnerable to severe complications and death if they contract COVID-19 and . . . incarcerated in Facilities at the epicenter of the outbreak where they cannot practically adhere to social distancing guidelines or the adequate level of personal hygiene to stop the spread of the virus”).

12. *Id.*; *see also Basank v. Decker*, 449 F. Supp. 3d 205, 212 (S.D.N.Y. 2020) (“[A]t least one court has ordered the release on bail of a non-citizen in immigration detention on the ground that detention conditions have been rendered unsafe by COVID-19.” (citing *Calderon Jimenez v. Wolf*, ECF No. 507, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020)); *In re Extradition of Toledo Manrique*, 445 F. Supp. 3d 421, 422 (N.D. Cal. 2020) (granting defendant's release on bail pending extradition, stating that court was persuaded “that at 74 years old he is at risk of serious illness or death if he remains in custody”).

13. *See, e.g., United States v. Sanders*, No. 2:19-cr-20288, 2020 WL 2320094, at *7 (E.D. Mich. May 11, 2020) (finding defendant had “shown by clear and convincing evidence that conditions can be fashioned that . . . can secure his appearance for sentencing, and the safety of the community” and that “will also serve to diminish [his] risk of . . . contracting COVID-19, and the general public-health risk created by large prison populations”); *United States v. Shaheed*, 455 F. Supp. 3d 225, 237–38 (D. Md. 2020) (ordering defendant released from custody, granting emergency motion to reopen detention hearing, and setting conditions of pretrial release, finding “that there is a combination of conditions that will reasonably assure [his] appearance as required and the safety of the community,” factoring in COVID-related restrictions on attorney access and defendant's “current inability to confer with counsel confidentially in this decision”).

14. *See* U.S. Const. amend. VIII (prohibiting “[e]xcessive bail”); N.C. Const. art. I, § 27 (same); *cf. State v. O'Neal*, 108 N.C. App. 661, 665–66 (1993) (considering and rejecting argument that defendant's bond violated N.C. and U.S. constitutions' prohibitions on excessive bail, where there was no evidence trial court had disregarded statutory factors and the court had reduced defendant's bond on prior occasion).

because they are unable to post bail is an unconstitutional violation of their right to be free from cruel and unusual punishment.”¹⁵ Other courts have concluded that, in light of the pandemic, they

must now balance the public health safety risk posed by the continued incarceration of pre-trial defendants in crowded correctional facilities with any community safety risk posed by a defendant’s release . . . into a community which now has fewer open businesses, fewer opportunities for travel, and more people staying at home.¹⁶

Defendants also might argue that the Sixth Amendment is implicated by a bond determination that keeps them confined in a local jail at a time when attorney access to the facility is limited.¹⁷ Some courts have concluded that COVID-based restrictions on attorneys’ access to jails constitute a compelling reason to grant bond, given the obstacles they create to defendants’ ability to communicate with counsel and assist in their own defense.¹⁸ Defendants might also argue that COVID-19 outbreaks in the jails, along with the inherent difficulty of implementing effective mitigation measures in a custodial setting, have a material bearing on bond determinations for pretrial detainees under the Due Process Clause of the Fourteenth Amendment, which prohibits “conditions of confinement that would subject them to exposure to serious . . . illness.”¹⁹

15. *Off. of the Pub. Def. v. Connors*, No. SCPW-20-0000200, 2020 WL 3032863, at *11 (Haw. June 5, 2020) (Wilson, J., dissenting) (unpublished).

16. *Karr v. State*, 459 P.3d 1183, 1186 (Alaska Ct. App. 2020); see also *In re Extradition of Toledo Manrique*, 445 F. Supp. 3d 421, 423 (N.D. Cal. 2020) (granting defendant’s release on bail pending his extradition to Peru, discussing risk of flight, and stating this “problem has to a certain extent been mitigated by the existing pandemic,” given that “international travel is hard now” and “[t]ravel bans are in place”).

17. *United States v. Shaheed*, 455 F. Supp. 3d 225, 237–38 (D. Md. 2020) (ordering defendant released from custody and setting conditions of pretrial release, taking into account COVID-related restrictions on attorney access and defendant’s “current inability to confer with counsel confidentially in this decision”); cf. *State v. Jones*, 295 N.C. 345, 356 (1978) (acknowledging that defendants may bring a “claim that excessive bail prejudiced the efforts of the accused to prepare for trial”); *State v. O’Neal*, 108 N.C. App. 661, 666 (1993) (considering and rejecting argument that defendant’s inability to meet the bond requirements imposed by the court violated his rights and substantially interfered with the preparation of a defense to the charge against him, finding “no support for his contentions in the record”).

18. *United States v. Stephens*, 447 F. Supp. 3d 63, 67 (S.D.N.Y. 2020); see also *United States v. Davis*, 449 F. Supp. 3d 532, 540, 541 (D. Md. 2020) (observing that COVID-19 will dramatically “alter and limit a defendant’s interaction with his attorney—especially if the defendant is detained pending trial,” and denying government motion for pretrial detention, stating that “[e]ven though access to counsel is not a specified factor in the Bail Reform Act, the Court has considered it in its decision”); *United States v. Robinson*, No. CR 19-371, 2020 WL 5047895, at *5 (E.D. Pa. Apr. 21, 2020) (holding that a COVID-related “limitation on . . . legal visits is certainly relevant to [defendant’s] contention that he cannot prepare a defense” but concluding that, as of April 2020, “the limitation ha[d] not persisted long enough to be a controlling factor”). For a further discussion of access to counsel for in-custody clients, see Ian A. Mance, [COVID-19 Jail Restrictions and Access to Counsel](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2020/04 (Oct. 2020).

19. *United States v. Martin*, 447 F. Supp. 3d 399, 401–02 (D. Md. 2020); see also *Bell v. Wolfish*, 441 U.S. 520, 542 (1979) (stating that confining pretrial detainees in a “manner as to cause them to endure genuine privations and hardship . . . might raise serious questions under the Due Process Clause”).

Changed Circumstances

A number of state courts have held that “the risks inherent in the COVID-19 pandemic constitute a changed circumstance” such that a defendant “is entitled to a rebuttable presumption of release” unless the law prohibits bail.²⁰ In accordance with this view, some courts, including in North Carolina, have exercised their discretion to relax pretrial release conditions in response to the threat posed by the pandemic.²¹ State courts have granted motions for pretrial release in response to concerns about defendants’ medical vulnerabilities.²²

20. *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 142 N.E.3d 525, 529–30, *aff’d as modified*, 143 N.E.3d 408 (Mass. 2020); *see also Disability Rts. Montana v. Montana Judicial Dist.* 1–22, No. OP 20-0189, 2020 WL 1867123, at *4 (Mont. Apr. 14, 2020) (“[F]or those identified as part of a vulnerable or at-risk population by the [CDC], COVID-19 is presumed to be a material change in circumstances . . . For all other cases, the COVID-19 crisis may constitute a material change in circumstances and new information allowing amendment of a previous bail order or providing different conditions of release.” (quoting Montana chief justice’s order, *In re Statewide Response by Montana State Courts to the COVID-19 Pub. Health Emergency* (Mar. 27, 2020))).

21. *Guyer v. Montana Eighth Judicial Dist. Court*, No. OP 20-0233, 2020 WL 3545205, at *2 (Mont. June 30, 2020) (discussing letter from Montana’s chief justice to state courts, which encouraged them to “review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses”); *People v. Chandler*, 941 N.W.2d 920 (Mich. 2020) (mem.) (vacating lower court order denying emergency motion to modify bail, finding court “abused its discretion by failing to give adequate consideration to Administrative Order No. 2020-1 . . . , which directs courts to consider the public health factors arising out of the present public health emergency to mitigate the spread of COVID-19”); Isaac Groves, *Alamance County Courts, Sheriff, ACLU Progress on Bail*, BURLINGTON TIMES-NEWS, May 12, 2020 (quoting Alamance County District Attorney as stating that his office “asked the Sheriff’s Office to have the jail medical staff identify any inmates who were high risk for illness from Covid-19; [and that] once we had that list we worked to review bonds and reduce any that the courts deemed appropriate,” and that the “net result is that Alamance County has significantly reduced our jail population”). North Carolina judicial districts also have the authority to revise their bond policies, in accordance with G.S. 15A-535, to account for the impact of COVID-19 on vulnerable defendants. *See* G.S. 15A-535(a) (providing process by which local judicial officials “must devise and issue recommended policies to be followed within each of those counties in determining whether, and upon what conditions, a defendant may be released before trial”); *In re Foster*, 744 S.E.2d 496, 2013 WL 2190072, at *8 (N.C. App. May 21, 2013) (unpublished) (indicating that a “magistrate should not . . . disregard [] the established bond policy” under G.S. 15A-535(a)).

22. *See, e.g., In re Ung*, No. H048152, 2020 WL 4582595, at *1 (Cal. Ct. App. Aug. 10, 2020) (unpublished) (concluding that the defendant “has a right to bail under the California Constitution and the amended bail schedule adopted . . . in response to the COVID-19 pandemic”); *Spellman v. Jefferson Par.*, 20-44 (La. App. 5 Cir. Apr. 7, 2020) (stating that trial court reduced defendant’s bond in response to motion requesting that it be reduced “because [his] advanced age and pre-existing health conditions make him vulnerable to the threat posed by the recent COVID-19 out[break], especially if he were to remain incarcerated”); *see also State v. Portomene*, 13 Wash. App. 2d 1048 (Apr. 29, 2020) (unpublished) (ordering a limited remand to trial court to conduct a hearing to determine whether the defendant should be released on bail, pending appeal, in response to motion seeking “immediate release due to the current COVID-19 pandemic and his medical conditions (multiple sclerosis) and immune-suppressing medication making him vulnerable to COVID-19”).

The Supreme Court of North Carolina has, in other contexts, affirmed the authority of trial courts to adjust a defendant's bond.²³ Case law on what constitutes a changed circumstance sufficient to warrant relief is sparse, but it is clear that the authority to take such action rests in the discretion of the trial court.²⁴

Evidence of an outbreak in a local jail may constitute a changed circumstance that warrants relief. Some North Carolina counties have endured large outbreaks in their facilities, with dozens of symptomatic people and nearly a third of detainees infected with the virus.²⁵ In response to such outbreaks, the Department of Public Safety has, on a number of occasions during the pandemic, suspended the transfer of people from county facilities into the Department of Adult Corrections, a reflection of its concern about the safety of interacting with people who have been held in the jails.²⁶ In light of these developments, defendants held in facilities with significant outbreaks may argue, either by way of a bond-reduction motion or a habeas petition, that they are entitled to relief.

Summaries of Selected Decisions

The following summaries of selected decisions provide guidance regarding the circumstances in which release from custody may be appropriate. In the first two cases, courts granted defendants bond and pretrial release in light of the COVID-19 pandemic. In the latter two, courts denied bond to defendants who argued they were entitled to pretrial release due to COVID-19.

In *In re Ung*,²⁷ the California Court of Appeals held that the defendant, who was charged with 76 theft-related offenses involving computer hacking, was entitled to have bail set under the state constitution and an amended bail schedule adopted in response to COVID-19. The court remanded the case to the trial court to set bail but left the appropriate amount to the trial court's discretion. Before being denied bail by the trial court, the defendant had "flagrant[ly] violat[ed]" his release conditions, and evidence suggested he had continued his criminal activities. On appeal, the court found it significant that the defendant's alleged crimes did not include crimes of violence. In its remand order, it directed the trial judge to "set bail under the emergency order 'with due consideration of public safety and health concerns,' which . . . necessarily include[s] a consideration of the impacts of COVID-19." The appellate court also "recognize[d] the trial court's authority to consider a wide range of potential conditions . . .

23. *State v. Perry*, 316 N.C. 87, 108 (1986); see also G.S. 15A-534(e) (stating authority for judicial official to modify bond).

24. See *State v. Hocutt*, 177 N.C. App. 341, 349 (2006) ("[T]he determination of what a 'reasonable' bond is rests within the trial court's discretion."). For a further discussion of motions to modify bond, see JOHN RUBIN, PHILLIP R. DIXON JR., & ALYSON A. GRINE, 1 NORTH CAROLINA DEFENDER MANUAL ch. 1, [Pretrial Release](#) (2d ed. 2013); PHILLIP R. DIXON JR., [DEFENSE MOTIONS AND NOTICES IN SUPERIOR COURT](#) (Dec. 2017).

25. See, e.g., WXII-TV, [Alamance County Jail Has 99 Positive Coronavirus Cases Among Staff, Inmates, Health Officials Say](#), WXII12.com, Aug. 31, 2020.

26. See James M. Markham, [An Update on Prisons and Jails as the Courts Expand Operations](#), N.C. CRIM. L. BLOG (UNC School of Government, June 3, 2020) (describing "moratorium on most inmate transfers from jail to prison").

27. No. H048152, 2020 WL 4582595 (Cal. Ct. App. Aug. 10, 2020).

including the confiscation of his passport, and perhaps the use of Ung's own financial resources . . . to ensure his appearance at future proceedings and prevent him from inflicting economic harm on the public.”

In *United States v. Davis*,²⁸ the U.S. District Court for the District of Maryland relied on a number of factors related to the COVID-19 pandemic and ordered a defendant released from pretrial detention to confinement in his girlfriend's home, to be monitored with location tracking. The defendant faced up to 60 years in prison stemming from an alleged drug-related conspiracy, during which he was also alleged to have sold firearms. The evidence against him was strong and included video and audio recordings. The court found that the defendant had significant mental health issues and had been homeless for two years before his arrest, had strong local ties, and did not possess a passport. Although he had been arrested six times, he had no prior criminal convictions or history of failing to appear in court. In ordering his release, the court cited its concerns regarding the defendant's access to counsel while in the jail in light of COVID-19 mitigation measures; the presence of COVID-positive detainees in the facility; and a determination by public health officials that “reducing the number of detained persons . . . will make the community safer.”

In *State v. Smith*,²⁹ the Connecticut Supreme Court dismissed a defendant's petition seeking review of a trial court's denial of his motion seeking modification of his \$250,000 bond and his release on a promise to appear based on the COVID-19 pandemic. The defendant asserted that he suffered from severe asthma and sleep apnea, making him acutely vulnerable to the virus. The State opposed the defendant's release based on the serious nature of the charges and his criminal history. The court recognized “that these are unprecedented times” and the “conditions created by the pandemic challenge every convention that we typically rely on,” but it denied the petition, concluding that “the record . . . is devoid of any evidence regarding the relevant conditions at the correctional facility at which the defendant is incarcerated or the nature and degree of the risk that the defendant claims is heightened by his detention at that facility.” The court concluded that it could “not see how a claim of this kind can be properly litigated or adjudicated in the absence of that information.”

In *State v. Labrecque*,³⁰ the Vermont Supreme Court affirmed a trial court's decision denying a defendant's motion for bail review in light of the COVID-19 pandemic. The defendant, who had been held without bail pending trial on “extremely serious offenses,” including sexual assault on a minor, argued that his detention in excess of 25 months, occasioned by the confluence of his defense counsel's withdrawal and the pandemic, violated his due process rights. The trial court determined that the evidence of the defendant's guilt was great, that he had a prior criminal history, and had, on multiple occasions, failed to appear in court. The court likewise found that the defendant had at times assaulted and eluded law enforcement and violated come-to-court orders. In support of his motion for release, the defendant offered an affidavit from a doctor that asserted correctional officials had not responded appropriately to COVID-19, claimed his prior convictions were old misdemeanors, and said that his lack of income and mobility issues rendered him incapable of fleeing the jurisdiction. The trial court concluded that while it was very concerned about the pretrial delay, those concerns were not

28. 449 F. Supp. 3d 532 (D. Md. 2020).

29. 230 A.3d 638 (Conn. 2020).

30. 2020 VT 81 (Vt. Sept. 3, 2020).

enough to override its lack of confidence that the defendant would abide by conditions of release intended to mitigate the risk of flight and protect the alleged victim. On appeal, the Vermont Supreme Court concluded that the defendant's "continuing detention did not violate due process, given that it was grounded in the court's lack of confidence that he could abide by conditions of release."

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