

Summary and Analysis of Session Law 2009-372 (S 920): Probation Reform

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The governor has signed a probation reform bill (S 920) into law (S.L. 2009-372), effective December 1, 2009, as discussed below. The law was written, in part, in response to supervision deficiencies that became apparent when Triangle-area students Eve Carson and Abhijit Mahato were killed in 2008, allegedly by defendants who were on probation at the time of the murders. Two parts of the new law—allowing probation officers access to certain probationers' juvenile records and making warrantless searches a default condition of supervised probation—are receiving the most attention, but the law also makes a number of additional changes. This paper summarizes the new law and then addresses some of the issues it raises for judges, prosecutors, defense lawyers, defendants, and the Division of Community Corrections (DCC).

Summary. In short, the probation reform law does the following:

- Gives probation officers limited access to certain probationers' record of juvenile adjudications for offenses that would be a felony if committed by an adult.
- Requires probationers, as a default regular condition of supervised probation, to submit to warrantless searches by a probation officer of the probationer's person, vehicle, or premises, and to submit to warrantless searches by a law enforcement officer of the probationer's person or vehicle if the officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon or explosive without court permission.
- Makes it a default regular condition of supervised probation that probationers may not use, possess, or control illegal drugs or controlled substances; associate with known or previously convicted users, possessors, or sellers; or be present at any place where drugs are sold, kept, or used.
- Sets out four new probation conditions that will apply by default to all probationers subject to intermediate punishment: perform community service at the probation officer's direction; not use, possess, or control alcohol; remain within the county of residence unless granted permission to leave; and participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer.
- Clarifies existing law related to deferred prosecutions and probation violation hearings held in the defendant's absence.

- Amends G.S. 15A-1344 to give credit for time spent on probation in tolled status when the charge that tolled the probation does not result in a conviction.
- Removes statutory time limits for completion of community service ordered in impaired driving and shoplifting cases.

Access to Juvenile Records. The law amends provisions of the Juvenile Code (Chapter 7B of the General Statutes) to give probation officers access to portions of certain probationers' juvenile records without a court order. Probation officers are thus added to the relatively short list in G.S. 7B-3000(b) of people who can access those records—the juvenile; his or her parent, guardian, or custodian or their authorized representative; the district attorney; and court counselors. The law authorizes the Department of Juvenile Justice and Delinquency Prevention to notify DCC, at DCC's request, that a probationer has records releasable under the new law, including information about the county or counties in which the adjudication(s) of delinquency occurred.

To protect the confidentiality of a probationer's juvenile record, the law restricts a probation officer's access to juvenile records in the following ways:

- Officers may only access the juvenile record of those 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. Note that this is broader than the category of juvenile adjudications—those that would be a Class A through E felony if committed by an adult—that may support an aggravating factor under G.S. 15A-1340.16(d)(18a);
- Only the officer assigned to supervise a probationer may view that probationer's record;
- DCC must designate a single staff person in each county to obtain records from the clerk and transfer them to the appropriate probation officer;
- Copies of any juvenile records obtained must be withheld from public inspection, must not become part of the public record in any criminal proceeding, and must be destroyed within 30 days of the end of the probationer's supervision.

The new law does not give probation officers access to a probationer's juvenile court counselor's record, which includes social, medical, and psychiatric or psychological information about a juvenile and his or her family.

Warrantless Searches. The new law makes warrantless searches—by probation officers and by law enforcement officers (LEOs) in circumstances described below—a default condition of supervised probation under G.S. 15A-1343(b), unless the presiding judge specifically exempts the defendant from the condition. This is a change from existing law, under which a warrantless search condition applies only if added by the judge as a special condition under G.S. 15A-1343(b1), and which authorizes only probation officers, not LEOs, to conduct such a search.

The new probation officer warrantless search provision uses nearly the same language as the existing special condition, with minor (though perhaps not insignificant) changes. Under existing law, warrantless searches may only be conducted “*for purposes specified by the court and reasonably related to the probation supervision.*” G.S. 15A-1343(b1)(7) (emphasis added). The new law broadens the search condition by dropping the limitation to searches conducted “for purposes specified by the court,” eliminating the need for the judge to check the box on form AOC-CR-603 or AOC-CR-604 (in what is currently special condition 13) to specify whether searches may be conducted for stolen goods, controlled substances, contraband, child pornography, or some other purpose. At the same time, the condition is perhaps narrowed by replacing the term “*reasonably related*” with “*directly related.*”

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. Prior to 1977, allowing probation searches by law enforcement officers was apparently a “tool that [was] often used by the courts.” *State v. Grant*, 40 N.C. App. 58, 60 (1979). With the enactment of G.S. 15A-1343 in 1977, however, the legislature ended this practice, limiting warrantless searches to those conducted by a probation officer.¹ Since then, there have been a number of cases in North Carolina challenging LEO involvement in searches pursuant to a warrantless-search condition on statutory grounds. An express condition purporting to allow warrantless searches “upon request of any law enforcement officer” was deemed invalid on its face in *Grant*, *see id.*, but police-assisted and even police-initiated searches have been upheld, as long

¹ The Criminal Code Commission noted at the time of the law’s passing that the warrantless search condition was the special probation condition that caused the “greatest difficulty.” The Commission wrote: “The present provision is one that attempts to respond to those who felt that the ability to search a probationer was an essential element of successful probation. It includes two important limits: (1) only a probation officer, and not a law enforcement officer may search the probationer under this condition, and (2) the search may be only for purposes reasonably related to the probation supervision.” G.S. 15A-1343 (official commentary).

as the probation officer exercised independent judgment in determining the need to conduct the search. *State v. Howell*, 51 N.C. App. 507 (1981). In any event, it is important to note that the limitation on law enforcement searches at issue in these cases flowed from statutory, not constitutional, proscription.

As to the constitutionality of law enforcement searches, they have generally been upheld, *see* Wayne R. LaFare, *Search and Seizure*, Vol. 5, § 10.10(c), with a case from the United States Supreme Court leading the way. In *United States v. Knights*, 534 U.S. 112 (2001), the 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. The Court reasoned that the search was not unreasonable under the Fourth Amendment in light of a probationer's reduced expectation of privacy and society's unusually strong interest in searching probationers.

By design, the language in the 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. The new condition is more limited than the one at issue in *Knights* in that it does not allow LEOs to search a probationer's premises without a warrant. On the other hand, the *Knights* Court attached some significance to the fact that the judge who originally sentenced the defendant had "determined that it was necessary to condition the probation on Knights's acceptance of the search provision." This will not be true under the new provision in North Carolina, in that it will apply by default unless the judge says it will not, possibly supporting an argument that the condition is not sufficiently narrowly tailored to be reasonable under the Fourth Amendment as applied to certain probationers.

Some have argued (or may argue) that the reasonableness of the condition is beside the point, as the condition is consented to—and thus Fourth Amendment rights are waived—as a prerequisite to being on probation in the first place. This contract theory view of probation may at one time have been appropriate in North Carolina (assuming "agreement" to probation conditions as an alternative to prison is a voluntary waiver at all); there are older cases analyzing probation searches as "consent searches." *E.g.*, *State v. Mitchell*, 22 N.C. App. 663 (1974). However, legislation passed in 1995 (S.L. 1995-429) removed from the law provisions allowing a defendant to "elect to serve" an active sentence. With that law repealed, a

defendant probably cannot be said to consent to the conditions of his or her probation, and no rights should be deemed waived.²

By spelling out a reasonable suspicion standard for LEO searches, the new law raises a question about the level of suspicion required for a probation officer to conduct a search without a warrant. Does silence in the probation officer search condition amount to tacit approval of suspicionless searches? There is no clear answer in North Carolina. In *State v. Robinson*, 148 N.C. App. 422 (2002), the court of appeals referred to and seemed to endorse the reasonable suspicion standard from *Knights*, even in the context of a warrantless search led by a probation officer. In a recent federal case interpreting North Carolina law, however, the Fourth Circuit appeared to adopt a “special needs” approach to probationer searches, suggesting in dicta that suspicionless searches (even by LEOs in that case) would be acceptable if part of a program that was, considered as a whole, reasonably tailored. *United States v. Midgette*, 478 F.3d 616 (4th Cir. 2007). The court determined that North Carolina’s warrantless search regime was reasonably tailored in that it included the following restrictions: (1) the sentencing judge must specifically impose the warrantless search condition, and not all probationers are subject to it; (2) the search must be conducted at a reasonable time; (3) the probationer must be present during the search; (4) the search must be conducted for purposes specified by the court in the conditions of probation; and (5) it must be reasonably related to the probationer’s supervision. Under the new law, factors (1) and (4) are absent—the sentencing judge would not specially impose the condition (it would apply unless the judge specifically says it does not), and the court would not specify the purposes for which the search may be conducted.

With those differences in mind, the safest path for the Division of Community Corrections may be to require as a matter of policy that a probation officer seek a probationer’s consent to conduct a search, or, if the probationer does not consent, to require that an officer have reasonable suspicion that a violation has occurred as a prerequisite to conducting a warrantless search. That may not be necessary if the Supreme Court’s holding in *Samson v. California*, 547 U.S. 843 (2006), a parolee search case, also applies to probationers. The Court held in *Samson* that the Fourth Amendment does not prohibit warrantless, suspicionless searches of a parolee, even by a police officer. The Court noted, however, that on the continuum of state-imposed punishments, parolees have a lower expectation of privacy than probationers. Subsequently, courts have gone in different directions on whether the *Samson* rule also applies to suspicionless searches of probationers. A judge in the Eastern District of California concluded

² This question is discussed at length in Stacy C. Eggers, IV, Comment, *A Fourth Amendment Problem with Probation in North Carolina*, 23 CAMPBELL L. REV. 143 (2000), although the comment was written before the Supreme Court upheld a warrantless search on alternative grounds in *Knights*.

that it does apply, *Sanders v. Bishop*, 2008 WL 5424105; the Kansas Supreme Court held that under Kansas law, searches of probationers must be supported by reasonable suspicion, 200 P.3d 455 (Kan. 2009).

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). With the condition applicable to all supervised probationers by default, however, probationers whose crime had nothing to do with substance abuse, and who have no personal history of substance abuse, may argue that the other aspects of the condition unnecessarily impinges on their First Amendment association rights.

Default Conditions for Intermediate Punishment. Under current law, there are regular conditions of probation that apply by default to all probationers, special conditions of probation that apply if the judge adds them, and mandatory conditions for sex offenders. The new law adds another category of conditions: those that will apply by default for all probationers sentenced to intermediate punishment. Under new G.S. 15A-1343(b4), the following conditions will apply to intermediate probationers unless the judge specifically exempts the defendant:

- If required by the probation 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.

Unlike existing North Carolina statutes regarding delegations of authority to probation officers (G.S. 15A-1343.2(e) and (f)), which allow an officer to order, among other things, community service or substance abuse treatment in response to a violation, the provisions in the new law do not include a process by which a probationer may seek judicial review of conditions ordered

by the officer, or a requirement that the probationer be given notice of the right to seek court review.

The first and last of the new default intermediate conditions may raise a separation of powers issue, in that they arguably involve a delegation of judicial function to an executive agency. North Carolina's courts have not ruled on the issue, but similar arguments have succeeded elsewhere. In *United States v. Nash*, 438 F.3d 1302 (11th Cir. 2006), for example, the Eleventh Circuit held it was improper for a probation officer to decide *whether* a probationer would have to attend mental health treatment (distinguishing the acceptable scenario in which an officer merely approves a provider to carry out judicially-ordered treatment). Unlike the situation in *Nash*, however, where the judge delegated decisionmaking authority to a probation officer, the "delegation" in the new North Carolina law is a product of statute. Such statutory delegations are rare in the United States, *see generally* Neil P. Cohen, LAW OF PROBATION & PAROLE, § 7:24, n. 1, but they have been upheld when challenged as a "usurpation of the judicial function," *see State v. Mobley*, 634 A.2d 305 (Conn. Super. Ct. 1993).

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). Some courts have, however, overturned alcohol-related conditions when they had no nexus to the crime of conviction. *See, e.g., State v. Krueger*, 190 P.3d 318 (Mont. 2008) (alcohol condition held invalid for a defendant convicted of sexual assault, with no indication that alcohol was involved in the crime, and the defendant had no history of alcohol abuse).

Generally speaking, North Carolina's appellate courts have deferred to the legislature's judgment that certain probation conditions ought to apply to certain probationers by default, mandating a "reasonable relation" to the defendant's crime only when the trial judge creates an ad hoc condition. *See, e.g., State v. Lambert*, 146 N.C. App. 360, 367 (2001) ("[W]hen the trial judge imposes one of the special conditions of probation enumerated by N.C. Gen. Stat. § 15A-1343(b1), the condition need not be reasonably related to defendant's rehabilitation because the Legislature has deemed all those special conditions appropriate to the rehabilitation of criminals and their assimilation into law-abiding society."); *State v. Parker*, 55 N.C. App. 643 (1982) (same, albeit partially on a consent theory). To the extent that the new default intermediate conditions are analogous to existing regular conditions of probation, North Carolina's courts may be expected to take a similarly hands-off approach.

Intensive Probation. The new law removes all references in the General Statutes to the “Intensive Supervision Program” and “intensive probation,” replacing them with “intensive supervision.” The change is not meant to make a substantive change in the law. Rather, it is intended to capture the evolution of “intensive” from a stand-alone *program* to a heightened *supervision level*. Intensive supervision is still available under the new law as an intermediate condition of probation under Structured Sentencing, and still requires “multiple contacts by a probation officer per week, a specific period each day during which the offender must be at his or her residence, and that the offender remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the offender for suitable employment.” G.S. 15A-1340.11(5).

Tolling. Under existing 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.” This law is not new—it has existed in the same form since the late 1970s. Recently, however, in response to two decisions from the court of appeals, DCC changed its policy with respect to tolling. In *State v. Henderson*, 179 N.C. App. 191 (2006), and *State v. Patterson*, 190 N.C. App. 193 (2008), the court of appeals held that under G.S. 15A-1344(d), “a defendant’s probationary period is automatically suspended when new criminal charges are brought,” regardless of when the charge arises. 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. This interpretation is viewed by some as harsh, especially as applied to a probationer who is ultimately acquitted of the new charge or who has the charge dismissed.

The new law seeks to clarify what “tolled” means, and to mitigate the effect of tolling for probationers who ultimately are not convicted of a new criminal charge. First, in an effort to clarify the statute, the new law breaks the tolling provision out of G.S. 15A-1344(d) and places it in a stand-alone subsection, G.S. 15A-1344(g). Second, the law explicitly states something DCC had assumed to be true: the probationer remains subject to the conditions of probation, including supervision fees, during the tolled period. Third, the law 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.

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.

Section 10 of the new law adds G.S. 15A-1342(a1) to make clear that DCC officers are authorized to supervise such offenders—thereby giving statutory authorization to something that was already happening in practice. The statute breaks new ground, however, by answering a previously unresolved question about what happens when a defendant being supervised pursuant to a deferred prosecution agreement violates the conditions of that supervision. Current practices vary by district, although most districts appear to report the violating defendant directly to the district attorney for prosecution. A minority of districts bring the case before the court for a violation hearing under G.S. 15A-1345, requiring a judge to make a finding of the violation before the deferred prosecution may be “revoked.” The latter practice is probably required as a matter of constitutional due process—most courts that have considered the question have held that it is. *See, e.g.,* State v. Cassill-Skilton, 94 P.3d 407 (Wash. Ct. App. 2004); State v. Schroth, 690 A.2d 1071 (N.J. 1997); State v. Hancich, 513 A.2d 638 (Conn. 1986); State v. Aschan, 366 N.W.2d 912 (Iowa 1985); United States v. Hicks, 693 F.2d 32 (5th Cir. 1982). *But see* Deurloo v. State, 690 N.E.2d 1210 (Ind. 1998). Regardless, the new law removes any doubt by requiring 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). A parallel change in G.S. 15A-1344 makes clear that all probationers (and not just “convicted defendant[s]”) must be brought before the court in accordance with the provisions of G.S. 15A-1345 before probation may be revoked. The change corrects what had previously been a disconnect between the first clause of the sentence in G.S. 15A-1344(d) that begins “A convicted defendant” and the later reference in the same sentence to “charges as to which prosecution has been deferred.” Beyond addressing any constitutional concerns, the law also simplifies violation reporting procedures for probation officers, who may now use a common reporting process for regular probation, deferred prosecution, and G.S. 90-96 cases.³

A district attorney remains free, of course, to enter into non-statutory deferred prosecution agreements with defendants, although those agreements almost certainly may not include any sort of probation supervision under the rationale of *State v. Gravette*, 327 N.C. 114 (1990) (interpreting G.S. 15A-1341 as an inclusive listing of the circumstances in which supervised probation may be ordered).

Probation Hearings in Absentia. The current version of G.S. 15A-1344(d), which deals with extensions and modifications of probation and responses to violations, provides that “[t]he

³ For the most part, violations of probation under G.S. 90-96 already should be handled as they are in regular probation cases. *State v. Burns*, 171 N.C. App. 759 (2005) (“In the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of Chapter 15A apply to probation imposed under N.C. Gen. Stat. § 90-96.”).

hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him.” It is unclear, however, whether that provision was meant to apply only to hearings to extend or modify probation for good cause (the subject of the first half of G.S. 15A-1344(d)), or also to apply to hearings in response to violations of probation, including those at which probation may be revoked (the subject of the second half of the subsection). To make the law clearer—and to avoid a possible constitutional pitfall⁴—the new law provides that probation only may be *extended or modified* in the defendant’s absence; *revocation* requires the defendant’s presence at the hearing as provided in G.S. 15A-1345, unless the defendant waives that right.

Community Service. In 2001, the General Assembly transferred the Community Service Work Program from the Department of Crime Control and Public Safety to the Department of Correction (DOC). The new law makes technical changes meant to complete the integration of

⁴ The constitutional due process framework for probation violation hearings was set out in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). As summarized in the subsequent case of *Black v. Romano*, 471 U.S. 606 (1985), a “final revocation of probation must be preceded by a hearing, . . . [at which the] probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; [and] an opportunity to be heard in person and to present witnesses and documentary evidence . . . ,” *id.* at 611–12. At least two state courts have held that revocation of probation without the defendant’s presence violates constitutional due process. *Henderson v. State*, 933 So. 2d 395 (Ala. Crim. App. 2004) (improper to revoke in probationer’s absence even when defendant voluntarily chose not to attend hearing for fear of being revoked); *Commonwealth v. Harrison*, 712 N.E.2d 74 (Mass. 1999) (improper to revoke defendant’s probation in absentia while he was serving a federal sentence on unrelated charges).

Other state courts also have articulated a right to be present at a revocation hearing, but have nonetheless determined that the right can, like other due process rights, be waived by the defendant. *See, e.g., Santeufemio v. State*, 745 So. 2d 1002 (Fla. App. 1999) (defendant, present at courthouse on the day of the hearing, voluntarily fled and thus waived right to be present); *Chase v. State*, 522 A.2d 1348 (Md. 1987) (proper to revoke when defendant was absent for portions of his revocation hearing); *cf. People v. Severino*, 44 A.D.3d 1077 (N.Y. 2007) (proper to revoke defendant’s probation in absentia when the defendant had been advised at sentencing that a failure to appear could result in revocation in his absence; knowledge of consequences supported a finding of waiver); *State v. Lovell*, 600 P.2d 1099 (Ariz. 1979) (proper, under Arizona Rules of Criminal Procedure, to revoke defendant’s probation in absentia when he had received “a warning that the proceeding would go forward in his absence should he fail to appear”).

the program into DOC, including changing the name of the officials who monitor the program from community service coordinators to judicial service coordinators. Substantively, 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 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.

Effective Date. Provisions of the new law allowing probation officers to access juvenile records are effective December 1, 2009, and applicable to probationers placed on probation for *offenses committed* on or after that date. For covered probationers, however, probation officers may access adjudications of delinquency that occurred before that date. The provisions of Section 11(a) of the law, which pertains to probation extension and modification hearings held in a defendant’s absence, and which requires deferred prosecution violations to be brought before a court before revocation, apply to *hearings held* on or after December 1, 2009. The remainder of the law is effective only for those whose offense is committed on or after December 1, 2009, avoiding any ex post facto issue arising from the new default conditions of probation added by the law.