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SUGGESTED PROCEDURES FOR REVOCATION OF PROBATION AND PAROLE IN NORTH CAROLINA

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INTRODUCTION

Inquiries received in the last few years by the Institute of Government indicate considerable confusion regarding the proper procedure to be followed in North Carolina for arresting probationers and parolees and revoking their probation or parole status. This confusion has been increased by two recent decisions of the U.S. Supreme Court (Morrissey v. Brewer[1] and Gagnon v. Scarpelli[2]) and the new Pretrial Criminal Procedure Act that went into effect September 1, 1975, as G.S. Ch. 15A. The law in this area remains unclear in a number of respects. The purpose of this memo is not to resolve all the legal issues but rather to suggest practical, step-by-step procedures to be followed for arrest and revocation. Legal reasoning and policy considerations are discussed following the suggested procedures. I hope these suggestions may be helpful to the Parole Commission, the Department of Correction, the Administrative Office of the Courts, clerks, judges, magistrates, and others who will have to work together if a uniform procedure is to be established.

A good many people were helpful in this project: Algernon F. Sigmon, Jr., Chief of Program Services, Division of Adult Probation and Parole, Department of Correction; Jack Scism, Chairman, Parole Commission; James E. Cline, Parole Commissioner; Richard Kucharski, Department of Correction; Franklin E. Freeman, Jr., and J. Taylor McMillan, Administrative Office of the Courts; many probation/parole supervisory officers too numerous to mention here; Judge Henry A. McKinnon, Jr.; and Judge A. Pilston Godwin, Jr. Many thanks to all of them.

I. ARREST OF PROBATIONERS[3] AND PROBATION REVOCATION

A. Suggested Procedure[4]

The event that sets this procedure in motion is the discovery by a probation officer, court, or other authorities that a probationer may have violated some condition of his suspended sentence and/or probation. The procedural steps should be read consecutively unless the text indicates otherwise.

Step 1. Does the alleged violation involve a new crime or is it a purely technical violation? If it is purely technical, go to Step 7. If it involves a new crime, go to Step 2.

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Step 2. Follow the usual procedure of G.S. Ch. 15A to prosecute for a crime: citation, criminal summons, or arrest; appearance before a magistrate without unnecessary delay after arrest for probable cause determination and/or bail-setting; etc. When the megistrate sets bail conditions, the probation

officer may properly call the magistrate's attention to relevant information, such as the fact that the defendant is on probation for an earlier offense, the nature of that earlier offense, his prior criminal convictions, and any other relevant and reliable information (favorable or unfavorable to the defendant) that the probation officer may be able to supply.

Note: Although the normal procedure is to wait until trial on a new criminal charge has been completed before beginning revocation proceedings, it may be necessary to begin sooner if the period of probation will expire in the meantime. In this situation, the proper procedure is to obtain an order for arrest for probation violation from a court, as described in Step 9 below, before the period of probation expires; otherwise, the probationer's suspended sentence cannot be activated.[5]

Step 3. Is the final court disposition of the new criminal charge either acquittal or dismissal after jeopardy attaches (i.e., after the swearing of the first witness in a non-jury case or the swearing of the jurors in a jury case)? If the answer is yes, do not proceed with the revocation procedure unless the probationer has committed violations other than the crime as to which he received an acquittal or dismissal (if he has committed such other violations, go to next step). If the answer is no--i.e., there is no acquittal or dismissal with jeopardy but instead a nolle prosequi, dismissal (nonsuit) before jurors or witnesses are sworn, or a conviction, go to the next step.

Step 4. Does the probation officer or court believe that there is probable cause that the probationer violated probation and that the violation requires revocation? If no, do not proceed with revocation procedure. If yes, go to next step.

Step 5. Has the probationer received an active prison or jail sentence for the new crime? If no, go to Step 7; if yes, go to next step.

* * * * * * * *

Step 6. [Here the probationer is already in jail or prison for a new crime; therefore no Morrissey preliminary hearing is required.] The probation officer prepares a written report naming the probationer and listing specific alleged violations of conditions, indicating time and place. If the probationer has just been sentenced to jail or prison, is represented by counsel, and wishes to waive the seven days' notice required by G.S. 15-200.1, and if he is now before a court with jurisdiction to hold a revocation hearing, the probation officer gives him a copy of the report of violations and the revocation hearing can begin immediately; go to Step 25.

Otherwise, if the probationer does not wish to waive his right to seven days' notice, or if he is no longer before a court with jurisdiction to hold the revocation hearing, the officer schedules a revocation hearing in a court with such jurisdiction; this must be a court of the same division (district or superior) in which the probationer was originally sentenced and may be in the district where he was originally sentenced or the one in which he resides or allegedly violated probation. The revocation hearing should be held no sooner than seven days and no later than sixty days after the probationer receives notice of the hearing. The probation officer should

clear all court dates with the district attorney's office (the district attorney is responsible for preparing dockets in all criminal actions; see G.S. 7A-61). The officer then gives the probationer a copy of the violation report and tells him the time and place of the revocation hearing; the probationer is returned to the proper court by jail or prison authorities in no less than seven days for his revocation hearing; go to Step 25.

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Step 7. [Here either a purely technical violation is alleged, or the probationer is free after final court disposition of a new criminal charge but without an acquittal barring probation revocation.] If the probation officer finds that the violation is serious enough to begin revocation proceedings, he prepares a report naming the probationer, listing specific alleged violations of conditions, indicating time and place, and stating the officer's own personal finding that there is probable cause to believe the probationer committed the violations charged. The probation officer should also prepare and keep, for his own possible future use, a written memorandum or notebook entry summarizing the evidence that led him to believe the probationer violated conditions--for example, his own observations or reliable statements made to him, and who his sources were. If the officer decides that the probationer can be trusted to come to court for a revocation hearing without being arrested, no Morrissey preliminary hearing is necessary; in that case, the officer gives the probationer a copy of the violation report and notifies him of the date of his revocation hearing, just as in Step 6; go to Step 25. Otherwise, go to Step 8.

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Step 8. If it is necessary to arrest the probationer, does the situation allow time for the probation officer to request a court to issue an order for arrest? (In the probation officer's discretion, he should either seek a court order for arrest or ask a police officer to make the arrest--or, in rare instances, make the arrest himself--as described in the steps below.) If no, go to Step 13. If yes, go to Step 9.

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Step 9. The probation officer responsible for supervising the probationer submits the report of violation to the court and requests an order for arrest for violating conditions of probation and/or suspended sentence. The officer should also give the judge information, such as his own observations or statements made to him by reliable persons, from which the judge can determine whether there is probable cause to believe that the probationer committed the violations alleged in the violation report. This can be done in a written affidavit, sworn to in court, or in sworn testimony by the officer. (This court must be in the same division as the court that originally imposed the probation and/or suspended sentence--i.e., district court division or superior court division--but may be in the judicial district where the sentence was originally imposed, where the probationer resides, or where the alleged violation of probation occurred.)

Step 10. Does the court find probable cause that a violation occurred? If no, the revocation procedure stops. If yes, go to next step.

Step 11. If the court, having found probable cause, decides that the violation is serious enough to begin revocation proceedings, it issues the order for arrest.

Step 12. A police officer arrests the probationer on the authority of the order for arrest. Go to Step 15.

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Step 13. [Situation requires arrest without court order.] The probation officer submits a report of violation, prepared as outlined in Step 7, to a police officer or law enforcement agency and asks for the arrest of the probationer.

Step 14. The police officer arrests the probationer for violating probation. Note: Although the police officer will normally honor the probation officer's request to arrest an alleged probation violator, under some circumstances he may legitimately refuse or postpone compliance with the request; see the further discussion in subsection F below. In these instances, the probation officer may want to request a court to issue an order for arrest as outlined in Steps 9-12 above. (In rare instances, the probation officer himself will need to make the arrest. The arrest power of the probation officer, the Department of Correction's regulations on the exercise of this power, and the provisions in G.S. Ch. 15A regarding the proper way to make arrests and the use of force are discussed in subsections B and C below.) Go to Step 15.

Step 15. [Probationer has just been arrested.] The arresting officer brings the arrested probationer before a judicial official (magistrate, clerk, or judge) without unnecessary delay.

Step 16. Is the arrest based on a court-issued order for arrest? If yes, go to Step 18. If no, go to next step.

Step 17. [The arrest was without a court-issued order for arrest.] The judicial official, by looking at the violation report on which the probationer was arrested, confirms that the probationer has been properly charged with violating conditions of probation and/or suspended sentence. If the violation report cannot be provided and there is no other legal basis for holding the probationer, the judicial official releases the probationer and the revocation procedure stops. Otherwise, he issues a magistrate's order showing that the probationer is charged with violating conditions. Go to next step.

Step 18. The judicial official sets bail conditions and gives the probationer written notice of the specific alleged violations (a copy of the violation report). [For a discussion of the probation officer's role in setting bail conditions, see subsection F below.] The probation officer may provide information relevant to the setting of bail conditions; the judicial official should request this information and consider it carefully in setting

bail conditions because the probation officer usually knows more about the probationer than other officials. If the probationer can meet bail conditions, a Morrissey preliminary hearing is unnecessary; the judicial official instructs him to return to court on a specific date for his revocation hearing. This court should be in the same division as the court that originally imposed probation, and in the same district as that court or in the district either where the probationer now resides or where he allegedly violated probation. The revocation hearing should be set no sooner than seven days and no later than sixty days after the probationer receives notice of it. The court date should be obtained from, or approved by, the district attorney's office. The probationer is then released on bail; go to Step 25. If the probationer cannot meet bail conditions, the judicial official gives him written notice that a preliminary hearing on whether his probation should be revoked will be held in a specific district court and at a time no later than four working days from the date of arrest. The district court in which the preliminary hearing is scheduled should be in the judicial district either where the probationer was arrested or where the alleged violation occurred. The judicial official further informs the probationer of his rights in connection with the preliminary hearing: the right to disclosure of evidence against him; the right to present evidence in his own behalf; and the right to confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. Go to next step.

Step 19. The judicial official commits the arrested probationer to detention following G.S. 15A-521.

Step 20. [This step occurs four working days or less after the probationer is committed to detention, in the judicial district where he was arrested or where the alleged violation occurred.] The probationer appears in district court to begin the Morrissey preliminary hearing. If the probationer can be released on bail, the preliminary hearing need not be held. Bail conditions set earlier should be reviewed by the district judge to see whether they can be modified, as provided by G.S. 15A-534(e), to permit the probationer's release. If it appears that the probationer can meet bail conditions and be released on bail, the district judge obtains a date from the district attorney's office for the revocation hearing in the proper court (this court should be in the same division as the court that originally imposed probation and in the same district as that court or the district in which the probationer resides or allegedly violated probation). The revocation hearing should be set no later than sixty days after the probationer receives notice of it and no sooner than seven days unless the probationer waives his right to the seven-day notice provided by G.S. 15-200.1 as amended. The district judge then tells the probationer the place and date of the revocation hearing. Go to Step 25. Otherwise, if the probationer cannot be released on bail, the judge should inquire whether he is represented by counsel. If he is already represented by counsel, go to Step 23. If not, the judge informs the probationer that he has a right to counsel at the preliminary hearing, and that if he is indigent he has the right to ask the court to appoint counsel for him. Go to Step 21.

Step 21. If probationer says he wants to retain counsel at his own expense, the district judge grants a continuance for this purpose.

If he requests the court to appoint counsel for him, the judge asks him whether he denies the specific alleged violations of probation (reading them to him from the probation officer's report) and whether there are other reasons why he needs the help of counsel. The judge must then decide (1) whether the probationer has made a colorable claim that he did not commit the alleged violations; or (2) if he admits the violations, whether there are complex mitigating factors; or (3) whether the probationer is unable to speak effectively for himself. If the judge finds any of these three things (denial of violation, complex mitigating factors, or inability to speak effectively for himself), go to Step 22. Otherwise, the judge denies the request to appoint counsel and records the denial and the reasons for it in writing. The reasons for denial--for example, "probationer admits violations and there are no mitigating circumstances"--should be recorded on the usual form. Go to Step 23.

Step 22. The district judge determines whether the probationer is indigent within the meaning of G.S. 7A-450. If he is not indigent, the judge denies the request to appoint counsel and makes a written record of the denial and the reasons for it. If the probationer is indigent, the judge appoints counsel, allowing a continuance to permit appointed counsel to enter the case. The indigent probationer may waive his right to counsel, following the procedure of G.S. 7A-457.

Step 23. The district judge conducts the Morrissey preliminary hearing; see description of preliminary hearing in subsection D below. (A continuance may be granted to allow the probationer to obtain witnesses or evidence.) If the judge does not find probable cause to believe that the probationer violated conditions, the probationer is released and the revocation procedure stops. If the judge finds probable cause, go to Step 24.

Step 24. [At this stage the probationer has just completed a Morrissey preliminary hearing and is still in district court.] The district judge or probation officer gives the probationer written notice of the specific violations he is charged with (a copy of the probation officer's report is sufficient if prepared as suggested in Step 7). He then obtains a date for the revocation hearing from the district attorney and gives the probationer the time and place of the hearing. (The hearing must be in the same court division as the court that originally imposed probation, and it may be in the same district as that court or in the district either where the probationer resides or where he allegedly violated conditions. The hearing should be held no later than sixty days from the date the probationer receives notice of it nor sooner than seven days unless he waives the seven-day notice.

Step 25. [This step occurs in the court that will hold the revocation hearing, which must be in the same division as the court that originally imposed probation, and may be in the same district as that court or in the district either where the probationer now resides or where he allegedly violated probation.] The judge informs the probationer of his rights in connection with the revocation hearing: the right to be represented by counsel and to have the court appoint counsel for him if he is indigent (G.S. 15-200.1); the right to disclosure of evidence against him; the right to present evidence and call witnesses in his own behalf; and the right to confront and cross-examine adverse witnesses unless the judge finds good cause for not allowing

confrontation. The court may, in its discretion--and must, if the probationer requests it--return the probationer to the district where probation was originally imposed for the revocation hearing. Unless the probationer is already represented by counsel, the judge determines whether he is indigent within G.S. 7A-450. If the judge finds him indigent, he appoints counsel for the revocation hearing unless the indigent probationer waives his right to counsel following the procedure of G.S. 7A-457. If the probationer is not indigent, the judge makes a written record of the finding of nonindigency on the usual form.

Step 26. The court conducts the revocation hearing. First, the probationer is again given notice of the specific alleged violations (he should have already received written notice); the court may also review the probationer's eligibility for appointed counsel if he appears without counsel, and continue the hearing if necessary to permit counsel to be appointed or privately obtained. The sentencing court then conducts the revocation hearing in accordance with state law and the Morrissey standards; see the description of the revocation hearing in subsection E below. If the court does not find that the probationer violated conditions, he is released. Otherwise, the court may, in its discretion, revoke probation or continue probation under the same or modified conditions.

Step 27. If probation was revoked by a district court, the probationer may appeal to superior court under G.S. 15-200.1; if the appeal to superior court fails or if probation was revoked originally by a superior court, appeal may be taken to the Court of Appeals.

B. Manner of Effecting Arrests of Probationers

When a probationer is arrested, whether for a new crime or for a violating conditions of probation and/or suspended sentence, G.S. 15A-401(c) through -(e) and G.S. 15A-501 should be followed.[6] The arresting officer should identify himself as a law enforcement officer unless his identity is clearly apparent (e.g., from his uniform). Probation officers should be especially careful to identify themselves when they make arrests since they do not wear uniforms. The arresting officer should inform the probationer that he is under arrest and tell him the reason for his arrest (the new criminal charge or violation of conditions). The arresting officer may use physical force either (a) to complete the arrest or prevent the probationer's escape from custody, or (b) to defend himself or someone else from what he reasonably believes to be the use or imminent use of physical force while he is completing an arrest or preventing an escape. He may use deadly force to complete arrest or prevent escape, but only on those rare occasions when deadly force is reasonably necessary (1) to defend himself or someone else from imminent use of deadly physical force; or (2) to arrest or prevent the escape of a person who either presents an imminent threat of physical injury to others unless apprehended without delay or is attempting to escape by means of a deadly weapon; or (3) to prevent the escape of a person from custody imposed as a result of conviction of a felony. The officer may forcibly enter private premises (i.e., someone's home) or a vehicle to complete an arrest, but only if (1) he has an arrest warrant in his possession or has a legal basis for making the arrest without a warrant, and (2) he has reasonable cause to believe the person to be arrested is present in the premises or vehicle,

and (3) he first gives notice of his authority and purpose to an occupant of the private premises or vehicle. However, this notice may be omitted if giving it would clearly endanger human life [see G.S. 15A-401(e)]. G.S. 15A-501, which applies to arrests for probation violation as well as arrests for crime, requires the arresting officer to take the arrested person before a judicial official without unnecessary delay. The officer may, before taking the arrested probationer before a judicial official, take him to some other place at the probationer's request or to have the probationer identified. He must advise the arrested probationer without unnecessary delay that he has a right to communicate with counsel and friends and allow him a reasonable opportunity to do it.

A law enforcement officer who is making an arrest for a crime may, to protect himself and prevent the destruction of evidence related to the crime, search the arrestee's person and the area within his "grabbing distance" for weapons and evidence related to the crime (see Gill, Laws of Arrest, Search, and Investigation in North Carolina 55-57 [3rd ed. Institute of Government, University of North Carolina at Chapel Hill, 1976]). Presumably, the probation or parole officer has this same power in making an arrest for probation or parole violation. A recent Department of Correction regulation[7] allows search incident to arrest by a probation or parole officer, but only for weapons and only of the probationer's or parolee's person and the surrounding area from which he could obtain a weapon.

C. The Arrest Power of Probation Officers

The Department of Correction's policy has long been to limit the exercise of probation officers' arrest power, because the probation officer is not meant to be a law enforcement officer and because the limitation protects both his safety and the safety of others. A recently adopted regulation[8] provides that probation officers shall not make any arrests for alleged new crimes (this is in keeping with the long-standing policy of withholding revocation action until the probationer is tried), except when delay in arrest would allow the period of probation to expire. The probationer should be arrested only when necessary to ensure his appearance at revocation proceedings, and only if the probation officer has "probable cause to believe that a violation has been or is being committed"--in other words, sufficiently reliable knowledge that would lead a reasonable man to conclude that a violation has been or is being committed (certainty is not required, but the officer must have more than mere suspicion). The new regulation further provides that, when a probationer must be arrested for a technical violation, the arrest can be made in three ways: (1) by obtaining from a competent court an order for arrest that is later executed by a law enforcement officer; (2) by requesting a police officer or law enforcement agency to make the arrest, accompanying the request with a written statement of the alleged violations (prepared on the "Form 10A") that "expresses the probation officer's belief that probable cause exists to believe that the violations have been or are being committed"; or (3) in certain situations, by the probation officer himself. [Note: A detailed discussion of arrest using the Form 10A procedure appears in subsection F below.] The regulation requires that the arrest be made "whenever feasible" by a law enforcement officer (this is also consistent with earlier regulations),[9]

although the probation officer may accompany the law enforcement officer on the arrest when there is no risk to himself and his presence may be helpful. The new regulation is apparently intended to authorize the probation officer to execute an arrest himself only in "emergency situations." Whether an emergency exists must be decided by the officer on a case-by-case basis; the regulation lists as examples of emergencies those in which the delay involved in having a law enforcement officer make the arrest would (1) allow the violator to abscond, (2) unreasonably endanger the person or property of the probationer or another person, or (3) allow the destruction of evidence relevant to revocation. However, even in an emergency, the probation officer should get help from a law enforcement officer if he thinks he would risk injury by conducting the arrest himself.

The new regulation limits the exercise of the probation officer's full authority to arrest and he should not exceed these limits. A legal issue remains as to how broad an arrest power the General Assembly intended to confer. G.S. 15-205 gives the probation officer "in the execution of his duties, the powers of arrest and, to the extent necessary for the performance of his duties, the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State." The meaning of "in the execution of his duties" is not clear. The "duties" provided by G.S. 15-205 include making presentence investigations, keeping informed on the "conduct and condition" of each probationer, making such reports as the Secretary of Correction and the court require, and using "all practicable and suitable methods . . . to aid and encourage persons on probation to bring about improvement in their conduct and condition." Does this mean that the performance of the probation officer's duties requires him to arrest the probationer any time he finds probable cause that the probationer has committed a new crime or violated probation? May the probation officer arrest for a crime only if the crime hinders him in doing his job--for example, when a probationer assaults him while he is making a home visit? What limits apply to arrest for a probation violation? These questions have no clear answers.

Even though G.S. 15-205 does not clearly state the situations in which it authorizes the probation officer to make arrest, it does make clear that in these situations (i.e., "in the execution of his duties"), the probation officer has the arrest power of a sheriff. G.S. 15A-401, which establishes the arrest powers of sheriffs and other law enforcement officers, should not be interpreted to give the probation officer more arrest power than the Department of Correction's new regulation allows, but it is relevant in interpreting the authority granted by G.S. 15-205. G.S. 15A-401(b) lists situations in which law enforcement officers may arrest without a warrant; these situations involve felonies and misdemeanors, not probation violations, but--like the Department of Corrections' new regulation cited above--the statute requires the arresting officer to have probable cause.

When the probation officer must exercise the power to arrest a probationer, what happens if the arrest is resisted by a third person--for example, the probationer's friend, who assaults the probation officer as he is trying to effect the arrest? Presumably, because the probation officer is exercising the arrest power of a sheriff in this situation, this third person is commit-

ting the misdemeanor of resisting a public officer in discharging a duty of his office, defined by G.S. 14-223. Often, in this situation, the probation officer is wise to retreat and protect himself since he is neither armed nor trained in law enforcement techniques; however, he apparently has the same legal authority to arrest the person who is interfering with the discharge of his duty as a sheriff has authority to arrest for the misdemeanor of resisting a public officer when the resistance is committed in his presence [see G.S. 15A-401(b)(1)]. The Department's regulation requires that the officer seek aid from a law enforcement officer if he would risk injury by conducting an arrest himself but apparently does not rule out completely the probation officer's arresting a person who attempts to obstruct an arrest. A probation officer should not arrest a person for the crime of obstructing him in making an authorized arrest unless he has notified the person that he is a probation officer performing his official duty and the person then persists in his obstructive behavior.[10] Also, it should be kept in mind that, while willfully and unlawfully resisting, delaying, or obstructing a probation officer in making an authorized arrest violates G.S. 14-223, merely arguing with the officer or talking to the person being arrested is not a crime.[11]

D. The Morrissey Preliminary Hearing

There seems to be some doubt in North Carolina about the right to a preliminary hearing on violation of probation. For example, a recent North Carolina Court of Appeals holding on the subject made no reference to the Morrissey and Gagnon decisions and rejected the probationer's claim that he was entitled to an "arraignment" following arrest.[12] Nevertheless, it seems clear that the probationer who is the subject of revocation proceedings has a right to a preliminary hearing,[13] as described below, unless (1) he is not arrested and appears in court voluntarily for his revocation hearing; (2) he is arrested for probation violation but is freed on bail promptly after arrest; or (3) he is already in lawful custody for some reason other than probation violation--for example, because he is serving an active sentence for a new crime committed while on probation, or because he cannot meet the bail conditions set in connection with arrest for a new crime.

In Morrissey v. Brewer, the U.S. Supreme Court held that due process requires a preliminary hearing in a parole revocation proceeding; the Court applied the same requirement to probation revocation in Gagnon v. Scarpelli.[14] The preliminary hearing must

> . . . be conducted at or reasonably near the place of the alleged parole [or probation] violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.[15]

At the preliminary hearing, the probationer or parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information, and he may confront and question each adverse witness unless the hearing officer specifically finds that the adverse witness would be subjected to risk of harm if his identity were disclosed. [If the suggestions made here are followed, the probation "hearing officer" in North Carolina will be a judge; parole preliminary hearings are now conducted

by parole hearing officers.] The decision implies that a continuance should be granted, if necessary, to allow the probationer or parolee to obtain evidence or subpoena witnesses.

The purpose of the Morrissey preliminary hearing is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee [or probationer] has committed acts that would constitute a violation of parole [or probation] conditions."[16] The hearing is informal and rules of evidence do not apply. The hearing officer must make a written summary of the hearing and state the reasons for his determination of probable cause (or the absence of it). If the judge does not find probable cause, he must dismiss the revocation proceeding and order the probationer or parolee released immediately.[17]

E. The Probation Revocation Hearing

The North Carolina case law makes it clear that the probation revocation hearing is not a criminal prosecution, that strict rules of evidence do not apply, and that hearsay evidence should not be admitted, but a sentencing court's revocation order will be upheld if there is enough "competent" (non-hearsay) evidence to "reasonably satisfy the judge that the probationer has violated a valid condition."[18]

The U.S. Supreme Court's decision in Morrissey (which applies to both parole and probation revocation) requires that the revocation hearing lead to a final evaluation of any contested relevant facts and a determination of whether the facts warrant revocation. The probationer must have an opportunity to be heard and show that he did not commit the violations alleged, or, if he did, that there were mitigating circumstances. Evidence against the probationer must be disclosed to him. He has the right to be heard in person and to present witnesses and documentary evidence in his behalf. (Although the Supreme Court did not specifically say so, it appears to be necessary to continue the hearing to allow the probationer to obtain evidence or subpoena witnesses.) The probationer has the right to confront and cross-examine adverse witnesses, unless the court finds good cause for not allowing confrontation; for example, confrontation could be disallowed if it would subject an informant to risk of harm. The Supreme Court said the revocation hearing is not "a criminal prosecution in any sense";[19] the procedure is informal (as North Carolina's courts have characterized it); and evidence such as letters, affidavits, and other material may be admitted that would not be admissible in a criminal trial. (Thus Morrissey appears to allow hearsay testimony, while the North Carolina rule on probation revocation hearings is that hearsay should not be admitted but a revocation will not be reversed if there is sufficient competent evidence to support the finding of probation violation.)[20] Finally, Morrissey requires "a written statement by the factfinders [in North Carolina, the judge] as to the evidence relied on and reasons for revoking."[21]

G.S. 15-200.1 provides a right of appeal to the superior court if probation is revoked by the district court. Thereafter, appeal may be taken to the Court of Appeals [(G.S. 7A-27(b)].

F. Commentary on Probation Arrest and Revocation Procedure

The commission of a criminal offense while on probation violates the standard condition that the probationer break no penal law [G.S. 15-199(13)]. It would be possible to treat an alleged new crime as a violation of probation and set revocation proceedings in motion before the probationer's guilt is determined by the criminal court. However, the practice long followed by North Carolina probation authorities is to wait until the probationer is tried for the new offense before beginning revocation proceedings unless the period of probation will terminate in the meantime. (See Step 2 above.) The probationer suspected of committing a crime is, like any other criminal suspect, subject to citation, summons, or arrest as provided by G.S. Ch. 15A. If arrested, he has the right to a probable cause determination by a judicial official (if the arrest is made without a warrant) and to have bail conditions set.

Trial on a new criminal charge does not conclude the matter of probation revocation (see Step 3). Conviction does not mean that probation will necessarily be revoked, nor does it eliminate the requirement of revocation proceedings under North Carolina law and constitutional due process as interpreted by the Morrissey and Gagnon decisions. (One U.S. Court of Appeals has recently held that the revocation proceeding may not be postponed until after the sentence imposed for the new crime has been served.)[22] Conversely, the fact that the probationer is not convicted of the alleged new crime does not necessarily mean that his probation cannot be revoked. Although when a defendant is acquitted of a criminal charge, the same charge may not be the basis for activating a suspended sentence,[23] a nolle prosequi or dismissal of the charge before jeopardy attaches (i.e., before the jury is sworn or before the first witness is sworn in a non-jury case) would not prevent the court that originally imposed probation from finding that the probationer violated probation by committing a new offense.[24]

If the probationer receives an active sentence after conviction of a new crime (see Step 6), a Morrissey preliminary hearing is not needed because he is already in lawful custody. The proper procedure is to notify him of the specific alleged violations of probation and proceed with the revocation hearing. After conviction of a new crime, the probationer will often wish to waive the seven-day notice required by G.S. 15-200.1 and proceed with the revocation hearing so that the activated sentence can be made to run concurrently with the new sentence. If the probationer's trial on a new charge does not result in conviction, or if he is convicted but not given an active jail or prison sentence, he will be free in the community; in this situation, the arrest and revocation procedure is the same as for a probationer whose violation is technical only.

When the probation officer believes a probationer has violated conditions of probation seriously enough to require revocation, he normally begins revocation proceedings by preparing a report of the violation (Step 7). A recently adopted Department of Correction regulation provides that a probation officer must have probable cause before arresting or seeking arrest; it defines probable cause as "knowledge of such facts and circumstances from reasonably trustworthy sources which would warrant a man of reasonable caution and

belief to conclude that a violation of the terms of probation . . . has been or is being committed." When a probation officer requests a law enforcement officer to make an arrest pursuant to G.S. 15-200, the regulation requires him to submit to the law enforcement officer a written statement (using the "Form 10A") that not only lists specific violations of probation but also "expresses the probation officer's belief that probable cause exists to believe that the violations have been or are being committed."[25] Step 7 suggests that the probation officer make a written memorandum, for his own possible use later should the constitutionality of the arrest be questioned, of the facts and sources of information on which he bases his belief that the probationer has violated probation conditions.

The procedure in Steps 8-14 recognizes two methods of arresting a probationer for probation violation, as provided by G.S. 15-200: (1) the issuance by a court--either on its own initiative or upon the application of the probationer officer--of a warrant [now called an "order for arrest"; see G.S. 15A-305(b)(4)]; and (2) arrest without a warrant by a police officer on the request of a probation officer. With regard to the first method, G.S. 15-200 authorizes a judge of the same court division (district or superior) as the court that originally imposed probation, in the same district as that court or in the district either where the probationer now resides or where he allegedly violated probation, to issue the warrant (see Steps 9-12). It is suggested that a probable cause requirement be read into this statute. When a judge issues an order for arrest for failure to appear in court or failure to pay a fine, probable cause is self-evident; the court is presumed to know the facts. However, when a probationer violates probation conditions, the judge will not necessarily know the facts. The probation officer, who usually has better information than the judge because he supervises the probationer, could easily present facts on which the judge can make an independent decision whether there is probable cause to believe the probationer has violated probation. This can be done following the procedure of G.S. 15A-304(d) for arrest warrants, using the probation officer's report as an affidavit or by taking testimony under oath.

The second method of arrest (Steps 13-14) is arrest by a police officer without a warrant on the request of the probation officer, accompanied by a written statement of alleged violations of probation (the Form 10A). The question here is whether the arresting officer must himself have probable cause to believe that the person to be arrested violated probation or whether he may simply rely on the probation officer's written allegations without knowing himself the facts and sources on which the allegations are based. It is not clear whether the general Fourth Amendment requirement[26] that the arresting officer have probable cause for warrantless arrest applies to arrest for probation violation. The old view of probation was that the probationer was always in the court's custody and therefore entitled to no greater constitutional rights than an incarcerated prisoner.[27] This view was explicitly rejected by the U.S. Supreme Court in Morrissey v. Brewer and Gagnon v. Scarpelli. The Court held that even though the liberty of the probationer is "conditional," "[i]ts termination calls for some orderly process, however informal."[28] The Court went on to specify certain standards for post-arrest revocation procedure, but it did not deal with arrest. If the Fourth Amendment applies to warrantless arrest for probation violation,

the present North Carolina "Form 10A" procedure can be considered constitutionally adequate because the arresting police officer can be regarded as acting with the probation officer's probable cause. As mentioned earlier, the Department of Correction requires that a probation officer not request a police officer to arrest a probationer unless he has probable cause to believe that the violation was committed--i.e., "knowledge of such facts and circumstances from reasonably trustworthy sources which would warrant a man of reasonable caution and belief to conclude that a violation of the terms of probation . . . has been or is being committed"--and that the Form 10A express the probationer's belief that probable cause exists.[29] It seems unnecessary for the probation officer to give the police officer the precise evidence that led him to believe that a violation occurred. The probation officer requesting the police officer to make the arrest is not like an ordinary citizen who may ask for someone's arrest; he has law enforcement power, supervises the probationer, and is charged with keeping the court informed about the probationer (G.S. 15-205); therefore his request for arrest may be presumed to be based on probable cause.

If one takes the position that the Fourth Amendment applies here, as in a warrantless arrest for a felony, the probation officer can be thought of as a law enforcement officer informing another law enforcement officer that a named person committed a specific felony and asking him to arrest that person; it can then be argued that the second officer can assume that the first officer had the requisite probable cause and may proceed with the arrest. Legal authorities are divided on whether a warrantless arrest is valid in this situation. In U.S. v. Maryland,[30] the U.S. Court of Appeals for the Fifth Circuit held to be valid an arrest that was made on the basis of a police radio bulletin issued by an officer who had probable cause, described the suspects and their car, and indicated their alleged offense but did not communicate the evidence on which the probable cause finding was based. In another case, a South Dakota sheriff who had probable cause to arrest suspects informed a Wyoming sheriff that an arrest warrant was "being obtained" for the suspects; he described the suspects and said that they had passed counterfeit money but without did not give facts on which the probable cause finding was based; the court held that the arrest was constitutional.[31] On the other hand, the Second Circuit in Mungo v. LaVallee[32] held that the arresting officer needed some corroborative evidence of his own in addition to the description of the suspect in a radio bulletin. The U.S. Supreme Court, in dictum, said that if a radio bulletin from police in one county informs police in another county that an arrest warrant has been issued for a suspect and the warrant is valid, the police in the second county may arrest the suspect.[33] A broad interpretation of this holding, supported by two of the three U.S. Court of Appeals decisions just cited, is that a warrantless arrest by one officer based on another officer's conclusory statement that a suspect has committed a felony is valid if the other officer in fact had probable cause.[34] A contrary view is that, where no warrant has been issued, the arresting officer must have some evidence to consider in addition to the other officer's conclusions.[35]

If one takes the position that the probationer in this situation is entitled to less than full Fourth Amendment protection, then the North Carolina procedure also seems quite adequate. In any event, the arresting officer would not

be liable in a false arrest or civil rights action because of the clear legal authority provided in G.S. 15-200 on which he may in good faith rely and the lack of any other clear authority to the contrary.[36]

May the police officer validly refuse the request to arrest a probation violator? It is important to note that G.S. 15-200 uses the word "request," which implies that the police officer has discretion to refuse, and says that he "may" make the arrest "without a warrant." This language indicates that the request of the probation officer was never intended to have the force of a judicially issued arrest warrant. If G.S. 15-200 were interpreted as authorizing the probation officer to issue what would amount to a warrant, it would directly conflict with G.S. 7A-274, a 1965 statute that abolishes the power of any persons "not officers of the General Court of Justice" to issue arrest warrants (clearly, probation officers are not "officers of the General Court of Justice" within the meaning of G.S. Chapter 7A). Also, if interpreted in this way, G.S. 15-200 would arguably conflict with State v. Matthews,[37] in which the North Carolina Supreme Court held unconstitutional a Wake County ordinance authorizing police officers to issue arrest warrants.[38] This decision is supported by Coolidge v. New Hampshire,[39] in which the U.S. Supreme Court held that the Constitution requires that a warrant be issued by a "neutral and detached magistrate"--in other words, a judicial officer. Thus it seems a fair conclusion that the police officer has some discretion to refuse to comply with the request.

The next question is what sort of discretion the police officer has in this regard. The request to arrest should be honored unless there is some good reason related to the protection of the public for refusing to comply or postponing compliance with it; for example, if all the officers on duty in a sheriff's office were occupied in making arrests or responding to calls involving serious crimes, the sheriff might then legitimately postpone complying with the request. It is important to remember that the probation officer is neither armed nor trained in effecting arrests, although he does have some very limited arrest powers (G.S. 15-205); by Department of Correction policy, he is required to seek an arrest warrant from a court or request a police officer to make the arrest and not make the arrest himself except in emergencies (see subsection C above). Even in emergency situations, the probation officer must seek police assistance when he has reason to believe that he risks injury by acting alone. A local law enforcement agency should consider each request to arrest a probation violator, weighing the need to bring the violator in for a revocation hearing against the agency's need to make arrests for crime, respond to calls from the public, serve process, and carry out its other duties. The request to arrest a probation violator should take its place in a priority ranking with these other duties. A blanket refusal by a law enforcement officer or agency to honor probation officers' requests to arrest probation violators might result in criminal liability.[40]

In an arrest for probation violation (Steps 13 and 15), the provisions of G.S. 15A-401 and 15A-501 regarding notification of authority and purpose, use of force, and entry of private premises should be followed. These are summarized above in subsection B.

Now let us consider post-arrest procedure (Steps 15-19). G.S. 15A-501 requires that the arrested probationer be taken before a magistrate or

other judicial official without unnecessary delay. If the arrest is not authorized by a judicial order for arrest--in other words, if the arrest is made by a police officer on the request of a probation officer or by a probation officer--the first step should be the magistrate's confirmation that the probationer has been charged in a probation officer's written report (Form 10A) with probation violation. G.S. 15A-511(c), which applies only to warrantless arrest "for a crime," requires the magistrate to make an independent determination of probable cause. However, it seems unnecessary for the magistrate to make a probable cause determination immediately after arrest for probation violation, because the probationer--if not released on bail--is entitled to a probable cause hearing[41] (the Morrissey preliminary hearing) "as soon as convenient after arrest." In a sense, the alleged probation violator receives more protection after arrest than another person charged with crime, because his post-arrest probable cause hearing--which must be held whether or not he was arrested on a judicial warrant--is adversarial rather than ex parte. In a footnote to a recent opinion, the U.S. Supreme Court said that this greater degree of protection is necessary because revocation proceedings "may offer less protection from initial error than the more formal criminal process."[42] Thus, in Step 17, it seems appropriate for the magistrate merely to verify that the probationer has been properly charged, to release him if there is no proper allegation of probation violation, and otherwise to issue a magistrate's order as he would after a warrantless arrest for crime [G.S. 15A-511(c)(3)].[43]

Bail is covered by Step 18 of the suggested procedure. G.S. 15-200 gives the probationer a right "to give bond pending a hearing"--in other words, a right to bail. (Thus far, this is not a Constitutional right.) The statute further provides that bail be set either before the arrest by the judge in his order for arrest, or by the "officer having the defendant in charge," who shall "take" sufficient bail for the defendant's appearance at the revocation hearing. In practice, this "taking" of sufficient bail has apparently been interpreted to mean that the probation officer who requests the arrest has the authority to set bail conditions, even though this is a doubtful reading of the statute; the phrase "officer having the defendant in charge" was probably intended to refer to the police officer who arrested the probationer. (G.S. 15-200 does not even mention arrest by a probation officer.) L. P. Watts, the principal draftsman of relevant portions of G.S. Ch. 15A, points out that the probation officer's power to set bail may have already been repealed in 1965 by G.S. 7A-274, which reads:

> § 7A-274. Power of mayors, law enforcement officers, etc., to issue warrants and set bail restricted.--The power of mayors, law enforcement officers, and other persons not officers of the General Court of Justice to issue arrest, search, or peace warrants, or to set bail, is terminated in any district court district upon the establishment of a district court therein. [Emphasis added.]

Since probation officers are not "officers of the General Court of Justice" within the meaning of G.S. Chapter 7A, G.S. 7A-274 seems to repeal the officer's power to "take" bail provided by G.S. 15-200. Some doubt remains, however, because the bail-setting provisions of G.S. 15-200 have never been explicitly amended. In any case, Watts says, the Criminal Code Commission

strongly favored "individually-set conditions of release in a hearing with the person defendant present" as opposed to the setting of bail conditions before arrest, and setting of bail conditions by judicial officials exclusively.[44]

A recent Attorney General opinion observes that the bail-setting provisions of G.S. Ch. 15A do not explicitly apply to those arrested for probation violation. Making no reference to G.S. 7A-274, the opinion concludes:

> When a probationer is arrested for violating the conditions of his probation, G.S. 15-200 authorizes his probation officer to take bail for the probationer's appearance at a hearing without consulting with or receiving any order from a magistrate or other judicial officer, when the Court issuing the order of arrest has failed to set bond in the order.[45]

When it says "take bail," using the language of G.S. 15-200, the opinion clearly means "set bail"--i.e., set conditions of bail--because it concludes:

> Although bail for criminal defendants under Chapter 15A must be set by a judicial official, G.S. 15-200 authorizes probation officers to set bail for probation violators.[46]

A probation officer may rely on the Attorney General's opinion and assume that he has a power to set bail conditions for a probationer arrested for probation violation. The best policy, however, may be to let bail conditions be set only after arrest and only by judicial officials, applying the procedures of G.S. 15A-511(e) and G.S. 15A-534 even though these were not drafted with probation violation arrest in mind. If this procedure is not already required by state law, it may soon be required by new legislation. The Criminal Code Commission's trial and post-trial procedure bill (HB 988-SB 663, submitted late in the 1975 session and never acted upon by the General Assembly) provides that the person arrested for violating probation "must have conditions of release pending a revocation hearing set, as conditions of pretrial release are set under G.S. 15A-534 [i.e., as if he had been arrested for a crime]."[47] This procedure will reduce administrative confusion. It will also permit a thorough examination of bail conditions, which is desirable not only from the probationer's point of view but also for administrative convenience. If the arrested probationer can be released on bail, a Morrissey preliminary hearing is unnecessary.[48]

Although the bail procedure suggested in Step 18 requires bail to be set after arrest by a magistrate or other judicial official, it is expected that the probation officer will give the magistrate information relevant to bail-setting. He may want to let the magistrate know that the probationer is on probation and what offense he was originally convicted of, or he may have other information--favorable or unfavorable to the probationer. He may also want to recommend that certain conditions of bail be set. The magistrate, following G.S. 15A-534(c), should carefully consider the information and recommendations of the probation officer, because the officer usually knows more about the probationer than other officials. Thus, the probation officer, while he has not set bail conditions himself, should have considerable influence on them. When a judge issues an order for arrest for probation violation, he may want to set bail conditions before arrest, indicating them on the

order. In the procedure suggested here, such conditions could be regarded as recommendations by the sentencing judge to the magistrate and should have a strong influence on the magistrate's bail-setting because of the judge's presumed knowledge of the probationer's background.

North Carolina's policy and procedure on bail-setting are clearly set forth in G.S. 15A-534. The magistrate or other judicial official must impose some condition other than secured appearance bond unless he finds that no other bail condition will assure appearance in court or that another kind of bail condition may endanger someone, or lead to destruction of evidence, subornation of perjury, or intimidation of witnesses. Probation officers may want to become familiar with the written policies on pretrial release, which are issued by the senior resident superior court judge in each judicial district as provided by G.S. 15A-535.

If the arrested probationer is released on bail, the preliminary hearing is not necessary. The Supreme Court in Morrissey and Gagnon held that a preliminary hearing (see description above, subsection D) is required for the probationer or parolee held in detention in connection with a revocation proceeding, but a hearing seems needless if he is free on bail. The highest court of Montana recently decided that when a probationer remains free pending his revocation hearing, no Morrissey preliminary hearing is required.[49] Although the Montana case dealt with a probationer who had not been arrested rather than one who had been arrested and then released on bail, its reasoning would presumably apply to the latter. Of course, some basis must exist for detaining the probationer before bail conditions can be set, but the probable cause requirement suggested earlier would provide that basis.

If the arrested probationer is released on bail (Step 18), the revocation hearing can be scheduled. The probationer must be given a copy of the violation report, which serves as a "bill of particulars," and he must be notified of the court and date of the revocation, which should be no more than sixty days and no less than seven days from the time he receives notice of it, unless he chooses to waive the seven-day notice required by G.S. 15-200.2. (Morrissey set no precise limit on the delay between arrest and revocation hearing, but indicated that two months would not be unreasonable.)[50] When the probationer appears in the court that will conduct the revocation hearing (Step 25), he will be informed of his rights to counsel, disclosure, opportunity to be heard, and confrontation.

If the arrested probationer cannot make bail, he will be committed to detention (Step 19). The best policy--and the present practice--is to use the commitment procedure provided by G.S. 15A-521, even though this statute was written to apply only to persons "charged with a crime," for the sake of uniformity and administrative convenience. The probationer held in detention must receive a Morrissey preliminary hearing.

Jurisdiction to issue orders for arrest for probation violators and to revoke, continue, extend, or terminate probation lies in the division of the General Court of Justice that originally imposed the probationer's sentence in (1) the district where sentence was imposed, or (2) the district where the probationer resides, or (3) the district where he allegedly violated

probation conditions (G.S. 15-200). In the suggested procedure, this jurisdiction has been recognized with regard to orders for arrest (Step 9) and revocation hearings (Step 26), but modified in connection with the Morrissey preliminary hearing (Steps 20-23). To comply with Morrissey, the preliminary hearing should be held in the judicial district where the probationer was arrested or where the alleged violation occurred.

In Steps 20-23, it is suggested that the preliminary hearing be held in district court. The Supreme Court did not say that the preliminary hearing had to be held by a judge; in fact, Morrissey and Gagnon would be satisfied if any probation officer other than the one who arrested the probationer held the hearing. However, it seems more consistent with North Carolina's practice to require that a judge conduct the preliminary hearing. Probation revocation hearings have been a judicial matter since the North Carolina probation system was made statutory in 1937, and North Carolina courts had a common-law power to suspend and activate sentences before then.[51] Another reason for a court to conduct the hearing is that the decision to appoint counsel may be made only by a judge or a clerk of superior court.[52] The Administrative Office of the Courts favors having preliminary hearings conducted by district court.[53]

The probationer who remains in detention should be brought back to district court within four working days of his arrest for review of bail conditions, to be informed about his preliminary hearing and his right to counsel (Steps 20-22), and for his preliminary hearing (Step 23). It is clear that the Supreme Court established a right to request counsel at the preliminary hearing but not the unqualified right to counsel that North Carolina provides at the later revocation hearing. The criteria for eligibility for court-appointed counsel are listed in Step 21. Gagnon requires that if these criteria are not satisfied and counsel is denied, the reasons for the denial should be "stated succinctly in the record."[54] If the Gagnon criteria are satisfied, then the usual indigency determination and counsel appointment procedures should be followed.[55] (The probationer may, of course, waive counsel under G.S. 7A-457.) The next step is the preliminary hearing (Step 23), but a continuance may be granted to allow counsel to be retained or appointed or to permit the probationer to obtain evidence or witnesses (see description of preliminary hearing in subsection D above).

Gagnon v. Scarpelli held that the indigent probationer is entitled to appointed counsel at both the preliminary hearing and the revocation hearing required by Morrissey, if he meets certain eligibility criteria summarized in Step 21 above. The Supreme Court did not reach the issue of whether the non-indigent probationer is entitled to be represented by privately retained counsel.[56] G.S. 15-200.1 provides that "[t]he probationer shall be entitled to representation by counsel, including court-appointed counsel if he is indigent and confinement is possible." [Confinement is "possible," of course, because the suspended sentence can be revoked; G.S. 7A-451(a)(4) has similar provisions.] This statute applies to the revocation hearing but was not drafted with the preliminary hearing in mind, since none was required when it was enacted. Steps 21 and 25 above suggest that privately retained counsel be allowed at both the revocation hearing and the preliminary hearing in an attempt to make both hearings consistent with North Carolina's scheme as illustrated by G.S. 15-200.1.

The Supreme Court said in Morrissey that the preliminary hearing must be held "as promptly as convenient after arrest while information is fresh and sources are available." A delay of no more than four working days after arrest satisfies this requirement, in the view of the Criminal Code Commission.[57]

Can the probationer waive his right to a preliminary hearing? Whether he can, constitutionally, is open to doubt if he is unrepresented by counsel; the situation is analogous to waiver of a felony preliminary hearing by an uncounseled defendant.[58] The Supreme Court did not consider the question in Morrissey and Gagnon. The best policy may be to not allow waiver unless the probationer is represented by counsel.

After the preliminary hearing, the probationer who is not free on bail, if held on a finding of probable cause, must be notified in writing of the time and place of his revocation hearing and told of his rights in connection with it (Step 24). Because the probationer is in jail, the hearing should be held as soon as possible, although no sooner than seven days after he receives notification unless he waives his right to seven days' notice.

It is important, in scheduling any preliminary hearing or revocation hearing, to remember that the district attorney has the authority to prepare the court calendar in "all criminal actions" (G.S. 7A-61). In practice, especially with regard to district court, this authority is sometimes delegated to the clerk. Steps 6, 7, 18, 20, and 24 suggest that the hearing date be "obtained" from the district attorney's office. It may often be sufficient merely to get the district attorney's approval of a date, but he should always be consulted.

Steps 25-26 and subsection E above describe the revocation hearing based on Morrissey, G.S. 15-200, and G.S. 15-200.1. G.S. 15-200 provides that the court that holds the revocation hearing must be in the same court division (district or superior) as the court that originally imposed probation, and may be in the same district as that court or in the district either where the probationer resides or where he allegedly violated probation; however, if the probationer requests it, the court must transfer the hearing to the district where probation was originally imposed. The right to counsel at the hearing under G.S. 15-200.1 is broader than the right to request counsel established by the Gagnon decision. A revocation may be appealed, under G.S. 15-200.1 and G.S. 7A-27(b), to superior court or the Court of Appeals (see Step 27).

II. ARREST OF PAROLEES AND PAROLE REVOCATION

A. Suggested Procedure

This procedure begins with the discovery by the parole officer, the Parole Commission, or other authorities that a parolee may have violated some condition of his parole. The procedure is intended to cover paroled and conditionally released committed youthful offenders as well as other

parolees (parole and conditional release have become virtually synonomous as a result of statutory amendments in 1975).

Step 1. Do the alleged violations consist solely of a new crime or crimes or are substantial technical violations alleged? If no new crimes are alleged--i.e., only technical violations are alleged--go to Step 8. If new crimes are alleged and no substantial technical violations are alleged, go to Step 2 (the parolee will be tried, and only if he is convicted of a new crime will revocation proceedings be held). If both new crimes and substantial technical violations are alleged, criminal prosecution, as described in Steps 2 through 7, will proceed concurrently with the revocation process beginning with Step 8. A substantial technical violation is a violation of condition of parole that the parole officer, after investigation, decides is serious enough to warrant a revocation proceeding. When the alleged violation involves harm or threatened harm to people and may constitute a crime--for example, carrying a concealed weapon or assaulting someone--the parole officer, in reporting the violation, should be careful to refer to it not as a criminal charge (for example, "the parolee was charged with assault" would not be proper reporting procedure) but rather as a violation of a specific parole condition in a specific way. For example: "The parolee violated Condition No. 11 of his parole on January 20, 1976 by possessing a .22 rifle and threatening John Doe with a rifle."

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Step 2. Follow the usual procedure of G.S. Ch. 15A to prosecute for a crime: citation, criminal summons, or arrest; appearance before a magistrate without unnecessary delay after arrest for probable cause determination and/or bail-setting; etc. When the magistrate (or other judicial official) sets bail conditions, the parole officer may properly bring to the magistrate's attention the fact that the defendant is on parole, the nature of the offense for which he was serving the sentence from which he was paroled, his prior convictions, and any other relevant and reliable information (favorable or unfavorable to the defendant) that the parole officer can supply.

Step 3. Is the final court disposition of the new criminal charge either acquittal or dismissal after jeopardy attaches (i.e., after the swearing of the first witness in a non-jury case or the swearing of the jurors in a jury case)? If the answer is yes, do not proceed with the revocation procedure. If the answer is no--i.e., there is no acquittal or dismissal with jeopardy but instead a nolle prosequi, a dismissal (nonsuit) before jurors or witnesses are sworn, or a conviction, go to the next step.

Step 4. Does the parole officer believe that there is probable cause that the parolee violated parole and that the violation is serious enough to require revocation? If no, do not proceed with revocation procedure. If yes, go to the next step.

Step 5. Has the parolee received an active prison or jail sentence for the new crime? If no, go to Step 8; if yes, go to the next step.

* * * * * * * *

Step 6. [Here the parolee is already in jail or prison for a new crime, so a Morrissey preliminary hearing is not required.] The parole officer prepares a report that sets out specific alleged violations of parole conditions, indicates time and place, and includes a statement of the facts that led him to believe the violation has occurred; he then submits the report to the Parole Commission, as in Step 8, and if the Commission finds probable cause that a violation occurred that is sufficiently serious to justify revocation, it issues its warrant. (Although the parolee is already in custody, this is the usual procedure for beginning revocation proceedings.)

Step 7. The parole officer who reported the violation, or another parole officer in the district where the parolee is now confined, receives a copy of the violation report and the Parole Commission warrant. The appropriate officer then serves copies of the violation report and the Parole Commission warrant on the parolee and gives him a written notice of the revocation hearing date as soon as he receives it from the Parole Commission. The officer also informs the parolee of his rights in connection with the revocation hearing: the right to be represented by counsel and to request appointed counsel if he is indigent; the right to disclosure of evidence against him; the right to present evidence in his own behalf, including witnesses; and the right to confront and cross-examine adverse witnesses unless the Parole Commission finds good cause for not allowing confrontation. Go to Step 19.

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Step 8. [At this point, one of three things is true: (1) technical parole violations are alleged but no new crime has been charged; (2) the parolee is free after final court disposition of new criminal charges but without an acquittal that bars parole revocation; or (3) both new crimes and technical violations are alleged, and prosecution for the new crime will go on concurrently with parole revocation proceedings.] The parole officer writes and submits to the Parole Commission a report setting out specific alleged violations, indicating time and place, and including a statement of the facts that led him to conclude that the parolee violated parole conditions. This statement should identify the source of the facts--the officer's own observation or reliable informants--and (unless it is self-evident) why he believes his sources to be reliable.

Step 9. Does the Parole Commission find probable cause that a parole violation occurred that is sufficiently serious to warrant revocation? If no, the revocation procedure stops. If yes, go to the next step.

Step 10. The Parole Commission, having found probable cause, issues its warrant for the parolee's arrest [the term "warrant" as used here includes the warrant for the arrest of paroled committed youthful offenders under G.S. 148-49.9(b) and also the "order revoking a parole conditionally or for a temporary period of time" under G.S. 148-61.1(b)].

Step 11. A parole officer (or any law enforcement officer, if the parolee is not a committed youthful offender) arrests the parolee on the authority of the Parole Commission warrant. The best practice may be for the arresting officer to have the Commission's warrant in his possession

when he makes the arrest; however, G.S. 148-61.1(b) does not say that this is necessary. G.S. 15A-401(a)(2) allows a police officer to execute an arrest warrant for a crime when he knows that a warrant has been issued but does not have it in his possession; the same rule can logically be applied when police or parole officers make parole violation arrests. The arresting officer should make sure that the Commission's warrant has actually been issued before making the arrest if he does not have the warrant in his possession.

Step 12. The arresting officer gives a copy of the Parole Commission warrant and the violation report to the arrested parolee. (Under a new regulation, 5 N.C. Admin. Code § 4D.0401, a copy of the violation report is sent attached to the copy of the warrant to be served on the parolee.) The arresting officer then takes the parolee either to a local jail in the county where the alleged parole violations occurred or in the county where the arrest occurred or to one of the state prison units specifically approved by the Department of Correction for holding parolees as near as possible to the place of arrest or alleged parole violation. (See further comments in subsection F below.)

Step 13. Promptly after arrest (preferably within 24 hours), the Parole Commission must be notified by jail or prison authorities that the parolee has been taken into custody. The Commission will then schedule a Morrissey preliminary hearing at a specific place (normally the jail or prison where the parolee is being held) and not later than seven days from the date of arrest. A written notice of the hearing date is sent to both the parole officer who reported the violation and a parole officer in the district where the parolee is being held; the latter officer serves this notice on the parolee (see 5 N.C. Admin. Code § 4D.0402). If the parolee has not yet received a copy of the violation report, the parole officer gives him one at this time and tells him of his rights in connection with the preliminary hearing: the right to be represented by counsel at that hearing and to ask for appointed counsel if he is indigent; the right to disclosure of evidence against him; the right to present evidence in his own behalf; and the right to confront and cross-examine adverse witnesses unless the hearing officer finds good cause for not allowing confrontation.

Step 14. Within seven days after the arrest, a parole hearing officer prepares to conduct the Morrissey preliminary hearing wherever the parolee is being held. Before beginning the hearing, the hearing officer inquires whether the parolee is represented by counsel. If not, the hearing officer informs him that he has a right to counsel at the hearing and may request appointed counsel if he is indigent. If the parolee says he wants to retain counsel at his own expense, the hearing officer continues the hearing for not more than seven days while he obtains counsel. If the parolee requests that counsel be appointed, the officer asks him both whether he denies the specific alleged violations of parole (reading them to him from the violation report) and whether there are other reasons why he needs the help of counsel. The hearing officer must then determine (1) whether the parolee denies that he committed the alleged violations; or (2) if, he admits the violations, whether there are complex mitigating factors; or (3) whether he is unable to speaking effectively for himself. If the officer finds any of these three things (denial of violations, complex mitigating factors, or inability to speak

effectively for himself), go to Step 15. Otherwise, the hearing officer denies the request for appointed counsel and makes a written record of the denial and the reasons for it (the reasons for denial might be, for example, "parolee admits violations, there are no mitigating circumstances, and he seems to be capable of speaking effectively for himself"); go to Step 16.

* * * * * * * *

Step 15. The hearing officer questions the parolee and fills out an affidavit of indigency form. He then takes the form to a clerk of superior court, who decides whether the parolee is indigent within the meaning of G.S. 7A-450. If the parolee is not indigent, the clerk denies the request to appoint counsel and makes a written record of the denial and reasons. If he is indigent, the clerk appoints counsel and the hearing officer may allow a continuance to permit appointed counsel to enter the case. (The lawyer appointed to represent the parolee at the preliminary hearing will not follow the case to the later parole revocation hearing by the Parole Commission in Raleigh; instead, under a procedure recently developed by the Administrative Office of the Courts, new counsel from the Wake County Bar will be appointed by the clerk in Wake County to represent the parolee at the revocation hearing.) The indigent parolee may, of course, waive his right to counsel, following the procedure of G.S. 7A-457. Go to Step 16.

* * * * * * * *

Step 16. The parole hearing officer conducts the Morrissey preliminary hearing; see description of preliminary hearing in subsection D below. (A continuance may be granted to allow the parolee to obtain witnesses or evidence.) If the hearing officer does not find probable cause to believe that the parolee violated conditions of parole, the parolee is released and the revocation procedure stops. If the officer finds probable cause, go to the next step.

Step 17. [At this point, a preliminary hearing has just been held and probable cause found.] The hearing officer orders that the parolee be returned to the custody of the Department of Correction, if he is not already in the Department's custody.

Step 18. Within ten days after the parolee returns to the custody of the Department of Correction, the hearing officer or other probation or parole officer informs the parolee that a parole revocation hearing will be held by the Parole Commission and serves on him a written notice of the place and time of the hearing, which should be no later than sixty days from the date the parolee was arrested for parole violation (or, if he was arrested for a new crime and committed to jail or prison after conviction of the new crime, no later than sixty days from the date of the judgment for that conviction). The officer should give the parolee a copy of the violation report if he has not already received one. The officer also informs the parolee of his rights in connection with the revocation hearing: the right to be represented by counsel and to request appointed counsel if he is indigent; the right to disclosure of evidence against him; the right to present evidence and call witnesses in his own behalf; and the right to confront and cross-examine adverse witnesses unless the Parole Commission finds good cause for not allowing confrontation.

Step 19. The Parole Commission determines whether the parolee has received a preliminary hearing and has had counsel appointed for him at that hearing; if so, go to Step 20. Otherwise, if no preliminary hearing has been held or if the parolee had no counsel at that hearing, the revocation hearing is continued and the parolee appears before the Parole Commission for the purpose of determining his right to counsel. The Parole Commission informs him that he has a right to counsel at the revocation hearing, that he may himself retain counsel, and that he may request appointed counsel if he is indigent. If the parolee requests appointed counsel, the Commission asks him whether he denies the specific alleged violations of parole (reading them to him from the violation report) and whether there are other reasons why he needs the help of counsel. The Commission must then determine (1) whether the parolee denies committing the alleged violations; or (2) if he admits the violations, whether there are complex mitigating factors; or (3) whether the parolee is unable to speak effectively for himself. If the Commission finds any of these three things (denial of violations, complex mitigating factors, or inability to speak effectively for himself), go to Step 20. Otherwise, the Commission denies the request to appoint counsel and makes a written record of the denial and the reasons for it; go to Step 21.

* * * * * * * *

Step 20. The Commission or a parole officer questions the parolee and fills out an affidavit of indigency. The form is then submitted to the clerk of the Wake County Superior Court, who will decide whether the parolee is indigent within the meaning of G.S. 7A-450. If the parolee is not indigent, the clerk denies the request to appoint counsel and makes a written record of the denial and reasons; if he is indigent, the clerk appoints counsel. The indigent parolee may, of course, waive his right to counsel, following the procedure of G.S. 7A-457.

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Step 21. The parolee appears before the Parole Commission and is again given notice of the specific alleged violations. The Commission then conducts the revocation hearing in accordance with the Morrissey decision (see description of revocation hearing in subsection E below). If the Commission does not find that the parolee violated conditions, his parole is reinstated; otherwise, the Commission takes appropriate action, including revoking parole if necessary. (If the parolee has been tried for and acquitted of a new crime while the revocation proceeding has been going on, the Parole Commission's policy is to provide a rehearing or reverse its decision to revoke to the extent that its decision depends on a finding that the parolee committed acts that constituted the crime of which he has been acquitted. If the acquittal occurs before the revocation hearing, it can be argued that the Fifth Amendment doctrine of collateral estoppel bars a parole revocation based solely on factual issues decided in the parolee's favor in the earlier criminal trial.)

B. Manner of Effecting Arrests of Parolees

The G.S. Ch. 15A and common law requirements for carrying out arrests should be followed in arresting parolees for parole violation, just as in arresting those accused of crime or probation violation (see subsection I(B) above). An arrest for parole violation can only be made after the Parole Commission issued a warrant, although (as explained in Step 11 above) the warrant need not be in the arresting officer's possession if he knows it has been issued. Otherwise, the material in subsection I(B) above concerning notice to the person being arrested, use of force, entry of private premises, search incident to arrest, etc., applies to parole as well as probation and should be read by officers preparing to arrest parolees on a Parole Commission warrant.

C. The Arrest Power of Parole Officers

Parole officers' power to arrest is even more limited than probation officers'. The only statutory mention of their arrest power is in G.S. 148-49.9 and G.S. 148-61.1(b), which provide that after the Parole Commission has issued a warrant or temporary revocation order, a parole officer may arrest a parolee. A new regulation issued by the Department of Correction provides that when a parole officer receives a temporary revocation order (i.e., a warrant) from the Parole Commission, he should deliver the order to a law enforcement officer for execution, unless an "emergency" exists; examples of emergencies are situations in which the delay involved in getting a law enforcement officer to make the arrest would allow the parolee to abscond, unreasonably endanger persons or property, or allow the destruction of evidence relevant to revocation.[59] However, even in these emergencies, the parole officer should seek help from a law enforcement officer if he would risk injury by conducting the arrest himself.

When the parolee for whom the Parole Commission issues a warrant is a paroled (or "conditionally released") committed youthful offender, police officers have no power to make the arrest; only a parole officer or state correctional officer may make the arrest in this situation (G.S. 148-59.9), although, presumably, he may seek police assistance.

A new Parole Commission regulation provides, in an emergency involving "clear danger to safety of others," that the Commission may "dispatch a Police Information Network authorization (known as a PIN message) to hold the parolee pending receipt by the arresting authority of a regular Commission warrant."[60] This seems to be a good procedure if the Commission has actually issued its warrant before the PIN message is sent; reliable knowledge that the warrant has been issued should be enough to empower parole and police officers to make the arrest, even if they do not have a copy of the warrant with them [see G.S. 15A-401(a)(2)].

D. The Morrissey Preliminary Hearing

The U.S. Supreme Court in Morrissey v. Brewer held that due process requires a preliminary hearing in a parole revocation proceeding. The

preliminary hearing (applicable to both parole and probation revocation) is described above in subsection I(D) and in a new Parole Commission regulation.[61]

E. The Parole Revocation Hearing

The U.S. Supreme Court's decision in Morrissey requires that the parole revocation hearing lead to a final evaluation of any contested relevant facts and a determination of whether the facts warrant revocation. The parolee must have an opportunity to be heard and show that he did not commit the violations alleged, or, if he did, that there were mitigating circumstances. Evidence against the parolee must be disclosed to him. He has the right to be heard in person and to present witnesses and documentary evidence in his behalf. (Calling witnesses presents a problem in North Carolina because the Parole Commission has no subpoena power; a statutory amendment may be needed to solve the problem.) The parolee has the right to confront and cross-examine adverse witnesses, unless the Parole Commission finds good cause for not allowing confrontation; for example, confrontation could be disallowed if it would subject an informant to risk of harm. The Supreme Court said the revocation hearing is not "a criminal prosecution in any sense"; the procedure is informal, and evidence such as letters, affidavits, and other material may be admitted that would not be admissible in a criminal trial. Finally, Morrissey requires "a written statement by the factfinders [Parole Commission] as to the evidence relied on and reasons for revoking."[62]

F. Commentary on Parole Arrest and Revocation Procedure

Much of the commentary in subsection I(F) above applies to parole as well as probation. The major difference between probation revocation and parole revocation is that parole revocation is handled by the Parole Commission rather than by a court.

When a parolee is charged with a new crime, the procedure to be followed is described in Step 1 above; it is based on a letter to the Director of Adult Probation and Parole, Department of Correction, from the Parole Commission, dated January 16, 1975, and on a letter from James E. Cline, Parole Commissioner, of November 5, 1975. At one time, Parole Commission warrants were occasionally issued either to keep parolees charged with new crimes from obtaining bail or for disciplinary reasons;[63] they are no longer used for this purpose. The Parole Commission takes the position that probable cause, in the constitutional sense, must exist before it can issue its warrant [see the discussion of the Fourth Amendment in relation to arrest of probation violation in subsection I(F) above]. Thus, the parole officer must provide the Commission with not only his conclusions that parole violations occurred but also the essential evidence on which he bases those conclusions [see Step 8; see also 5 N.C. Admin. Code § 4F.0114(h), in which the Parole Commission indicates the kind of evidence it prefers to support various types of allegations of violation].

Who may arrest a parolee on a Parole Commission warrant? With regard to a parolee other than a committed youthful offender (CYO), G.S. 148-61.1(b) provides that after the Parole Commission's temporary revocation order (arrest

warrant) has been issued, the parolee may be arrested "by any peace [i.e., law enforcement] officer or parole officer." What about committed youthful offenders? G.S. 148-49.9(b) provides that a CYO on conditional release or parole may be arrested on a Parole Commission warrant [only one Commissioner's signature is required] "by a State parole officer or by any officer of the State Department of Correction, using the assistance of any law-enforcement officer when necessary." The 1975 General Assembly left this language untouched but enacted a number of amendments to the CYO statutes. In particular, G.S. 148-49.8(a) (Supp. 1975) now speaks of "parole" of CYOs, whereas the former term was "conditional release," and says that the Parole Commission may "parole" a CYO "pursuant to the provisions of Article 4 of this Chapter" (the article dealing with ordinary parole), although G.S. 148-49.8(b) still speaks of "conditional release." The effect of these amendments is unclear, but apparently the intent was to eliminate most of the distinctions between conditional release and parole, except that the CYO need not have served one-fourth of his sentence to be eligible for parole (the Parole Commission evidently shares this interpretation of the 1975 amendments). While an ordinary parolee may be arrested only by a law enforcement or parole officer, G.S. 148-49.9 provides that a paroled CYO may be arrested by "any officer of the State Department of Correction." The best policy may be to continue the present practice of allowing arrest of paroled CYOs to be made only by parole officers, with police assistance when necessary.

When a parolee is arrested for a new crime, he has the same right to bail as any other criminal defendant under G.S. Ch. 15A. However, when a Parole Commission warrant for his arrest for parole violation has been issued, he loses the right to bail. There is no constitutional right to bail in connection with parole and probation revocation proceedings; the probationer's right to bail, as explained earlier, was created by a North Carolina statute (G.S. 15-200). (The Connecticut Supreme Court recently held that a state may constitutionally grant bail to probation violators and not to parole violators, as North Carolina has done.)[64] G.S. 148-61.1(b) provides that the Parole Commission "may, in its discretion, enter an order revoking a parole conditionally or for a temporary period of time," and when it does, the parolee "may be arrested without warrant by a peace officer or parole officer" and "shall be held for a reasonable length of time" (presumably meaning without bail) while the Commission decides whether parole has been violated. G.S. 148-49.9(b), concerning arrest of paroled CYOs, does not mention bail and speaks of a warrant for "apprehension and return to custody" (emphasis added) of the CYO. In a recent opinion, the North Carolina Attorney General ruled that "a parolee arrested by virtue of a warrant issued by the Parole Commission pursuant to G.S. 148-61.1 may not be released on bond."[65] Neither this opinion nor G.S. 148-61.1 seems to apply when the parolee has been arrested by a law enforcement officer for a new crime under the provisions of G.S. Ch. 15A. Ch. 15A was not intended to repeal G.S. 148-61.1, and clearly a parolee given pretrial release after arrest for a crime could be returned to custody and held without bail on a Parole Commission warrant. Therefore, a magistrate or other judicial official should not set bail conditions for a person arrested for crime if he receives reliable information that the person is a parolee and a Parole Commission warrant has been issued for him. In the absence of a Parole Commission warrant, the parole officer (if he knows that bail conditions are being set

for a parolee arrested for a new crime) could inform the magistrate that the defendant is on parole, and the magistrate should consider this information in setting bail conditions.

The discussion of bail raises a problem that should be mentioned, although there is no obvious solution to it. If the parolee accused of a new crime is kept in custody on the basis of a Parole Commission warrant and (as has often happened) is transferred to Central Prison for an eventual revocation hearing, the transfer may compromise his trial on the new charge by making it both more difficult for the lawyer defending him on the new charge to confer with him and more difficult to obtain evidence for his defense. Perhaps legislation is needed that will deny pretrial release once the Commission's warrant has been issued but keep the parolee in custody in the district where the alleged new crime occurred until his trial is completed.

Step 12 above suggests that the officer who arrests the parolee on a Commission warrant take him to a local jail. The reason for this suggestion is the U.S. Supreme Court's holding in Morrissey that the preliminary hearing must be held "at or reasonably near the place of the alleged parole violation or arrest."[66] Formerly, this requirement of Morrissey was not satisfied because parolees were usually transferred to Central Prison before the preliminary hearing. This problem has now been somewhat alleviated by the designation of a number of prison units as places of custody where parolees can be held near the place of arrest. A problem still remains, however, in that youthful offenders are still being held in a central location (Triangle Youth Center in Raleigh) and felon parolees often cannot be held in local misdemeanant units. The best solution seems to be to hold parolees in a county jail in the county where the alleged parole violations occurred or in the county where the arrest was made. Jailers are often reluctant to hold parolees; nevertheless, despite the new commitment provisions of G.S. Ch. 15A, Art. 25, which apply to persons accused of crimes, G.S. 162-41 seems to oblige the jailer to receive the arrested parolee.[67] The responsibility of jailers for apprehended parolees is a subject that, along with others discussed here, seems to call for legislative attention.

Step 14 above calls for conducting the Morrissey preliminary hearing within seven days of arrest, a time limit that is probably within the limits of the Supreme Court's holding that the hearing should be held "as soon as convenient." A speedier preliminary hearing, for parolees, seems almost impossible under current conditions (probation preliminary hearings can be held sooner because there are many courts but few parole hearing officers). However, the North Carolina Criminal Code Commission recommended[68] that the preliminary hearing be held within four working days of arrest.

The suggested procedure in preliminary and revocation hearings is based on the reasoning indicated in subsection I(F) of this memorandum. The parolee's constitutional right to counsel at the preliminary and revocation hearing has not been expanded by statute as the probationer's right has. Gagnon v. Scarpelli[69] held that parolees have a right to request appointed counsel if they are indigent. The Gagnon standards for determining eligibility for appointed counsel in connection with parole revocation have been summarized in G.S. 148-62.1, which became effective on July 1, 1974. The procedure

for appointing counsel described in Steps 14, 15, 19, and 20 above is based on a procedure worked out by James E. Cline, Parole Commissioner, and Franklin E. Freeman, Jr., Assistant Director, Administrative Office of the Courts, and expressed in a memorandum dated October 13, 1975, from Mr. Freeman and James L. Glenn to all clerks of superior court.[70] The Gagnon decision did not deal with the parolee who wants to retain counsel himself. The Parole Commission's present practice is always to allow parolees to retain their own counsel at the preliminary hearing as well as the revocation hearing; the procedures suggested here (Steps 14 and 19 above) would continue this practice.

III. ARREST AND REVOCATION IN INTERSTATE SITUATIONS

This section will suggest how the procedures for returning probationers and parolees to the state that imposed their probation or parole could be interpreted in light of the Morrissey and Gagnon decisions. When North Carolina probation and parole authorities seek the return of probationers and parolees in other states, they prefer--and the North Carolina Attorney General's Office prefers--to use extradition rather than the procedure provided by the Interstate Compact for the Supervision of Parolees and Probationers. (See the comments in subsection C below on the legal relationship of extradition and the Compact.) This seems a very wise policy. The fact that both procedures are described below should not be interpreted to mean that North Carolina should follow the Interstate Compact return procedure.

A. Extradition

1. Extradition When North Carolina Seeks the Return of a Probationer/Parolee from Another State. If a North Carolina probationer/parolee who is in another state being supervised under the Interstate Compact violates conditions of probation/parole, the probation/parole authorities in the receiving state may learn of the violations, arrest the probationer/parolee, and request North Carolina to retake him; this procedure is discussed further in subsection B below.

If North Carolina authorities learn of violations by their probationer/parolee in another state--whether he is in the other state with permission, or without permission, or pursuant to the Interstate Compact--the probationer/parolee may be brought back to North Carolina by the procedures of the Uniform Criminal Extradition Act (G.S. Ch. 15A, Art. 37, G.S. 15A-721 through -750), whether the violation occurred before or after he went to the other state. When North Carolina probation or parole authorities find--or learn from authorities in the receiving state--that a North Carolina probationer/parolee in another state (no matter under what basis) has violated conditions of probation or parole there and revocation is necessary, a probation/parole officer or other Department of Correction employee prepares a report of the violation and seeks an arrest warrant either from the court that originally imposed the probation or (for a parolee) the Parole Commission. This warrant probably should be based on a finding by the court or Commission that there

is probable cause to believe that the probationer/parolee violated conditions. A law enforcement agency where the probationer/parolee is located is then notified that he is wanted for violation, or, if his present location is unknown, this information is sent to the Federal Bureau of Investigation and entered on its National Crime Information Center system (NCIC). A magistrate or judge in the state where the probationer/parolee is found may issue a "fugitive warrant" for his arrest, as provided by G.S. 15A-733, when the North Carolina warrant issued by the sentencing court or Parole Commission is submitted to him. (Frequently the authorities in the state where the probationer/parolee is located do not at first have a copy of the actual warrant but instead have an NCIC message that says that the probation/parole violation warrant has been issued, gives the probationer/parolee's name and other identifying information, and specifies the alleged violations. Judicial officials in some states will accept NCIC messages as a basis for issuing fugitive warrants. North Carolina's Attorney General has recently approved this procedure for North Carolina judges and magistrates; see subsection A(2) below.) The Extradition Act (G.S. 15A-734) also permits arrest without a warrant of a person charged in another state with a crime punishable by death or imprisonment for more than one year. This provision probably should be interpreted to include a probationer or parolee convicted of a crime punishable by imprisonment for more than one year,[71] but the arrested probationer/parolee must be taken before a judge or magistrate "with all practicable speed"; the judge or magistrate could not then hold him unless a complaint under oath were made against him as provided by G.S. 15A-733. Presumably, this means that the judge or magistrate would have to see the North Carolina arrest warrant or a verified NCIC message stating that the warrant had been issued or else release the arrested probationer/parolee. After arrest, whether a fugitive warrant was issued beforehand or not, the arrested probationer/parolee must be brought before a magistrate or judge to determine whether "the person held is the person charged with having committed the crime alleged and . . . that he has fled from justice" (G.S. 15A-735). For a probationer/parolee, this requirement would be satisfied by showing that the person arrested is the one charged with the alleged violation of probation or parole (apparently the person's motive for leaving North Carolina need not be shown, despite the "flight from justice" language).

If the arrested probationer/parolee is found to be the person for which the North Carolina warrant was issued, G.S. 15A-735 authorizes the magistrate to commit him for up to thirty days (which can be continued for up to sixty more days under G.S. 15A-737) pending the issuance of an extradition warrant. Most probationers and parolees are released on bail in this situation pursuant to G.S. 15A-736. If the probationer/parolee cannot be released on bail, apparently the magistrate must conduct a Morrissey preliminary hearing before committing him to detention.

Continuing with the usual extradition situation, after the arrested probationer/parolee is arrested and held, North Carolina's governor requests the governor of the state where the probationer/parolee is found to issue an extradition warrant (see G.S. 15A-723 through -728) unless the probationer/parolee waives his right to extradition, which G.S. 15A-746 allows him to do. After arrest on the extradition warrant, he receives a hearing by a judge. This hearing is limited by the act to (a) determining that the extradition

warrant is valid and that the person arrested is the person for whom the warrant was issued, and (b) informing the probationer/parolee of his right to apply for a writ of habeas corpus (see G.S. 15A-730, -740); thereupon, the judge delivers the probationer/ parolee to a North Carolina officer. If a Morrissey preliminary hearing has not already been held by the time this post-extradition warrant hearing is held, the extradition hearing should probably be expanded, in light of the Morrissey decision, to include a determination of whether there is probable cause to believe that the probationer/parolee violated his probation or parole. It would thus become a Morrissey preliminary hearing as described in subsection I(D) above.

2. Extradition of a Probationer/Parolee in North Carolina Sought by Another State. Some states do not share North Carolina's preference for the extradition procedure; their officers may enter North Carolina and simply seize the probationer/parolee and take him back to their state. Even though this procedure clearly violates the due process guarantees of Morrissey and Gagnon, North Carolina authorities can do nothing about it unless the arrested probationer/parolee has an opportunity to seek habeas corpus relief in a North Carolina court.

If the state seeking the probationer/parolee's return chooses the extradition procedure, North Carolina authorities could follow the procedure outlined in the previous subsection. If a fugitive warrant is sought, a North Carolina judge or magistrate, pursuant to G.S. 15A-733 (Section 13 of the Uniform Criminal Extradition Act), must require one of the following before issuing the warrant: (1) that the person whose arrest is sought be "charged" with probation or parole violation in another state "on the oath of any credible person" before the judge or magistrate; or (2) that there be a complaint "setting forth on the affidavit of any credible person in another state" that the person is "charged" with violating probation or parole in that state. Often, the information the judge or magistrate receives comes in the form of a message received by law enforcement authoritites over the National Crime Information Center (FBI) and North Carolina Police Information Network telecommunications system, known as an NCIC-PIN message. In a recent opinion,[72] the North Carolina Attorney General said that information obtained through the NCIC-PIN system, when sworn to by the officer who received it, is sufficient grounds for a magistrate or judge to issue a fugitive warrant under G.S. 15A-733. The opinion cited G.S. 15A-304(d), which provides that a judicial official may issue a warrant to arrest for crime only when he has information from which he can find probable cause. This statute may not really apply to the situation dealt with here, because (a) it does not deal with the extradition situation, and (b) it does not apply to arrest for probation or parole violation. The Attorney General's opinion concludes that the NCIC-PIN information, when sworn to, is sufficiently reliable to support a probable cause finding. However, the Extradition Act does not require a probable cause finding; it requires a finding that the person for whom a fugitive warrant is sought is "charged with" crime, parole or probation violation, or violation of bail conditions in another state. The applicable case law does not help much in interpreting what "charged with" means, although the context of G.S. 15A-723 (Section 3 of the Extradition Act), makes it clear that for a person to be "charged with" an offense, a warrant, indictment, or information must have been issued for him in the other state (or he must

have been convicted for a crime and then have fled). The Attorney General's opinion just cited is careful to point out that no NCIC-PIN message is issued for any out-of-state arrest unless an arrest warrant has been issued for the person whose arrest is sought. Therefore, the best rule seems to be that if a NCIC-PIN message is sworn to by the officer who received it before the North Carolina judge or magistrate and the message states that an arrest warrant for probation or parole violation has been issued in another state, the magistrate or judge may issue the fugitive warrant under G.S. 15A-733. However, if the message does not say that a warrant has been issued in another state, the magistrate or judge should not issue the fugitive warrant.[73]

If the probationer/parolee is arrested without a warrant under G.S. 15A-734, the magistrate or judge before whom the arrested person is brought immediately after arrest should require a warrant, other complaint made under oath, or a NCIC-PIN message sworn to by the receiving officer that state that a warrant has been issued; otherwise, he should release the arrested person. At the post-arrest hearing required by G.S. 15A-735, if the arrested probationer/parolee cannot be released on bail pursuant to G.S. 15A-736, the judge or magistrate should determine not only whether the person held is the person charged with probation or parole violation, but also whether there is probable cause to believe that he actually violated his probation or parole--in other words, the official should conduct a Morrissey preliminary hearing as described above in Section I, Steps 20-23, with the probationer/parolee having the right to counsel as described there. If the North Carolina judicial official finds probable cause, he may then commit the arrested probationer/parolee for a period of time up to thirty days (the specific period must be indicated in the commitment order), and may recommit him later for up to sixty additional days, pending issuance of the extradition warrant by North Carolina's Governor (G.S. 15A-735, -737).

If the probationer/parolee does not waive extradition, there must be an extradition hearing before a North Carolina judge after the Governor's extradition warrant is issued (G.S. 15A-730). The best procedure may be to conduct the extradition hearing as a Morrissey preliminary hearing as described in the previous paragraph unless such a preliminary hearing has already been held. The probationer/parolee will also be told of his right to petition for a writ of habeas corpus, as provided by G.S. 15A-730. If probable cause is found and the probationer/parolee waives habeas corpus or if his habeas corpus action fails, the court will deliver him to the custody of the state that seeks his return.

B. The Interstate Compact

The U.S. Supreme Court held that the due process standards set by the Morrissey and Gagnon decisions apply to both Interstate Compact situations and intrastate situations. Gagnon, which applied the Morrissey due process standards to probation as well as parole, involved a parolee who had been allowed to leave the convicting state for supervision in another state. In a footnote, the Court said:

> We are confident . . . that modification of the interstate compact can remove without undue strain the more serious technical hurdles to compliance with Morrissey.[74]

(Presumably, the same could have been said of the Extradition Act.) Since the Interstate Compact has not yet been amended to conform to Morrissey and Gagnon, the Compact must be reinterpreted consistently with these decisions.

1. The "They for Us" Situation. The Interstate Compact for the Supervision of Parolees and Probationers has been enacted by North Carolina as G.S. Ch. 148, Art. 4A (G.S. 148-65.1 through -65.3 in the 1974 Replacement Volume 3C and 1975 Supplement). All fifty states have adopted the Compact. Under its provisions, a person placed on probation or parole in one state may be allowed by that state (the "sending state") to reside in another state (the "receiving state") if he is a resident of the other state or if the other state consents to his being there. The receiving state then supervises him in the same manner as it would one of its own probationers or parolees.

The Compact further provides:

> . . . That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense. [G.S. 148-65.1(3).]

This retaking procedure clearly violates the due process standards of Morrissey and Gagnon. Suppose a probationer/parolee whose probation/ parole was imposed by the sending state is allowed to go to the receiving state to be supervised by that state under the Interstate Compact. If probation/parole officers of the sending state learn that the probationer/parolee has violated conditions and feel that revocation is necessary, the Compact allows them to go to the receiving state and retake him, although presumably they would first obtain a warrant for his arrest from a court or parole board of the sending state. The officers of the sending state may take the probationer/parolee into custody, but under Morrissey he has a right to a preliminary hearing "as promptly as convenient" in a place "at or reasonably near the place of the alleged parole [or probation] violation or arrest";[75] if the alleged violation occurred in the receiving state, that is where the preliminary hearing must be held. At this preliminary hearing, the probationer/parolee has a right to counsel as in Steps 14-15 of Section II of this memo. A probation/parole officer of either the sending or the receiving state may hold the hearing as long as he is not the officer who initially reported the violation.[76] If the hearing officer finds the probationer/parolee entitled to appointed counsel under Gagnon, and if the preliminary hearing must be held in the receiving state, probably the best procedure would be to request a court of the receiving

state in the district where the probationer/parolee was arrested to appoint counsel for this limited purpose. If the preliminary hearing results in a finding of no probable cause, the probationer/parolee must be released; otherwise, he is taken back to the sending state for a revocation hearing.

Now suppose that authorities of the receiving state believe that the probationer/parolee has committed a violation that requires revocation. Under the provision of the Interstate Compact that corresponds to G.S. 148-65.1A, the receiving state may take him into custody but must give him a hearing before deciding whether to request the sending state to retake him. This provision of the Compact needs to be reinterpreted somewhat in light of Morrissey and Gagnon; pertinent suggestions appear in the next subsection.

2. The "We for Them" Situation. Let us consider a Virginia probationer/parolee who resides in North Carolina and is supervised by North Carolina under the Interstate Compact. If Virginia wishes to "retake" this probationer/parolee, its officers should provide the preliminary hearing and otherwise comply with Morrissey. However, if they fail to do so, North Carolina officers can do little or nothing about it. If the preliminary hearing must be held in North Carolina (because the alleged violation occurred there), and if the Virginia officer holding the hearing finds the probationer/parolee entitled to appointed counsel, it is not clear whether North Carolina judges and clerks have the power to appoint counsel under G.S. Ch. 7A, Art. 36. The Interstate Compact suggests that they do; it provides that the receiving state, in supervising the probationer/parolee, "will be governed by the same standards that prevail for its own probationers and parolees" [G.S. 148-65.1(2)]

Now suppose that North Carolina authorities want Virginia to retake the probationer/parolee. Since North Carolina cannot revoke the Virginia probation/parole, the remedy for a violation is to take custody of the probationer/parolee and request the sending state to retake him, as authorized by G.S. 148-65.1A. It may be a good policy for North Carolina officers not to take the probationer/parolee into custody without first obtaining an order for arrest, based on probable cause, from the sentencing court (for a probationer) or a warrant from the Parole Commission (for a parolee). An alternative, when a parolee is involved, is to obtain an arrest warrant from an official of the Department of Correction designated by the administrator of the Interstate Compact--i.e., the Secretary of Correction.[77] This procedure is consistent with the Compact and with Morrissey and Gagnon; the problem with it is that North Carolina law does not authorize the arrest of parolees for parole violation unless a Parole Commission warrant has been issued [G.S. 148-61(b), G.S. 148-49.9(b)].

G.S. 148-65.1A allows the probationer/parolee to be held in custody for up to fifteen days before a hearing is held to decide whether North Carolina should ask the sending state to retake him. This long a period without a hearing almost certainly conflicts with the Morrissey requirement of a preliminary hearing "as promptly as convenient after arrest while information is fresh and sources are available." To apply the Criminal Code Commission's interpretation[78] of this requirement, the preliminary hearing should be held within four working days after the probationer/parolee is taken into custody.

The Interstate Compact (G.S. 148-65.1A) allows the hearing to be held by the Administrator of the Interstate Compact (the Secretary of Correction), or any person appointed by the Administrator, or any person authorized by state law to conduct probation or parole hearings, but it says that the officer who makes the allegation of violation may not hold the hearing. This is entirely consistent with Morrissey.[79] When a probationer supervised by North Carolina under the Compact is arrested pursuant to G.S. 148-65.1A, it may be most compatible with North Carolina's present practices for the Morrissey preliminary hearing to be held by a judge as described in Steps 20-23 of Section I above. The probationer would, of course, have the right to counsel at the hearing as described in Steps 20-22 of Section I. When a parolee is supervised by North Carolina under the Interstate Compact, the preliminary hearing could be held by a hearing officer, the parolee having a right to retain private counsel or to request appointed counsel if he is indigent, as described in Steps 14-16 of Section II above.

C. Comments

The Uniform Criminal Extradition Act clearly applies to a probationer or parolee who goes (with or without permission) to a state other than the one that imposed probation or parole and violates his probation or parole--whether the violation occurs before or after he leaves the imposing state. This statement is supported by many cases summarized in 11 Uniform Laws Annotated 52 et seq. (annotations to the Uniform Criminal Extradition Act, § 2).

All states have now adopted the Extradition Act and the Interstate Compact for the Supervision of Parolees and Probationers. Some questions regarding the relationship of the Extradition Act and the Interstate Compact and the constitutionality of the latter were decided 34 years ago by the Supreme Court of California. In Ex parte Tenner,[80] a person paroled by the State of Washington was permitted to go to California and be supervised by that state under the Compact. Washington later revoked his parole and ordered his return to a Washington prison. He resisted return in a long legal battle. The U.S. Supreme Court refused to review the case but ordered California not to transfer custody to Washington until the California Supreme Court could decide the issues. The parolee argued that (1) the Compact violates the U.S. Constitution, and (2) extradition is the sole means of returning an alleged interstate fugitive to the state that seeks him. The California Supreme Court rejected both these claims, saying that the purpose of Art. IV, Sec. 1, Clause 2 of the U.S. Constitution, which says that a person charged with crime in a state who flees to another state must be delivered upon demand of the state where he is charged, was to prevent those charged with crime from obtaining immunity by fleeing and was "not for the benefit of the fugitive."[81] Therefore, states may agree on a method of securing return of a class of fugitives other than by extradition. Furthermore, the court held, neither the constitutional provision nor the federal act implementing it and authorizing the states to pass the Extradition Act (now 18 U.S.C. §§ 3182, 3194, and 3195) was intended to be exclusive. Therefore, the sending state has a choice; it may proceed under the Compact if the parolee (or probationer) is subject to the compact or it may choose extradition, but if it chooses extradition

it must follow the Extradition Act. Until it demands extradition from the receiving state, the sending state is free to proceed under the Interstate Compact.

There seem to be no reported decisions construing the retaking procedures of either the Extradition Act or the Interstate Compact in light of the Morrissey and Gagnon decisions. As explained earlier, the U.S. Supreme Court referred to the Interstate Compact in Gagnon,[82] indicating that the Compact would need to be modified to meet the new due process standards; the implication is that the Extradition Act also needs to be modified in its application to probation and parole violation.

FOOTNOTES

1. Morrissey v. Brewer, 408 U.S. 472 (1972).
2. Gagnon v. Scarpelli, 411 U.S. 778 (1973).
3. The term "probationer" here includes anyone subject to terms of a suspended sentence and/or probation supervision; "probation" includes suspended sentence without probation supervision as well as with it.
4. See subsection F below for legal comments on the suggested procedure.
5. See 43 N.C.A.G. Op. 353 (1969).
6. Although the statute was not enacted with arrest for probation violation in mind, subsections (c), (d), and (e) generally contain the commonlaw requirements that apply to any arrest. See Corbett, "Criminal Process and Arrest Under the North Carolina Pretrial Criminal Procedure Act of 1974," 10 Wake Forest L.Rev. 377, 407-10 (1974).
7. 5 N.C. Admin. Code § 3C.0507(4).
8. 5 N.C. Admin. Code § 3C.0500 (adopted 1976).
9. N.C. Dept. of Correction, Div. of Adult Probation and Parole, Officer's Manual, p. II-5 (1974).
10. State v. Kirby, 24 N.C. 201 (1842).
11. State v. Leigh, 278 N.C. 243 (1971).
12. State v. Harris, 26 N.C. App. 254 (1975).
13. The North Carolina Criminal Code Commission has recognized this right; see HB 988 - SB 663, N.C. General Assembly, 1975 Session, proposed new G.S. 15A-1345.
14. Gagnon v. Scarpelli, 411 U.S. 778 (1973).
15. Morrissey v. Brewer, 408 U.S. 472, 485 (1972).
16. Id.
17. This procedure is analogous to North Carolina's felony preliminary hearing; see N.C. Gen. Stat. §§ 15A-601, -612.
18. State v. Hewett, 270 N.C. 348, 353, 356 (1967); followed, State v. Elliott, 22 N.C. App. 334 (1974). The Hewett case also held that there was no right to counsel; this decision was overruled in a habeas corpus action by the U.S. Court of Appeals for the Fourth Circuit [415 F.2d 1316 (4th Cir. 1969)] and later the right to counsel was provided by statute. See also N.C. Gen. Stat. § 15-200.1; State v. Duncan, 270 N.C. 241, 245 (1967).
19. Morrissey v. Brewer, 408 U.S. 472 (1972).
20. State v. Hewett, 270 N.C. 348 (1967).
21. Morrissey v. Brewer, 408 U.S. 472, 489 (1972).
22. Cleveland v. Ciccone, ___F.2d___, 17 Crim. L. Rep. 2277 (8th Cir. 1975).
23. State v. Causby, 269 N.C. 747 (1967). The Fifth Amendment guarantee against double jeopardy embodies the doctrine of collateral estoppel, and this doctrine has recently been applied to preclude revocation of probation when the probationer was earlier acquitted of criminal charges that were the basis for revocation. Ashe v. Swenson, 297 U.S. 436 (1970); Illinois v. Grayson, 58 Ill.2d 260, 319 N.E.2d 43 (1974), cert. den., ___U.S.___, 17 Crim. L. Rep. 4066 (1975); Standlee v. Rhay, ___F.S.___, 18 Crim. L. Rep. 2269, 4 Correctional Services Newsletter, No. 9, p. 12 (E.D. Wash. 1975).

24. State v. Debnam, 23 N.C. App. 478 (1974).

25. 5 N.C. Admin. Code §§ 3C.0504, 3C.0505.

26. Arrest without a warrant for a felony, where the arresting officer has probable cause, has recently been approved (and has long been accepted) by the U.S. Supreme Court. U.S. v. Watson, ____U.S. ____, 18 Crim. L. Rep. 3051 (1976); LaFave, "Warrantless Searches and the Supreme Court," 8 Crim. L. Bull. 9, 20-21 (1972); Henry v. U.S., 361 U.S. 98 (1959); Trupiano v. U.S., 334 U.S. 699 (1948); Kamisar, LaFave, and Israel, Modern Criminal Procedure 283-84 (4th ed. 1974). However, the Fourth Amendment requires judicial determination of probable cause promptly after a warrantless arrest before the suspect can be held in detention pending trial. Gerstein v. Pugh, ____U.S. ____, 16 Crim. L. Rep. 3049 (1975).

27. White, "The Fourth Amendment Rights of Parolees and Probationers," 31 U. Pitt. L.R. 167 (1969). In Martin v. United States, 183 F.2d 436 (4th Cir. 1950), the court held that probationers do have Fourth Amendment rights in the context of investigation for a crime committed while on probation.

28. Morrissey v. Brewer, 408 U.S., at 482.

29. 5 N.C. Admin. Code §§ 3C.0504, 3C.0505(a)(2).

30. 479 F.2d 566 (5th Cir. 1973).

31. United States v. Morris, 445 F.2d 1233 (8th Cir. 1971), cert. den., 404 U.S. 957 (1973).

32. 522 F.2d 211 (2d Cir. 1975).

33. Whiteley v. Warden, 401 U.S. 560, 568 (1971).

34. This view is taken by Israel & LaFave, Criminal Procedure in a Nutshell 106 (2d ed., 1975).

35. Hall, The Law of Arrest 58 (2d ed., Institute of Government, University of North Carolina at Chapel Hill, 1961).

36. Pierson v. Ray, 386 U.S. 547, 557 (1967); Prosser, Law of Torts 989 (4th ed., 1971).

37. 278 N.C. 35 (1967).

38. See N.C.A.G. Op., April 28, 1967, to Charles M. Clodfelter, Director, North Carolina Probation Commission.

39. 403 U.S. 443 (1971).

40. What liability may a police officer incur for refusing a probation officer's request to arrest a probation violator? Ordinarily, there would be no civil liability to an individual who is injured or has property damaged by the person the police officer failed to arrest; failure to perform the duty to make an arrest is a breach of a duty to the public, not to individuals, and may be redressed only in some form of public prosecution [Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969); Annotation, "Personal Liability of Policeman, Sheriff, or Similar Peace Officer or His Bond, for Injury Suffered as a Result of Failure to Enforce Law or Arrest Lawbreaker," 41 A.L.R. 3d 700 (1972)]. The possibility of criminal prosecution is suggested by G.S. 14-230, which makes it a misdemeanor punishable by removal from office and fine and/or imprisonment for a sheriff or policeman to "willfully omit, neglect or refuse to discharge any of the duties of his office." If the police officer refused to make the arrest corruptly--for example, because the probationer paid him not to make it--then his refusal would, of course, be a violation of this section. North Carolina courts have held that corrupt intent need not be shown; to convict an officer under this statute, it need only be shown that the failure to perform the officer's duty injured the public

[State v. Hatch, 116 N.C. 1003 (1895); State v. Anderson, 196 N.C. 771 (1929)]. However, a police officer has discretion in arresting persons without a warrant. A refusal to exercise this discretion does not necessarily constitute willful neglect of duty; in fact, it may represent the officer's judgment as to what will best serve the public interest. To convict a police officer of a violation of G.S. 14-230 for refusing to make a warrantless arrest for probation violation, it will probably be "necessary to show something more than the intentional and deliberate forbearance to do a discretionary act" [Perkins, Criminal Law 489 (2d ed. 1969)]--i.e., to show some sort of improper intent or motive not related to legitimate functions of law enforcement. [See also Annotation, "Conduct Contemplated by Statute Which Makes Neglect of Duty by Public Officer or Employee a Punishable Offense," 134 A.L.R. 1250 (1941).]

41. Morrissey v. Brewer, 308 U.S. 472, 485 (1972).

42. Gerstein v. Pugh, _____ U.S. _____, 16 Crim. L. Rep. 3049 (1975), fn. 22 of opinion.

43. The principal draftsman of G.S. 15A-511 indicates that it was not written with probation arrests in mind but notes that North Carolina judges "are accustomed, from long association with the sketchy provisions of Chapter 15 [now repealed], to the common law process of improvising procedure by analogy." Watts, "The Pretrial Criminal Procedure Act: The Subchapter on Custody," 10 Wake Forest L. Rev. 417, 437 (1974).

44. Id. at 452-53, n. 203.

45. N.C.A.G. Op., to James P. Smith, Senior Administrative Assistant, N.C. Dept. of Correction, December 11, 1975.

46. Id.

47. See HB 988 - SB 663, N.C. General Assembly 1975 Session, proposed new G.S. 15A-1345(b).

48. This preliminary hearing is adversarial, very much like the felony probable cause hearing provided by G.S. 15A-611, and the fact that it must be so is very difficult to accept in the Morrissey decision. It is especially awkward because of the right to bail that North Carolina provides. If the probationer is not bailed, he must receive the preliminary hearing, but some delay in scheduling it will often be necessary to permit the probationer to exercise rights that Morrissey gives him, such as the right to prepare to present evidence in his own behalf at the preliminary hearing. During this delay--at least a few days--he would remain in detention, but that may violate his statutory right to bail unless bail conditions are set promptly after arrest.

49. In re Meidinger, ____Mont.____, ____P.2d____, 18 Crim. L. Rep. 2009 (Sup. Ct. 1975).

50. Morrissey v. Brewer, 408 U.S. 472, 488 (1972).

51. Pelley v. Colpoys, 122 F.2d 12 (D.C. Cir. 1941); Note, 15 N.C. L. Rev. 321, 345-46 (1937).

52. N.C. Gen. Stat. § 7A-452(c), -453 (Supp. 1975).

53. Telephone conversations with Franklin E. Freeman, Jr., Assistant Director, Administrative Office of the Courts, March 8 and April 13, 1976.

54. Gagnon v. Scarpelli, 411 U.S., at 791.

55. See N.C. Gen. Stat. Ch. 7A, Art. 36.

56. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

57. See HB 988 - SB 663, N.C. General Assembly 1975 Session, proposed new G.S. 15A-1345(c). The Criminal Code Commission also applied the four-day rule to parole preliminary hearings; see proposed new G.S. 15A-1376(b).

58. Amsterdam, Trial Manual, 3d Ed., §§ 131, 132 (1974).
59. 5 N.C. Admin. Code §§ 3C.0505(b), 3C.0506.
60. 5 N.C. Admin. Code § 4D.0401(b).
61. 5 N.C. Admin. Code § 4D.0404.
62. Morrissey v. Brewer, 408 U.S, 472, 489 (1972).
63. N.C. Board of Paroles, Parole Manual 24b-25 (undated).
64. Liistro v. Warden, ___ Conn. ___, 18 Crim. L. Rep. 2494 (1976).
65. N.C.A.G. Op., March 27, 1975, to James E. Cline, Parole Commissioner.
66. Morrissey v. Brewer, 408 U.S. 472, 485 (1972).
67. See Watts, op. cit. supra note 41, at 441; N.C.A.G. Op., March 30, 1976, to Special FBI Agent Louis A. Giovanetti.
68. HB 988 - SB 663, N.C. General Assembly 1975 Session, proposed new G.S. 15A-1376(b).
69. Gagnon v. Scarpelli, 411 U.S. 778 (1973).
70. See 5 N.C. Admin. Code § 4D.0403.
71. The phrase "charged . . . with treason, felony, or other crime" in § 2 of the Uniform Criminal Extradition Act (G.S. 15A-722) has been held to include probation and parole violation (see 11 Uniform Laws Ann. 52 et seq.). The same phrase is used in § 14 of the Act (G.S. 15A-734), and its meaning is presumably the same there.
72. N.C.A.G. Op., March 4, 1976, to Det. Sgt. Harold Caudle, Lexington Police Department.
73. What if information constituting probable cause to believe a crime or probation or parole violation has been committed, rather than a statement that a warrant has been issued, is received in a NCIC-PIN message? It would appear that a North Carolina magistrate or judge could not issue a warrant in this situation, because the specific provisions of G.S. 15A-733 would override the more general ones of G.S. 15A-304(d).
74. Gagnon v. Scarpelli, 411 U.S., 778, 782, n. 5 (1973).
75. Morrissey v. Brewer, 408 U.S. 472, 485 (1972).
76. Id. at 486.
77. Under the Interstate Compact, the Governor designated a Compact Administrator [G.S. 148-65.1(5)]. This power of the Governor was transferred to the Department of Social Rehabilitation and Control by G.S. 143A-170 (repealed in 1973), and later to the Department of Correction by G.S. 143B-262 (Supp. 1975).
78. HB 988 - SB 663, introduced in the 1975 session of the N.C. General Assembly, proposed new G.S. 15A-135(c) and G.S. 15A-1376(b).
79. Morrissey v. Brewer, 408 U.S. 472 486 (1972).
80. 20 Cal.2d 670, 128 P.2d 338 (1942).
81. Id. at 20 Cal.2d ___, 128 P.2d 342.
82. Gagnon v. Scarpelli, 411 U.S. 778, 782, n. 5 (1973).