

Easy Come, Easy Go: Legislature Removes Affidavit Requirement for Citizen-Initiated Criminal Process

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About a year ago, I wrote [this post](#), discussing what was then a new provision in [G.S. 15A-304](#)(b): “[A]n official shall only find probable cause based solely on information provided by a person who is not a sworn law enforcement officer if the information is provided by written affidavit.” This year, the General Assembly reversed course and removed the affidavit requirement.

The law before 2017. Prior to 2017, [G.S. 15A-304](#) simply required a judicial official, before issuing an arrest warrant, to receive “sufficient information, supported by oath or affirmation, to make an independent judgment that there is probable cause.” The statute did not differentiate between information provided by a law enforcement officer and information provided by a civilian, and it allowed for the information to be presented by affidavit or by sworn oral testimony. The criminal summons statute, [G.S. 15A-303](#), incorporated by reference the probable cause standard of the arrest warrant statute. The upshot of all this is that an aggrieved person could appear before a magistrate, swear orally to facts providing probable cause, and ask the magistrate to issue an arrest warrant or a criminal summons.

The 2017 change. As noted above, in 2017 the General Assembly effectively required citizens seeking criminal process to put the facts supporting probable cause in a written affidavit. It also strengthened the statutory preference for issuing a criminal summons, rather than an arrest warrant, in a citizen-initiated case.

The 2018 change. This legislative session, the General Assembly removed the written affidavit requirement. It did so in [S.L. 2018-40](#), an “omnibus” bill that contains multiple provisions concerning various aspects of the court system. The new law leaves in place the strengthened presumption for issuing a criminal summons rather than an arrest warrant in a citizen-initiated case.

Effective date of the 2018 change. The overall effective date for S.L. 2018-40 is “when it becomes law,” which was on June 22. However, Section 7.2 of the bill states that the part of the law dealing with affidavits has its own effective date, which is “October 1, 2018 . . . [for] warrants issued on or after that date.”

Reason for the change. The short title for the bill removing the affidavit requirement is “AOC Omnibus Changes,” so it appears that the Administrative Office of the Courts suggested that it be removed. My understanding is that the AOC was concerned that the written affidavit requirement was inconsistent with federal law regarding the access of disabled persons and non-English speakers to the courts. I don’t know the details of the legal concerns, but I do know that dealing with complainants who couldn’t read or write, or who couldn’t read or write in English, was a challenge for magistrates.

Local policies. Even before 2017, some counties required complainants to fill out written affidavits, or at least written statements, as a matter of local policy. Some court officials thought that this made complainants adhere more closely to the truth, and others thought that it helped complainants organize their thoughts and present their grievances more cogently. Nothing in the new bill directly addresses such local policies, but the federal law considerations that worked against the statutory written affidavit requirement might be pertinent to local policies as well – at least to local policies that don’t allow exceptions for people for whom completing a written affidavit would be a severe challenge. Judicial

officials interested in advice on that issue may wish to contact NCAOC legal counsel. It is worth noting that NCAOC plans to circulate a memo regarding the statutory change in September as the effective date approaches, and that memo may answer some court officials' questions.