Judicial Council of Georgia

MISDEMEANOR PROBATION:
Georgia and U.S. Constitutional Law
— A Bench Card for Judges —

This bench card is designed to provide judges with guidance on the relevant legal principles regarding misdemeanor probation, including first offenders placed on misdemeanor probation under Article 6 of Chapter 8 of Title 42 of the OCGA. It focuses in particular on how to address the situation of indigent misdemeanor defendants and probationers and contains information about changes to Georgia law under H.B. 310 (2015), S.B. 367 (2016), S.B. 407 (2018), and S.B. 105 (2021).

KEY CONSIDERATIONS

CONSTITUTIONAL REQUIREMENTS BEFORE IMPOSING OR REVOKING PROBATION

- Before being placed on probation, a defendant is entitled to the assistance of counsel absent a proper waiver. *Alabama v. Shelton*, 535 U. S. 654, 658 (2002).

- When revoking probation, a court *must* find that the probationer has willfully violated probation conditions. Failure to comply is not willful if the probationer lacks notice of a condition. *Douglas v. Buder*, 412 U. S. 430, 432 (1973) (per curiam).

- Failure to comply is not willful if the probationer lacks the ability to comply. *Bearden v. Georgia*, 461 U. S. 660, 672-73 (1983). A probationer may not be imprisoned for failing to pay fines, fees, or restitution if the court has not inquired into the reasons for failure to pay. If the failure to pay is not willful, the court must consider alternative conditions rather than imprisonment. Id.[1]

- In revocation proceedings, the probationer must be informed of the right to request counsel. *Gagnon v. Scarpelli*, 411 U. S. 778, 790 (1973). If counsel is denied, the reasons *must* be stated succinctly in the record. Id.

  - There is no categorical Sixth Amendment right to appointment of counsel in probation revocation proceedings, only a more limited due process right, determined on a case-by-case basis where fundamental fairness requires it. Id.

  - In determining whether due process demands the appointment of counsel, the court should consider whether "the probationer . . . makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." The court "also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself." Id. at 790-791.

GEORGIA LAW REGARDING INDIGENT DEFENDANTS AND DEFENDANTS WITH A SIGNIFICANT FINANCIAL HARDSHIP

- If the defendant is unable to pay or demonstrates a significant financial hardship, either before or after sentencing, the court must:

  - **Waive** the fine, surcharges, or fees;
  - **Modify** the fine, surcharges, or fees to an amount that the defendant can pay; or
  - **Convert** the fine, surcharges, or fees to community service or educational advancement. OCGA § 42-8-102 (d).

- Notably, Georgia law defines significant financial hardship as occurring where there is *a reasonable probability that the defendant will be unable to satisfy his or her financial obligations for two or more consecutive months*. OCGA § 42-8-102 (e) (1) (C). A significant financial hardship is presumed if the defendant:

  - Has a developmental disability under OCGA § 37-1-1;
  - Is totally and permanently disabled under OCGA § 49-4-80;
  - Earns less than 100 percent of the Federal Poverty Guidelines[2] (i.e., "indigent"); or
  - Has been released from confinement within the past 12 months and was incarcerated for more than 30 days before release. OCGA § 42-8-102 (e) (3).

COMMUNITY SERVICE AND EDUCATIONAL ADVANCEMENT DEFINED, OCGA § 42-3-50 (a)

- **Community service** means uncompensated work with any private or public entity or organization that provides services to the public and enhances the social welfare and general well-being of the community, including educational institutions and religious organizations that are nonprofit or tax exempt under 26 USC § 501 (c) (3).

- **Educational advancement** means attending a work or job skills training program, a preparatory class for the general education development (GED) diploma, or a similar activity.

[1] For more on determining the ability to pay and whether failure to comply is willful, see the Lawful Collection of Legal Financial Obligations and At-a-Glance Checklist for Ability to Pay Determination Hearings bench cards from the National Task Force on Fines, Fees and Bail Practices, which are available at: https://www.ncsc.org/information-and-resources/resource-centers/resource-centers-items/fines-costs-and-fees/fines-and-fees-resource-guide.

[2] However, please note that the Lawful Collection of Legal Financial Obligations bench card referenced in footnote 1 uses the standard of "whether income is at or below 125% of the [2016] Federal Poverty Guidelines (FPG)[,]" as opposed to OCGA § 42-8-102 (e) (1) (B), which uses the terms "earns less than 100 percent of [FPG]" to define "indigent" and trigger "significant financial hardship" under OCGA § 42-8-102 (e) (3).

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SETTING FINES AND FEES IN MISDEMEANOR PROBATION CASES

INQUIRING INTO ABILITY TO PAY AND SIGNIFICANT FINANCIAL HARDSHIP, OCGA § 42-8-102 (e)

At sentencing, the court must determine whether fines, surcharges, or probation supervision fees that the court would otherwise impose would create a significant financial hardship on the defendant or whether he or she has an inability to pay such sums. See KEY CONSIDERATIONS.

CONVERTING FINES AND FEES TO COMMUNITY SERVICE OR EDUCATIONAL ADVANCEMENT, OCGA §§ 17-10-1 (d); 42-8-102 (d)

The court may convert fines, surcharges, or probation supervision fees to community service or educational advancement. The number of service hours is determined by dividing the fine, surcharges, or fees by an hourly wage, which must be at least the minimum wage under the federal Fair Labor Standards Act of 1938, 29 USC § 206 (currently $7.25/hour), but may be higher at the court's discretion. The court shall determine the number of educational advancement hours required to be completed where applicable.

SETTING FINES, FEES, AND RESTITUTION

If **fines or probation fees** are imposed, the amount **should** be adjusted to the defendant's circumstances, including (OCGA § 42-8-102 (c)):

- The defendant's financial resources and income.
- The defendant's financial obligations and dependents.
- The length of the defendant's probation sentence.
- The goals of the punishment being imposed.
- Any other factor the court deems appropriate to consider.

If **restitution** is imposed, the court **must** consider the following factors:

(1) The defendant's financial resources and other assets;

(2) The defendant's earnings and other income;

(3) The defendant's financial obligations, including obligations to dependents;

(4) The amount of damages;

(5) The goal of restitution to the victim and the goal of rehabilitation of the defendant;

(6) Any restitution previously made;

(7) The period of time during which the restitution order will be in effect; and

(8) Other factors which the court deems to be appropriate. OCGA § 17-14-10 (a).

If the amount of restitution is contested, the court **must** hold a hearing at which the burden is on the State to establish the amount of the victim's loss, and the burden is on the defendant to establish hardships justifying a reduction in the restitution amount. OCGA § 17-14-7 (b).

WHAT THE COURT SHOULD TELL MISDEMEANOR DEFENDANTS OR PROBATIONERS

When a misdemeanor defendant or probationer appears before the court for any reason, the court should advise the person that he or she:

- **May request counsel at sentencing or revocation** (*Alabama v. Shelton*, 535 U. S. 654, 658 (2002) (sentencing); *Gagnon v. Scarpelli*, 411 U. S. 778, 790 (1973) (revocation)).
- **May request community service, educational advancement, or other probation modifications to avoid hardships** (OCGA § 42-8-102 (d)-(e)).
- **Must continue to report even if unable to pay** (OCGA § 42-8-102 (f) (4) (A)).
- **Will be subject to tolling if he or she fails to report** (OCGA § 42-8-105 (b)).

SPECIAL REQUIREMENTS FOR PAY-ONLY PROBATION

LIMITS ON PAY-ONLY PROBATION

- If a defendant is placed on supervised probation solely due to inability to immediately pay fines and surcharges, total maximum fees collected may not exceed three months' worth of ordinary probation supervision fees. OCGA § 42-8-103 (b). The collection of probation supervision fees must end when fines and surcharges are paid in full. Id. If fines and surcharges are converted to community service, a probation officer may petition for probation supervision fees under OCGA § 42-8-103 (c).

- The total maximum fees collected as referenced above shall be capped at three months' worth of fees regardless of the name of the fee or how it is described. OCGA § 42-8-103 (b).

EARLY TERMINATION BY PROBATION OFFICER'S MOTION

When all fines and surcharges are paid, the probation officer shall submit an order to the court terminating probation within thirty days. Id. The court shall issue an order terminating the probated sentence or issue an order stating why the sentence shall continue within 90 days of receiving such order. Id.

EARLY TERMINATION BY DEFENDANT'S MOTION

The court may terminate supervision upon the defendant's motion when "it is satisfied that its action would be in the best interest of justice and the welfare of society." OCGA § 42-8-103 (d).

PROBATION REVOCATION

APPOINTMENT OF COUNSEL

• Prior to revocation hearing, the court should make the probationer aware of the opportunity to request appointed counsel; however, there is no categorical Sixth Amendment right to appointment of counsel in probation revocation proceedings; only a more limited due process right, determined on a case-by-case basis where fundamental fairness requires it. *Gagnon v. Scarpelli*, 411 U. S. 778, 790 (1973).

• In determining whether due process demands the appointment of counsel, the court should consider whether "the probationer . . . makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." The court "also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself." Id. at 790-791.

• In every case in which a request for counsel is refused, the grounds for refusal should be stated succinctly in the record. Id. at 791.

REVOCATION GENERALLY, OCGA § 42-8-102 (f) (4)

If the court determines that the probationer has violated probation by failing to report, make court-imposed payments, or comply with any general probation condition, the court must consider alternatives to confinement, including:

- Community service.
- Modification of probation conditions to facilitate the probationer's good-faith efforts to comply (in the case of failure to report or failure to pay).
- Any other alternative deemed appropriate.

NOTE: Different penalties and notice requirements may apply to the imposition and revocation of special conditions of probation. See *Hill v. State,* 270 Ga. App. 114 (2004); OCGA § 42-8-34.1 (e).

CONCURRENT VS. CONSECUTIVE SENTENCES

When a probationer is before the court on multiple sentences, the sentences shall run concurrently unless it is expressly indicated that the sentences are to be served consecutively.
OCGA § 17-10-10 (a); *Rooney v. State,* 287 Ga. 1 (2010).

NEGATING FINES, SURCHARGES, AND FEES, OCGA § 42-8-105 (f)

If the entire balance of probation is revoked, all the conditions of probation, including moneys owed, shall be negated by a defendant's imprisonment. If only part of the balance is revoked, the court shall determine the probationer's responsibility for the amount of unpaid sums and may reduce arrearages considering probationer's ability to pay.

REVOKING FOR FAILURE TO PAY

If the sole basis for a probation revocation is failure to pay fines, surcharges, or probation supervision fees, the court shall not issue a prehearing arrest warrant and shall schedule an appearance on the next available court calendar for a hearing. OCGA § 42-8-102 (f) (2). A warrant may be issued if the probationer fails to appear for this hearing. Id.

In cases of failure to pay, the court must inquire into the probationer's ability to pay and make express written findings that:

- The failure to pay was willful and the probationer has not made sufficient efforts to pay; or
- Adequate alternative punishments do not exist. OCGA § 42-8-102 (f) (4).

If the court determines that imprisonment is necessary and permissible, it may revoke the balance of probation or up to 120 days, whichever is less. Id.

REVOKING FOR FAILURE TO REPORT TO PROBATION, OCGA § 42-8-102 (f) (3) (A)

If the sole basis for revocation is failure to report to probation, the probation officer must submit an affidavit describing efforts to contact the probationer and swearing that the probationer has failed to report. The affidavit must show that:

- The probationer has failed to report twice;
- The officer has tried to contact the probationer twice at a last-known telephone number or e-mail address shown in the affidavit;
- The officer has checked local jails and determined that the probationer is not incarcerated;
- The officer has sent a letter by first-class mail to a last-known address shown in the affidavit, warning the probationer that the officer will seek to have the probationer arrested and have his or her probation revoked if the probationer failed to report in person within ten days. (If a probationer reports within the ten day period, the probationer may be scheduled to appear on the next available court calendar for a revocation hearing.); and
- The probationer failed to report as directed in the letter.

The probation officer may submit this affidavit along with a request for prehearing arrest warrant, although the court has discretion to issue the prehearing arrest warrant or decline to do so.

If the court determines that imprisonment is necessary and permissible, it may revoke the balance of probation or up to 120 days, whichever is less. OCGA § 42-8-102 (4) (A).

TOLLING

TOLLING PROBATION SENTENCES, OCGA § 42-8-105 (b)

Before a sentence is tolled, the probation officer must submit an affidavit describing efforts to contact the probationer and swearing that the probationer has failed to appear in court for a revocation hearing or failed to report to the assigned probation officer. If tolling is based solely on failure to report to probation, the affidavit must show that:

- The probationer has failed to report twice;
- The officer has tried to contact the probationer twice at a last-known telephone number or e-mail address shown in the affidavit;
- The officer has checked local jails and determined that the probationer is not incarcerated; and
- The officer has sent a letter by first-class mail to a last-known address shown in the affidavit, warning the probationer that a tolling order would be sought if the probationer failed to report in person within ten days and the probationer failed to report as directed in the letter.
- If the probationer reports during the ten day period, the probationer officer shall neither submit an affidavit nor seek a tolling order.

CALCULATING THE TOLLING PERIOD, OCGA § 42-8-105 (b), (d)

The tolling period begins when the court enters a tolling order supported by a valid affidavit. The clerk of court must send a copy of the tolling order to the Georgia Crime Information Center within 30 days of when the order is filed. Tolling ends and the sentence begins to run again when the probationer reports to the probation officer, is taken into custody in this state, or is otherwise available to the court.

NOTE REGARDING PROBATION SENTENCES IMPOSED PRIOR TO JULY 1, 2015:

Statutory authority to toll misdemeanor probation sentences did not exist prior to this date, but common law principles authorized tolling in some situations. For probation sentences imposed prior to that date, the Supreme Court of Georgia has found that under the common law "mere failure of a defendant to abide by the terms of a misdemeanor sentence will not alone toll that sentence; instead, tolling requires a judicial determination of a violation sufficiently serious that the defendant was not serving the sentence imposed and of the time when that violation occurred." *Anderson v. Sentinel Offender Services*, 298 Ga. 854, 857 n. 3 (2016).

TERMINATING AND MODIFYING PROBATION SUPERVISION

TERMINATING OR REDUCING PROBATION SENTENCES

The court may reduce or terminate the sentence at any time if it finds that "probation is no longer necessary or appropriate for the ends of justice, the protection of society, and the rehabilitation of the defendant." OCGA § 17-10-1 (a) (5) (A). A probationer who is eligible for modification or termination of probation does not become ineligible "solely due to his or her failure to pay fines, statutory surcharges, or probation supervision fees." OCGA § 42-8-102 (f) (2) (B).

"When the court is presented with a petition to shorten the period of active probation supervision or unsupervised probation, the court shall set the matter for a hearing as soon as possible but not more than 90 days after receiving such motion." OCGA § 17-10-1 (a) (5) (A).

EARLY TERMINATION OF CONSECUTIVE SENTENCES BY DEFENDANT'S MOTION

If a defendant is serving consecutive misdemeanor probation sentences, the court may terminate supervision upon the defendant's motion when "it is satisfied that its action would be in the best interest of justice and the welfare of society." OCGA § 42-8-103.1 (a). The defendant may file the motion 12 months after sentencing and every four months thereafter. Id. This provision also applies to defendants placed on first offender probation. OCGA § 42-8-60 (e) (2).

EARLY TERMINATION OF CONSECUTIVE SENTENCES BY PROBATION OFFICER'S MOTION

If a defendant is serving consecutive misdemeanor probation sentences, the probation officer is required to review the case after 12 months of supervision. OCGA § 42-8-103.1 (b). If the defendant has paid court-ordered fines, surcharges, and restitution, and completed court-ordered testing, evaluation, or rehabilitation, the probation officer may submit an order for early termination. Id. After 12 months of supervision, the officer shall review the file every four months to determine if early termination is warranted. Id. This provision also applies to defendants placed on first offender probation. OCGA § 42-8-60 (e) (2).

TERMINATING FIRST OFFENDER PROBATION, OCGA § 42-8-60 (e)

A defendant sentenced to first offender probation pursuant to the First Offender Act "shall be exonerated of guilt and shall stand discharged as a matter of law" when the defendant completes the terms of his or her probation, including the time of the probation sentence as long as it is not tolled or suspended.

MODIFYING TERMS OF A PROBATION SENTENCE

"When a defendant has been sentenced to probation, the court shall retain jurisdiction throughout the period of the probated sentence as provided in [OCGA § 42-8-34 (g)]." OCGA § 17-10-1 (a) (5) (A). "The judge is empowered to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, modify or change the probated sentence[.]" OCGA § 42-8-34 (g).

However, "a sentencing court may not increase a [probated] sentence once the defendant begins serving it without violating the prohibition against double jeopardy in both the Georgia and Federal constitutions." *Tyson v. State*, 301 Ga. App. 295, 297 (2009). See *Stephens v. State,* 289 Ga. 758 (2011). See also *Hudson v. United States,* 522 U.S. 93, 99-100 (1997) (The Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense[.]"). (Emphasis in original and citation omitted).

Examples of permissible modifications include, but are not limited to:

- Making the probation non-reporting.
- Modifying a probation requirement from "no violent contact" with victim to "no contact." *Bell v. State,* 323 Ga. App. 751 (2013).
- Adding a requirement to stay away from victims' neighborhood. *Tyson v. State*, 301 Ga. App. 295 (2009).
- Require appropriate rehabilitative treatment for the defendant. *Gould v. Patterson*, 253 Ga. App. 603 (2002).