Topic:
CONDITIONS OF
ADULT PROBATION

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CONDITIONS OF ADULT PROBATION — LEGAL AND ILLEGAL

C. E. Hinsdale and Richard Chaney

CONTENTS

G.S. 15-199 sets out sixteen specific "conditions of probation" that a sentencing judge may impose. The statute adds "or any other"--an unnecessary attempt at enlarging the list, since the North Carolina Supreme Court has held both before and after enactment of the list that the power to suspend execution of a sentence on specified conditions is inherent [State v. Simmington, 235 N.C. 612 (1952); State v. Miller, 225 N.C. 213 (1945); and State v. Hardin, 183 N.C. 815 (1922)]. For the purposes of this paper, the terms "suspend sentence" and "place on probation" are synonymous. The latter term will be used in all cases, for the sake of simplicity, and "probationer" as used will include one whose sentence has been suspended on specific conditions.

The judge's power to impose conditions of probation is broad. A great many statutory conditions can be found in the various states, and conditions that have been approved by case law are substantially without number and appear to be limited only by the imagination of trial judges.

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There are limits, however. A condition has to be constitutional, of course. In addition, a condition must be reasonable (usually, relevant to the offense and the rehabilitative purpose) [State v. Baynard, 4 N.C. App. 645 (1969); State v. Stallings, 234 N.C. 265 (1951); State v. Smith, 233 N.C. 68 (1950)]. For some statutory conditions (report to probation officer, violate no law, etc.), reasonableness is obvious or is presumed. This memorandum, through a representative sampling of cases from North Carolina and other jurisdictions and an analysis of some recent probation judgments, will attempt to give some guidance as to the constitutional, statutory, and reasonableness limits on conditions of probation.

PART I

PROBATION CONDITIONS AUTHORIZED BY G.S. 15-199 AND OTHER STATUTES

(1) Avoid injurious or vicious habits. This condition was upheld in Hewett v. North Carolina [270 N.C. 348 (1967), 415 F.2d 1316 (4th Cir. 1969)], in which the evidence showed that the probationer had threatened law enforcement officers and assaulted others. However, in remanding the case on other grounds, the circuit court called the condition "vague and ambiguous." A stronger case is State v. Green [29 N.C. App. 574 (1976)], in which the use of heroin was held to be an injurious habit. A similar condition, to "live a clean and temperate life," was held valid in U.S. v. Ball [358 F.2d 367 (4th Cir. 1966)]. On the other hand, "maintain a correct life" was held too vague in Morgan v. Foster [68 S.E.2d 583 Ga. 1952)]. Since further challenge to this condition in federal court is foreseeable, it is probably prudent for the sentencing judge in the probationary judgment to enumerate specific habits that the defendant is to avoid. In addition, coupling this condition with the condition of avoiding unlawful conduct (see paragraph 13 below) is usually desirable on the theory that an injurious or vicious habit may also be illegal.

(2) Avoid persons or places of disreputable or harmful character. In State v. Boggs [16 N.C. App. 403 (1972)], our Court of Appeals held this condition to be reasonable and not too vague, at least when applied to association with heroin and marijuana users convicted of conspiring to bomb an occupied building. "Keep good company" was held valid in U.S. v. Ball [358 F.2d 367 (4th Cir. 1966)]. A prohibition on associating with other probationers was held valid in Jordan v. State [481 P.2d 185 (Okla. 1971)]. Again, however, since "disreputable" and "harmful" clearly may be challenged in federal court as too vague, it would be wise to be more specific as to the conduct prohibited and to tie this condition together with the unlawful-conduct condition.

(3) Report to probation officer as directed. This condition is essential to the successful operation of the probation system and is apparently reasonable no matter what the offense. It was upheld in State v. Stuntz [24 N.C. App. 267 (1974)]. It is possible, of course, that unreasonable reporting

conditions could be imposed by the judge (or, perhaps more likely, by the probation officer) that would render the condition subject to successful challenge. Senate Bill 663 (House Bill 988), 1975 Session of the General Assembly, the Criminal Code Commission's pending trial procedure bill, would require that reporting be at reasonable times and in a reasonable manner.

(4) Permit the probation officer to visit at his home or elsewhere. This is reasonable on its face and apparently never has been challenged in North Carolina. A requirement that the probationer let the probation officer visit him at his place of abode at any time of the day or night was held reasonable in a marijuana case [State v. Tuck, 462 P.2d 175 (Ore. 1969)].

(5) Work faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses. This condition was held valid in State v. Braswell [283 N.C. 332 (1973)], although "work faithfully" was the only part of the condition seriously considered by the Court. The "savings" condition might be questionable in respect to some (for example, the well-to-do probationer whose "necessary expenses" can be met with a fraction of his income). Senate Bill 663 does not carry forward the "savings" condition, and the American Bar Association's Standards Relating to Probation (1970) do not include it.

(6) Remain within a specified area. No North Carolina cases on this condition have been found. Usually the area specified is the "state," or the jurisdiction of the court. A lesser area (county, city) might be challengeable on constitutional (right to travel) grounds or merely as unreasonable, depending on the extent of the restriction and other facts (nature of probationer's employment, for example), unless it is made clear to the probationer that exceptions to the restriction may be granted for reasonable requests.

(7) Deposit with the clerk of court a bond for appearance (to show compliance with conditions of probation) at such time or times as the court may direct. If the probationer is unable to provide the bond otherwise, the court may require the bond to be paid in cash from his earnings in installments. A similar condition was held invalid for lack of statutory authority in Colorado, but the court hinted that to avoid possible equal protection questions, the condition (if authorized by law) should be limited to those who can afford to pay for the bond [Logan v. People, 332 P.2d 897 (Colo. 1958)]. The ABA Standards, sec. 3.2(e), disapprove of this condition.

(8) Deposit with the clerk of court from the probationer's earnings a savings account in such installments and at such intervals as the court may direct . . . with principal and interest to be paid to probationer upon discharge or sooner on court order. This condition is subject to the same arguments as the earlier savings condition (paragraph 5, above). It also places a burden on the clerk of superior court, which may be another reason why it is apparently rarely used.

(9) Pay a fine. The amount of the fine must not be constitutionally (N.C. Const., Art. I, sec. 27) excessive, under the circumstances. In State v. Calcutt [219 N.C. 545 (1941)], in which a fine of $10,000 was imposed, the trial court found that the defendant, a big-time slot machine operator, received a seven-figure income from this illegal activity. (The reasonableness of the fine was specifically approved in two concurring opinions.) Also, under Art. IX, sec. 7, of the State Constitution, the clear proceeds of the fine (whether called a "fine" or merely a sum of money) must be allocated to the county school fund and may not be diverted to the use of a local law enforcement agency or any other activity. [Shore v. Edmisten, ____N.C.____, decided September 1, 1976; State v. Walker, 27 N.C. App. 205 (1975).]

Apparently the probationary fine may not be greater than the maximum fine allowable for the crime of which the probationer was convicted [People v. Christensen, 2 Cal. App. 3d 546 (1969)].

(10) Make restitution or reparation to the aggrieved party for the damage or loss caused by the offense, as determined by the court. This frequently used condition has been the subject of considerable case law.

In State v. Gallimore [6 N.C. App. 608 (1969)], a condition of payment of $3,000 to the prosecuting witness (apparently injured by defendant's negligence) was upheld as reasonable.

Under this condition the court may not require payment of a sum that is not related to the crime of which the probationer is convicted, except sums for support of dependent wife and children. Such a condition would amount to use of the criminal process to enforce a civil obligation (a debt) and therefore would be unconstitutional [State v. Caudle, 276 N.C. 550 (1970)]. However, a Wisconsin case upheld a condition that ordered money obtained by a series of thefts to be repaid even though the probationer was not tried for all the acts, since he admitted having obtained all the money criminally [State v. Scherr, 101 N.W.2d 77 (Wis. 1960); see also State v. Gerard, 205 N.W.2d 374 (Wis. 1973)].

A condition of payment of medical bills of those injured by the probationer while operating his automobile was held invalid where probationer was charged with and convicted of only leaving the accident scene [People v. Becker, 84 N.W. 2d 833 (Mich. 1957)]. The court was also concerned about due process objections to requiring payment of an amount not determined in a civil proceeding in which the defendant's liability would be established in accordance with principles of civil law and a jury trial. S 663 would limit payments to an amount supported by the trial record. How specific this support must be is left to future cases.

The capacity of the defendant to pay should be taken into account, according to a Michigan case [People v. Gallagher, 223 N.W.2d 92 (Mich. 1974)]--the position also taken by the ABA Standards, sec. 3.2(d).

The phrase "aggrieved party" has been held to include a surety who paid

the amount embezzled by the probationer [U.S. v. Follette, 32 F. Supp. 953 (E.D. Pa. 1940)] and the parents of a child killed by the probationer [State v. Green, 29 N.C. App. 574 (1976); State v. Gunderson, 444 P.2d 156 (Wash. 1958)].

"Damage or loss" has been held to include funeral expenses of the victim, [State v. Summers, 375 P.2d 143 (Wash. 1962)], pain and suffering [State v. Morgan, 504 P.2d 1195 (Wash. 1973)], and the amount of workmen's compensation benefits that would have been paid to the injured employee if the employer-defendant had not illegally failed to carry workmen's compensation insurance [Basile v. U.S., 38 A.2d 620 (D.C. App. 1944)].

In People v. Alexander [6 Cal. Rptr. 153 (App. 1960)], a wealthy probationer, convicted of arson, appealed a condition that he make reparations of $139,000 on the ground that it constituted deprivation of property without due process. The court upheld the condition, pointing out somewhat inadequately that the probationer could refuse probation. A better reason might have been that the close relationship between the crime and the punishment and the obvious ability of the defendant to pay made the condition manifestly reasonable.

A requirement that a probationer make restitution of half the loss but the entire loss if a co-defendant failed to pay the other half was held valid on the ground that each was legally liable for the entire amount [People v. Flores, 17 Cal. Rptr. 382 (App. 1961)]. The same jurisdiction was held that the amount of restitution required of a single probationer, when others were involved in the illegal conduct, must be related to the loss caused by him. An arbitrary division is not valid [People v. Kay, 111 Cal. Rptr. 894 (1973)].

Another California court has held that the sentencing court may set the maximum amount of restitution and make it subject to reduction by the probation officer [People v. Marin, 305 P.2d 659 (Cal. 1957)].

In Shore v. Edmisten, __N.C.____, decided September 1, 1976, the Supreme Court held that "In a case for prosecution for sale or possession of contraband ...it is proper to order reimbursement to a state or local agency as a condition for suspension of sentence or probation for any sum paid by its agents to the defendant in order to obtain evidence of the crime." The Court found an additional statute to support this position --G.S. 90-19.3 (1975 Supp.), which provides:

> When any person is convicted of an offense under this Article [N.C. Controlled Substances Act] the court may order him to make restitution to any law-enforcement agency for reasonable expenditures made in purchasing controlled substances from him or his agent as part of an investigation leading to his conviction.

The quoted statute was approved so long as the court's order is contained in a condition of probation to which the defendant consents. Further, the restitution must be to a specific aggrieved party (including

agency, apparently) named in the judgment, and the record must support the amount of money ordered restored.

(11) Support dependents. This condition has apparently been rarely challenged. In Redewill v. Superior Court [29 P.2d 475 (Ariz. 1934)], however, a condition that the probationer support his children beyond the age of majority was held invalid; the applicable statute used the term "minor."

(12) Waive extradition from any jurisdiction in or out of the United States. No cases have been found involving this condition, which would of course not be binding on the responding jurisdiction. It is not included in the list of conditions set out in the ABA Standards or in S 633.

(13) Violate no penal law of any state or the federal government and be of general good behavior. "Good behavior" has been equated to "lawful conduct" [State v. Millner, 240 N.C. 602 (1954); State v. Pelley, 221 N.C. 487 (1942)], so it apparently adds nothing to the prohibition on violating a state or federal law. According to the ABA Standards sec. 3.2, this should be a condition of every probationary sentence.

(14) Spend weekends in jail, surrendering earnings to pay jail expenses and family support, etc. This condition, enacted in 1963, has apparently not been challenged.

G.S. 15-197.1, enacted in 1975, authorizes, in felony cases carrying a maximum of not more than 10 years, a split sentence of not more than six months active imprisonment and suspension of the remainder. A survey of the first 386 defendants sentenced under this law (by 46 superior court judges) indicates that about 80 per cent of the defendants would have received straight confinement and 20 per cent probation, in the absence of the statute. Two-thirds of the judges thought the new law would effect a modest reduction in prison population.

Confinement as a condition of probation has been widely criticized [see 8 Ga. L. Rev. 466, 472 (1974); 67 Colum. L. Rev. 181, 185 (1967); 51 Geo. L. J. 809, 829 (1963)]. S 633 would continue both of the above types of "special probation," however. It would also authorize conditions requiring the probationer to undergo inpatient medical or psychiatric treatment or to reside in a facility providing rehabilitation, instruction, or recreation for probationers.

(15) Perform certain reasonable and useful community activities under appropriate supervision. This condition was added to the statute by the 1975 General Assembly. Apparently it has been little used so far. See Part III of this paper. It may eventually open up a Pandora's box by further broadening the already broad bounds of "reasonableness." The condition has a brief but successful history in England and in Alameda County, California.

(16) Visit, with his probation officer, a prison unit for a tour thereof so that he may better appreciate the consequences of a probation revocation.

This condition was also added by the 1975 legislature. Apparently few judges so far have used it. See Part III.

The identical duty is imposed on probation officers independently by an amendment to G.S. 15-205. In the light of prevailing caseloads, this represents a questionable use of a probation officer's time, especially if--as is frequently the case--the probationer has previously served a prison sentence, or if the prison is some distance away from the court, or if the probationer is a woman and can be confined only in the Raleigh unit.

PART II

CONDITIONS OF PROBATION NOT SPECIFICALLY AUTHORIZED BY NORTH CAROLINA STATUTE

(1) Not operate a motor vehicle. This condition is generally upheld when reasonably related to the crime [State v. Smith, 233 N.C. 68 (1950)]. The crime in Smith was larceny of 900 pounds of seed cotton, apparently by means of a vehicle. (The reasonableness of the relationship may not be as clear now as it apparently was in 1950). State v. Sandoval [452 P.2d 350 (Idaho 1969)] upheld the condition in a case involving manslaughter by automobile. A Michigan court [City of Detroit v. Del Rio, 157 N.W.2d 324 (Mich. 1968)] sustained a six-month no-driving condition for a red light violation, although the length of the prohibition compelled the court to note that the trial judge could observe the defendant's attitude and may have known of pertinent local traffic problems.

In a marijuana possession case that did not involve an automobile, the condition was held invalid [In re W. (a minor), 105 Cal. Rptr. 775 (1973)]. The court reasoned that the relationship between use of a car and repetition of the crime was too remote.

(2) Conditions involving alcoholic beverages or drugs. A prohibition from having alcoholic beverages on his premises was held valid when the probationer had been convicted of illegal possession of intoxicating liquors for sale [State v. Causby, 269 N.C. 747 (1967)].

Prohibition on use of alcoholic beverages was held invalid when the probationer was a chronic alcoholic on the ground that, because it was an impossible condition, it could serve no rehabilitative purpose [State v. Oyler, 436 P.2d 709 (Idaho 1968); see also Sweeney v. U.S., 353 F.2d 10 (7th Cir. 1965)]. On the other hand, this condition was held valid against an alcoholic on the ground that protection of the public required prevention of conduct that resulted in the conviction [Sobota v. Williard, 427 P.2d 758 (Ore. 1967)].

In a North Carolina drug case, a prohibition from owning, possessing,

or being involved with drugs except as prescribed by a doctor was held valid although the probationer was a drug addict [State v. Braswell, 283 N.C. 332 (1973)]. A similar condition has been held valid because it fell under the prohibition of unlawful conduct [Jennings v. State, 511 P.2d 1048 (Nev. 1973)].

(3) Condition restricting right of appeal. A condition requiring a withdrawal of an appeal in a separate case was held invalid in State v. Rhinehart [267 N.C. 470 (1966)]. Also, a condition that had to be performed before the end of the time allowed for appeal was struck down in State v. Calcutt [219 N.C. 545 (1941)] in a controversial 4-3 opinion.

(4) Leave the state. This condition was held to be void as punishment of banishment, contrary to public policy [State v. Doughtie, 237 N.C. 368 (1953)]. This case distinguishes earlier cases that reached a contrary result and may throw into some question the occasional practice in prostitution cases of suspending sentence on condition that the defendant leave town. See also State v. Culp, 30 N.C. App. 398 (1976).

(5) Agree to warrantless searches. In State v. Mitchell [22 N.C. App. 663 (1974)], the defendants, convicted of a liquor law violation, were given a suspended sentence on condition that they consent to a warrantless search of their premises at reasonable hours for illegal liquor. Officers thereafter forced a locked door without knocking and requesting entry and conducted a search. The Court of Appeals found the condition valid but the search itself illegal for the officers' failure to request admission before entering, holding that the probationer may insist that such searches be made in an otherwise lawful manner. [See also State v. White, 264 N.C. 600 (1965).]

A condition of a warrantless search of property or person at any time was held valid where the probationer was convicted of a narcotics offense, on grounds of a compelling public interest [Russi v. Superior Court, 108 Cal. Rptr. 716 (1973)].

In People v. Kay [111 Cal. Rptr. 894 (1973)], the defendant was convicted of assault and battery with large objects during a demonstration. A condition that he submit to a warrantless search of his person was held invalid because objects used in the crime were too large to be concealed on his person; a condition that he submit to search of his automobile was held valid because the objects could be carried to the demonstration scene in an auto.

In U.S. v. Consuelo-Gonzales [521 F.2d 259 (9th Cir. 1975)], the probationer, a drug smuggler, was released on condition that she submit her person and property to search by a law enforcement officer without a warrant. The Ninth Circuit held this to be unconstitutional, although a like search by a probationer officer alone would apparently have been upheld. [See discussion in Note, 44 Fordham L. Rev, 617, 630 (1975); see also Note, 1976 Duke L.J. 71 (1976).]

S 663 would not go as far as the cases cited above. It would authorize

conditions that require submission at reasonable times to searches of the person by a probation officer for purposes reasonably related to the probationer's supervision but would not allow the court to require the probationer, as a probationary condition, to submit to any other search that would otherwise be unlawful.

(6) Limitations on employment. The defendant in State v. Simpson [25 N.C. App. 176 (1975), a building contractor, was convicted of false pretenses. The conditional judgment required that the defense might stay in the contracting business only as an employee. The condition was upheld because it would reduce the temptation to repeat the crime. When a lawyer was convicted of a felony, a condition requiring him to surrender his license until the State Bar determined that it should be reissued was was held reasonable and valid. The court noted also that the trial court had inherent authority to disbar the defendant summarily [State v. Beach, 283 N.C. 261 (1973)].

A condition prohibiting the probationer from playing college or professional basketball without the court's consent was held invalid where probationer pleaded guilty to breaking and entering and the trial record gave no indication that the condition would serve a rehabilitative purpose [People v. Higgins, 177 N.W.2d 716 (Mich. 1970)].

(7) Submit to psychiatric treatment. This condition is rarely questioned if the probationer is a convicted sexual deviate [Foy v. Bounds, 481 F.2d 286 (4th Cir. 1973)]. But it has been held invalid when no need has been shown for it and when it was not related to the crime (disturbing the peace) of which the probationer was convicted [In re Bushman, 463 P.2d 727 (Cal. 1970)]. In a 1926 case, confinement in a psychopathic ward was held invalid as a probationary condition on the ground that the probation statute contemplated freedom from physical confinement [Ex parte Fink, 250 P. 714 (Cal. 1926)]. This reasoning would hardly be persuasive in North Carolina today, however, where six months' regular confinement or weekend confinement as conditions of probation are now authorized by statute.

(8) Pay counsel and costs of prosecution. In Fuller v. Oregon [417 U.S. 40 (1974)], the U.S. Supreme Court upheld an Oregon statute that required a convicted indigent defendant, as a condition of probation, to pay the cost of his defense counsel. The Oregon statute required a finding that the probationer be able to pay and that his failure was intentional. Before Fuller and without statutory authority, North Carolina upheld the imposition of court-appointed attorney's fees as valid costs, provided (before revocation of probation for failure to pay) there was an evidentiary finding that failure to pay was willful or without lawful excuse [State v. Foust, 13 N.C. App. 382 (1971)]. (In State v. Young [21 N.C.App. 316 (1974)], the Court of Appeals reconsidered Foust and held that a bare unrebutted showing that the defendant has failed to make payments as required may support a finding of willful failure. In the light of the Fuller decision, Young, which was handed down a few weeks earlier, should have let Faust stand. In any event, before revoking probation for failure

to pay counsel fees, trial judges should study Fuller). [See Notes, 53 J. Urban Law 89 (1975), 9 Richmond L. Rev. 353 (1975), 49 Tulane L. Rev. 699 (1975), and 11 Wake Forest L. Rev. 490 (1975)].

A condition requiring reimbursement for costs of prosecution and probation supervision ($90,000; the defendant, a doctor convicted of illegally prescribing narcotics, was able to pay) was held invalid on grounds that such a condition allows a potentially unlimited penalty and may deter the exercise of the right to a jury trial [People v. Baker, 112 Cal. Rptr. 137 (1974)]. And a condition requiring payment of part of the police payroll, rent for vice squad premises, costs of operation of courtroom, part of the prosecutor's salary, and the cost of the grand jury investigation (altogether, several thousand dollars) was held to be excessive even when the statute allowed imposition of costs of "apprehension, examination, trial, and probationary oversight" [People v. Teasdale, 55 N.W.2d 149 (1952)].

Payment of routine costs of court have long been considered a valid condition in North Carolina [State v. Edward, 192 N.C. 321 (1926)]. This condition is limited to statutory costs [G.S. 7A-304(c)]. A condition requiring the probationer to pay "costs of prosecution" to a police agency or an ABC Board, for example, is unauthorized. [See N.C.A.G. Opinion of 24 October 1975 to Donald Jacobs, District Attorney.]

(9) Reveal details relating to crime of which convicted. This condition has been held valid on the basis that no privilege exists against self-incrimination after conviction for the crime for which the privilege could otherwise be asserted [U.S. v. Worcester, 190 F. Supp. 548 (D. Mass. 1961)]. It has been held invalid when revealing certain information, such as the identity of heroin source, would expose the defendant to probable harm [State v. Langford, 529 P.2d 839 (Wash. 1974)].

(10) Conditions restricting First Amendment rights. (a) Attend Sunday school or church. This condition was held unconstitutional in a civil proceeding involving a juvenile [Jones v. Commonwealth, 38 S.E.2d 444 (Va. 1946)]. [See the discussion in 35 Fed. Prob. No. 3, p. 3 (June, 1971)].

(b) Not distribute pornographic material. In U.S. v. Nu-Triumph, Inc. [500 F.2d 594 (9th Cir. 1974)], the defendant corporation pled guilty to mailing obscene material. The nondistribution condition was held to be reasonable and valid.

(c) Maintain short haircut. This restriction was held a violation of both First and Eighth Amendment rights and not related to rehabilitation [Inman v. State, 183 S.E.2d 413 (Ga. 1971)].

(d) Restrictions imposed on convicted demonstrators. A condition that the probationer is not to associate with Students for a Democratic Society or Humanists groups, with which he had violated the law (by wearing an Army uniform), was held valid in U.S. v. Smith [414 F.2d 630 (5th Cir. 1969)]. A prohibition on public speeches designed

to encourage others to violate income tax laws was upheld against a probationer who was found to be fanatical in his opposition to these laws, and a prohibition on travel for this purpose outside the jurisdiction of the court was held to be reasonable [Porth v. Templar, 453 F.2d 330 (10th Cir. 1971)]. A ban on active participation in sit-downs, roadblocking, etc., was held valid where probationer was convicted of assault during such a demonstration; the court found that protecting the probationer from his own irresponsibility in emotionally charged situations was a valid purpose [People v. King, 73 Cal. Rptr. 440 (1968)].

Other demonstration cases that contain legal and illegal conditions are Malone v. U.S. [502 F.2d 544 (9th Cir. 1974)]; People v. Arvanites [95 Cal. Rptr. 493 (1971)]; and In re Mannino [92 Cal. Rptr. 880 (1971)].

(11) Submit written monthly reports to probation officer. This was held valid as a reasonable facet of probationary supervision, which justifies limited restriction of the right of privacy [U.S. v. Manfredonia, 341 F. Supp. 790 (S.D.N.Y. 1972)].

(12) Pay taxes. If probationer has been convicted of violating a tax law, a condition of probation requiring payment of a greater amount of taxes than that admitted by the probationer has been held invalid until the exact amount is lawfully determined [U.S. v. Taylor, 305 F.2d 183 (4th Cir. 1962)]. But it is valid to require settlement in full with the Internal Revenue Service for taxes owed (but no more than legally owed), with full right in the probationer to contest any tax imposed [U.S. v. Weber, 437 F.2d 1218 (7th Cir. 1971)].

(13) Miscellaneous conditions.

Defendant, convicted of unlicensed fortune-telling and abetting prostitution, was placed on probation on condition that she not allow people to congregate or remain in her home after the hours of darkness. This was upheld in State v. Davis [244 N.C. 621 (1956)], although apparently only because the trial judge found that the night-time activity at the defendant's house justified an inference that she was engaged in fortune-telling or aiding in prostitution. [See State v. Davis, 243 N.C. 754 (1956) (same defendant)]. The Court does not mention reasonableness; but read together, these cases give the impression that the Court thought the condition imposed was unreasonable without a further finding that violating the condition was synonymous with unlawful conduct. Although the condition was eventually upheld, these cases indicate that the Court may not endorse a surface appearance of reasonableness without something in the record to give substance to the appearance.

In State v. Smith [196 N.C. 438 (1929)], the defendant, convicted of slandering a virtuous woman, was placed on probation on condition that he "not talk about young girls in any way except complimentary remarks." The order revoking probation was voided by the Supreme Court for lack of proof of a violation. The condition appears to be reasonable, although perhaps inappropriate for the 1970s.

A prohibition on "having anything to do with any politics" was imposed in State v. Calcutt [219 N.C. 545 (1941)]. A concurring dissenting opinion by Justice Clarkson approved the condition, noting that the record showed that the defendant, convicted of violations of the slot machine laws, had spent large sums of money lobbying to secure legislation favorable to his illegal activities. It is very doubtful that such a broad restriction on political activity would meet with judicial approval today.

Upon conviction of possessing liquor for purposes of sale, the defendant in State v. Elliott [22 N.C. App. 334 (1974)] was placed on probation on condition that he close the "Am-Vet Club" that he had been operating. Since the evidence showed that the defendant had been selling liquor at the "Club," the condition was manifestly reasonable, although it might have been worded more strictly to eliminate any deprivation-of-property argument. (The case was disposed of on a point of evidence.)

The defendant in State v. Baynard [4 N.C. App. 645 (1969)] was convicted of driving under the influence. Conditions of probation prohibited him from going on premises where intoxicating liquors are manufactured or sold for five years and from riding in any motor vehicles except in his business for two years. Upon challenge, the court found these conditions reasonable, both in substance and in duration, specifically noting their obvious relationship to the offense. (Since "intoxicating liquor" by definition includes wine and beer, the defendant in this case was forbidden to enter literally thousands of retail establishments. Use of "alcoholic beverages" instead of "intoxicating liquor" would have barred the probationer from only ABC stores and restaurants with liquor licenses but would have allowed him to enter grocery stores).

A requirement that a convicted bookmaker not have a phone in his home or on any property under his control was upheld in People v. Stanley [327 P.2d 973 (Cal. 1958)]. The relationship between the crime and the condition is obvious.

A condition that a convicted robber, the mother of two illegitimate children, not become pregnant unless married was voided in People v. Dominguez [64 Cal. Rptr. 290 (1967)]. This is a classic case of no reasonable relationship between the crime and the condition.

The defendant in Butler v. District of Columbia [346 F.2d 798 (D.C. Cir. 1965)] was convicted of making a false report of police brutality. A condition of probation was that he write an essay satisfactory to the judge telling why the police department deserves the respect of the citizenry. The appellate court held that there was no basis in the law for this kind of condition. Other unarticulated reasons might have been that the condition is not necessarily relevant to the purposes of probation and that the standard for performance is not objectively measurable and hence is "unreasonable."

A probationer convicted of failing to report for induction under the Selective Service law was ordered to donate a pint of blood to the Red Cross. The Seventh Circuit on its own initiative held this to be an unwarranted

invasion of the person and void on its face [U.S. v. Springer, 148 F.2d 411 (1945)], although the condition is probably much less shocking to constitutional sensibilities in 1976 than it was in 1945.

PART III

QUESTIONABLE CONDITIONS OF PROBATION NOTED IN AN EXAMINATION OF PROBATIONARY JUDGMENTS RECENTLY ENTERED IN NORTH CAROLINA SUPERIOR AND DISTRICT COURTS

In January and February, 1976, the Division of Adult Probation made available copies of approximately 250 probationary judgments recently received by it from all over the state. This sample was selected unscientifically, consisting merely of all judgments received in a given number of days, but it included a sufficient number of judgments awarded by judges in both trial courts to be a reasonably representative cross-section.

It was gratifying to note that the overwhelming majority of all judgments in both courts was unexceptionable. A very small percentage involved illegal conditions of probation; or conditions that were clearly questionable under the "reasonableness" test; or conditions that could be challenged because they were too broad or vague, or were otherwise carelessly drawn, or granted too much discretion to the probation officer. These conditions will be discussed in this section.

Two judgments required the probationer to attend church or Sunday school, or both. This is generally considered to be a violation of the probationer's First Amendment right of freedom of (or "from") religion.

Judgments requiring as a condition of probation that the probationer pay restitution to a local law enforcement agency for expenses of investigation were fairly common. Many of these judgments would not be proper under the rather strict limitations on this practice set out in Shore v. Edmisten, ___N.C.___, decided September 1, 1976. See Part I, Sec. (10).

Payments in restitution were also commonly ordered for worthless checks, damages resulting from automobile accidents, larceny of personal property, and medical bills for aggravated assault. These are presumed to be proper, although it should be pointed out (the probationary judgment form does not carry a space for this purpose) that the record should support the specific amount of damages awarded. It follows that the amount should not be left for determination by a third party, or the probation officer, or future events.

Probationary conditions considered to be unreasonable, vague, too broad, too restrictive, or at the very least badly drafted include the following:

-- to be under "house arrest" at all times except going to, from, or while at work, for six months (too restrictive).

-- in a breaking and entering case, submit himself as an inpatient to _____, a private mental hospital, as long as the doctors deem it necessary for his best interest. (The period of probation in this case was five years; the cost of treatment might be $1,000 per month). To support this kind of condition, the record should show (1) some connection between the crime of breaking and entering and mental illness, and (2) financial capacity on the part of the probationer to pay for the treatment.

-- not go within two miles of residence of _____ [presumably the prosecuting witness] (too broad).

-- not to communicate with wife. Even if the couple is estranged, public policy would seem to encourage good-faith efforts on the part of the husband, at least through a third party, to effect reconciliation (unreasonable, too restrictive).

-- in a drug possession case, that the probationer not attend <u>any</u> massive gathering and not go to a beach resort (unreasonable, too restrictive).

-- work in a drug program for 40 hours and give a "summary" to the court (too vague). It would be better to specify the nature of the drug program, and also the "summary."

-- In a temporary larceny of an automobile case, submit to a warrantless search of his person, residence, or auto at any time for contraband (unreasonable).

-- in a case involving assault and battery on a female, that the probationer not visit any "Stop and Go" store in _____ County for three years (unreasonable, too restrictive).

The following probationary judgments were considered to delegate too much discretion to the probation officer:

-- abide by such curfew restrictions as the probation officer deems necessary.

-- voluntarily commit herself to Dorothea Dix Hospital for testing and treatment, and if discharged and the need for recommitment arises, follow the "instructions of her probation officer for recommitment."

-- perform certain reasonable and useful community activities under appropriate supervision. [This merely repeats the words of the 1975 statute, leaving the nature and degree of participation in community activities (also unspecified) entirely up to the probation officer. At the least, the judge should specify the kind of activity, its extent, and under whose supervision.]

-- (after a long list of special conditions), that the probationer abide by "any other conditions" set out by his probation officer.

The probationary judgment forms were revised and reissued in July, 1976, after the first edition of this paper appeared. The new forms contain a number of improvements, foremost among them being a reduction in the kind and number of conditions printed on the form as judicial options. The new list consists of only the six most frequently used conditions (cooperate with probation officer, permit visitation, pay costs of court, etc.) The sentencing judge need only indicate which, if any, of the conditions is not to be imposed. Below this list of printed conditions is space for additional conditions, to be imposed as desired to fit the needs of the individual defendant. Proper use of the form will save time and eliminate the confusion and ambiguity that sometimes arose when additional conditions imposed on the old form overlapped the long list of conditions printed thereon.

Many judges are dictating the two 1975 conditions (perform useful community services and visit a prison unit) onto the form and adding "omit" in the margin adjacent to these items. This is unnecessary. As far as the judge is concerned, these conditions are optional (as are all statutory conditions); if they are not entered on the form, they are not imposed. And in the case of prison unit visitation, the judge's "omit" entry is probably ineffective. G.S. 15-205, as noted above, independently requires the probation officer to take the probationer on a prison visit.

GENERAL REFERENCES

1. Note, 8 Ga.L. Rev. 466 (1974).
2. Comment, 35 Fed. Prob. No. 2, p. 3 (June 1971).
3. Comment, 67 Colum.L. Rev. 180 (1967).
4. Comment, 51 Geo.L.J. 809 (1963).
5. Note, 31 N.C.L. Rev. 195 (1953).
6. American Bar Association Standards Relating to Probation
7. N.C. Index 2d, Criminal Law § 142.

APPENDIX A

Extract from Senate Bill 663, 1975-76 Session, N.C. General Assembly

§ 15A-1343. Conditions of probation.--(a) In General. The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) Appropriate Conditions. When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:

(1) Not commit any criminal offense.
(2)) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.
(3)) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.
(4) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on probation.
(5) Support his dependents and meet other family responsibilities.
(6) Make restitution or reparation for loss or injury resulting from the crime for which the defendant is convicted. When restitution or reparation is a condition of the sentence, the amount must be limited to that supported by the record. The court may direct a probation officer to fix the manner of performing the restitution or reparation.
(7) Pay a fine authorized by Article 84, Fines.
(8) Refrain from possessing a firearm or destructive device or other dangerous weapon unless granted written permission by the court or the probation officer.
(9) Report to a probation officer at reasonable times and in a reasonable manner, as directed by the court or the probation officer.
(10) Permit the probation officer to visit him at reasonable times at his home or elsewhere.
(11) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer.

(12) Answer all reasonable inquiries by the probation officer and obtain prior approval from the probation officer for any change in address or employment.

(13) Promptly notify the probation officer of any change in address or employment.

(14) Pay reasonable court costs and costs for appointed counsel or public defender to represent him in the case in which he was convicted.

(15) Submit at reasonable times to searches of his person by a probation officer for purposes reasonably related to his probation supervision. The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.

(16) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(17) Satisfy any other conditions reasonably related to this rehabilitation.

APPENDIX B

Extract from American Bar Association Standards Relating to Probation, Approved Draft (1970)

3.2 Nature and determination of conditions

(a) It should be a condition of every sentence to probation that the probationer lead a law-abiding life during the period of his probation. No other conditions should be required by statute; but the sentencing court should be authorized to prescribe additional conditions to fit the circumstances of each case. Development of standard conditions as a guide to sentencing courts is appropriate so long as such conditions are not routinely imposed.

(b) Conditions imposed by the court should be designed to assist the probationer in leading a law-abiding life. They should be reasonably related to his rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion. They should not be so vague or ambiguous as to give no real guidance.

(c) Conditions may appropriately deal with matters such as the following:

(i) cooperating with a program of supervision;
(ii) meeting family responsibilities;
(iii) maintaining steady employment or engaging or refraining from engaging in a specific employment or occupation;
(iv) pursuing prescribed educational or vocational training;
(v) undergoing available medical or psychiatric treatment;

(vi) maintaining residence in a prescribed area or in a special facility established for or available to persons on probation;
(vii) refraining from consorting with certain types of people or frequenting certain types of places;
(viii) making restitution of the fruits of the crime or reparation for loss or damage caused thereby.

(d) Conditions requiring payment of fines, restitution, reparation, or family support should not go beyond the probationer's ability to pay.

(e) The performance bond now authorized in some jurisdictions should not be employed as a condition of a probation.

(f) Probationers should not be required to pay the cost of probation.