

# Probation Violations

Jamie Markham  
September 16, 2009



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## Objectives

- Survey probation hearing procedure
- Learn possible hearing outcomes
- Understand available defenses
- Be aware of coming changes



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## Call any time....

- Sentencing
- Prisons
- Jails
- Probation
- Sex offenders



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## Notice

- DCC-10 (Violation Report)

 A document titled 'VIOLATION REPORT' with various fields and text. The document appears to be a form or report related to probation violations.

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## Preliminary Violation Hearings

- Required under G.S. 15A-1345(c)
  - Within 7 working days of arrest, to determine PC
  - Only required if probationer detained on PV only
  - If not held within 7 working days, release probationer pending final violation hearing
- Probably can be done by a district court judge, even in superior court cases

What's happening in your district?

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## Violation Hearings

- Proper venue, proper judge
- Class H & I felonies pled in district court
  - By default, violation hearing in superior court
  - With consent, violation hearing in district court
    - Appeal (de novo) is to superior court

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## Hearing Procedure

- Rules of evidence don't apply
  - Hearsay admissible
  - Exclusionary rule inapplicable
- Proof to judge's "reasonable satisfaction"
- Violation must be "willful" or "without lawful excuse"

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## Hearing Outcomes

- Continuation
- Modification
- Extension
- Termination
- Contempt
- Revocation

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## Modification

- At any time, for good cause shown
- After violation, Intermediate conditions may be added to a Community case



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## Extending Probation

- Two types: *ordinary* and *special purpose*



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## Extending Probation: Ordinary

- At any time prior to expiration, *for good cause shown*, the court may extend probation to the 5-year maximum
  - No violation required
  - No limitation to last 6 months



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## Extending Probation: Special Purpose

- Extension by up to 3 years beyond the **original** period if:
  - Probationer consents
  - During last 6 months of **original** period, *and*
  - Extension is for restitution or medical or psychiatric treatment
- This is the only way probation may extend beyond 5 years

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## Extending Probation: Illustration

- 1 Feb 2001: 36-month probation period
- 1 Feb 2004: probation set to expire
- 26 Feb 2004: defendant G...  
month extension (to Feb 2005)
- 9 January 2006: defendant G...  
another 24-month extension (to Feb 2008)
- Probation revoked on 30 April 2007

No jurisdiction to  
Goes beyond 5  
years; not a "special  
purpose" extension  
No jurisdiction to  
revoke

State v. Satanek (2008)

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## Termination

- At any time
- "Terminate unsuccessfully"

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## Contempt

- In lieu of revocation
- Requires findings beyond a reasonable doubt

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## Revocation

- Revoking judge can:
  - Reduce sentence
  - Change the sentencing judge's decision on consecutive/concurrent sentences
    - Silence = concurrent

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## Revocation

- Revocation for new crimes
  - Not solely for Class 3 misdemeanor
  - Not based on pending charge
  - Not based on acquitted conduct

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## Credit Rules

- When a sentence is activated, credit:
  - Pretrial confinement
  - Time jailed awaiting revocation hearing
  - Time served under active portion of split
  - Time spent at DART-Cherry
  - Time spent imprisoned for contempt under G.S. 15A-1344(e1)
- No credit for home detention under EHA



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## Defenses

- Lack of written notice of the condition
  - Including any modifications



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## Defenses

- Lack of “willfulness”
  - Especially for monetary conditions
  - Burden on defendant to show good faith inability to pay



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## Defenses

- Lack of jurisdiction
  - Court's power to act generally ends when probation expires
  - G.S. 15A-1344(f) extends jurisdiction

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## Jurisdiction: Hearings after Expiration

The court may extend, modify, or revoke probation after the expiration of the period of probation if:

1. Violation report filed [stamped] before period expired
2. The violation occurred prior to expiration
3. The court finds for "good cause shown and stated" that probation should be extended, modified, or revoked

**Reasonable efforts finding no longer required**




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## Jurisdiction: Absconders

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION Division of Community Corrections <b>POLICIES - PROCEDURES</b>	Number: V.1 Page: 1 Subject: Absconders Date: February 1, 2008
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**GENERAL PROVISIONS**  
An absconder is an offender who is actively avoiding supervision by missing his/her whereabouts unknown to the supervising officer. Prior to declaring an offender as an absconder by using a *Probation Report* (see V. II, *Procedures*), the officer will make due and diligent attempts to locate the offender and will document these efforts in the offender's narrative system.

- 1. REQUIREMENTS FOR DECLARING AN OFFENDER AN ABSCONDER**  
Prior to declaring an offender as an absconder, the officer will:
- (1) Telephone the offender, if he/she has a telephone;
  - (2) Conduct a home contact, including a contact in the evening or on the weekend. The officer must leave a notice to the offender directing them to report for an office contact or otherwise contact their officer;
  - (3) Make a work and/or school collateral contact;
  - (4) Make a relative or friend contact based on information in the file;
  - (5) Conduct a law enforcement check, including a jail/hospital check; and
  - (6) Check with the landlord if applicable.

This process will begin when the officer has specific information that the offender has absconded or when the officer has been unable to locate:

- Community offenders for thirty (30) days;
- Intermediate offenders for two (2) weeks; or
- Sex offenders for twenty-four (24) hours.

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## Jurisdiction: Tolling

- “The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation.”

G.S. 15A-1344(d)



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## Jurisdiction: Tolling

- A new charge for an offense other than a Class 3 misdemeanor automatically tolls probation



- Defendant remains subject to supervision during the tolled period



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## Jurisdiction: Tolling

- New “credit-back” provision
  - If acquitted or charge dismissed, credit back time spent in tolled status



- For offenses committed o/a Dec. 1, 2009



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## Defenses

- Improper period of probation
  - Defaults:
    - Misdemeanor–Community 6-18 months
    - Misdemeanor–Intermediate 12-24 months
    - Felony–Community 12-30 months
    - Felony–Intermediate 18-36 months

**SUSPENSION OF SENTENCE**  
Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on  supervised  unsupervised probation for \_\_\_\_\_ months.

1. The Court finds that a  longer  shorter period of probation is necessary than that which is specified in G.S. 15A-1343 2(d).

- Two-step: MAR + motion to dismiss

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## Defenses

- Invalid condition of probation
  - Not reasonably related to the crime and the offender's rehabilitation
  - Unconstitutional
    - E.g., mandatory AA/NA (First Amendment)
- But remember, a violation of 1 valid condition is all it takes to revoke

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## Probation Reform

- Default conditions for all probationers:
  - Warrantless searches
  - Not use, possess, or control drugs
- Default intermediate conditions
  - Community service at officer's direction
  - Not use, possess, or control alcohol
  - Remain in the county
  - Counseling and treatment at officer's direction
- Access to juvenile records

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- Questions?



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# Probation Violations



September 16, 2009

Jamie Markham  
Assistant Professor, UNC School of Government  
919.843.3914, markham@sog.unc.edu  
<http://sogweb.sog.unc.edu/blogs/ncclaw/>

## Preliminary Issues

**Notice.** Under G.S. 15A-1345(e), when a probationer is alleged to have violated probation, the State must give the probationer “notice of the hearing and its purpose, including a statement of the violations alleged . . . at least 24 hours before the hearing,” unless such notice is waived by the probationer. The DCC-10 (Violation Report) form ordinarily constitutes notice of the alleged violations and the hearing. Probation may only be revoked based on violations alleged in the notice provided to the defendant. *State v. Cunningham*, 63 N.C. App. 470 (1983).

**Preliminary violation hearings.** Under G.S. 15A-1345(c), a preliminary hearing on a probation violation must be held within seven working days of an arrest, unless the probationer waives the preliminary hearing or a final violation hearing is held first. The purpose of the preliminary hearing is to determine whether there is probable cause to believe that the probationer violated a condition of probation. If the hearing is not held the probationer must be released seven working days after his arrest to continue on probation pending a hearing. That doesn’t mean the violation is “dismissed”; it just means the probationer cannot be detained any longer without a hearing.

The preliminary hearing should be conducted by “a judge sitting in the county where the probationer was arrested or where the alleged violation occurred.” No statutory language limits authority to conduct preliminary hearing to a judge “entitled to sit in the court which imposed probation” (as is the case in G.S. 15A-1344(a), limiting authority to alter or revoke probation). Thus, any judge—district or superior court—may conduct the preliminary hearing, regardless of whether the underlying crime is a misdemeanor or felony.

The preliminary hearing only needs to be held when the probationer is detained solely for a violation of probation. A preliminary hearing is not required when the probationer is released on bail pending the final violation hearing, and is likewise unnecessary when the defendant is also being held on a new charge for which he or she is unable to obtain pretrial release. *State v. O’Connor*, 31 N.C. App. 518 (1976). In any event, the failure to hold a preliminary hearing apparently does not deprive the court of jurisdiction to hear a final violation hearing. *State v. Seay*, 59 N.C. App. 667 (1982).

## The Violation Hearing

**Where and by whom.** Any judge of same level as the sentencing judge, located in the district where (a) the probation was imposed, (b) the alleged violation took place, or (c) the probationer currently resides, has authority to modify, extend, terminate, or revoke probation. G.S. 15A-1344(a). There is a limited exception to this rule: under G.S. 15A-1342(h), a judge who sentences the offender to unsupervised probation may limit jurisdiction to alter or revoke the probation to him or herself.

Under G.S. 7A-272(c), with the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a plea of guilty or no contest to a Class H or I felony. If a person enters a felony plea in district court, is placed on probation, and is later alleged to have violated that probation, the violation hearing is, by default, held in superior court. G.S. 7A-271(e). The district court can hold the violation hearing if the State and the defendant consent (the judge gets no vote regarding the violation hearing). Appeal of a violation hearing held in district court is to the superior court, not to the court of appeals. *State v. Hooper*, 358 N.C. 122 (2004).

## The Nature of the Hearing

**Evidence.** The rules of evidence do not apply at hearings to revoke probation. G.S. 15A-1345(e). Hearsay is admissible, though it probably should not be the sole information upon which revocation is based. *See State v. Hewett*, 270 N.C. 348 (1967). The exclusionary rule does not apply at probation revocation hearings; evidence obtained as a result of an unlawful search is admissible. *State v. Lombardo*, 74 N.C. App. 460 (1985).

**Standard of proof.** To activate a suspended sentence for failure to comply with a probation condition, the State must present evidence sufficient to *reasonably satisfy* the judge that the defendant has willfully violated a valid condition of probation, or that the defendant has violated a condition without lawful excuse. *State v. White*, 129 N.C. App. 52 (1998). If the defendant offers evidence that he or she was unable to comply with the conditions of probation, the court must make findings that the defendant's evidence was considered. *State v. Hill*, 132 N.C. App. 209 (1999).

## Potential Outcomes of a Violation Hearing

**Continue probation unchanged.** Self-explanatory.

**Modification.** For good cause shown (i.e., not just after a violation), the court may at any time prior to expiration or termination modify the conditions of probation. G.S. 15A-1344(d). In addition to the conditions of probation set out in the General Statutes, the court may add any condition of probation determined by the court to be reasonably related to the defendant's rehabilitation. Upon a finding that an offender sentenced to community punishment has violated on or more conditions of probation, the court may add conditions of probation that would otherwise make the sentence an intermediate punishment. G.S. 15A-1344(a).

**Extension.** The General Statutes describe two different types of probation extensions, *ordinary extensions* under G.S. 15A-1344(d), and *special-purpose extensions* under G.S. 15A-1343.2. (I use the terms “ordinary” and “special-purpose” for clarity; they do not appear in the General Statutes.)

*Ordinary extensions* may, after notice and hearing, be ordered at *any time* prior to the expiration of probation for “good cause shown” (no violation need have occurred). The total maximum probation period for extensions under this provision is 5 years. G.S. 15A-1344(d).

*Special-purpose extensions* can be used to extend the probationer’s period of probation by up to 3 years beyond the original period of probation, including beyond the five-year maximum, if all of the following criteria are met:

- (1) The probationer consents to the extension;
- (2) The extension is being ordered during the last six months of the *original* period of probation (note: if probation has previously been extended, the offender is no longer in his or her *original* period of probation); and
- (3) The extension is necessary to complete a program of *restitution* or to complete *medical or psychiatric treatment*. G.S. 15A-1343.2.

Extensions for these special purposes are the only way to extend a period of probation beyond 5 years, and only when the *original* period was 5 years could probation be extended to as long as 8 years under this provision.

**Termination.** The court may terminate probation at any time if warranted by the conduct of the defendant and the ends of justice. G.S. 15A-1342(b). The concept of “unsuccessful” or “unsatisfactory” termination does not appear in the General Statutes or appellate case law.

**Contempt.** If a probationer willfully violates a condition of probation the court may hold him or her in criminal contempt in lieu of revocation. G.S. 15A-1344(e1). Unlike probation violations, contempt must be proven beyond a reasonable doubt. A sentence for criminal contempt may not exceed 30 days. Time spent imprisoned for contempt under this provision apparently counts for credit against the suspended sentence if it is ever activated. *State v. Belcher*, 173 N.C. App. 620 (2005).

**Revocation.** Revocation means the probationer’s suspended is sentence is activated. Often the sentence will be activated in the same form it was entered by the original sentencing judge, but the revoking judge has limited discretion to modify the sentence.

*Reduction of the suspended sentence.* A revoking court can, upon revocation, reduce the length of a suspended sentence of imprisonment. For felonies, the reduction must be within the original range (i.e., presumptive, mitigated, or aggravated) established for the class of offense and prior record level of the sentence being activated. G.S. 15A-1344(d1).

*Consecutive/concurrent sentences upon revocation.* Under G.S. 15A-1344(d), 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.*” The court of appeals has interpreted the last clause of this provision to mean that the revoking judge can change the concurrent/consecutive decision rendered by the original sentencing judge. *State v. Hanner*, 188 N.C. App. 137 (2008); *State v. Paige*, 90 N.C. App. 142 (1988). The revoking judge can, under *Hanner* and *Paige*, turn what would have been concurrent sentences into consecutive sentences—even, apparently, when the original concurrent sentences were entered pursuant to a plea. (The original judgment in *Hanner* was part of a plea, though it appears that the original sentencing court ran certain sentences concurrently even though the defendant had actually *agreed* that they would run *consecutively*.) If the revoking judge does not specifically state on the judgment activating the suspended sentence that it is to run consecutive to another sentence, DOC will run it concurrently with any other sentence the defendant is obligated to serve.

*Revocation based on a new crime.* Generally, a conviction for a new crime is also a violation of probation, though probation may not be revoked solely for a conviction of a Class 3 misdemeanor. G.S. 15A-1344(d). Probation likewise should not be revoked solely on the basis of a *pending charge* until there is a conviction or a plea of guilty to that charge. *State v. Guffey*, 253 N.C. 43 (1960). Additionally, probation generally should not be revoked on the basis of a criminal charge of which the probationer has been acquitted, *State v. Hardin*, 183 N.C. 815 (1922), unless the revoking judge makes independent findings that the defendant’s behavior constitutes a violation. *State v. Causby*, 269 N.C. 747 (1967).

*Credit for time served.* If probation is revoked and a sentence is activated, the probationer should get credit for the following time under G.S. 15-196.1:

- The active portion of a split sentence. *State v. Farris*, 336 N.C. 553 (1994);
- Time spent at DART-Cherry as a condition of probation. *State v. Lutz*, 177 N.C. App. 140 (2006);
- Presentence commitment for study. *State v. Powell*, 11 N.C. App. 194 (1971);
- Hospitalization to determine competency to stand trial. *State v. Lewis*, 18 N.C. App. 681 (1973);
- A federal court interpreted G.S. 15-196.1 to allow credit for time spent in confinement in another state awaiting extradition. *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983);
- Time spent in the now-defunct IMPACT boot camp program. *State v. Hearst*, 356 N.C. 132 (2002);
- Time spent imprisoned for contempt under G.S. 15A-1344(e1). *State v. Belcher*, 173 N.C. App. 620 (2005);
- But credit should NOT be awarded for time spent under electronic house arrest. *State v. Jarman*, 140 N.C. App. 198 (2000).

**Elect to serve.** Technically a probationer may not “elect to serve” his or her sentence; G.S. 15A-1341(c) used to have a provision allowing for that, but it was repealed in 1995 (S.L. 1995-429). A defendant can, of course, simply admit to a violation of probation that can then serve as a basis for

revocation. Regarding admissions generally, they are sometimes a part of an agreement in which the probationer admits a violation in return for the DA's recommendation to the court that probation not be revoked. Be aware, however, that a judicial finding of a violation of probation, even if it does not lead to revocation, can serve as the basis for an aggravating factor if the person is later sentenced for a felony. G.S. 15A-1340.16(d)(12a).

## Defenses

**Lack of notice.** A defendant must be given a written statement explicitly setting forth the conditions on which he or she is being released. If any conditions are modified, the probationer must receive a written statement of the modification. G.S. 15A-1343(c). Probation may not be revoked for violation of a condition unless the defendant had written notice that the condition applied to him or her; oral notice alone is insufficient. *State v. Suggs*, 92 N.C. App. 112 (1988). A violation report need not indicate precisely which condition the probationer has violated; rather, it need only allege facts that amount to a violation. *State v. Hubbard*, \_\_ N.C. App. \_\_ (July 7, 2009).

**Willfulness.** Probation may not be revoked unless a violation was either willful or without a lawful excuse. *State v. Hewett*, 270 N.C. 348 (1967). With respect to monetary conditions, probation may not be revoked for failure to pay all or part of what has been ordered if the probationer made a good faith effort to pay. The burden is on the probationer to show that he or she could not pay despite an effort made in good faith. *State v. Jones*, 78 N.C. App. 507 (1985). If the money owed is for a fine and the defendant has shown a good faith inability to pay, the court may (1) allow additional time for the defendant to pay, (2) reduce the amount owed, or (3) remit the fine altogether. G.S. 15A-1364(c).

**Jurisdiction.** A court's jurisdiction to review a probationer's compliance with the terms of his or her probation is limited by statute. Once the period of probation expires, the court loses power over the defendant, except as provided in G.S. 15A-1344(f). *State v. Camp*, 229 N.C. 524 (1980).

Sometimes probation violation hearings cannot be held before the probationer's period of probation has expired, either because the alleged violation occurred near the end of the period of probation, or because the probationer absconded or eluded arrest on the violation. G.S. 15A-1344(f) is a grant of additional jurisdiction to the courts to hear probation violations after the period of probation has expired. This section was modified in 2008 (S.L. 2008-129) to broaden the court's power in the after-expiration scenario, and to make it easier to preserve the court's jurisdiction to act.

Under the amended law (effective for hearings held after December 1, 2008, regardless of when the offender originally was placed on probation), the court may "extend, modify, or revoke probation" after the expiration of the period of probation if (1) the State files a written violation report before the expiration of the probation period, (2) the court finds that the probationer violated one or more conditions of probation prior to the expiration of the period of probation, and (3) the court finds for good cause shown and stated that probation should be extended, modified,

or revoked. The amended law does not change the requirement that to be *filed*, a violation report must be file stamped before the period expires. *State v. Hicks*, 148 N.C. App. 203 (2001), *State v. Moore*, 148 N.C. App. 568 (2002). In the absence of a file stamped motion, dated before the period of probation expires, the trial court is without jurisdiction to conduct a probation violation hearing after the end of the probationary period. Note that these jurisdictional provisions apply with equal force for those on probation under G.S. 90-96, and probably also to those on supervised probation pursuant to a deferred prosecution agreement. *State v. Burns*, 171 N.C. App. 759 (2005).

Prior to the 2008 amendments to the law, in order to preserve its jurisdiction to act after the period of probation expired, the court had to make a finding of the State’s “reasonable effort to notify the probationer and to conduct the hearing earlier.” *State v. Hall*, 160 N.C. App. 593 (2003); *State v. Bryant*, 361 N.C. 100 (2006). Under the 2008 amendments to the law, the court no longer has to make a finding of the State’s “reasonable efforts” to preserve its jurisdiction to act after the period of probation.

*A note on absconders.* “Absconder” is not a statutory term; rather, it is defined in DCC policy as follows:

<p>STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION <i>Division of Community Corrections</i> <b>POLICIES - PROCEDURES</b></p>	<p>Number: V.I Page: 1 Subject: <b>Absconders</b> Date: February 1, 2008</p>
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**GENERAL PROVISIONS**  
An *absconder* is an offender who is actively avoiding supervision by making his/her whereabouts unknown to the supervising officer. Prior to declaring an offender as an absconder by using a *Violation Report* (see V.H, *Violations*), the officer will make due and diligent attempts to locate the offender and will document these efforts in the automated narrative system..

**1. REQUIREMENTS FOR DECLARING AN OFFENDER AN ABSCONDER**  
Prior to declaring an offender as an absconder the officer will:

- (a) Telephone the offender, if he/she has a telephone;
- (b) Conduct a home contact, including a contact in the evening or on the weekend. The officer must leave a notice to the offender directing them to report for an office contact or otherwise contact their officer;
- (c) Make a work and/or school collateral contact;
- (d) Make relative/reference contact(s) based on information in the file;
- (e) Conduct a law enforcement check including a jail/hospital check; and
- (f) Check with the landlord if applicable.

This process will begin when the officer has specific information that the offender has absconded or when the officer has been unable to locate:

- Community offenders for thirty (30) days;
- Intermediate offenders for two (2) weeks; or
- Sex offenders for twenty-four (24) hours.

Multiple conditions of probation might be violated when a person “absconds,” but there is nothing legally special about a violation report alleging absconding. For instance, probationers alleged to have absconded are still subject to the jurisdictional provisions of G.S. 15A-1344(f) regarding violation hearings held after the expiration of the probationary period.

**Tolling.** Under G.S. 15A-1344(d) (soon to be G.S. 15A-1344(g)), a “probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation.” Though the tolling provision has been in the law for many years, DCC recently changed its approach to tolling in response to two court of appeals decisions. In *State v. Henderson*, 179 N.C. App. 191 (2006), and *State v. Patterson*, 190 N.C. App. 193 (2008), the court held that under G.S. 15A-1344(d), “a defendant’s probationary period is automatically suspended when new criminal charges are brought,” regardless of when the charge arises. So, when a probationer has a pending charge for any offense other than a Class 3 misdemeanor, time stops running on the person’s period of probation immediately, by operation of law, when the charge is brought, and doesn’t start running again until the charge is resolved, by way of acquittal, dismissal, or conviction. In other words, when a probationer is charged with a new crime, you effectively push pause on a clock counting down how much time the person has left on probation, and you don’t un-pause it until the charge is resolved.

In 2009 the General Assembly made several changes to the tolling law. First, the new law breaks the tolling provision out of G.S. 15A-1344(d) and places it in a stand-alone subsection, G.S. 15A-1344(g). Second, the law explicitly states something DCC had assumed to be true: the probationer remains subject to the conditions of probation, including supervision fees, during the tolled period. Third, the law provides that if a probationer whose case was tolled for a new charge is acquitted or has the charge dismissed, he or she will receive credit for the time spent under supervision during the tolled period. The new provisions apply only to those whose offense (which probably means the original crime, not the new crime or any alleged violation of probation) occurs on or after December 1, 2009.

**Improper period of probation.** G.S. 15A-1343.2 sets out the presumptive lengths for periods of probation as follows:

Misdemeanants sentenced to community punishment: 6 – 18 months.

Misdemeanants sentenced to intermediate punishment: 12 – 24 months.

Felons sentenced to community punishment: 12 – 30 months.

Felons sentenced to intermediate punishment: 18 – 36 months.

The court may always deviate from these defaults and order probation of up to 5 years if it “finds at the time of sentencing that a longer period of probation is necessary.” There is a check-box on the AOC forms (see below) to indicate that the judge has made the requisite finding.

<b>SUSPENSION OF SENTENCE</b>	
Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on <input type="checkbox"/> supervised <input type="checkbox"/> unsupervised probation for _____ months.	
<input type="checkbox"/> 1. The Court finds that a <input type="checkbox"/> longer <input type="checkbox"/> shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).	

When representing a probationer at a revocation hearing, check to make sure the period of probation was within the presumptive statutory range, or, if not, whether the court made the necessary finding that a longer period was necessary. If the period was improper, a motion for appropriate relief (MAR) may be filed at any time under G.S. 15A-1415(b)(8) to correct an unauthorized sentence. Once the MAR is granted, move to dismiss the probation violation if a proper period of probation would already have expired.

**Invalid conditions of probation.** The regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every case valid. The standard for other conditions of probation the judge might add is that they be reasonably related to the offender's rehabilitation and reasonably necessary to insure that the defendant will lead a law-abiding life. Probation conditions obviously cannot place unconstitutional constraints on a probationer (e.g., "Go to church every Sunday," or "Get married"). Under G.S. 15A-1342(g), a defendant's failure to object to a condition of probation imposed under G.S. 15A-1343(b1) at the time the condition is imposed does not constitute a waiver of the right to object *at a later time* to the condition. In *State v. Cooper*, 304 N.C. 180 (1981), the North Carolina Supreme Court held that the "at a later time" language of the statute does not grant a *perpetual* right to challenge a condition of probation. Rather, the defendant must object no later than the revocation hearing.

## A Note on Probation Reform

Legislation passed in 2009 (primarily S.L. 2009-372) made many changes related to probation. Among other things, the law makes it a default condition of supervised probation that the probationer submit to warrantless searches by a probation officer of the probationer's person, vehicle, or premises, and to warrantless searches by a law enforcement officer of the probationer's person or vehicle if the officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon or explosive without court permission. The law also makes it a default condition of probation that probationers may not use, possess, or control illegal drugs or controlled substances; associate with known or previously convicted users, possessors, or sellers; or be present at any place where drugs are sold, kept, or used. Additionally, the law adds new default conditions for all probationers subject to intermediate punishment: perform community service at the probation officer's direction; not use, possess, or control alcohol; remain within the county of residence unless granted permission to leave; and participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer.

For a detailed analysis of the new legislation, including some of the challenges that might be raised in response to the new default conditions described above, read the summary of the law available at <http://sogweb.sog.unc.edu/blogs/nclaw/wp-content/uploads/2009/08/summary-of-probation-reform-bill.pdf>.

Probation Violation Points to Check  
Prepared by Paul James, Assistant Public Defender, Forsyth County  
Updated as of 9/4/2009  
(Revised to consider effects of new legislation effective 12/1/08)

1. Check to determine that the Probation Violation Report was filed within the probation period.
2. Remember that the probation period should be argued to be defined in periods of 30 day months, not calendar months. You lose about 5 days a year from this. This argument is based on the statutory definition of month imprisonment being 30 days and the application of equal protection, which require that all probationers sentenced to a probationary period of specific months, be exposed to the same time period for risk of activation on violation. There is statutory construction statute N.C.G.S. §12-3 which defines month imprisonment as 30 days (12-3(12)). Unfortunately in the same statute there is a general definition of month if not otherwise specified saying it is a calendar month (12-3(3)).
3. Check to make sure that the Probation Violation Report was filed with the Clerk. The best evidence is a file stamp and State must prove filing beyond a reasonable doubt for the Court to have jurisdiction. State v. Moore, 148 N.C. App. 568, 559 S.E.2d 565.
4. ***(NOTE WELL: Amendment by the legislature makes this paragraph now inapplicable to probation violations taken out after December 1, 2008. The revised statute says that these changes apply to offenses committed after 12/1/08 so anyone who was put on probation prior to 12/1/08 should still be covered under Bryant. The section that allows the Court to now extend probation after expiration of the period applies to any probation revocation hearing after 12/1/08.) Additional legislative amendments now make the former requirement that the State prove reasonable efforts to hold the hearing during the period of probation no longer required and lack of such evidence no longer deprives the Court of jurisdiction. Additionally, the new amendments now allow the Court to extend and/or modify the probation even after the period of probation has expired so long as the allegations of violation were timely filed before the probation period expired.***
5. Check to make sure the length of probation period is correct or that special findings were made to justify longer ranges. (15A-1343.2(d) **CAUTION:** Be aware of the unpublished opinion from the COA in State v. Lindsay, COA06-869, 2007 NC App LEXIS 1114 (June 5, 2007) which holds in a portion of its ruling that a challenge to the failure of the judgment to indicate findings required for a longer period of probation may not be challenged at the probation revocation hearing but must be done at the time the judgment is entered by appealing to the COA. (This is a silly argument in practice since it assumes without evidence that the missing check block is incorrect and the length period is correct and that the length period listed was the amount announced by the Court to counsel at the time it was entered or that trial counsel ever saw a copy of the judgment). Remember, unpublished opinions are not binding and since there is no other case on this point apparently this panel did not feel sufficiently confident in their analysis to subject it to widespread public scrutiny.
6. Check to be sure client had counsel on the underlying conviction. If he was indigent and denied counsel, or the record is silent as to counsel, under State v. Neeley, and now Alabama v. Sheldon, the suspended sentence cannot be activated. Only a fine and conditions such as drug treatment were authorized punishment and only contempt proceedings can be used to enforce.
7. Check the judgment itself to make sure that any probation condition that is claimed to have been violated is actually in the judgment. To be valid a condition of probation must be set forth in the judgment itself. 15A-1343(b)3<sup>rd</sup> paragraph.
8. Be sure the imposed sentence on the underlying conviction conforms with the requirements for the criminal history level as found by the Court.
9. Remember that the REVOKING court actually determines whether multiple sentences run concurrently or consecutively and according to 15A-1344(d), unless the revoking judge specifies consecutive, the cases run concurrently. (Sometimes silence can be golden.) Be sure to check the

Clerk's final judgment to make sure the cases are not consecutive unless ordered by the revoking judge in open court. You may need to file an MAR to correct the judgment if they just follow what the sentencing judge put in his judgment. In order for the written judgment to be different than that stated (or in this instance NOT stated) by the Court, the defendant must have been present in court when the written judgment is entered, with counsel, and have been afforded an opportunity to be heard. State v. Hanner, 654 S.E.2d 820, 823 (N.C. Ct. App. 2008); State v. Crumbley, 135 N.C. App. 59, 67 (N.C. Ct. App. 1999).

10. Under State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347 (2005), a judgment under 90-96 is clarified to be regular probation and in order to find a violation of that probation the State must timely file a violation report as required by the Moore case. By clear implication this would also apply to deferred prosecutions because those actions are also contained in the probation statutes. (A smart DA, if the court grants this challenge, will take the VD and then recharge).
11. Also be sure to note that a Class 3 misdemeanor conviction, by itself, cannot be grounds for revocation of probation. 15A-1344(d).
12. If you have to try a PV, remember that the violation report controls the proceeding. Object to anything not related to one of the listed violations. Do not automatically allow them to use hearsay. Even in a PV hearing, hearsay must be reliable before it can be used. Do not hesitate to explore the supporting base for a hearsay statement. You will often find that the testifying officer has no actual knowledge of what knowledge if any the declarant had.
13. Although a court is not bound by the strict rules of evidence during a probation violation hearing, *see Hewett*, 270 N.C. at 353, 154 S.E.2d at 480, it is nonetheless improper for the court to consider and rely upon hearsay evidence as the sole basis for making a factual determination, *see id.* at 356, 154 S.E.2d at 482. *State v. Turner*, 2002 N.C. App. LEXIS 1884. (Unpublished Opinion)
14. In trying a PV, do not let the PO say things like "the absconder". That is what they have to prove. Usually the easiest trials are where they allege absconding and no other violation. Usually this means somebody checked a couple of times and then said they could not find him. If this is the only violation they must affirmatively prove that he intentionally left the jurisdiction.
15. "In a probation revocation proceeding based upon [a] defendant's failure to pay a fine or restitution which was a condition of his probation the burden is upon the defendant to 'offer evidence of his inability to pay money according to the terms of the [probationary] judgment.'" *State v. Jones*, 78 N.C. App. 507, 509, 337 S.E.2d 195, 197 (1985) (citation omitted). Pursuant to N.C. Gen. Stat. § [15A-1364\(b\)](#), "a convicted defendant ordered to pay a fine or costs *may not* be imprisoned for failure to comply if the delinquency in paying was 'not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment.'" *State v. Johnson*, 124 N.C. App. 462, 474-75, 478 S.E.2d 16, 24 (1996) (emphasis added) [\*16] (quoting N.C. Gen. Stat. § [15A-1364\(b\)](#) (1988)), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997).
16. Depending on when you get the case and whether or not it will be continued the first time and also whether your client is being held in custody you may wish to move for his unconditional release pending the final hearing. 15A-1345( c) requires that for all probation violations for which a defendant has been arrested and is being held pending a revocation hearing, if they are in custody then before 7 working days either a preliminary hearing to determine PC for the probation violation, or the actual hearing itself must be had. If no hearing is held then on the 7<sup>th</sup> day the probationer must be released to await the final hearing. This requirement may be waived by counsel but such a waiver must be affirmatively made and cannot be implied by default. If the file is silent then no waiver can be presumed. State v. Neeley.
17. According to our Supreme Court, State v. McMahan, 361 N.C. 420; 646 S.E.2d 112; 2007 N.C. LEXIS 589 (June 28, 2007) if the underlying sentence imposed was from the aggravated range and there was no stipulation by the defendant to being in the aggravated range it is ***not*** subject to a Blakely challenge for the imposition of any aggravated range sentence.

18. If the probation violation is a misdemeanor or felony heard in the District Court then appeal is to the Superior Court for a de novo probation violation hearing. State v. Hooper, 358 N.C. 122; 591 S.E.2d 514 (2004).
19. The District Court may only hear felony probation violations with both the consent of the State and the Defendant. (7A-271(e)). If the Defendant consents and thereafter wishes to appeal, appeal is to the Superior Court for hearing de novo pursuant to State v. Hooper, 358 N.C. 122; 591 S.E.2d 514 (2004).
20. Remember to make sure that any time a defendant spent at any rehabilitation program on an in-patient basis and which was required as a part of his probation is credited against his sentence as days in custody by the clerk if probation is revoked and a sentence activated. State v. Lutz, 177 N.C. App. 140; 628 S.E.2d 34 (2006).
21. Be sure to check the jurisdictional basis of any earlier probation hearing in which the defendant's probation was extended, either as a result of a violation hearing or due to a consent modification. Probation can only be extended in the last 6 months to allow for more time to pay restitution or to complete medical or psychiatric treatment, unless it is in response to a finding of violation. If the earlier extension is not lawful or was lacking jurisdiction, the Court will be without jurisdiction in the latest violation proceeding. State v. Satanek, \_\_\_\_ N.C. App.\_\_\_\_, \_\_\_\_, 660 S.E.2d 623, 625 (2008); State v. Reinhardt, 183 N.C. App. 291, 644 S.E.2d 26 (2007).
22. As a result of legislative amendment effective December 1, 2008, if a probation violation report was filed within the probationary period, then whenever the revocation hearing is later held, the Court, upon a finding of willful violation, can activate the sentence, terminate probation, or now extend and modify the period and conditions of probation, just as if the probation period had not expired. Previously the Court only had authority to revoke or terminate probation if the probation period had expired.
23. Be aware that the State, and the COA, have finally caught on to a little known and even less used, portion of the probation statutes to extend the period of probation. Whenever a probationer has new pending charges the period of probation is tolled until those new charges are resolved. (This is the ONLY time the period is tolled). Essentially the period of probation is extended by however long the new charges were pending before resolution. The COA has pronounced this to be an automatic function, so if the Court is aware of it, the state need not raise or allege it (but someone has to realize it at the trial level or it may have no practical effect). State v. Patterson, 660 S.E.2d 155, 158 (N.C. Ct. App. 2008); State v. Hanner, 654 S.E.2d 820, 823 (N.C. Ct. App. 2008).
24. If you have an out-of-county probation violation in order for the court to have jurisdiction the violation report must allege at least one of three things: 1) the probation was transferred to the current county by court order; 2) the probationer currently resides within the present county; 3) or the alleged violation occurred in the present county. Without one of these three conditions the court lacks jurisdiction. If the time period has expired before a new violation report properly alleging a jurisdictional requirement can be taken out you should be entitled to a dismissal. 15A-1344(a)
25. A finding of violation of probation, even one which the Court determines should be continued on probation, now will qualify as a statutory aggravating factor for any future criminal convictions. Accordingly, if for some reason all parties agree that a defendant should be continued on probation we should do our utmost to see that there is no finding of willful violation and arrange modifications by consent if it can be done within the statutory framework.

