STATE OF NORTH CAROLINA COUNTY OF DURHAM	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 16 CRS 54855
STATE OF NORTH CAROLINA))) vs.))))) [redacted])	**MOTION TO STRIKE SUGGESTED BOND SCHEDULE**

NOW COMES the Defendant, in the above-captioned criminal action, by and through his attorney, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 18, 19, 21, 23 and 27 of the North Carolina Constitution, N.C.G.S. § 15A-534 and *Simeon v. Hardin*, 451 S.E.2d 858 (1994), and moves this Honorable Court to strike in its entirety the suggested bond schedule for the 14th Judicial District.

In support of this motion, the defense shows the court as follows:

1. NCGS § 15A-534 lays out the law in North Carolina for the "Procedure for determining conditions of pretrial release";

2. NCGS § 15A-534 *requires* magistrates and judges, when considering conditions of pretrial release, to (1) release the defendant upon his written promise to appear, (2) release the defendant upon his execution of an unsecured bond, or (3) place the defendant in the custody of a designated person/organization, *unless* he or she determines that such release will not reasonably assure the appearance of the defendant in court, will pose a danger to others, or is likely to result in the destruction of evidence, subornation of perjury, or intimidation of potential witnesses;

3. NCGS § 15A-534 requires magistrates and judges who set a secured bond to record the reasons for doing so in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to NCGS § 15A-535(a).

4. NCGS § 15A-535(a) provides that the senior resident superior court judge for each district in consultation with the chief district court judge must devise and issue recommended policies to be followed in determining whether and upon what conditions a defendant may be released before trial and may include a requirement that each judicial official who imposes either a secured bond or house arrest must record the reasons for doing so in writing;

5. NCGS § 15A-535(a) neither requires nor encourages the setting of a suggested bond schedule based on the level of the crime charged;

6. The Honorable Orlando F. Hudson, Jr. and the Honorable Marcia H. Morey created the "Policies Relating to Bail and Pretrial Release," for the 14th Judicial District, Durham County, which went into effect on April 1, 2011;

7. The document entitled "Policies relating to Bail and Pretrial Release" includes a requirement that magistrates who determine that a secured bond is required to ensure public safety or a defendant's appearance in court must record the reasons for doing so in writing on the included form entitled "Secured Bond Findings";

8. The document entitled "Policies relating to Bail and Pretrial Release" also includes a schedule of suggested amounts for bail bonds, which is based solely on the class of charge;

9. The suggested amounts for bail bonds do not distinguish between indigent and non-indigent defendants;

10. The suggested amounts for bail bonds clearly assume that the vast majority of those defendants who are even able to post bond will be required to do so through bail bondsmen, who typically charge ten percent of the bail amount to post a defendant's bond;

11. The practice of posting bond through a bail bondsman defeats the apparent purpose of the cash bail system altogether, because when defendants pay bondsmen, they do not get their money back in return for appearing in court and therefore have no personal financial interest in appearing;

12. The document specifically acknowledges, "It is recognized that the General Statutes 'require a release decision related explicitly to all factors found to be relevant to the accused's roots in the community.' Consequently, 'a bail schedule is incompatible with such an individualized decision;'"

13. The document further states, "The circumstances of each individual case will govern each decision," and that the suggested amounts for bail bonds are meant to be used "as a general guideline only, and as a mere suggestion, and not to be blindly followed";

14. In practice, however, magistrates and judges often rely too heavily, or even solely, on the suggested amounts for bail bonds rather than on whether a defendant poses a flight risk or a danger to the public, and often without inquiring into the defendant's ability to pay;

15. Furthermore, in practice, the form requirement is not being consistently followed or enforced;

16. Despite the requirements laid out in NCGS § 15A-534, in practice, few judges in Durham County are willing to deviate from the suggested amounts for bail bonds;

17. This problem is evidenced by the fact that the *suggested* bond amounts are so often referred to by magistrates, judges, prosecutors and defense attorneys as *presumptive* bonds. *See* [redacted]*, Motion to Dismiss Defendant's Motion for Bond Reduction* and *http://www.newsobserver.com/opinion/article210053834.html*;

18. According to NCGS § 15A-534, the presumption should be an unsecured bond, unless there is evidence of flight risk or danger to the public;

19. The State routinely abuses its scheduling power in violation of *Simeon v. Hardin*, 451 S.E.2d 858 (1994) by intentionally scheduling bond hearings before judges who have demonstrated a tendency to rigidly follow the suggested bond amounts, and by avoiding judges who have shown a willingness to deviate from the suggested bond amounts and instead follow the law laid out in NCGS § 15A-534;

20. The suggested amounts for bail bonds, as applied, are excessive and a violation of the protection against excessive bail guaranteed by the Eighth Amendment to the United States Constitution and by Article I, § 27 of the North Carolina Constitution;

21. In practice, the suggested amounts for bail bonds punish defendants for being poor, unfairly prejudicing minority defendants, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

22. In practice, the suggested amounts for bail bonds punish defendants for invoking their right to trial, in violation of the guaranteed presumption of innocence and the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

23. Due process dictates that there be no punishment of a defendant prior to an adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *City of Billings v. Layzell*, 242 Mont. 145, 789 P.2d 221 (1990);

24. Article I, § 24 of the North Carolina Constitution grants every criminal defendant the absolute right to plead not guilty and to be tried by a jury. Criminal defendants cannot be punished for exercising this right. *See State v. Langford*, 319 N.C. 340, 354 S.E.2d 523 (1987);

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

26. For many underprivileged defendants, time spent in jail leads to the loss of their jobs, their homes and the custody and care of their children;

27. Pretrial detention often leads poorer defendants to plead guilty even in cases in which the evidence against them is weak, because it is often the only available means for them to get back to their jobs and their families;

28. Even in cases that do go to trial, a defendant's pretrial detention often impedes his ability to assist in the preparation of his defense;

29. According to studies of the link between pretrial detention and case outcomes, 78% of defendants detained pretrial - contrasted with 60% of defendants released pretrial - are ultimately convicted. *Thomas H. Cohen & Brian A. Reves: Bureau of Justice Statistics, State Court Processing Statistics, 1990-2004: Pretrial Release of Felony Defendants in State Courts 7* (2008);

30. Recent lawsuits around the country have been challenging the constitutionality of suggested bond schedules. In *O'Donnell v. Harris County*, the US Court of Appeals for the Fifth Circuit, in an opinion which referred to the "mechanical application of the secured bail schedule," upheld the District Court's ruling that the suggested bail practices of Harris County, Texas violated due process and equal protection rights of indigent people. *O'Donnell v. Harris County*, No. 17-20333 (United States Court of Appeals, Fifth Circuit, 2018). *Also see Buffin v. City and County of San Francisco*, No. 15-cv-04959-YGR (United States District Court, Northern District of California, 2018);

31. Counsel for the Defendant hereby respectfully requests that this Court, the Senior Resident Superior Court Judge for the Fourteenth Judicial District, strike the suggested bond schedule, which in practice is un unconstitutional presumptive bond schedule, to eliminated the need for litigation such as the above cited cases.

Respectfully submitted the 25th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been personally served upon the Office of the District Attorney for the Fourteenth Judicial District, by handing a copy of the same document to ADA Cindy Kenney in open court.

This the 25th day of May, 2018.

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