



## FELONY 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 felony probation. It focuses in particular on how to address the situation of indigent defendants and probationers and contains information about changes to Georgia law under S.B. 174 (2017), 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 alternate measures of punishment other than imprisonment.** Id.<sup>1</sup>
- 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 in the record. Id.
  - o 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.
  - o 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

- Prior to or subsequent to sentencing, **if the defendant is unable to pay or demonstrates a significant financial hardship, the court must:**
  - o Waive the fine, surcharges, or fees;
  - o **Modify** the fine, surcharges, or fees to an amount that the defendant can pay; or
  - o **Convert** the fine, surcharges, or fees to community service or educational advancement. OCGA § 42-8-34 (e) (3) (B).
- 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 § 42-8-34 (e) (3) (iii). A significant financial hardship is presumed where the defendant:
  - o Has a developmental disability under OCGA § 37-1-1;
  - o Is totally and permanently disabled under OCGA § 49-4-80;
  - o Earns less than 100 percent of the Federal Poverty Guidelines<sup>2</sup> (i.e., “indigent”); or
  - o Has been released from confinement within the preceding 12 months and was incarcerated for more than 30 days before release. OCGA § 42-8-34 (e) (3) (C).

#### 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 educational development (GED) diploma, or a similar activity.

<sup>1</sup> 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>.

<sup>2</sup> 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 § 42-8-34 (e) (3) (A) (ii), which uses the terms “earns less than 100 percent of [FPG]” to define “indigent” and trigger “significant financial hardship” under OCGA § 42-8-34 (e) (3) (C).

## SETTING FINES AND FEES IN FELONY PROBATION CASES

### SETTING FINES, FEES, AND RESTITUTION OCGA §§ 17-14-10 (a); 42-8-34 (e) (1)

If fines, restitution, or probation supervision fees are imposed, the amount should be adjusted to the defendant's circumstances, including:

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

If restitution is imposed, the court **must** consider, in addition to the above factors, the goal of rehabilitation of the offender, the amount of damages, and any restitution previously made.

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).

### CONVERTING FINES AND FEES TO COMMUNITY SERVICE OR EDUCATIONAL ADVANCEMENT OCGA §§ 17-10-1 (d) (3); 42-8-34 (e) (2)

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, surcharge, 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.

## BEHAVIORAL INCENTIVE DATE

A behavioral incentive date (BID) is required “[w]hen a defendant with no prior felony conviction is convicted of felony offenses or is charged with felony offenses and is sentenced pursuant to subsection (a) or (c) of Code Section 16-13-2 or Article 3 of Chapter 8 of Title 42, and the court imposes a sentence of probation or not more than 12 months of imprisonment followed by a term of probation[.]” OCGA § 17-10-1 (a) (1) (B) (i). (Emphasis supplied).

- A BID must not exceed three years from the date the sentence is imposed. *Id.*
- The Department of Community Supervision (DCS) shall provide the court with an order to terminate supervision within 60 days of the expiration of the BID “if the defendant has[.]”

(1) [P]aid all restitution owed;

(2) [N]ot had his or her probation revoked in the immediately preceding 24 months, or when the court includes a behavioral incentive date less than two years from the date a sentence was imposed, not had his or her probation revoked during such period; and

(3) [N]ot been arrested for anything other than a nonserious traffic offense as defined in OCGA § 35-3-37[.]” *Id.*

- If the above conditions are met, DCS “shall provide the court with an order to terminate such defendant's probation which the court shall execute unless the court or the prosecuting attorney requests a hearing on such matter within 30 days of the receipt of such order.” *Id.*

- The court must then “set the matter for a hearing as soon as possible but not more than 90 days after receiving the order to terminate.” *Id.*<sup>3</sup>

- At the hearing, the court “shall take whatever action it determines would be for the best interest of justice and the welfare of society.” *Id.* (Emphasis supplied).

- The BID provisions in OCGA § 17-10-1 (a) (1) (B) do not apply to probationers on a split sentence of “more than 12 months of imprisonment followed by a term of probation[.]” *Id.*

- The BID provisions in OCGA § 17-10-1 (a) (1) (B) (i) are “intended to be retroactive[.]” OCGA § 17-10-1 (a) (1) (B) (ii).

- A successfully completed first offender act sentence (OCGA § 42-8-60) or conditional discharge sentence (OCGA § 16-13-2 (a), (c)) does not count as a prior felony conviction. OCGA § 17-10-1 (a) (1) (B) (i).

- A BID “shall as a matter of law be included in the sentencing order, but in a case where it was not, the [BID] shall be three years from the date such sentence was imposed.” OCGA § 17-10-1 (a) (1) (B) (ii).

<sup>3</sup> This 90-day time limit to set the matter for a hearing also applies to “a petition to shorten the period of active probation supervision or unsupervised probation” under OCGA § 17-10-1 (a) (5) (A).

## PROBATION OFFICER REPORTS AND EARLY TERMINATION FOR PROBATIONERS WHO HAVE BEEN COMPLIANT FOR THREE YEARS

Probation officers must issue a report on probationers who have been sentenced to three or more years of probation. The report shall state whether the probationer has:

- “[B]een arrested for anything other than a nonserious traffic offense as defined in Code Section 35-3-37,
- “[H]ad his or her probation revoked in the immediately preceding 24 months, and
- “[T]he status of the probationer’s payments toward any restitution imposed.” OCGA § 42-8-37 (c) (1).
- **These reports must be issued by DCS after three years of probation, and then annually thereafter.** Id. Each report must be submitted to the sentencing court along with the probation officer’s recommendation as to whether early termination of probation is appropriate. Id.

For probationers on probation for a qualified offense, DCS must “provide the court an order to terminate probation if, after serving three years on probation, the probationer has:

(A) Paid all restitution owed;

(B) Not had his or her probation revoked in the immediately preceding 24 months; and

(C) Not been arrested for anything other than a nonserious traffic offense as defined in OCGA § 35-3-37.” OCGA § 42-8-37 (d) (1). (Emphasis supplied).

• The court “shall execute the order to terminate unless the court or the prosecuting attorney requests a hearing on such matter within 30 days of the receipt of such order.” OCGA § 42-8-37 (d) (2).

• If the prosecuting attorney requests a hearing, “[t]he court shall set the matter for a hearing as soon as possible but not more than 90 days after receiving the order to terminate.” Id.

• **“The court shall take whatever action it determines would be for the best interest of justice and the welfare of society” at the hearing.** Id.

• The procedure described in this section “is intended to be retroactive and applied to any probationer under the supervision of DCS.” OCGA § 42-8-37 (d) (3).

### QUALIFIED OFFENSES, OCGA § 42-8-21 (3)

- Burglary in the second degree.
- Possession of tools for the commission of crime.
- Criminal damage to property in the second degree.
- Interference with government property.
- Arson in the third degree.
- Burning of woodlands, brush, fields, or other lands in violation of OCGA § 16-7-63 when the punishment is as set forth in OCGA § 16-7-63 (c) (2).
- Theft and financial transaction card offenses under \$25,000.
- Theft by shoplifting.
- Refund fraud.
- Conversion of payments for real property improvements.
- Entering an automobile or other motor vehicle with intent to commit theft or felony.
- Livestock theft.
- Forgery.
- Printing, executing, or negotiating checks, drafts, orders, or debit card sales drafts knowing information thereon to be in error, fictitious, or assigned to another account.
- Failing to pay for natural products or chattels.
- Purchasing, possessing, manufacturing, delivering, distributing, administering, selling, or possessing with the intent to distribute controlled substances, marijuana, counterfeit substances, or flunitrazepam.
- Unlawfully manufacturing, delivering, distributing, selling, or possessing with the intent to distribute noncontrolled substances.
- Possession of substances containing ephedrine or pseudoephedrine or sales of products containing those ingredients when punishment is set forth in OCGA § 16-13-30.3 (b) (3).
- Violation of Article 3 of Chapter 13 of Title 16 when the punishment is as set forth in OCGA § 16-13-79 (b).

### PROBATION AND PAROLE CONDITIONS, OCGA § 42-9-42 (d) (1)

“Any person who is paroled shall be released on such terms and conditions as the board shall prescribe, and if he or she is serving a split sentence, the board’s conditions shall include all of the terms of probation imposed by the sentencing court.”

### PAROLE COMMUTATION, OCGA § 42-9-52

“When a parolee or conditional release” is serving a split sentence for a qualified offense as defined in Code Section 42-8-21, the board shall review such case after such parolee or conditional release “has successfully completed 12 consecutive months of parole supervision to consider commutation of such sentence.” If commuted, this would put the supervision of the offender under the court’s control sooner.