Changes to the Probation Laws in 2009

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Multiple bills passed in 2009 amended North Carolina's probation laws. This handout summarizes key portions of the new laws and addresses some of the issues they raise for judges. A longer version of this paper is available at http://sogweb.sog.unc.edu/blogs/ncclaw/wp-content/uploads/2009/08/summary-of-probation-reform-bill.pdf.

S.L. 2009-372 (S 920), Probation Reform

Access to Juvenile Records. The law amends provisions of the Juvenile Code to give probation officers access to portions of certain probationers' juvenile records without a court order for the purpose of assessing the offender's risk level. To protect the confidentiality of a probationer's juvenile record, new G.S.7B-3000(e1) restricts such access to cases in which an offender is on probation for offenses committed when the probationer was less than 25 years old. Officers may only look at the record of adjudications of delinquency for acts that would be a felony if committed by an adult, and only the officer assigned to supervise a probationer may view that probationer's record.

Warrantless Searches. The new law makes warrantless searches by probation officers and, in certain circumstances, by law enforcement officers (LEOs), a default condition of supervised probation under G.S. 15A-1343(b). As such, all supervised probationers will be subject to warrantless searches unless the court specifically exempts them from the condition. This is a change from prior law, under which a warrantless search condition applied only if added by the judge as a special condition, and which authorized only probation officers, not LEOs, to initiate searches.

The LEO warrantless search provision—which allows a law enforcement officer to search a probationer's person and vehicle with *reasonable suspicion* that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or deadly weapon without court permission—is a new feature in North Carolina law, at least in the General Statutes. In *United States v. Knights*, 534 U.S. 112 (2001), the United States Supreme Court upheld a warrantless search of a probationer's residence that was supported only by reasonable suspicion, even though the search was conducted by a law enforcement officer for investigative, rather than supervisory, purposes. By design, North Carolina's new LEO warrantless search provision tracks the Court's holding in *Knights*: it limits LEO searches to circumstances in which an officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon. By contrast, the new law does not spell out the level of suspicion required for a *probation officer* to conduct a search without a warrant.

The default warrantless search conditions apply to offenders whose offense was committed on or after December 1, 2009. **All parties should take care to use the proper judgment forms**; the Rev. 12/09 versions

include default probation conditions that would not apply to offenders whose crime took place before December 1, 2009.

Drug/Alcohol Screens as a Warrantless Search? On the old (pre–December 1, 2009) probation judgment forms, special condition #15 read "Supply a breath, urine and/or blood specimen for analysis of the possible presence of a prohibited drug or alcohol, when instructed by the defendant's probation officer." That condition is not listed on the new form. It may certainly be added in box #20 on the new form, "Other," as an ad hoc condition. But does it need to be added? Drug testing is, after all, a kind of search. *See* Schmerber v. California, 384 U.S. 757 (1966). The new search condition even includes the following language: "Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse [DOC] for the actual cost of drug screening and drug testing, if the results are positive." G.S. 15A-1343(b)(13). Thus, the condition clearly contemplates drug tests as one kind of search that may be done without a warrant. It is unclear, though, whether the warrantless search condition allows an officer to test for drugs *randomly*, or whether something like reasonable suspicion might be required for the condition to kick in. Given this uncertainty, a court that means for a probationer to be subject to *random* drug testing might consider saying so explicitly in an ad hoc special condition. (Also note that on the new judgment forms, the special conditions of probation are numbered differently—"13, 14, and 15" no longer mean what they used to mean.)

Use, Possess, or Control. The new law makes it a default condition for all supervised probationers that they not use, possess, or control any illegal drug or controlled substance unless it has been prescribed by a licensed physician; that they not knowingly associate with any known or previously convicted users, possessors, or sellers of such substances; and that they not knowingly be present at or frequent places where such substances are sold, kept, or used. To the extent that the condition proscribes behavior that is already criminal (using illegal and unprescribed drugs), it is unobjectionable; courts have generally upheld similar conditions in other states. *E.g.*, State v. Allen, 634 S.E.2d 653 (S.C. 2006).

Default Conditions for Intermediate Punishment. Under new G.S. 15A-1343(b4), the following conditions will apply to intermediate probationers unless the judge specifically exempts them:

- If required by the officer, perform community service and pay the community service fee;
- Not use, possess, or control alcohol;
- Remain within the county of residence unless granted permission to leave by the court or the probation officer;
- Participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer.

The prohibition on the use, possession, or control of alcohol for all intermediate punishment probationers may give rise to arguments that the condition is inappropriate for offenders whose crime did not involve alcohol or substance abuse. Conditions requiring total abstinence have been deemed reasonable in North Carolina for probationers convicted of crimes involving alcohol or drug abuse. *See* State v. Gallamore, 6 N.C.

App. 608 (1969) (impaired driving); State v. Shepherd, 187 N.C. 609 (1924) (violation of prohibition laws). Again, these default intermediate conditions apply only to offenders whose offense is committed on or after December 1, 2009. **All parties should take care to use the proper judgment forms.**

Tolling. Under former G.S. 15A-1344(d), a "probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation." Thus, when a probationer has a pending charge for any offense other than a Class 3 misdemeanor (under G.S. 15A-1344(d), probation cannot be revoked solely based on a conviction for a Class 3 misdemeanor), time stops running on the person's period of probation when the charge is brought, and doesn't start running until the charge is resolved by way of acquittal, dismissal, or conviction. State v. Henderson, 179 N.C. App. 191 (2006); State v. Patterson, 190 N.C. App. 193 (2008).

The new law, now codified at G.S. 15A-1344(g), explicitly states that a probationer remains subject to the conditions of probation, including supervision fees, during the tolled period. The law also provides that if a probationer whose case was tolled for a new charge is acquitted or has the charge dismissed, he or she will receive credit for the time spent under supervision during the tolled period. However, that credit-back provision only applies to offenses committed on or after December 1, 2009.

Deferred Prosecution. Under G.S. 15A-1341(a1), a court can place certain defendants on probation as a condition of a deferred prosecution agreement with the district attorney. The new law requires in G.S. 15A-1342(a1) that violations of the terms of a deferred prosecution agreement be reported to the court as provided in Article 82 (Probation), and not just to the district attorney.

Community Service. The new law removes time limits for completion of community service from Chapter 20 concerning impaired driving and Chapter 14 concerning shoplifting, in an effort to give the Division of Community Corrections (DCC) and the courts greater flexibility in administering the program. The law also adds a new subsection to G.S. 20-179.3 to make clear that "significant violations" of community service requirements in impaired driving cases are to be brought before the ordering court for a hearing to determine if the offender willfully failed to comply, and, if so, that the court must revoke any limited driving privilege until community service requirements are met.

Other Probation-Related Legislation

Transfer low-risk misdemeanants to unsupervised probation (S.L. 2009-275 (S 1089)). Effective July 1, 2009, G.S. 15A-1343(g) was amended to allow a probation officer to transfer a misdemeanant from supervised to unsupervised probation if the probationer: (1) is not subject to any special conditions of probation; (2) was placed on probation solely for the collection of court-ordered payments, and (3) is a low risk according to a Division of Community Corrections risk assessment. This transfer, which does not relieve the probationer of the obligation to make court-ordered payments, may be done without court authorization.

New pretrial release requirements for certain probationers (S.L. 2009-412 (S 1078), further amended by S.L. 2009-547 (S 726)). This law adds new G.S. 15A-534(d2) to provide that when a judicial official is considering pretrial release conditions for a defendant who is charged with a felony and is currently on probation, the official must determine and make a written record of whether the defendant poses a danger to the public. If the official determines that the defendant poses a danger, the official must impose a secured bond under subdivision (a)(4) or electronic house arrest with a secured bond under subdivision (a)(5) . If there is insufficient information to determine whether the defendant poses a danger to the public, the defendant must be retained in custody under a written order until a determination is made.

The law also amends G.S. 15A-1345 to require a similar determination of dangerousness when a probationer is arrested for a violation of probation and also has a felony charge pending (or, under a law passed last year, has ever been convicted of a crime that now requires sex offender registration). Prior to imposing release conditions for such probationers, a judicial official must make a written determination of whether the probationer poses a danger to the public. If the probationer is found not to pose a danger, he or she may be released as otherwise provided in Article 26 of Chapter 15A. If the probationer is found to pose a danger to the public, he or she must be denied release pending a revocation hearing. Though the law purports to require that dangerous probationers be held without release until a final violation hearing is held, probationers are still entitled under G.S. 15A-1345(c) (and as a matter of constitutional due process under *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)) to a preliminary probation violation hearing within seven working days. If the judicial official determines that he or she has insufficient information to determine whether the defendant poses a danger, the official must retain the defendant in custody for not more than seven days from the date of arrest to obtain sufficient information to make a determination. If, after seven days, sufficient information is still unavailable, the defendant must be brought before a judicial official, who shall record the lack of information in writing and impose conditions of release.

Tampering with EHA equipment (S.L. 2009-415 (S 713)). This law makes it a crime for a person subject to monitoring by an electronic device as a condition of house arrest, bond, pretrial release, probation, parole, or post-release supervision to remove, destroy, or circumvent the operation of the device. The offense class of the new tampering crime varies depending on the seriousness of the offense for which the person is under supervision.

EHA leave (S.L. 2009-547 (S 726)). Effective for offenses committed on or after December 1, 2009, this law amends G.S. 15A-1340.11(4a) (the definition of house arrest with electronic monitoring) and 15A-1343(b1)(3c) (the special probation condition requiring a probationer to remain at his or her residence) to provide that a probation officer may authorize a probationer to leave his or her residence for specific purposes not authorized by the court with the approval of the probation officer's supervisor.

COMMON SENTENCING ERRORS

Consider whether the court committed error in each of the scenarios below

1. A defendant is convicted of a misdemeanor. He is sentenced to community punishment—24 months of supervised probation. The trial court makes no findings related to length of the period of probation.

2. At a probationer's violation hearing, two sentences that had been set to run concurrently by the original sentencing judge are run consecutively by the revoking judge.

3. A defendant pleads guilty to a felony. At sentencing, the court counts prior record points for a felony habitual DWI and the three misdemeanor DWIs that led to the habitual DWI conviction.

4. A probationer spends 90 days at DART-Cherry as a condition of probation. He later violates probation and has his probation revoked. He asks for credit against the suspended sentence for the time spent at DART-Cherry. The judge denies the request.

5. A defendant spends 211 days on electronic house arrest as a condition of pretrial release. After conviction, she petitions the court for credit against her sentence for this time. The judge denies the petition.

6. A defendant's probation is revoked. A few months earlier she had been held in contempt of court under G.S. 15A-1344(e1) for a violation of probation and jailed for 30 days. She asks for credit against her suspended sentence for the time spent in jail for the contempt. The judge grants the request.

7. A Level III defendant is convicted of a Class 1 misdemeanor [1–120 days, C/I/A]. The judge sentences him to 100 days, suspended, with 40 days of special probation confinement (a 40 day split) as an intermediate condition of probation.

8. A defendant is convicted of a Level Two DWI [7 days minimum, 12 months maximum]. The judge sentences her to 8 months, suspended, with 3 months of special probation confinement (a 3 month split) as a condition of probation.

9. A defendant pleads guilty to sexual battery for an offense against his 12-year-old stepdaughter, who lives with the defendant and his wife. He is sentenced to probation. The judge does not add the special sex offender conditions set out in G.S. 15A-1343(b2) [and included on Page 2, Side 2 of Form AOC-CR-603], including the condition that the defendant not reside in a household with any minor child.

10. A defendant is charged with sexual battery for an offense against his 12-year-old stepdaughter. To avoid having to register as a sex offender, he pleads guilty to assault on a female. The judge does not add the special conditions of probation set out in G.S. 15A-1343(b2), including the condition that the defendant not reside in a household with any minor child.

11. A Level I defendant is convicted of a Class 1 misdemeanor [1–45 days, C]. The judge sentences the defendant to 45 days, suspended, with a special condition requiring the defendant to submit to house arrest with electronic monitoring for the first 3 months of a 12 month probationary period.

12. A Level I defendant is convicted of a Class 1 misdemeanor [1–45 days, C], and sentenced to probation. He violates probation. At his violation hearing, the judge modifies his probation to add special probation, requiring the defendant to serve 5 days in the jail.

13. A defendant is convicted of injury to real property. The judge continues prayer for judgment for 12 months on the condition that the defendant pay for the damage. A year later the defendant offers proof that he paid the money and asks the court to dismiss the charge, which the court does.

14. A Level II defendant is convicted of six counts of a Class 1 misdemeanor [1–45 days, C/I/A]. The judge, seeking the longest permissible sentence, imposes consecutive active terms totaling 240 days.

15. A defendant is convicted of assault on a female for an offense against his ex-wife. He is sentenced to probation and ordered to pay $500 in restitution for the victim's medical bills. His probation is later revoked. At the revocation hearing, the court makes a finding that the money is still owed and orders that it be entered as a civil judgment against the defendant.

16. A defendant's probation is revoked in district court. He appeals to superior court for a de novo hearing, and the superior court decides to continue him on probation under modified conditions. Later, he violates probation again. The district court revokes his probation.

17. A defendant is convicted of injury to real property. The judge sentences him to probation, with restitution in an amount and payment schedule to be determined by the probation officer.

18. In 2006, a defendant is sentenced to a 3-year term of probation. Late in the third year a violation report is filed (and file-stamped), but the violation hearing doesn't take place until several months after the period of probation expires. The defendant moves to dismiss, arguing that the court lacks jurisdiction to hold the hearing because the State failed to demonstrate a reasonable effort to conduct the hearing earlier. The court revokes her probation.

19. A defendant pleads guilty to a felony. As part of a plea agreement, he stipulates to the information on a prior record level worksheet, including a Virginia conviction for armed robbery. The defendant further stipulates that the Virginia conviction is "substantially similar" to armed robbery in North Carolina, and thus should count as a Class D felony (6 points) for prior record level purposes instead of a Class I felony (2 points, the default for out-of-state felony convictions).

20. A defendant is sentenced to a 3-year term of probation with a large amount of restitution owed. It becomes clear in the second year of probation that he will not be able to pay the restitution by the end of the original probation term, so he consents to an extension to five years. After 4 years and 9 months, he still has restitution left to pay. He consents to an additional extension of three years to complete the restitution. The court extends his probation to 8 years.