Topic: CRIMINAL PROCEDURE STATUTES

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TECHNICAL CHANGES MADE IN THE TRIAL AND APPELLATE PROCEDURE ACT

By L. Poindexter Watts

The new Trial and Appellate Procedure Act, recommended by the Criminal Code Commission, was enacted in 1977 to take effect July 1, 1978. This delayed effective date was designed to allow criminal justice officials to become familiar with the new provisions, and to spot any "bugs" in the act--so the 1978 short session of the General Assembly could make necessary corrections.

A number of changes were proposed, and the Criminal Code Commission recommended a package of technical changes, which formed the heart of a bill introduced in the 1978 session. That bill, Session Laws 1977 (1978 Session), Chapter 1147, amends the Trial and Appellate Procedure Act contained in Session Laws 1977, Chapter 711. Except for one provision given a delayed effective date of August 1, 1978, all the technical changes went into effect the same date as the Trial and Appellate Procedure Act--July 1, 1978.

An appendix to this memorandum sets out the full text of all technical changes. The majority of those changes are self-explanatory. (Those comparing the text of Chapter 1147 with the engrossed version in the appendix will note a few minor discrepancies; the appendix was prepared after consultation with the Attorney General's office, and represents the text as it will be codified in the North Carolina General Statutes.)

The memorandum below selects for discussion certain of the changes that are either of special interest or may require background explanation for full understanding. In addition, a few matters under the Trial and Appellate Act not affected by the 1978 changes are discussed because questions of interpretation have been raised.

Restitution Law Preserved

One of the major pieces of criminal justice legislation sought by the Governor in 1977 was a measure to enhance the likelihood of restitution

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to victims of crime by criminal defendants placed either on probation or parole. The key procedural provision of the restitution package was added among the conditions of probation in G.S. 15-199. Unfortunately, the Trial and Appellate Procedure Act, in rewriting the probation law, repealed G.S. 15-199 effective July 1, 1978.

An important technical change, then, was the placement of the restitution procedure formerly in G.S. 15-199(10) in new G.S. 15A-1343(d). G.S. 15A-1343(b)(6) was amended to refer to this special restitution procedure, and other cross-references were changed. See G.S. 15A-1021(d), 148-32.2(c), 148-57.1(c).

Other Recent Probation Provisions Reinstated

Two other recent additions to the probation statute were also affected by the repeal of G.S. 15-199. Therefore, these two items were shifted into Chapter 15A.

The first authorized the judge, as a condition of probation, to order that the probationer tour a prison during the first 30 days of his probation "so that he may better appreciate the consequences of probation revocation." Reinstating this probation provision, added in 1975, was not strictly necessary, as unrepealed G.S. 15-205 continues to mandate it, but the Commission determined that it nevertheless should be restored to the list of probation conditions. See G.S. 15A-1343(b)(16a).

The second item retained is much more important. Following the recommendation of the "Knox Commission" (Commission on Correctional Programs), the 1977 General Assembly provided that conviction of minor crimes--punishable by imprisonment of 30 days or less--would not automatically trigger probation revocation. This concept is brought into Chapter 15A by the language added in G.S. 15A-1344(d).

Reading of Indictment Prohibited

One of the important trial reforms intended by the Criminal Code Commission was to prohibit the reading of the indictment to jurors at the start of the trial. G.S. 15A-1213 provided that, on voir dire, the judge may not read the pleadings to the jury in informing them of the nature of the case. And, as noted in the commentary to G.S. 15A-1221, the main reason for requiring the arraignment out of the presence of jurors was to keep them from hearing the pleadings read--almost always the indictment in a felony jury trial. Several prosecutors pointed out, however, that there was no explicit ban on reading the indictment generally, and indicated that they would consider reading the indictment as part of the opening statement.

In reaction, the Criminal Code Commission recommended the insertion of G.S. 15A-1221(b) to follow through with its original concept. Two things should be noted about this new provision: (1) it applies to everyone, including defense counsel, and (2) it only bans readings of an indictment--not all pleadings. The Code Commission thought there may be times when it would be relevant for counsel for either side to question

an officer about a warrant, even though it may be a misdemeanor pleading, and that the major vice to be prevented was the formal declamation of the grand jury's accusation against the defendant. In the view of many, such a recitation subtly undermines the presumption of innocence.

Adding Maximum Statutory Punishment to Commitment Order

A staff member of the Department of Correction appeared before the Criminal Code Commission and objected to a number of the features of the Trial and Appellate Procedure Act relating to imprisonment and parole. As to some objections, the Commission responded that its new provisions were carefully considered, and refused to take action; as to several others, however, the Commission agreed to recommend technical changes.

One major criticism was that clerical personnel in the Department of Correction could no longer figure the earliest parole eligibility date from a mere reading of the judgment and commitment order. If a judge imposes a minimum sentence longer than one fifth of the maximum penalty allowed by law, G.S. 15A-1371(a) and (c) allow the Parole Commission to override the judge's minimum if it can state reasons in writing for so doing. The Commission agreed that clerks entering parole dates would have difficulty if it became necessary to check through a maze of statutes governing punishments whenever a commitment specified a minimum term of imprisonment, and responded with the language added at the end of G.S. 15A-1301. This requires a statement of the maximum penalty authorized by law to be entered on the commitment form. The Commission thought judges and clerks would have far less difficulty in identifying the statutory maximum than Department of Correction personnel.

In order to give the Administrative Office of the Courts time to revise AOC-L Form 153, which combines the judgment and commitment order, the General Assembly delayed the effective date of this provision to August 1, 1978. As the new parole provisions went into effect July 1, however, it is highly desirable that judges add the new language if possible to all commitments for persons sentenced to imprisonment on or after July 1.

As an interim measure before revised AOC-L Form 153 is issued, I recommend insertion of the following language to the commitment order immediately above or below the printed provision as to credit:

> "The maximum sentence of imprisonment allowed by law for the longest of the above-identified offense(s) is _____."

Though the statute will require such an entry in all cases after August 1, its insertion before that date is essential only if a minimum prison term is given. One important point: the recommended language above assumes that judges and clerks will continue to follow the general custom of using a separate AOC-L Form 153 for each sentence of imprisonment to be served consecutively (with internal cross-references to the sentences preceding or following).

(A further assumption is that judges and clerks will assume their appropriate responsibilities in seeing that AOC-L Form 153 is properly

filled out to identify the crime and the governing statutory provisions defining the crime and specifying punishment--not always an easy matter, especially in the motor vehicle law. In some instances, apparently, the form has been filled out to state that the defendant's offense was a violation of "the law"--rather than citing a statute or statutes.)

"Safekeeping" Order Pending Appeal No Longer Required

In checking with clerks concerning the additional entry required on the judgment and commitment form by the new law, I came across another matter that deserves comment. It grows out of the Trial and Appellate Procedure Act itself rather than the 1978 changes. Former G.S. 15-183 provided that, upon appeal to the appellate division, a person sentenced for longer than 30 days and not released on bail pending appeal could be sent to the Department of Correction. As I understand it, judges have usually added a provision in the judgment and commitment so indicating when this "safekeeping" provision is utilized. (This type of "safekeeping" order needs to be distinguished from the pretrial safekeeping authority set out in G.S. 162-39.)

In the course of a conversation on commitment orders, I was asked by a clerk what statute should be recited in the order concerning "safekeeping" for persons appealing their convictions now that G.S. 15-183 is repealed. The answer I finally reached is that the new act abolishes any interim status for persons appealing, and that no order on the matter is necessary or desirable.

G.S. 15A-1352 and 15A-1353 simply provide for judgment and commitment following conviction unless the judge in his discretion grants bail pending appeal. Note that any orders as to bail must be in or attached to the judgment and commitment, and that a prisoner may be released on bail by the custodial authorities, including the Department of Correction, under certain circumstances. Compare G.S. 15A-1451(3), indicating that confinement is stayed after notice of appeal is given only when the defendant is released pursuant to Article 26, Bail.

Changes as to Probation Revocation or Modification

In addition to the changes made at the behest of the Department of Correction, there was one other major source of changes. A committee of judges has been working on a bench book to be issued by the Administrative Office of the Courts. An Institute of Government faculty member serving with the committee brought the new Chapter 15A probation provisions before the committee for comments, and this process eventuated in a number of the changes affecting procedures as to probation revocation or modification. The changes are self-evident, but three are worthy of brief comment.

First, G.S. 15A-1342(d) was amended to delete the language apparently requiring that the probationers whose cases are being reviewed must always be brought before the court. The amendment makes it plain that the case is to be reviewed, and gives the probationer notice and a right to appear.

Second, G.S. 15A-1344(a) was originally drafted on the assumption that the local prosecutor would always know of changes affecting probation status occurring in his district, and only provided for formal notice when hearings were to be held in another district as to probationers first placed on probation in his district. After learning from the bench book committee that the above assumption was not always correct, the Criminal Code Commission altered G.S. 15A-1344(a) to require that the district attorney receive notice "of any hearing to affect probation substantially." The revised notice requirement applies even if the hearing will be in the district attorney's own district. The Commission first considered a proposal to require notice in all instances, but modified it to allow judges to make minor changes in conditions without holding an adversary hearing on the matter. An example might be a modification to allow a probationer to take an otherwise prohibited out-of-state trip for some legitimate reason.

Two observations: (1) the notice need not be written, and (2) it must be given to the elected district attorney. The Commission's original draft specified "district attorney" rather than "prosecutor" because the notice was to come from outside the district. In making the change, the Commission apparently left this wording "district attorney" unchanged because the prosecutor in a particular county may not have been the trial prosecutor with knowledge of the probationer's case. There may be a need to check the district attorney's central files. In any multi-county district in which there are not central prosecution files, presumably the district attorney may appoint a particular prosecutor in a county as his agent to receive these notices as to proceedings that would substantially affect probation.

The third procedural change selected to be highlighted is in G.S. 15A-1347. The added language specifies that if a superior court undertakes to continue a misdemeanor probationer on probation after the district court has revoked, the probationer thereafter is under the jurisdiction of the superior court. Neither the bench book committee nor the Commission thought it greatly mattered which court had jurisdiction in this instance, but thought it needed to be settled. Thus the Commission left the misdemeanor probationer with the superior court, as it had last acted in the case.

Weekend Jailings Must Be Local

For some time judges have been authorized to impose sentences of imprisonment to be served at intervals--for example, on weekends. G.S. 15A-1351(a) continues this policy. The Department of Correction complained, however, that it was not geared to handle in-and-out prisoners, and the language was added to the section requiring that prisoners given noncontinuous sentences under special probation serve their jail time in a local facility.

Short Terms To Be Served in County Jail

An important piece of 1977 legislation designed to relieve prison overcrowding provided that persons sentenced to terms of imprisonment of 180 days or less should, if possible, serve the time in a local confinement facility--that is, in most cases, the county jail. The amendment to

G.S. 15A-1352 makes an important correction as to the number of days (180 days or less--not less than 180 days), and adds a reference to the exception in G.S. 148-32.1(b). This provision allows prisoners serving terms over 30 days to be sent to the Department of Correction if no county jail, local or otherwise, has room.

As discussed below, some short-term prisoners will receive automatic parole, if then eligible, after serving one third of their sentences unless the Parole Commission acts to deny parole. The question has been raised whether this provision interacts with G.S. 15A-1352. Suppose, for example, a judge sentences a felon to a minimum term of less than six months and a maximum term over six months but less than 18 months. As the prisoner will very likely receive automatic parole before he has served 180 days of imprisonment, would the judge be required to sentence the felon to a local confinement facility? The answer clearly seems to be "no." G.S. 15A-1352 is structured in terms of the sentence imposed by the judge--not the projected actual time of imprisonment.

Sentences of Imprisonment and Parole Eligibility under New Act

Several of the sections below treat issues related to sentences of imprisonment and parole eligibility under the Trial and Appellate Procedure Act. It will be helpful in understanding that discussion to review certain major provisions of the new act.

Every sentence of imprisonment under the new law will have both a minimum and a maximum term. If the judge fails to state a minimum and gives a "flat" sentence, this has the effect of a zero minimum sentence--and, according to G.S. 15A-1371(a), the prisoner is eligible for parole immediately. If the judge wishes to give what would have been, for example, a flat sentence of five years under the old law, he would have to impose a sentence stipulating a minimum term of five years and a maximum term of five years.

After the prisoner has served his minimum sentence, or has served one fifth of the statutory maximum, he is eligible for parole. Whether the prisoner will be considered for parole or get it at any particular time prior to service of his maximum term will depend upon policies of the Parole Commission, except:

(1) Prisoners serving 18 months or longer must be considered by the Parole Commission at certain times mandated by statute.

(2) Felons serving 18 months or longer must be released on parole at least six months prior to the completion of the maximum term unless there are special circumstances.

(3) Because the Parole Commission's processing procedures may not allow discretionary handling at an early enough date, misdemeanants and certain felons serving six months or more are eligible for automatic parole unless the Parole Commission acts to keep them imprisoned. (The automatic-parole feature is discussed below.)

From the above it is clear that persons who are sentenced to terms of six months or longer will normally be released on parole at some point before the maximum term is completed. This result is intentional, as the Criminal Code Commission thought it best for the prisoner to have a transitional period under parole supervision after release. It is theoretically possible for prisoners serving sentences of less than six months to be paroled, but it is not yet certain how matters will be administered with respect to routine cases. (There is a possibility that a defendant may fare much better with a maximum sentence of six months than one of five months; this situation is compounded by the fact that prisoners committed for 180 days or less will often have to serve the time in local jails. Not only will the local prisoners get somewhat less credit against the sentence, as will be discussed below, but presumably the Parole Commission will have much greater difficulty in checking any records relating to the prisoner's behavior and attitude as a basis for granting discretionary parole. The Parole Commission may have to invent some kind of automatic parole for those prisoners eligible for it who are serving less than six months.)

With the increased importance of the minimum sentence under the new act, it becomes necessary to examine the impact of statutory minimums upon the judge's authority. Suppose the defendant is convicted under G.S. 14-49 of malicious bombing, which carries a penalty of imprisonment from five to 30 years. There is a superficial argument that this statute could be interpreted merely to require imposition of a maximum sentence between five and 30 years in length. This argument loses force on analysis, for it would undercut all statutory minimums but the handful of no-probation/no-parole statutes recently enacted. It is clear that the Criminal Code Commission did not intend its procedural code to have such a drastic impact on the existing sentencing statutes. This point of view is strengthened beyond the point of argument by the legislative addition of the provision resurrecting the rule of parole eligibility upon service of one fourth of the minimum if the minimum is imposed solely because required by law; this action was premised upon the existence of effectual statutory minimums. It therefore is certain that the judge imprisoning a defendant is obligated to impose any applicable statutory minimum--though he would, of course, in most instances retain the power to suspend the sentence.

Resolving this legal issue, however, does not end matters. Suppose a judge deliberately imposes a three-year minimum sentence in a malicious bombing case. Who would have standing to object to the judge's sentence? In what forum? What release date should the Department of Correction enter upon its records? Of more practical importance is the likelihood that a judge may inadvertently give a "flat" sentence, importing a zero minimum, in a case in which there is a statutory minimum. Concrete examples of such an occurrence are set out in the discussion below dealing with sentences of life imprisonment. Answers are suggested in two of the situations involving life imprisonment, but obviously unsettled issues remain.

In conclusion, the new sentencing law purposefully gives the judge a great deal more power to set minimum sentences that will limit the

Parole Commission's discretion than was true under the former law. Sentencing judges will have to consider what they do carefully; if they follow old habits of sentencing they may inadvertently give a defendant a much harsher, or much lighter, sentence than intended.

Credit for Time Served Before Sentencing

The original concept of credit for time served in the Trial and Appellate Procedure Act was in G.S. 15A-1355(b), which required the Department of Correction to give the appropriate credit if not already taken into account by the judgment or parole revocation order. A novel feature was G.S. 15A-1355(b)(2), which also gave credit for time spent in imprisonment in other jurisdictions on essentially the same charge. The detailed provisions on credit for time served of Article 19A of Chapter 15 of the General Statutes were left unrepealed, as noted by the commentary, to be followed by judges in giving credit upon sentencing.

The Department of Correction objected that it was not equipped to verify how much creditable time a prisoner had spent in various institutions prior to sentencing, and whether the judge had or had not given the appropriate credit. There was particular concern over the need to resolve the factual questions necessary to the giving of credit for out of state time served. The response of the Commission was to recommend repeal of G.S. 15A-1355(b) and amendment of other sections that refer to it. The other sections are changed to cite directly the credit provisions of Article 19A of Chapter 15 rather than G.S. 15A-1355(b).

The result of the change is that no credit is given for out-of-state time served, and a prisoner must go to court to correct the judgment if proper credit for time served is not given by the sentencing judge.

Impact of Imprisonment Credit upon Parole Eligibility

Although not substantively affected by the 1978 technical changes, the interrelationship between imprisonment credit provisions and parole eligibility date has raised several questions that need to be discussed.

There are three basic types of credit to reduce the time spent in imprisonment: (1) credit for time served before sentencing, (2) "good-time" credit, and (3) "gain-time" credit. The first type of credit is authorized by Article 19A of Chapter 15 of the General Statutes. Good-time credit is mandated for prisoners in local confinement facilities by G.S. 14-263 and 162-46, and is provided for prisoners in the State system by regulations of the Department of Correction authorized by G.S. 148-13. Gain-time credit is given only by the Department of Correction's regulations, and is not available to prisoners in local jails. The Attorney General's office is currently advising custodians of local confinement facilities (primarily, sheriffs) that, because they are not equipped to deal with all the due process implications of the classification scheme set out in G.S. 14-263, all prisoners who are of good behavior should receive the most generous credit allowance of 104 days per year (8.667 days per average month). As interpreted, the credit provision in G.S. 14-263 is more liberal than the five-day per month allowance in

G.S. 162-46, and would supersede it. Good-time credit of 108 days a year is available to all prisoners of the Department who are of good behavior, and is computed on the basis of 8.94 days of credit for each average 30.4 day month--a credit of almost 30 per cent. There are three regular classes of gain-time credit available to selected prisoners in the State system who are given certain onerous or hazardous job assignments. The most generous of the gain-time credits added to good time can result in a total good-time/gain-time credit of nearly 50 per cent (14.71 days per 30.4 day month). ("Emergency" gain-time is also granted for work done in very cold weather or under emergency conditions, at the rate of one day per day worked; presumably, this is quite unusual.)

Prisoners sentenced before July 1, 1978, are entitiled to have all three types of credit apply against their minimum and maximum sentences. In addition, under G.S. 15-196.3, credit for time served counts to reduce the time to be served before the parole eligibility date is reached. Although the Department's written regulations are not explicit on this point, by administrative interpretation neither good-time nor gain-time credit counts toward parole eligibility--just toward the minimum and maximum sentences. For prisoners in local confinement facilities the same rule would apply, as G.S. 14-263 credits its good-time only as a commutation of the sentence.

Prisoners sentenced on and after July 1, 1978, will continue to have credit for time served count against minimum and maximum sentences and against the parole eligibility date--as G.S. 15-196.3 is left untouched. As to good time and gain time, G.S. 15A-1355(c), which will be codified as such without change despite the repeal of subsection (b), provides:

> "(c) Credit for Good Behavior.--The Department of Correction may give credit toward service of the maximum term and any minimum term of imprisonment for allowances of time as provided in rules and regulations made under G.S. 148-11 and G.S. 148-13."

Another provision bearing on credit is the statement in G.S. 15A-1371(a), which in its revised form reads: "A prisoner whose sentence includes a minimum term of imprisonment . . . is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offenses for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes."

Against this background it is appropriate to ask the following two questions:

(1) Since parole eligibility under the new law will in many instances occur upon service of the minimum sentence, will this time be reduced by good-time and gain-time credit?

Answer: For prisoners in the State system, it depends on how the Department of Correction writes its regulations. Members of the Attorney General's staff have informally advised the Department of Correction that G.S. 15A-1355(c) gives the Department complete discretion as to

awarding of credit. It can give credit against the maximum and not the minimum, against both, against none, or greater credit for one than the other. As a result of a meeting between members of the Attorney General's staff and the Department of Correction, I understand the current intention of the Department is to amend its regulations and provide that for prisoners under the new act:

(a) good-time credit will be given toward both the minimum and maximum sentences; and
(b) gain-time credit will be applied only toward service of the maximum sentence.

For local prisoners, the new provisions are not explicit. G.S. 14-263 is unrepealed, however, and there seems little question that the maximum good-time credit provided by that statute should continue to be granted. This credit will assuredly by given both against the minimum and maximum sentences.

(2) Is there any credit which will reduce the parole eligibility date of one fifth of the maximum penalty which applies if the judge sets a longer minimum sentence?

Answer: Credit for time served will need to be given, under the terms of G.S. 15-196.3. The Criminal Code Commission takes the position, however, that the "floor" of one fifth of the statutory maximum was never meant to be subject to good-time/gain-time credit. It buttresses its interpretation of G.S. 15A-1371(a) to reach that result on the cross-reference to G.S. 15A-1355(c). That latter subsection only speaks in terms of credit toward minimum and maximum sentences. I understand that a ruling will be requested of the Attorney General, and the matter should be resolved shortly.

In all of this general discussion of parole eligibility, it is necessary to remember that Chapter 15A preserves the concept of a Knox Commission recommendation adopted in 1975 with respect to misdemeanants. The new law grants automatic parole for eligible prisoners at the end of one third of the maximum sentence imposed for two classes of prisoners unless the Parole Commission makes written findings of the type set out in G.S. 15A-1371(g). The two classes are: (1) misdemeanants serving six months or more and (2) felons serving between six and 18 months. A significant new restriction, in keeping with the Criminal Code Commission's philosophy of giving more control to judges, limits this automatic parole to prisoners eligible for parole under G.S. 15A-1371(a). Thus, it would be within the power of a judge in most felony cases to insure imprisonment for substantially longer than one third of an under-18-month maximum by giving a stiff minimum sentence. (For example, upon conviction of a ten-year felony, the judge could give a minimum of 15 months and a maximum of 16 months; the prisoner would have to serve at least 15 months less his allowable credit.) The converse situation is likely to occur with more frequency: the prisoner will become eligible for parole before his automatic parole date. (I suspect that the processing of cases will often take long enough that the automatic parole date will be reached before any discretionary release is approved. Note that G.S.

15A-1371(b), which requires that parole consideration be given at certain intervals, only applies to persons sentenced for a maximum of 18 months or longer.)

To recapitulate the above discussion:

* With the apparent exception of certain situations involving statutory minimums, discussed below, a "flat" sentence means the prisoner is eligible for parole immediately--no matter how long the sentence. G.S. 15A-1371(a). (The district attorney will receive notice, however, whenever anyone is considered for parole before half the maximum sentence is served.)

* If the judge imposes a minimum sentence that does not exceed one fifth of the maximum allowed by law, the prisoner becomes eligible for parole upon service of the minimum sentence. (Assuming the Department of Correction amends its regulations as indicated, the minimum sentence will be subject to reduction at the rate of 108 days a year for good time, but not gain time, and by credit for time served before sentencing. The current interpretation of G.S. 14-263 and G.S. 162-46 results in a similar good-time credit, of 104 days a year, for prisoners in local confinement facilities. These prisoners would also receive credit for time served.)

* If the sentencing judge imposes a minimum sentence substantially longer than one fifth of the statutory maximum, the prisoner cannot be paroled until he has served one fifth of that penalty--subject only to credit for time served before sentencing.

* If the judge imposes a minimum sentence that exceeds one fifth of the maximum allowed by law, but not by an amount great enough to offset good-time credit, the prisoner probably becomes eligible upon service of the net minimum sentence.

Treatment of Sentences of Life Imprisonment

As originally written, the provisions of G.S. 15A-1371(a) dealing with parole eligibility did not apply to persons actually sentenced to a term of life imprisonment, and its reference to calculating one fifth of the maximum as 20 years when a life sentence was the maximum could only apply, for parole eligibility, when the judge gave less than a life term. For persons sentenced to life imprisonment, it would have been necessary to refer to an uncodified provision, Session Laws 1977, Chapter 711, § 38, which retained the old law for prisoners not covered by G.S. 15A-1371(a). Upon reflection, the Criminal Code Commission determined this was an improper way to handle the matter. Therefore, the technical changes made the parole eligibility provisions applicable when sentences of life imprisonment are imposed by striking out the phrase "life imprisonment or" in the first sentence of the subsection.

This highly simple approach to the matter leaves some questions to be resolved if the sentencing judge persists in old habits and imposes a "flat" sentence of life imprisonment:

(1) If the statute provides for life imprisonment as the only permissible sentence (e.g., first-degree burglary, first-degree murder when the jury recommends life imprisonment) and the judge imposes a "flat" sentence of life imprisonment, when is the prisoner eligible for parole?

Answer: The general rule is that unless the judge specifies a minimum sentence, the prisoner is eligible for parole at any time. It seems obvious to me, however, that a statute requiring a mandatory sentence of life imprisonment in effect imposes a minimum sentence of life, and that the failure of the judge to follow through and so specify a minimum term of life imprisonment in his commitment order should not have any effect. The Attorney General takes the position, however, that the Department of Correction has no authority to correct judgments; thus it may be necessary for the judgment and commitment order to be returned to the court for appropriate modification. In this event, with life imprisonment being both the minimum and maximum sentence, the prisoner would be eligible for parole in 20 years, less any credit for time served before sentencing. To prevent paperwork snarls, therefore, the sentencing judge needs to express the statutory policy explicitly, and provide in his sentence for a minimum as well as a maximum term of life imprisonment.

(2) If the statute provides for a term of years up to life imprisonment and the judge imposes a "flat" sentence of life imprisonment, when is the prisoner eligible for parole?

Answer: Here, the judge--no matter what he intended--has given a maximum sentence with no minimum specified. Therefore, if the crime were second-degree rape, see G.S. 14-21(2), the defendant would be eligible for parole immediately. In a quick check of the statutes, I can find no other up-to-life-imprisonment offense carrying no statutory minimum. There are, though, three kinds of up-to-life punishments specifying minimums:

(a) the special provisions of the habitual felon act which require that the prisoner serve at least 75 per cent of the 20-year minimum before he is eligible for parole;
(b) those that rule out probation and parole for the minimum seven-year terms set (second-degree burglary, armed robbery); and
(c) those that merely specify minimum terms without elaboration.

A fourth type can occur under the new G.S. 14-2.1 if an up-to-life-imprisonment crime constitutes the second deadly-weapon felony conviction occurring on or after September 1, 1977; this statute also mandates a minimum term of seven years without probation or parole.

Despite the reluctance of the Department of Correction to antagonize judges by sending judgments back for modification, the legislative

policy is unmistakably clear when the statutes specify no parole for a certain term; therefore, I find it unlikely that the Department of Correction would be justified in following the face of the judge's order in those cases and entering an immediate parole-eligibility date. If the Attorney General's advice continues to be that the Department of Correction has no power to modify or interpret judgments and commitments, the judge's order would have to be returned to the court for appropriate changes.

The answer becomes more difficult when the statute sets an "ordinary" minimum and the judge imposes a "flat" sentence of life imprisonment. As indicated in an earlier general discussion, answering this question requires a decision as to the power of judges to disregard statutory minimums; a question of procedural methods for challenging the judge's action; and the administrative practices of the Department of Correction in entering the parole eligibility date in its records. I assume that answers will be forthcoming in due course.

An illustrative case posing the issues last raised would occur when a judge gave a "flat" sentence of life imprisonment for second-degree murder. It certainly would not be fair to the prisoner to interpret the "flat" sentence of life imprisonment as setting a minimum term of life, and society would be uneasy to see immediate parole eligibility come about simply through a judge's paperwork error. From the foregoing, it becomes abundantly clear that until definite answers emerge all careful judges should state both maximum and minimum terms under the new law when there may be any doubt.

Minimum Sentence Identical to Statutory Minimum

In 1977 a legislative committee added a provision to G.S. 15A-1371(a) that was not a part of the Criminal Code Commission's original proposal. It stated that a prisoner given a "minimum sentence imposed only because required by law" should be eligible for parole upon completion of one fourth of the minimum time. The reason stated in committee was that certain statutes with high minimums were enacted upon the expectation that a deserving prisoner could become eligible for parole upon service of one fourth of the minimum. (The 25-year minimum for aggravated kidnapping comes to mind as an illustration.)

The Department of Correction complained that its personnel would have difficulty telling when a minimum sentence identical to the statutory minimum was imposed "only" because required by law--or whether the judge believed the sentence was deserved. Therefore, in the technical changes G.S. 15A-1371(a) is amended to apply the one-fourth rule when the judge-imposed minimum is identical to the statutory one--"unless the order of commitment indicates that the minimum sentence was not imposed solely because required by law."

The structure of this amendment needs to be noted carefully by judges. If a minimum sentence coincides with the statutory one and the judgment and commitment are silent on the issue, a special early parole eligibility date is available; the normal rules will apply only if the judge states that the sentence was not imposed solely because required

by law. To keep this matter from catching any judge unaware, it would probably be best if a standard provision were added to AOC-L Form 153. One I have proposed is:

> "[*Fill out only if there is a minimum sentence equal to the statutory minimum. See G.S. 15A-1371(a).*] The minimum sentence above (is) (is not) imposed solely because required by law."

Applying the rule discussed here to particular situations may be helpful to a full understanding:

(1) One could argue that crimes carrying a punishment of mandatory life imprisonment fall under the last sentence of G.S. 15A-1371(a) because the judge is left with no choice and is imposing a sentence "solely" because required by law. It seems clear to me, though, that the specific provision of parole eligibility after 20 years written into G.S. 15A-1371(a) for sentences of life imprisonment will supersede any attempt to apply the one-fourth rule. In addition, there is nothing left stating an equivalent in years to be divided by four, as the new code repealed the last portion of G.S. 14-2 which had previously set out an 80-year equivalency. (The only remaining equivalency provision seems to be the one in G.S. 14-7.6.)

(2) The last sentence of G.S. 15A-1371(a) will be overridden by specific parole limitations. These have been noted above: the requirement that an habitual felon serve at least 75 per cent of the sentence imposed, the two seven-year minimums for second degree burglary and armed robbery, and the new seven-year minimum applicable when there is a second felony conviction involving use of a deadly weapon.

(3) Even though imposition of a minimum term of imprisonment may be required, a judge may still suspend the sentence and place the defendant on probation except, as noted in G.S. 15A-1341(a), in capital cases, cases of mandatory life imprisonment, and cases in which the statute specifies no probation for a minimum term (i.e., the offenses listed in the paragraph above and, after March 1, 1979, certain repeat offenses of driving under the influence of liquor or drugs). If the statutory maximum does not exceed ten years, the special probation statute, G.S. 15A-1351(a), would also apply except as to the no-probation crimes.

Parole Revocation Not under Administrative Procedure Act

After a discussion with representatives of the Department of Correction, the Criminal Code Commission recommended deletion of the provisions making the parole revocation hearing subject to the Administrative Procedure Act, Chapter 150A of the General Statutes. It was pointed out that this Act contemplates much more cumbersome procedures than normally employed in parole revocation hearings, and that to authorize appeals to the courts would be unprecedented. To avoid the inevitable flood of procedural snarls and appeals to the courts by prisoners was one of the major reasons why the Department of Correction had been exempted from the Administrative Procedure Act. The Criminal Code Commission, therefore, recommended repeal of G.S. 15A-1377 and modification of G.S. 15A-1376(e)

simply to provide that the Parole Commission's regulations on the parole revocation hearing must be published in accordance with the provisions of the Administrative Procedure Act.

Laying the Foundation Still Required for Appeal

The general rule has always been that for most trial errors, including ones of constitutional dimension, a foundation for appeal must be laid by objection or exception at the trial level. The provisions of G.S. 15A-1446(d)(7), broadly interpreted, might have undermined this settled rule. The Criminal Code Commission, therefore, recommended its repeal.

Procedures for Taking Appeal

In 1977 a committee of the General Assembly inserted the provisions of former G.S. 15A-1448(a)(4) into the Trial and Appeallate Procedure Act to delay the running of the time limits on taking appeals until after delivery of the transcript to the clerk of court. After its enactment concern was expressed that this placed a power of delay of appellate review in the hands of the court reporter. In the process of reexamining this provision, the Criminal Code Commission was sensitive as to the need for coordinating any statute with the appellate rules of the Supreme Court of North Carolina, and this coordination occurred before the changes were made in G.S. 15A-1448. It is my understanding that the North Carolina Rules of Appellate Procedure will be amended so that they will be in harmony with the provisions of the Trial and Appellate Procedure Act, as amended in 1978.

Conditional Discharge and Expunction Left Untouched

G.S. 90-96(a) in the Controlled Substances Act provides for a conditional discharge and expunction procedure for minor drug offenders. Part of the procedure is placing the defendant on "probation" prior to the entry of a judgment in the case; if the defendant lives up to the conditions of "probation" he may have the criminal proceedings discharged without having a conviction on his record.

One legislator alert to the value of this proceeding noted that G.S. 15A-1342(c), in speaking of probation under the new Trial and Appellate Procedure Act, requires that a suspended sentence of imprisonment be a part of any order of probation. Since minor marijuana offenses have been partly decriminalized, and are subject to fine only, the legislator feared a court might hold the conditional discharge and expunction unavailable for marijuana offenders--as a suspended sentence of imprisonment could not accompany the "probation." This fear was probably groundless for the peculiar type of "probation" in G.S. 90-96(a) is obviously not regular probation, as no conviction occurs, but the technical change was made in that subsection as a matter of caution.

Transfer of Prisoners to Out-of-State Federal Institutions

G.S. 148-37(b) has for some time authorized the Department of Correction to make contracts with the United States with respect to

prisoners. We may, under contract, house federal prisoners, and we may send our prisoners to federal institutuons within North Carolina. The Department of Correction recently noted, however, that there was no provision for a contract that would allow North Carolina prisoners to be sent to an out-of-state federal prison. Officials of the Department of Correction approached legislators about a corrective provision, and it was decided this was a matter that could be incorporated in the technical changes to the Trial and Appellate Procedure Act. The importance of this change for judges and trial counsel is that it offers the opportunity of specialized rehabitation programs in out-of-state federal institutions that may be appropriate in special cases. A judge's order recommending that a prisoner be considered for such a program would obviously be given weight. Prosecutors relying upon the testimony of a defendant who gives State's evidence may particularly wish to take the steps necessary to see that the defendant is sent to a different prison system.

Attachment

TECHNICAL CORRECTIONS TO THE TRIAL AND APPELLATE PROCEDURE ACT

[Except for one provision specially noted, the following amendments take effect the date the Trial and Appellate Procedure Act takes effect--July 1, 1978. In the material below, matter in italics (*italics*) is added; matter struck through (~~struck-through~~) is deleted; and matter in regular type (regular type) is unchanged.]

GENERAL STATUTES OF NORTH CAROLINA.

CHAPTER 15.

CRIMINAL PROCEDURE.

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

. . . .

§ 15-196.1. Credits allowed.--~~The term of a determinate sentence or the minimum and maximum term of an indeterminate~~ *The minimum and maximum term of a* sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

. . . .

CHAPTER 15A.

CRIMINAL PROCEDURE ACT.

SUBCHAPTER X. General Trial Procedure.

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.--(a) . . . .

. . . .

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made *as a condition of special probation* pursuant to the provisions of ~~G.S. 15-199(10)~~ *G.S. 15A-1351*, or *probation* pursuant to the provisions of ~~G.S. 15-197.1~~ *G.S. 15A-1343(d)*. If an active sentence is imposed ~~other than by the provisions of G.S. 15-197.1,~~ the court may order that the defendant make restitution or reparation out of any earnings gained by the defendant if he attains work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order providing for restitution or reparation shall be in accordance with the applicable provisions of ~~G.S. 15-199(10)~~ *G.S. 15A-1343(d)*.

When restitution or reparation is ordered as a part of a plea arrangement or a condition of parole or work release privileges, the sentencing court court shall enter as a part of the commitment that restitution or reparation is ordered as a part of a plea arrangement. The Administrative

Office of the Courts shall prepare and distribute forms which provide ample space to make restitution or reparation orders incident to commitments~~, which forms shall be conveniently structured to enable the sentencing court to make its order~~.

. . . .

SUBCHAPTER XII. Trial Procedure in Superior Court.

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1221. Order of proceedings in jury trial; *reading of indictment prohibited.*--*(a)* The order of a jury trial, in general, is as follows:

. . . .

(b) At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury.

. . . .

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.--(a) The judge at appropriate times must admonish the jurors that it is their duty:

. . . .

(3) Not to form an opinion about the guilt or innocence of the of the defendant, or express any opinion about the case *until they begin their deliberations*;

. . . .

. . . .

SUBCHAPTER XIII. Disposition of Defendants.

ARTICLE 78.

Order of Commitment to Imprisonment.

§15A-1301. Order of commitment to imprisonment when not otherwise specified.--When a judicial official orders that a defendant be imprisoned he must issue an appropriate written commitment order. *When the commitment is to a sentence of imprisonment, the commitment must include the identification of the offense or offenses for which the defendant was convicted and, if the sentences are consecutive, the maximum sentence allowed by law upon conviction of each offense, and, if the sentences are concurrent or consolidated, the longest of the maximum sentences allowed by law upon conviction of any of the offenses.*

NOTE: The amendment to this section takes effect August 1, 1978.

. . . .

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally.--(a) Use of Probation.--A person who has been convicted of any noncapital criminal offense not punishable by a minimum term of life imprisonment *or a minimum term without benefit of probation* may be placed on probation as provided *by* ~~in~~ this Article.

(b) Supervised and Unsupervised Probation.--The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by *or assignment to* a probation officer.

. . . .

§ 15A-1342. Incidents of probation.--(a) . . . .

. . . .

(d) Mandatory Review of Probation.--Each probation officer must bring ~~all probationers~~ *the cases of each probationer* assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. *The probation officer must give reasonable notice to the probationer, and the probationer may appear.* The court must review the case file of probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision.--~~Probationers~~ *Supervised probationers* are subject to out-of-state supervision under the provisions of G.S. 148-65.1.

. . . .

§ 15A-1343. Conditions of probation.--(a) . . . .

(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:

. . . .

(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 evidence. The court may direct a probation officer to fix the manner of performing the restitution or reparation.~~ *as provided in subsection (d).*

. . . .

(16a) Within the first 30 days of his probation, visit, with his probation officer, a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation.

. . . .

. . . .

(d) Restitution as a Condition of Probation.--As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses for which the defendant has been convicted. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay. The court shall fix the manner of performing the restitution or reparation, and in doing so, the court may take into consideration the recommendation of the probation officer. An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. As used

herein, "restitution" shall mean compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein, "aggrieved party" shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local. Provided, that no government agency shall benefit by way of restitution or reparation except for particular damage or loss to it over and above its normal operating costs. Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State.

"§ 15A-1344. Response to violations; alteration and revocation.--(a) Authority to Alter or Revoke.--Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. The district attorney of the district in which the probation was imposed must be given reasonable notice ~~if the hearing is to be held in any other district.~~ *of any hearing to affect probation substantially.*

. . . .

(d) Extension and Modification; Response to Violations.--At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of the initial sentencing; *provided that probation may not be revoked solely for conviction of a misdemeanor unless it is punishable by imprisonment for more than 30 days.* The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(e) Special Probation in Response to Violation.--When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In

placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either ~~consecutive~~ *continuous* or ~~nonconsecutive~~ *noncontinuous*, at whatever time or intervals within the period of probation the court determines. If imprisonment is for ~~consecutive~~ *continuous* periods the confinement may be in either the custody of the Department of Correction or a local confinement facility. ~~Nonconsecutive~~ *Noncontinuous* periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

. . . .

§ 15A-1345. Arrest and hearing on probation violation.--(a) Arrest for Violation of Probation.--A probationer is subject to arrest for violation of conditions of probation *by a law-enforcement officer or probation officer* upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation. However, a probation revocation hearing under subsection (e) may be held without first arresting the probationer.

. . . .

(d) Procedure for Preliminary Hearing on Probation Violation.--The preliminary hearing on probation violation must be conducted by a judge who is sitting in the county where the probationer was arrested or where ~~probation was imposed.~~ *the alleged violation occurred.* If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the judicial district. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply at the hearing. If probable cause is found or if the probable cause hearing is waived, the probationer may be held for a revocation hearing, subject to release under the provisions of subsection (b). If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

. . . .

"§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.--When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. At the hearing the probationer has all rights and the court has all authority they have in a revocation hearing held before the superior court in the first instance. Appeals from lower courts to the superior courts from judgments revoking probation may be heard in term or

out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. *When the defendant appeals to the superior court because a district court has found he violated probation and has activated his sentence or imposed special probation, and the superior court, after a de novo revocation hearing, orders that the defendant continue on probation under the same or modified conditions, the superior court is considered the court that originally imposed probation with regard to future revocation proceedings and other purposes of this Article.* When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27.

. . . . .

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation.--

(a) The judge may sentence a defendant convicted of an offense for which the maximum penalty does not exceed 10 years to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within

the period of probation, consecutive or nonconsecutive, the court determines. *If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility.* The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one-fourth the maximum penalty allowed by law for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The period of probation, including the period of imprisonment required for special probation, may not exceed five years. The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

. . . .

(e) Youthful Offenders. If an offender is under the age of 21 years at the time of conviction, the court may sentence the offender as a youthful offender under the provisions of ~~Article 3A~~ *Article 3B* of Chapter 148 of the General Statutes.

. . . .

(g) Credit. Credit towards a sentence to imprisonment is as provided in Article 19A of Chapter 15 of the General Statutes.

§ 15A-1352. Commitment to Department of Correction or local confinement facility.--A person sentenced to imprisonment for a felony or a misdemeanor under this Article or for nonpayment of a fine under Article 84, Fines, must be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed is for a period ~~less than 180 days,~~ *of 180 days or less,* the commitment must be to a facility other than one maintained by the Department of Correction~~,~~ *, except as provided in G.S. 148-32.1(b).*

. . . .

§ 15A-1355. Calculation of terms of imprisonment.--(a) . . . .

~~(b) Credit.--To the extent that credit has not been given in the judgment or parole revocation order, the Department of Correction must give credit toward service of the maximum term and any minimum term of a sentence to imprisonment for:~~

~~(1) All the time spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence or for all time spent in a mental institution following a civil commitment arising from the criminal proceedings; and~~

~~(2) All time spent in confinement in another jurisdiction as a result of conviction for an offense which is based on the same facts and which contains all the elements of the offense for which sentence is being served in this State or of a lesser included offense.~~

(c) Credit for Good Behavior.--[No change.]

. . . .

ARTICLE 85.

Parole.

§ 15A-1371. Parole eligibility, consideration, and refusal.--

(a) Eligibility.--Unless his sentence includes a minimum sentence, a prisoner serving a term other than ~~life imprisonment or~~ one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under ~~G.S. 15A-1355(b) and (c)~~ *G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes*. Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years. A prisoner whose sentence includes a minimum sentence ~~imposed only because~~ *identical to a minimum sentence* required by law is eligible for release *on parole* upon completion of one fourth of the minimum time~~,~~, *unless the order of commitment indicates that the minimum sentence was not imposed solely because required by law.*

(b) Consideration for Parole. The Parole Commission must consider the desirability of parole for each person sentenced for a maximum term of 18 months or longer:

(1) ~~At least 60~~ *Within the period of 90* days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year; or

(2) ~~At least 60~~ *Within the period of 90* days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify *the prisoner and* the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must ~~issue a formal order granting or denying parole.~~ *give the prisoner written notice of its decision.* If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must ~~issue a formal order granting or denying parole~~ *give the prisoner written notice of its decision* at least once a year.

. . . .

(g) Automatic Parole in Absence of Finding.--A prisoner eligible for parole under subsection (a) and serving a *maximum* sentence of not less than six months for a misdemeanor or serving a sentence not less than six months nor as great as 18 months for a felony must be released on parole when he completes service of one third of his maximum sentence unless the Parole Commission finds in writing that:

. . . .

. . . .

"§ 15A-1376. Arrest and hearing on parole violation.--(a) Arrest for Violation of Parole.--A parolee is subject to arrest *by a law-enforcement officer or a parole officer* for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required.--Unless the hearing required by subsection (e) is first held or the parolee waives the hearing *or a continuance is requested by the parolee*, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within ~~four~~ *seven* working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released ~~four~~ *seven* working days after his arrest to continue on parole pending a hearing. *If the parolee is not within the State, his preliminary hearing is as prescribed by G.S. 148-65.1A.*

. . . .

(d) Procedure for Preliminary Hearing on Parole Violation.--The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the ~~court~~ *hearing officer* finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons

for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing.--Before finally revoking parole, the Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The ~~hearing is governed by the provisions of Article 3 of Chapter 150A of the General Statutes except:~~ *Parole Commission must adopt regulations governing the hearing and file and publish them as provided in Article 5 of Chapter 150A of the North Carolina General Statutes*

~~(1) The parolee is entitled to appear and speak in his own behalf and to confront and cross-examine adverse witnesses unless good cause is found for not allowing confrontation; and~~

~~(2) The hearing examiner must meet the requirements of subsection (c).~~

~~"§ 15A-1377. Appeal from revocation of parole. A person whose parole has been revoked may appeal the revocation under the provisions of Article 4 of Chapter 150A of the General Statutes.~~

. . . .

SUBCHAPTER XIV. Correction of Errors and Appeal.

ARTICLE 91.

Appeal to Appellate Division.

. . . .

§ 15A-1446. Requisites for preserving the right to appellate review.--

(a) . . . .

. . . .

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

. . . .

~~(7) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.~~

. . . .

. . . .

§ 15A-1448. Procedures for *taking* appeal.--(a) Time for Entry of Appeal, Jurisdiction over the Case.--

. . . .

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and *the period described in (1) and (2) has expired.*

~~a. The period described in (1) and (2) has expired; or~~

~~b. No motion for appropriate relief is pending and the parties file written consent that the case be transferred immediately to the appellate division; or~~

~~c.--Thirty-days-after-the-making-of-a-motion-for-appropriate relief-there-has-been-no-ruling-and-the-appealing-party files-with-the-clerk-a-written-request-that-the-case-be transferred-immediately-to-the-appellate-division.~~

(4) ~~For-the-purpose-of-computing-time-limitations-for-settling-of-the record-on-appeal,-docketing-the-appeal,-or-other-steps-in-the appellate-process,-the-appeal-is-considered-as-"taken"-on-the date-the-jurisdiction-of-the-trial-court-is-divested-under subdivision-(3),-or-the-date-a-transcript-is-delivered-to-the clerk-of-court,-whichever-is-later.~~ *If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied.*

. . . .

. . . .

CHAPTER 90.

MEDICINE AND ALLIED OCCUPATIONS.

ARTICLE 5.

North Carolina Controlled Substances Act.

. . . .

§ 90-96. Conditional discharge and expunction of records for first offense.--(a) Whenever any person who has not previously been convicted of any offense under this Article, or under any statute of the United States, or any state relating to controlled substances included in any schedule of

this Article pleads guilty to or is found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules III through VI of this Article, the court may without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. *Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine.** Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and idsmiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Discharge and dismissal under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

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* The section of the act inserting this sentence was followed by one not to be codified: "The provisions of the preceding sentence shall apply to all offenses committed on or after July 1, 1977."

The reference to July 1, 1977 is an apparent typographical error; It should be July 1, 1978.

CHAPTER 148.

STATE PRISON SYSTEM.

ARTICLE 3.

Labor of Prisoners.

. . . .

§ 148-33.2. Restitution by prisoners with work-release privileges.--

(a) . . . .

. . . .

(c) When an active sentence is imposed, the court shall consider whether, as a further rehabilitative measure, restitution or reparation should be ordered or recommended to the Parole Commission and the Secretary of Correction to be imposed as a condition of attaining work-release privileges. If the court determines that restitution or reparation should not be ordered or recommended as a condition of attaining work-release privileges, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be ordered or or recommended as a condition of attaining work-release privileges, it shall make its order or recommendation a part of the order committing the defendant to custody. The order or recommendation shall be in accordance with the applicable provisions of ~~G.S. 15-199(10)~~ *G.S. 15A-1343(d)*. The Administrative Office of the Courts shall prepare and distribute forms which provide ample space to make restitution or reparation orders or recommendations incident to commitments, which forms shall be conveniently structured to enable the sentencing court to make its order or recommendation.

. . . .

§ 148-37. Additional facilities authorized; contractual arrangements.--

(a) . . . .

(b) The Secretary of Correction may contract with the proper official of the United States or of any county or city of this State for the confinement of federal prisoners after they have been sentenced, county, or city prisoners in facilities of the State prison system or for the confinement of State prisoners in ~~federal, county or city facilities located in North Carolina,~~ *any county or any city facility located in North Carolina, or any facility of the United States Bureau of Prisons,* when to do so would most economically and effectively promote the purposes served by the Department of Correction. Any contract made under the authority of this section shall be for a period of not more than two years, and shall be renewable from time to time for a period not to exceed two years. Contracts for receiving federal, county, and city prisoners shall provide for reimbursing the State in full for all costs involved. The financial provisions shall have the approval of the Department of Administration before the contract is executed. Payments received under such contracts shall be deposited in the State treasury for the use of the State Department of Correction. Such payments are hereby appropriated to the State Department of Correction as a supplementary fund to compensate for the additional care and maintenance of such prisoners as are received under such contracts.

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ARTICLE 3B.

Facilities and Programs for Youthful Offenders.

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§ 148-49.16(b). Supervision of paroled youthful offenders and revocation of such parole.--(a) . . . .

(b) If at any time before unconditional discharge of a youthful offender the Parole Commission is of the opinion that for proper reason

parole should be revoked, revocation shall proceed under the provisions of ~~Article 4 of this Chapter.~~ *Article 85 of Chapter 15A of the General Statutes.* After revocation of parole, the Parole Commission may thereafter reinstate parole at such time as in the commission's discretion the youthful offender is ready for reinstatement. Notice to the Secretary of Correction of intent to reinstate parole shall not be required.

ARTICLE 4.

Paroles.

. . . .

§ 148-57.1. Restitution as a condition of parole.--(a) . . . .

. . . .

(c) When an active sentence is imposed, the court shall consider whether, as a rehabilitative measure, restitution or reparation should be ordered or recommended to the Parole Commission to be imposed as a condition of parole. If the court determines that restitution or reparation should not be ordered or recommended as a condition of parole, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be ordered or recommended as a condition of parole, it shall make its order or recommendation a part of the order committing the defendant to custody. The order or recommendation shall be in accordance with the applicable provisions of ~~G.S. 15-199(10)~~ *G.S. 15A-1343(d).* The Administrative Office of the Courts shall prepare and distribute forms which provide ample space to make restitution or reparation orders or recommendations incident to commitments, which forms shall be conveniently structured to enable the sentencing court to make its order or recommendation.

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Sections 38 and 39 of Chapter 711 of the 1977 Session Laws of North Carolina are rewritten to read as follows:

"Sec. 38. The eligibility for parole and work release of prisoners ~~not specified in G.S. 15A-1371(a)~~ *sentenced before the effective date of this act* is determined by the law applicable prior to the effective date of this act. ~~In applying G.S. 15A-1371(a) to sentences entered before the effective date of this act, a sentence to an absolute term of years, with no minimum, is regarded as having a minimum term equal to the absolute term.~~

"Sec. 39. This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of ~~Article 85, 'Parole'~~ *this act regarding parole* shall not apply to persons sentenced before July 1, 1978."