

STATUTES / RULES OF CRIMINAL PROCEDURE: Probation Revocations

Rule 27.4. Initiation of revocation proceedings; securing the probationer's presence; arrest

(a) INITIATION OF REVOCATION PROCEEDINGS.

(1) Petition by prosecutor or probation officer. If either the prosecutor or the probation officer responsible for supervision of the probationer has reasonable cause to believe that probationer has violated a condition or a regulation of probation or has acted contrary to the instructions issued by the probation officer, the prosecutor or the probation officer may petition the sentencing court to revoke probation.

(2) Initiation by the court. The sentencing court, on its own motion, may initiate proceedings to revoke probation by an order to show cause specifying the alleged violation of conditions, regulations, or instructions.

(b) SECURING THE PROBATIONER'S PRESENCE. Pursuant to a petition to revoke or an order to show cause, the sentencing court may issue a warrant for the probationer's arrest, or the court may issue a summons under the conditions provided in Rule 3.1(b), directing the probationer to appear on a specified date for a revocation hearing.

(c) ARREST BY THE PROBATION OFFICER. The probationer may be arrested without a warrant by the probation officer responsible for his supervision for violation of a condition of probation or regulation imposed or instructions issued, if such arrest is reasonably necessary to prevent the probationer from hiding or fleeing from the jurisdiction of the court or to prevent commission by the probationer of a crime or a further violation of conditions of probation or regulations imposed or instructions issued.

Rule 27.5. Initial appearance after arrest

(a) INITIAL APPEARANCE. When a probationer is arrested pursuant to Rule 27.4(b) or Rule 27.4(c), the probation officer shall be notified immediately (unless the officer made the arrest), and the probationer shall be taken without unnecessary delay before the judge who issued the warrant or summons, if available, or, in case of an arrest without a warrant, before the original sentencing judge, if available; otherwise, the probationer shall be taken before another judge of the same district or circuit, who shall

- (1) Inform the probationer of the alleged violation of probation and furnish the probationer with a written copy thereof;
- (2) Inform the probationer that any statement the probationer makes prior to the hearing may be used against the probationer;
- (3) Advise the probationer of his or her right to request counsel and appoint counsel to represent an indigent probationer if the requirements of Rule 27.6(b) are met;
- (4) Set the date of the revocation hearing; and
- (5) Determine whether the probationer is to be released pending the probation revocation hearing or is to be held without bond.

In cases involving breaches of conditions of probation because of nonpayment of fines, costs, restitution, or other court-ordered assessments, the court, before the probationer is incarcerated, must inquire into the probationer's financial status and determine whether the probationer is indigent.

(b) **SUMMARY DISPOSITION.** The probationer may waive the probation hearing under Rule 27.6(a) and the judge of the sentencing court may make a final disposition of the issue, if:

- (1) The probationer has been given sufficient prior notice of the charges and sufficient notice of the evidence to be relied upon; and
- (2) The probationer admits, under the requirements of Rule 27.6(c), that he committed the alleged violation. (Amended 10-8-97, eff. 12-1-97.)

Committee Comments to Amendment to Rule 27.5(a) Effective December 1, 1997

This amendment to Rule 27.5(a) recognizes the fact that the release provisions of Rule 7.2(b) did not adequately address the release of a probationer arrested for a violation of probation conditions and recognizes that the provisions of § 15-13-109, Ala. Code 1975, granting the court the discretion to set bail for a probationer who has been arrested, govern the release of a probationer pending the probation revocation hearing.

Rule 27.6. Revocation of probation

(a) **HEARING.** A hearing to determine whether probation should be revoked shall be held before the sentencing court within a reasonable time after the probationer's initial appearance under Rule 27.5.

(b) PRESENCE; RIGHT TO COUNSEL. The probationer is entitled to be present at the hearing and to be represented by counsel. Counsel will be appointed to represent an indigent probationer upon request:

(1) If the probationer makes a colorable claim that the probationer has not committed the alleged violation of the conditions or regulations of probation or the instructions issued by the probation officer; or

(2) Even when the violation is a matter of public record or is uncontested, if there are substantial reasons that justify or mitigate the violation and that may make revocation inappropriate, and the reasons are complex or otherwise difficult to develop or present.

(c) ADMISSIONS BY THE PROBATIONER. Before accepting an admission by a probationer that the probationer has violated a condition or regulation of probation or an instruction issued by the probation officer, the court shall address the probationer personally and shall determine that the probationer understands the following:

(1) The nature of the violation to which an admission is offered;

(2) The right under section (b) to be represented by counsel;

(3) The right to testify and to present witnesses and other evidence on probationer's own behalf and to cross-examine adverse witnesses under subsection (d)(1); and

(4) That, if the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer may still be tried for that offense, and although the probationer may not be required to testify, that any statement made by the probationer at the present proceeding may be used against the probationer at a subsequent proceeding or trial.

The court shall also determine that the probationer waives these rights, that the admission is voluntary and not the result of force, threats, coercion, or promises, and that there is a factual basis for the admission.

(d) NATURE OF THE HEARING.

(1) The judge must be reasonably satisfied from the evidence that a violation of the conditions or regulations of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and to cross-examine adverse witnesses who appear and testifies in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

(2) If the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer shall be advised at the beginning of the revocation hearing that, regardless

of the outcome of the revocation hearing, the probationer may still be held for that offense and that any statement made by the probationer at the hearing may be used against the probationer at a subsequent proceeding or trial.

(e) **DISPOSITION.** If the court finds that a violation of the conditions or regulations of probation or instructions occurred, it may revoke, modify, or continue probation. Probation shall not be revoked for violation of a condition or regulation if the probationer had not received a written copy of the condition or regulation.

(f) **RECORD.** The judge shall make a written statement or state for the record the evidence relied upon and the reasons for revoking probation.

Committee Comments

Rules 27.5 and 27.6 are intended to comply with *Armstrong v. State*, 294 Ala. 100, 312 So. 2d 620 (1975), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Rules 27.5 and 27.6 together set up a two-hearing process specifically required by *Gagnon*. Rule 27.5 provides for an initial appearance before the judge who issued the warrant for the probationer's arrest, if the probationer is arrested pursuant to an arrest warrant, or, if the probationer is arrested without a warrant, before the original sentencing judge, if available, or before another judge or magistrate. Rule 27.6(a) then provides for the revocation hearing itself.

Rule 27.5(b) allows the probationer to waive a revocation hearing within carefully defined limits. While *Gagnon* is silent on whether the second hearing may be waived, *Armstrong* says that two hearings are not necessary if at the first hearing the probationer has received such sufficient notice of the charges against him and of the evidence of probation violation that the probationer can make an adequate defense. The rule as drafted complies with *Gagnon*.

Rule 27.6(b) provides for the probationer's right to counsel in all instances. The right to appointed counsel for indigents is more restricted. *Gagnon* applied a case-by-case due process approach. Certain minimal guidelines were set forth, and section (b) tracks the language of the *Gagnon* decision. The Alabama Supreme Court in *Armstrong* adopted this same language in a footnote.

The United States Supreme Court specifically left open the question whether a probationer who can afford to hire a lawyer has an absolute right to be represented by counsel. This rule specifically addresses the question, since the right to the presence of counsel covered by Rule 6.1(a) and Art. I, § 6, Alabama Constitution of 1901, is as broad as possible and would cover this situation.

Under Ala. Code 1975, § 15-22-54, probation cannot be revoked without a hearing. However, there is no Alabama statute which requires a formal trial, and the court is not bound by the strict rules of evidence.

Specific time limits are not imposed under this rule. The probationer may request either an acceleration or postponement of the hearing date, depending on the particular circumstances. However, it is contemplated that a hearing will be held as soon as feasible and that a probationer will not be subjected to lengthy or unwarranted confinement prior to hearing.

The procedure for accepting an admission applies at either the initial appearance or the revocation hearing. If there is no admission, the hearing is conducted pursuant to section (d).

The court which has legally placed a prisoner on probation has a vested right to revoke or to modify any condition or period of probation. *Reynolds v. State*, 28 Ala. App. 246, 181 So. 797 (1938). Section (d) is designed to prevent arbitrary actions by probation officers seeking the aid of the court in revoking probation and to ensure compliance by probationer with regulations or conditions of probation or instructions pursuant to Rules 27.1 and 27.2. Although probation revocation may follow any violation by the probationer of a condition of his probation, revocation followed by imprisonment is not the recommended disposition, unless:

- (1) Confinement is necessary to protect the public from further criminal activity by the probationer; or
- (2) The probationer is in need of correctional treatment which can most effectively be provided if he is confined; or
- (3) It would unduly depreciate the seriousness of the violation if probation were not revoked.

Other intermediate steps which should be considered in every case as possible alternatives to revocation include:

- (1) A review of the conditions, followed by changes where necessary or desirable;
- (2) A formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions;
- (3) A formal or informal warning that further violations could result in revocation.

Section (f) is included to give a reviewing court a basis for evaluating the revocation hearing and decision. Both *Gagnon, supra*, and *Armstrong, supra*, require that a written statement be made as to the evidence relied upon and the reasons for revoking probation. A written judgment entry would constitute a sufficient written statement.

See *Stout v. State*, 45 Ala. App. 262, 229 So. 2d 37 (1969).

§ 15-22-54.1. Resentencing as a technical violator

- (a) Any person now serving a prison sentence based on revocation of probation who would have been an eligible offender as defined in Section **15-22-54** at the time of revocation shall be entitled to be resentenced upon petition to the sentencing court. Such petition shall be on a form and filed in the manner prescribed by the Administrative Office of Courts. Petitions shall be considered authorized motions for modification of sentence, assigned a unique identifier by the Administrative Office of Courts, and shall not require payment of a filing fee.
- (b) The court shall have jurisdiction to resentence the offender in accordance with the terms of this section, upon a showing of the following:
 - (1) The petitioner met all requirements of an eligible offender as defined in Section **15-22-54** at the time of revocation.
 - (2) Probation was thereafter revoked and the petitioner was sentenced to the penitentiary only as a result of administrative violations of probation.
 - (3) The petitioner has no disciplinary infractions while serving the sentence in the penitentiary.
 - (4) The petitioner has no pending criminal charges or convictions for a new offense since the time the petitioner was placed on probation.
- (c) A successive petition shall not be considered by the trial court unless new grounds are raised in the petition. Any successive petition which is not set for a hearing by the court within 30 days after filing is deemed denied by operation of law.

Cite as ALA. CODE § 15-22-54.1 (1975)