

Report of the Orange County Pretrial Working Group¹

May 2020 (Revised Sept. 2020)²

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This report summarizes the work of the Pretrial Working Group and its recommendations to promote public safety and a fair and effective pretrial justice system in Orange County.

Background

Orange County has implemented a number of reforms to improve its pretrial system. Among other things, it has a county-funded pretrial services program, adopted an empirical risk assessment tool to inform judges’ decision-making about pretrial conditions, established a “strike order court” affording relief from court non-appearances in appropriate cases, instituted pre-arrest diversion with law enforcement support, and established specialized courts to more effectively address the needs of those who enter the criminal justice system because of underlying issues such as poverty, homelessness, substance use and mental health concerns. Additionally, local police departments and the sheriff’s department have implemented policing practices, such as citation in lieu of arrest, to promote the county’s pretrial goals. Notwithstanding these efforts and the statutory mandate that conditions other than secured bond must be imposed unless the judicial official finds certain factors,³ data show that secured bonds are the most common condition of pretrial release used in the county, even in misdemeanor cases.⁴ Additionally, stakeholders reported concerns that low-risk individuals were being unnecessarily detained pretrial on money bonds they could not pay.

¹ This report was prepared for the Working Group by Jessica Smith, W.R. Kenan Jr. Distinguished Professor and Director, Criminal Justice Innovation Lab, UNC School of Government.

² September 2020 revisions include non-substantive adjustments to the magistrates’ tool to address issues identified prior to implementation, ensure necessary data collection for the planned empirical evaluation, and ensure that existing local policy guidance is preserved in the tool; and deletion of the draft Implementation Plan, which became an internal working document.

³ G.S. 15A-534(b). The statute provides that in granting pretrial release, the judicial official “must” impose a written promise, custody release or unsecured bond “unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.”

⁴ In 2019, secured bonds were imposed in 58% of highest charge misdemeanor cases. See JESSICA SMITH AND ROSS HATTON, 2019 NORTH CAROLINA CONDITIONS OF RELEASE REPORT (2020), <https://cjil.sog.unc.edu/files/2020/02/2019-Conditions-of-Release-Report.pdf>.

Against this backdrop, the Pretrial Working Group came together in 2019 to explore what additional steps the county could take to further improve its pretrial system. A primary focus of discussion was eliminating the negative consequences that flow from unnecessary pretrial detention of individuals who do not present any significant risk but who remain detained pretrial because they are unable to afford money bonds imposed in their cases. After that convening, a subcommittee identified two priority areas for reform: (1) a structured decision-making tool for use by the magistrate at the initial appearance; and (2) a more nuanced approach for dealing with first time non-appearances in district court by individuals charged with misdemeanors. The County and District 18 Judicial Bar subsequently engaged Professor Smith from the UNC School of Government to help the Working Group develop tools to address these priority areas. In 2020, Smith worked with the subcommittee and the larger Working Group, facilitating their development of the tools described in this report.

Working Group participants included:

- Superior Court Judge Allen Baddour
- District Court Judge Samantha Cabe
- Chief Magistrate Tony Oakley
- Orange County Commissioner Renee Price
- District Attorney James Woodall
- Assistant District Attorney Byron Beasley
- Assistant Public Defender Phoebe Dee
- Chapel Hill Chief of Police Chris Blue
- UNC Police Chief David Perry
- Orange County Sheriff Charles Blackwood
- Clerk of Superior Court Mark Kleinschmidt
- Caitlin Fenhagen, Criminal Justice Resource Director, Criminal Justice Resource Department
- Ted Dorsi, Orange County Pretrial Services, Criminal Justice Resource Department
- Jeff Hall, Orange County Bail Bond Justice Project
- Probation and Parole Chief Mike Rakouskas
- Hathaway Pendergrass, Board Representative, Justice Initiatives
- Jennifer Marsh, Self-Help Credit Union
- Madison Burke, Director of Court Advocacy, Compass Center for Women and Families

Recommended Reforms

Magistrate's Structured Decision-Making Tool

In Orange County, Pretrial Services interviews in-custody individuals and performs a release assessment using the VPRAI-R risk assessment tool.⁵ This information is provided to the district court judge presiding over the first appearance and to the public defender and prosecutor involved in that proceeding. Local resourcing does not allow for use of the VPRAI-R at the first bail determination, the initial appearance held before the magistrate. Although the existing local bail policy contains strong language favoring conditions other than secured bond, secured bonds are being imposed in the majority of cases, including highest charge misdemeanor cases.⁶ Additionally, there was some concern that the lack of detailed guidance for magistrates allows for inconsistent pretrial decisions in similar cases. Other North Carolina jurisdictions have adopted structured decision-making tools for use at the magistrate stage. Eight North

⁵ Virginia Pretrial Risk Assessment Instrument-Revised.

⁶ See SMITH AND HATTON, *supra* note 4.

Carolina counties already use such tools.⁷ The first jurisdiction to adopt such a tool was Judicial District 30B, which in January 2019 implemented a set of reforms, including a structured decision-making tool for use at the magistrate stage. An empirical evaluation of that effort showed promising results. Specifically, in 2019 the percentage of cases in the District receiving a condition other than secured bond increased 43.79%. In that same time period, the district experienced only a 1.10 percentage point increase in the number of defendants incurring a new criminal charge during the pretrial period, and only a 1-2 percentage point increase in court non-appearance rates.⁸ These results caused Working Group members to focus on adapting the structured decision-making tool used in Judicial District 30B to local needs and circumstances. The result of that effort is the structured decision-making tool for Orange County magistrates presented in Appendix A. Key features of the tool include:

- Creating a presumption for conditions other than secured bond for non-DWI Class 1-3 misdemeanors.
- Screening for all other offenses using an easily implemented checklist of defendant- and offense-specific factors designed to quickly identify other low-risk defendants who can be released on conditions other than secured bond.
- Expressly incorporating into the magistrate’s decision-making process the statutory determination under G.S. 15A-534(b), requiring imposition of a written promise, custody release, or unsecured bond unless the decision-maker finds that such conditions will not reasonably assure appearance, will pose a danger of injury to any person, or are likely to result in the destruction of evidence, subornation of perjury, or intimidation of potential witnesses.
- Allowing for release to Pretrial Services at the magistrate stage as an alternative to a secured bond, when such release sufficiently mitigates pretrial risk.
- Requiring documentation of reasons for imposing a secured bond.
- Requiring that ability to pay be considered when setting a secured appearance bond, and that the ability to pay determination be made as to the total amount of the bond, not the percentage paid for a bail bond.
- Requiring a detention bond hearing when a defendant is detained pretrial.
- Providing a maximum bond table.
- Preserving the magistrate’s discretion to deviate from the tool’s recommendations.

Responses to Non-Appearances in Criminal District Court

Stakeholders reported that the most common response to a non-appearance in district court was issuance of an Order for Arrest and imposition of a secured bond, even for first missed court dates in lower level misdemeanor cases. Pretrial Services reported that a significant number of lower level misdemeanor defendants were in jail on such conditions. Understanding that non-appearances can occur for a variety of reasons, including lack of notice of court dates, transportation or childcare issues, or an inability to get time off from work, the Working Group desired a process that encouraged a “second chance” for lower level defendants who miss a single court date or have good cause for their

⁷ The relevant counties include: Haywood, Jackson, Forsyth, Washington, Beaufort, Hyde, Terrell, and Martin. See JESSICA SMITH, NC JUDICIAL DISTRICT 21 BAIL REFORM PROJECT (2019), <https://cjil.sog.unc.edu/files/2020/01/Project-Report-JD-21.pdf>; JESSICA SMITH, NC JUDICIAL DISTRICT 2 BAIL REFORM PROJECT (2019), <https://cjil.sog.unc.edu/files/2020/01/Project-Report-JD2.pdf>; JESSICA SMITH, NORTH CAROLINA JUDICIAL DISTRICT 30B PRETRIAL JUSTICE PILOT PROJECT, FINAL REPORT, PART I: BACKGROUND, PROCESS & IMPLEMENTED REFORMS (2020), <https://cjil.sog.unc.edu/files/2020/04/March-2020-Final-Report-30B-Project-Part-1.pdf>.

⁸ See UNC School of Government Criminal Justice Innovation Lab, *District 30B Bail Reform*, <https://cjil.sog.unc.edu/areas-of-work/bail-reform-2-0/district-30b-bail-reform/>.

failure to appear as required. They thus recommend adoption of the decision-making process set forth in Appendix B for responding to non-appearances in district court. The proposed decision-making process is designed to encourage consideration of alternatives to orders for arrest in appropriate, lower-level misdemeanor cases. Key features include:

- Application in district court only.
- Focus on lower-level misdemeanor charges.
- Preservation of the judge's discretion.
- Simple and fast execution.

Stakeholders discussed whether driving while license revoked (DWLR) charges should be treated as an exception to the new decision-making process for responding to non-appearances. Although they decided that the new process *should* apply to those offenses, they developed special procedures for DWLR charges to integrate them with the new decision-making process. Their consensus recommendations on this issue are included in this report as Appendix C.

Next Steps

The Working Group recommends that these tools be adopted into the local Bail Policy or by Standing Administrative Order. To facilitate implementation, the Working Group has crafted a detailed Implementation Plan. Finally, the Working Group proposes that if these recommendations are adopted, that it collaborate with Smith to pursue grant funding allowing the UNC Criminal Justice Innovation Lab to conduct an empirical evaluation of the impact of these reforms. An empirical evaluation will provide important feedback to stakeholders and community members regarding whether or not the proposed reforms achieve desired criminal justice metrics and/or create unintended consequences.

Appendix A: Magistrate’s Structured Decision-Making Tool

Orange County Magistrate’s Pretrial Decision-Making Process

Instructions:

1. This process supplements and provides structure for the magistrate’s application of G.S. 15A-534. Specifically, it requires compliance with G.S. 15A-534(b), requiring a written promise, custody release or unsecured bond unless certain factors are found, creates presumptions for certain release conditions and emphasizes certain factors in the decision-making process. G.S. 15A-534(c) specifies factors that must be considered when setting pretrial conditions. A number of those factors are incorporated into this decision-making process. In deciding whether to follow recommended release conditions or to deviate, magistrates should consider other factors specified in G.S. 15A-534(c) including the weight of the evidence against the defendant; the person’s family ties, employment, character, mental condition, and length of residence in the community; and any other relevant evidence.
2. This form must be used in all cases except where a statute or local policy prescribes a different process/result.
3. When a defendant is charged with multiple offenses arising out of a continuous transaction, only one form should be completed for all offenses.
4. For defendants arrested for probation violations, do not use this process; instead proceed directly to table below entitled, Maximum Secured Appearance Bond Amounts -- Probation Violations.

Date: _____

Magistrate’s Name (first initial, last—no commas): _____

Defendant’s Name (first, middle, last—no commas): _____

Case #: (no commas): _____

Highest Charged Offense: _____

STEP 1: Is the defendant before you on an OFA after a FTA or after arrest in a 48-hour case with judge setting conditions by phone?

- No. **[GO TO STEP 2]**
- Yes **[IF CHECKED ALSO CHECK ONE OF THE OPTIONS IMMEDIATELY BELOW]**
 - Set conditions as ordered by judge in OFA or by phone:
 - written promise
 - custody release
 - pretrial services
 - unsecured bond \$ _____
 - secured bond \$ _____ **[FORM COMPLETE]**
 - Bond doubling rule in G.S. 15A-534(d1) applies; secured bond \$ _____ **[FORM COMPLETE]**

STEP 2: Is the highest charged offense a non-DWI Class 1-3 misdemeanor?

- No **[GO TO STEP 3]**
- Yes
- Follow policy recommendation: Impose a written promise custody release or unsecured bond. (Note: Per local policy, written promise & custody release are preferred over unsecured bond) **[FORM COMPLETE]**
 - Follow alternative recommendation: Where defendant’s impairment presents a risk of injury to a person, impose a “disappearing” secured bond for up to 8 hours or until sober, to convert to a written promise after that time. **[FORM COMPLETE]**
 - Deviate from recommendation to impose written promise, custody release or unsecured bond. **[GO TO STEP 3]**

STEP 3: Do any sidebar factors apply?

- Yes **[GO TO STEP 4]**
- No
 - Follow policy recommendation: Impose written promise custody release or unsecured bond. (Note: Per local policy, written promise & custody release are preferred over unsecured bond) **[FORM COMPLETE]**
 - Deviate from recommendation to impose written promise, custody release or unsecured bond. **[GO TO STEP 4]**

STEP 4: Assess the statutory risk factors.¹² Release on written promise, custody release or unsecured bond (*check any that apply*)

- will not reasonably assure defendant's appearance as required
Explain: _____
- poses a danger of injury to any person
Explain: _____
- is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses
Explain: _____

STEP 4, continued

- No boxes checked
 - Follow policy recommendation: Impose written promise custody release or unsecured bond. (Note: Per local policy, written promise & custody release are preferred over unsecured bond) **[FORM COMPLETE]**
 - Deviate from recommendation to impose written promise, custody release or unsecured bond. **[GO TO STEP 5]**
- Any boxes checked
 - If release on written promise, custody release or unsecured bond poses a danger of injury to any person and that risk is created *only* by the defendant's impairment, impose a "disappearing" secured bond for up to 8 hours or until sober, to convert to a written promise after that time **[FORM COMPLETE]**; *otherwise*
 - [GO TO STEP 5]**.

STEP 5: Can Step 4 risk factor/reason for deviation be addressed by custody release/release to pretrial supervision services?

- Yes. Impose a custody release and order release to custodian or pretrial services. **[FORM COMPLETE]**
- No
 - Follow policy: Impose secured bond¹³ in the amount of: \$_____
Explanation for imposing a secured bond: _____
[If amount within maximum bond table, FORM COMPLETE; if in excess of that table COMPLETE NEXT LINE]
Explanation for secured bond in excess of maximum bond table: _____. **[FORM COMPLETE]**
 - Deviate from policy & impose written promise, custody release or unsecured bond. (Note: Per local policy, written promise & custody release are preferred over unsecured bond) Explanation: _____. **[FORM COMPLETE]**

Sidebar Factors [CHECK ANY THAT APPLY]

- Charged offense is Class A-E felony (*if checked, check Yes in Step 3 & proceed immediately to Step 4*)
- Defendant has recent history of FTAs¹
- Defendant has prior record of at least one violent felony conviction
- Defendant has prior record of felony or misdemeanor convictions within the last five years demonstrating a pattern of conduct²
- Charged offense committed when defendant was on pretrial release, supervised probation, parole or post-release supervision
- Charged offense involves domestic violence³
- Charged offense involves violence⁴ or injury to a person⁵
- Charged offense requires sex offender registration⁶ or is a failure to register as a sex offender offense⁷
- Charged offense is a drug trafficking offense⁸ or involves distribution of drugs⁹
- Charged offense is DWI and defendant has at least 1 DWI conviction within the last seven years
- Defendant is impaired such that immediate release is likely to cause harm to self/others/property¹⁰
- Charged offense involved defendant's use of a firearm or deadly weapon¹¹

Notes:

1. There must be more than one prior FTA for this factor to apply. FTAs within the last two years are most relevant, as are OFAs for FTAs in cases other than minor traffic. Impaired driving is not a minor traffic case. Notwithstanding the word “recent” in this sidebar factor, magistrates may deviate from recommendations based on an older FTA history, for example, when a person has an older FTA history but was only recently released from incarceration for that offense.

2. The pattern of conduct must relate to the present offense. For example: the current charge involves drug possession and the Defendant has three priors within the last five years for misdemeanor drug or drug paraphernalia possession.

3. An offense involves domestic violence when the relationship between the parties is one of the following:

- Current or former spouses
- Currently or formerly lived together as if married
- Currently or formerly in a dating relationship
- Have a child in common
- Parent (or one in parental role)/child
- Grandparent/grandchild
- Current or former members of the same household

Note: this list is drawn from G.S. 15A-534.1, the 48-hour domestic violence hold statute.

4. For example, robbery, assault, assault by pointing a gun, and assault by strangulation.

5. This factor applies when the offense involved harm to a person (e.g., assaultive conduct). It does not apply to offenses in which property is taken or harmed (e.g., larceny, embezzlement, obtaining property by false pretenses, etc.).

6. For a list of offenses requiring sex offender registration, see JAMIE MARKHAM AND SHEA DENNING, NORTH CAROLINA SENTENCING HANDBOOK 2018 (UNC School of Government, 2018).

7. See G.S. 14-208.11(a); JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 268 (7th Ed. 2012) (discussing this offense).

8. G.S. 90-95(h); SMITH, NORTH CAROLINA CRIMES, *supra* note 8, at 721–739 (discussing trafficking offenses).

9. For example, sale and delivery of a controlled substance and possession with intent to manufacture, sell, or deliver.

10. For defendants in impaired driving cases, follow impaired driving procedures. In all other cases if a secured bond is imposed only because of this factor and the defendant remains detained, conditions must be revised without consideration of this factor when the defendant’s impairment no longer presents a danger of physical injury to himself or herself or others or of damage to property, but in any event, no later than 24 hours after secured bond was set.

11. As a general rule, for this factor to apply the defendant must have actively used the firearm or deadly weapon during the charged offense, for example, pointing a gun during a robbery. Carrying concealed is an exception to this general rule. Although a single carrying concealed violation does not satisfy this factor, multiple such violations may satisfy it.

12. G.S. 15A-534(b). When making this inquiry, judicial officials should consider whether pretrial restrictions (e.g., restrictions on travel, associations, conduct or place of abode, as well as abstention from alcohol consumption, as verified by the use of an approved continuous alcohol monitoring system), which can be imposed with a written promise, custody release or unsecured bond, can sufficiently mitigate pretrial risk. See G.S. 15A-534(a).

13. If a secured appearance bond is imposed: (1) the judicial official must consider—among other relevant factors—the defendant’s ability to pay; and (2) the amount of the secured appearance bond should not exceed the amounts listed the tables shown below; if a secured bond is set in excess of these recommended maximums, reasons for doing so must be documented. Ability to pay should be assessed as to the total bond amount, not 10% that would be paid for a commercial bail bond.

If a secured bond is used to detain (“detention bond”), a detention bond hearing that affords the defendant appropriate procedural protections must be held before a judge on motion by the defense.

Maximum Secured Appearance Bond Amounts – Felonies and Misdemeanors (Other than DWI)

If a bond is set in excess of these recommendations, reasons for doing so must be documented.

These suggested maximum bond amounts are not mandatory and do not replace the use of the Magistrate’s Tool and judicial discretion.

	Offense Class	Maximum Bond
Felony	A	By Judge
	B	\$200,000
	C	\$100,000
	D	\$75,000
	E	\$25,000
	F	\$15,000
	G	\$10,000
	H	\$5,000
	I	Written Promise
Misdemeanor	A1	\$2,500
	1	\$500
	2	Written Promise
	3	Written Promise

Maximum Secured Appearance Bond Amounts –DWI

If a bond is set in excess of these recommendations, reasons for doing so must be documented.

These suggested maximum bond amounts are not mandatory and do not replace the use of the Magistrate’s Tool and judicial discretion.

No prior DWI convictions	Written Promise
1 prior DWI conviction within 7 years	\$500
2 prior DWI convictions within 7 years	\$2,500
3 or more prior DWI convictions within 7 years	\$15,000

Maximum Secured Appearance Bond Amounts—Probation Violations

Bail conditions and bond amounts must be set for probation violations based on the nature of the violation, not the offense class of the underlying offense, using the table immediately below. If a bail condition or bond is set in excess of these recommendations, reasons for doing so must be documented.

Type of Violation	Maximum Bond
Technical violation	Written Promise
Violation is a new crime – Class 2 or 3 misdemeanor	Written Promise
Violation is a new crime – Class 1 or A1 misdemeanor or Class H or I felony	\$5,000
Violation is absconding ⁹ or a new crime – Class G felony and above	Double the maximum bond allowed for the new offense in the tables above

Other Bond Amount Guidelines

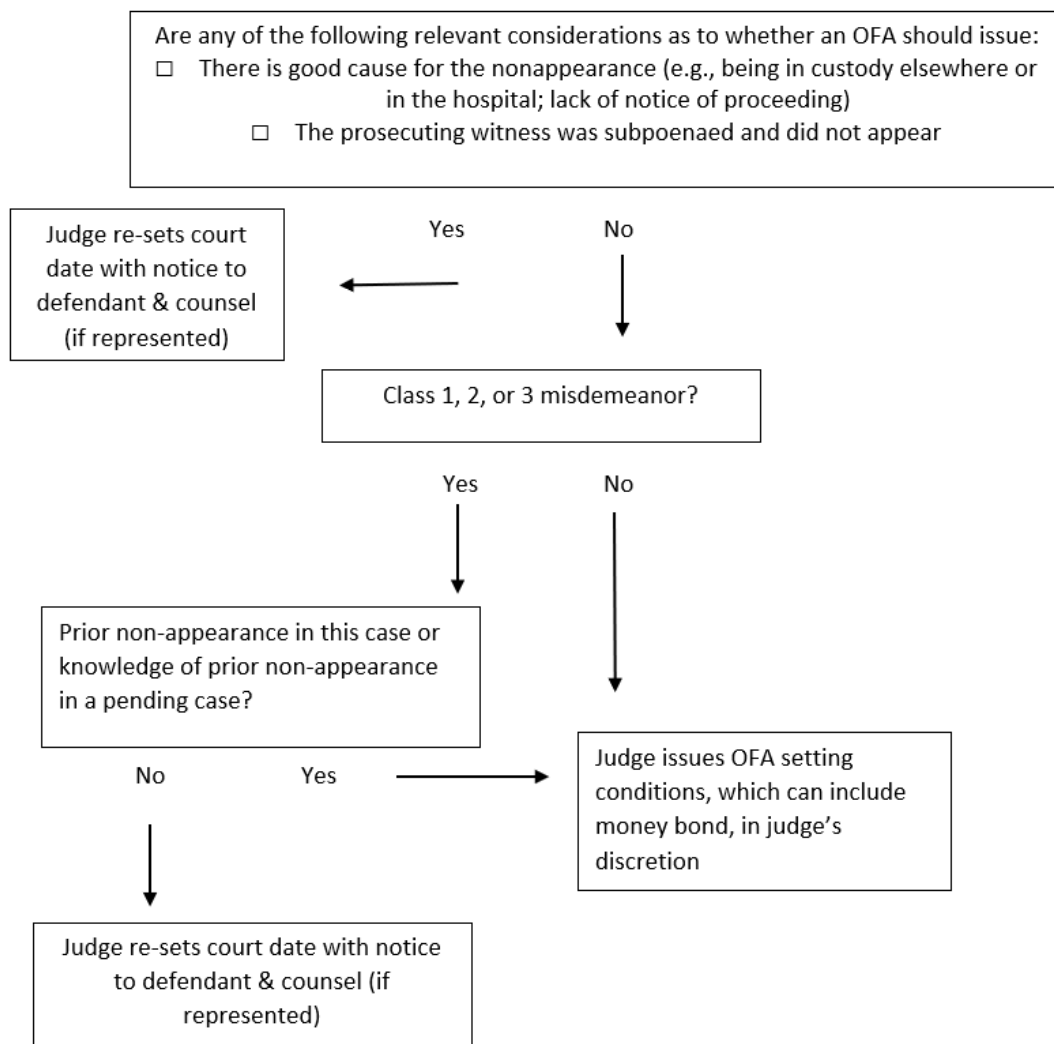
Fugitive Warrant	Set amount appropriate for underlying offense
Governor’s Warrant	No bond
Parole Warrant	No bond
Drug Trafficking	Suggested maximum bond: An amount that is double that listed in table above for other offenses of the same class

⁹ As defined by G.S. 15A-1343(b)(3a) and interpreting cases.

Appendix B: Responses to Non-Appearances in Criminal District Court

Responses to Non-Appearances in Criminal District Court

Orange County adopts the following decision-making flowchart for responding to non-appearances in district court for all class 1-3 misdemeanors that are not subject to exception by other district policies. This flowchart is designed to encourage consideration of alternatives to orders for arrest (OFA) and bond doubling in appropriate and lower-level misdemeanor cases. Judges always retain discretion to deviate from this flowchart.¹⁰



¹⁰ In exercising this discretion, judges may deviate from the recommendation to re-set the court date after a first non-appearance if the non-appearance occurred for a trial date and the witness was subpoenaed and present.

The Clerk of Court will provide the notice required by this process by letter or card. All Chapter 20 cases except Impaired Driving and Driving While License Revoked (DWLR) will go to the "20-day failure box." DWLR cases are subject to the additional procedures set out in Appendix C. Strike Order court will continue to be held every Thursday morning.

Appendix C: DWLR Procedures

This proposal integrates treatment of Driving While License Revoked (DWLR) charges into the new Responses to Non-Appearances policy for Criminal District Court.

Current policy addresses non-appearances on DWLR charges under the 20-day Failure to Appear system, in which the Clerk of Court sends notice to the Department of Motor Vehicles (DMV) 20 days after the non-appearance. The DMV then sends notice to the defendant, 60 days after which the defendant's license will be suspended if the matter is not resolved. Under the current policy, an OFA is not issued for a DWLR charge.

Integration into the new Responses to Non-Appearance policy will create a better mechanism to encourage defendants charged with DWLR to appear in court to resolve the matter, which in turn will help to avoid the accumulation of driver's license consequences. This policy does not modify treatment of any other Chapter 20 charge; other Chapter 20 charges which currently fall under the 20-day Failure to Appear system will continue to do so.

Under the Responses to Non-Appearance policy the following steps will result from a non-appearance on a DWLR:

1. Defendant has first non-appearance for DWLR charge.
2. Judge re-sets court date with notice sent to defendant & counsel (if represented). Notice includes Restoration Legal Counsel Information as well as educational information about missed court dates.
3. If Defendant misses the new court date, an Order for Arrest (OFA) is issued with a Written Promise to Appear (WPA). When arrested, Defendant will be taken to Magistrate for a review of the release conditions and receive a new court date. Magistrate will provide Defendant with Restoration Legal Counsel information.
4. If Defendant has a third non-appearances, then an OFA and cash bond issues.

Under this system, Defendants still will be able to make use of the Strike Order Hearing system if an OFA is issued for a second or subsequent missed court date.

In both the notice of new court date letter and appearance before the magistrate, information will be provided about Orange County Restoration Legal Services, which is available to assist in getting defendants information about their driving records and helping to restore their driver's licenses. The following information also will be provided in the notice of new court date letters to educate on the financial and license consequences of missed court appearances:

- If you are charged with Driving While License Revoked-Not Impaired and go to your court date, then your license will NOT be suspended further if you are found guilty of or plead guilty to this charge.
- If you are worried about being able to pay court costs and fines if you are found guilty of or plead guilty to this charge, contact Restoration Legal Counsel for assistance.
- If you miss your court date a second time, the clerk will enter a Failure to Appear on your record. This will add a \$200 fine to the amount you will owe to the court if you are found guilty of or plead guilty to this charge. If you cannot pay that \$200 fine, an additional suspension could be placed on your license.
- If you miss your court date a second time, the DMV will receive notice of this miss and will contact you. 60 days after they contact you, an additional suspension will be added to your

license if you do not handle the case in court. Your license will then stay suspended until you handle this case, and it will become more difficult for you to restore your license.

- If you continue to miss your court dates on this case, you risk being arrested and incarcerated if you cannot pay a cash bond.

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