JUSTICE REINVESTMENT EXERCISES
Special Topic Seminar for District Court Judges
February 2012

Answers and Explanations

COMMUNITY AND INTERMEDIATE PUNISHMENT

1. A prior conviction level I offender is convicted of Class 1 misdemeanor larceny for an offense that occurred on January 8, 2012. Which of the following conditions of probation could the court lawfully impose at sentencing (select all that apply)?

   a. Unsupervised probation.
   b. Community service.
   c. House arrest with electronic monitoring.
   d. Special probation (a split sentence).
   e. Jail confinement of no more than 6 days per month during any three separate months, served in 2- or 3-day periods.
   f. Intensive supervision.
   g. Assignment to a day reporting center.
   h. Residential substance abuse treatment program.
   i. Drug treatment court.

   C

   1 - 45 days

   A community punishment for an offense committed on or after December 1, 2011, may not include special probation or drug treatment court. G.S. 1340.11(2). Intensive supervision is repealed for offenses committed on or after December 1, 2011 and would thus be unavailable as a sentencing option for this offense. S.L. 2011-192, sec. 1(i). For offenses committed on or after December 1, 2011, day reporting center and residential program are removed from the definition of an intermediate punishment, and are thus available as part of a community punishment. G.S. 1340.11(6). Note, however, that day reporting centers will (at least by that name) be unavailable beginning this summer on account of the transition from the Criminal Justice Partnership Program (CJPP) (which was repealed by Justice Reinvestment) to the Treatment for Effective Community Supervision (TECS) program. S.L. 2011-192, sec. 6. The other conditions listed are part of the new set of "community and intermediate" probation conditions set out in new G.S. 15A-1343(a1) [p. 23 of the Justice Reinvestment tab], available in any Structured Sentencing case involving an offense committed on or after December 1, 2011.

2. Which of the conditions listed above could the court add in response to a violation of probation by the defendant from Exercise 1?

   All except intensive supervision. Under G.S. 15A-1344(a), upon finding that an offender sentenced to community punishment has violated one or more conditions of probation, the court's authority to modify the probation judgment includes the authority to require the offender to comply with conditions that would otherwise make the sentence an intermediate punishment. G.S. 15A-1344(a). So, in response to a violation, the court could add any condition except intensive supervision, which is repealed for a crime with this offense date.

3. A prior conviction level II offender is convicted of a Class 2 assault for an offense that occurred on February 4, 2012. Which of the following conditions could the court lawfully impose at sentencing (select all that apply)?

   a. Unsupervised probation.
   b. Community service.
   c. House arrest with electronic monitoring.
   d. Special probation (a split sentence).
   e. Jail confinement of no more than 6 days per month during any three separate months, served in 2- or 3-day periods.
   f. Intensive supervision.
   g. Assignment to a day reporting center.
   h. Residential substance abuse treatment program.
   i. Drug treatment court.

C/I
1 - 45 days

   Any condition other than intensive supervision would be permissible. Note that day reporting centers will not be available after this summer on account of the repeal of CJPP.

4. What is the most jail confinement that could be ordered at sentencing for the defendant from Exercise 3?

   The court could order up to 18 days of jail confinement under the new "community and intermediate" condition set out in G.S. 15A-1343(a1)(3). The confinement would have to be served 6 days per month, across three separate calendar months, in 2- or 3-day intervals.

   If the court gave the defendant a 45-day suspended sentence, it could order 11 days of confinement as special probation (a split sentence) under G.S. 15A-1351(a). Note that the ¼ rule applicable to split sentence confinement does not apply to the 18 days of confinement permissible as a "community and intermediate" condition.

5. If the court imposes supervised probation and electronic house arrest on the defendant from Exercise 3, is the sentence a Community punishment or an Intermediate punishment?

   It is not possible to tell based on the imposed conditions alone—the sentence could be either community or intermediate. Under prior law (for offenses committed before December 1, 2011), it would have clearly been intermediate, because a community punishment could not include EHA. Under the new law, a community punishment may include EHA (either as a special condition of probation under G.S. 15A-1343(b1)(3c) or as a "community and intermediate" condition under G.S. 15A-1343(a1)(1)—note that the former provision requires a $90 fee under G.S. 15A-1343(c2), whereas the latter does not).

   Given the ambiguity, the court should take care to note when pronouncing judgment whether the sentence is a community or intermediate punishment. The distinction matters for determining (1) the permissible length of the period of probation under G.S. 15A-1343.2(d); (2) whether or not the intermediate conditions set out in G.S. 15A-1343(b4) apply; and (3) what conditions probation can add through delegated authority.

6. What is the difference between community service under G.S. 15A-1343(a1)(2) ("community and intermediate" community service, check-box 2 on Page Two/Side One of AOC-CR-603C [p. 13 of the Justice Reinvestment Act tab]) and community service under G.S. 15A-1343(b1)(6) (community service

as a special condition of probation, check-box 16 on Page One/Side Two of AOC-CR-603C [p. 12 of the Justice Reinvestment Act tab])?

The "community and intermediate" community service in G.S. 15A-1343(a1)(2) does not appear to require the $250 community service fee.

7. Can the court impose "community and intermediate" conditions for a defendant on probation for impaired driving?

   No. "Community" and "Intermediate" punishment are terms applicable to Structured Sentencing sentences. Impaired driving is sentenced under G.S. 20-179 and expressly excluded from Structured Sentencing in G.S. 15A-1340.10.

8. In February 2012, a defendant on probation for an offense that occurred in 2010 is alleged to have violated the curfew imposed as part of his intensive supervision. At his violation hearing, he argues that the curfew condition is unenforceable because "intensive has been repealed." How would you respond?

   Intensive supervision is only repealed for offenses committed on or after December 1, 2011. It is still an enforceable condition for probationers with offense dates before December 1, 2011.

DELEGATED AUTHORITY

9. A defendant receives a Community punishment of supervised probation with no special conditions of probation. Two months after sentencing, the Division of Community Corrections (DCC) determines, based on its risk/needs assessment, that the defendant is Supervision Level 2. Which of the following conditions could the probation officer impose through delegated authority (select all that apply)?

   a. Perform up to 20 hours of community service, and pay the fee required by law
   b. Report to the probation officer at a frequency determined by the officer
   c. Submit to a substance abuse assessment, monitoring, or treatment
   d. Submit to house arrest with electronic monitoring
   e. Jail confinement of no more than 6 days per month during any three separate months, served in 2- or 3-day periods
   f. Submit to an electronically-monitored curfew
   g. Participate in an educational or vocational skills development program

   A probation officer may only use "quick dips" in response to a violation of probation, not in response to an offender's risk level alone.

10. The probation officer in Exercise 9 uses delegated authority in response to the defendant's "high risk" and requires the offender to submit to house arrest with electronic monitoring. The probationer violates the EHA condition, prompting the officer to file a violation report and bring the case before the court. The defendant argues that the house arrest is not enforceable through the violation process unless the court imposes it. The State says the delegated authority condition is enforceable in the same manner as a condition imposed by the court. Who is correct?

    The State. The conditions appear to be enforceable like conditions imposed by the court –although the statute does not expressly say so and there are no cases on point.

11. A probation officer imposes a curfew through delegated authority. The defendant violates the curfew. Assuming the officer follows the appropriate notice and waiver procedure, can the officer impose a 2-day "quick dip" in the jail in response to the curfew violation under G.S. 15A-1343.2(e)?

    No. Under G.S. 15A-1343.2(e) and (f), a probation officer may only impose a quick dip if he or she determines that the offender failed to comply with one or more of the conditions imposed "by the court."

12. An offender files a petition for court review of an officer-imposed condition of probation under G.S. 15A-1343.2(e). At the hearing, the court learns that the probation officer has imposed additional conditions of probation that the court does not think are appropriate. The court did not "un-delegate" delegated authority at sentencing, and the additional conditions imposed were (as a legal matter) properly added by the officer. May the court remove the conditions? And may the court choose to "un-delegate" delegated authority from that point forward?

    The court may remove the conditions, and may use check-box 7.b on Page One/Side Two of AOC-CR-609 [p. 18 of the Justice Reinvestment tab] to withhold delegated authority from that point forward.

13. A probationer is before the court on a violation of a court-imposed condition that the offender complete a treatment program. At the violation hearing, the probationer argues that the alleged violation has already been responded to by the probation officer, who earlier imposed a 2-day quick dip in the jail. Does the officer's prior response limit the court's authority to respond to the violation? Does the officer's use of 2 days of "quick dip" time decrease the amount of "dip" time available to the court?

    There is no clear answer in the statute. The delegated authority statutes (G.S. 15A-1343.2(e) and (f)) say that nothing in the delegated authority law "shall be construed to limit the availability of the procedures authorized under G.S. 15A-1345 [the probation violation hearing statute]." That provision neither clearly authorizes nor clearly forecloses a future response to a violation by the court. At least one other state (Oregon) expressly provides in its "administrative sanction" law that a judge may not revoke probation or impose additional sanctions on a probationer who has already completed a sanction imposed by the Department of Correction. O.R.S. 137.595.

    Regardless, Community Corrections has decided as a matter of policy that "once noncompliance has been addressed through the delegated authority process, it cannot be included on any future violation report."

    Regarding the 18 days of quick-dip confinement time, there is no express statutory connection between the time that can be imposed by a probation officer and the short term jail confinement that may be imposed by the court as a "community and intermediate" condition. Community Corrections has decided as a matter of policy to discount the number of quick dip days available to them by any quick dip time imposed by the court.

14. Can a probation officer use delegated authority in an impaired driving case?

    No. G.S. 15A-1343.2 only applies to persons sentenced under Article 81B of Chapter 15A—Structured Sentencing—and thus does not apply in impaired driving cases.

LIMITS ON REVOCATION AUTHORITY AND CONFINEMENT IN RESPONSE TO VIOLATION (CRV)

15. A person is on probation for communicating threats, an offense that occurred in September 2010. He has a 120-day suspended sentence. He violates probation in November 2011 by coming into contact with the victim. The probation officer files a violation report, which is file stamped January 4, 2012. A violation hearing is held February 20, 2012.

    Can the court revoke the defendant's probation for the violation?

    Yes. The effective date for the portion of Justice Reinvestment that limits revocation authority applies to "probation violations occurring" on or after December 1, 2011. S.L. 2011-192, sec. 4.(d), as amended by S.L. 2011-412, sec. 2.5 [see p. 50 of the Justice Reinvestment tab]. That refers to the alleged offending behavior, not to the date the violation report is filed or the date the hearing is held. Thus, the "old" probation revocation rules apply to this violation of probation, and revocation is a permissible court response.

    Can the court impose confinement in response to violation (CRV)?

    No. The portion of Justice Reinvestment creating CRV is likewise effective for "probation violations occurring" on or after December 1, 2011. Thus, CRV is not an option for this pre–December 1, 2011 violation, notwithstanding the date of the hearing.

16. Suppose the alleged probation violation by the probationer from Exercise 15 occurred in January 2012.

    Can the court revoke the defendant's probation?

    No. For a violation occurring after December 1, 2011, the court can only revoke for a new criminal offense or statutory absconding. G.S. 15A-1344(a) [see pp. 31–32 of the Justice Reinvestment tab].

    Can the court impose confinement in response to violation (CRV)? If so, how long may the CRV period be?

    Yes. G.S. 15A-1344(d2) [see pp. 48–49 of the Justice Reinvestment tab]. The CRV period may be any length up to 90 days for a misdemeanor.

    Must the court impose CRV?

    No, the court is not required to impose CRV in response to a technical violation. Rather, G.S. 15A-1344(d2) says the court "may" impose such confinement.

17. If the defendant from Exercise 16 had been held in jail for 15 days awaiting his probation violation hearing, what is the longest amount of the time he could be jailed through CRV?

    75 days. As amended by S.L. 2011-412, sec. 2.3(d), G.S. 15A-1344(d2) says "If a defendant is arrested for violation of a condition of probation and is lawfully confined to await a hearing for the violation, then the judge shall first credit any confinement time spent awaiting the hearing to any confinement imposed under this subsection; any excess tie shall be credited to the activated sentence." The court must apply the credit to the CRV period, and thus <u>cannot</u> do what it can do in the context of a split sentence: bank the credit to be applied against the suspended sentence in the event of activation. The court is permitted to do that in the context of a split sentence because G.S. 15A-1351 expressly says so.

18. A defendant has a 45-day suspended sentence for a simple assault against his ex-wife committed in 2010. He violates probation in early 2012 by failing to pay $500 of court-ordered restitution (assume the violation is willful). What is the longest CRV period the court could order in response the violation?

    45 days. G.S. 15A-1344(d2) allows CRV of "up to 90 days" for a misdemeanor. But CRV cannot be longer than the suspended sentence itself. The law says that "if the time remaining on the defendant's maximum imposed sentence is 90 days or less, then the term of confinement is for the remaining period of the sentence." [The final version of G.S. 15A-1344(d2) is set out in S.L. 2011-412, sec. 2.3.(d), on pp. 48–49 of the Justice Reinvestment tab.]

    Can the court order a shorter CRV period?

    It is unclear. The issue is the effect of the "90-days-or-less" rule mentioned immediately above. On the one hand, the law says that CRV for a misdemeanor may be "up to 90 days," indicating that the CRV in this case could be as little as 1 day and up to 45 days. On the other hand, the law says that if the time remaining on the defendant's sentence is 90 days or less, then the CRV period is for the remaining period. This defendant is obviously within the 90-days-or-less window, and so the CRV period arguably <u>is</u> for the remaining 45 days. There is some argument that the 90-days-or-less rule only applies to felonies; it uses the term "maximum imposed sentence," which fits more naturally with felonies than misdemeanors. But the intent of the law may have been to avoid having multiple probation violation hearings and multiple CRV periods for a person with a relatively short suspended sentence. That would make more sense were it not for the fact that 90 percent of misdemeanor sentences are for 90 days or less—meaning the 90-days-or-less rule effectively swallows the "up to 90 days" rule for most misdemeanants.

    If the court orders a CRV period that uses up the remainder of the defendant's suspended sentence, it would use check-box 1.c in the Confinement in Response to Violation block on Page Two/Side Two of AOC-CR-609 [p. 20 of the Justice Reinvestment tab].

    What, if anything, can the court do about the restitution (the assault is covered under the Crime Victims' Rights Act)? (See the note below check-box 1.c in the Confinement in Response to Violation block on Page Two/Side Two of AOC-CR-609 [p. 20 of the Justice Reinvestment tab])?

    If the court orders a 45-day CRV period—effectively revoking probation—the form gives the court an opportunity to terminate the defendant's probation upon completion of the "terminal" CRV period. That finding of "termination" opens the door for execution on any civil judgment docketed for a Crime Victims' Rights Act restitution order under G.S. 15A-1340.38. Under G.S. 15A-1340.38(c), the court must make a finding that probation has been terminated and that restitution in a sum certain remains due and payable in order for the judgment to be executed upon. The court should use AOC-CR-612 for that finding. This procedure only applies in Crime Victims' Rights Act cases; in other cases, the court does not have authority to impose a civil judgment for restitution. That issue is discussed on pp. 6–7 of the Restitution tab.

19. A person is on probation with a 150-day suspended sentence for sexual battery, an offense that requires registration as a sex offender. He violates probation in January 2012 by failing to report to his probation officer as ordered. Can his probation be revoked based on that violation?

    No. There is no exception to the law's limit on revocation authority for sex offenders. (Note that comparable provisions limiting the revocation authority of the Post-Release Supervision and Parole Commission include

an exception allowing the Commission to revoke a sex offender's post-release supervision for any violation. G.S. 15A-1368.3(c)(1) [p. 26 of the Justice Reinvestment tab].)

20. At the violation hearing for the probationer from Exercise 19, you find that the defendant has violated probation by failing to report to his probation officer as ordered. The State is asking you to impose a 30-day CRV period. The probationer asks that the time be ordered as special probation. Which might you do, and why?

    The probationer may prefer special probation (a split sentence) because it, unlike CRV, does not count as a "strike" under G.S. 15A-1344(d2), setting the table for eventual revocation. The split sentence could be up to 37 days. CRV could be up to 90 days.

21. In February 2012, a defendant on probation for an offense that occurred before December 1, 2011 is alleged to have violated probation by absconding. The probation officer alleges that the probationer disappeared for the entire month of January 2012. Can the court revoke the defendant's probation?

    No. The authority to revoke for "absconding" applies only to violations of the new statutory absconding condition in G.S. 15A-1343(b)(3a). That statutory condition only came into effect for persons on probation for offenses occurring on or after December 1, 2011, S.L. 2011-412, sec. 2.5, and so would not apply to this probationer. Because the alleged violation took place after December 1 and is not a new criminal offense or statutory absconding, the court does not have authority to revoke based on this violation. The court could impose CRV, a split sentence, or some other modification of probation short of revocation.

22. A person is placed on probation for misdemeanor breaking or entering in early 2012. While on probation, she writes a worthless check on a closed account and is convicted of that offense. Can the court revoke her probation in the breaking or entering case based on the violation of the "commit no criminal offense" condition?

    Yes. This is clearly a violation of the "commit no criminal offense" condition set out in G.S. 15A-1343(b)(1), and thus a proper basis for revocation under G.S. 15A-1344(a).

    Can the court impose CRV in response to the new criminal offense?

    No. G.S. 15A-1344(d2) says the court may only impose CRV for violations of conditions <u>other than</u> G.S. 15A-1343(b)(1) [new criminal offense] or (b)(3a) [absconding].

    What if the worthless check charge is still a pending charge at the time of the probation violation hearing? Could the court still treat it as a violation of probation?

    This is an open question and an issue that existed before Justice Reinvestment. Older cases suggest that a pending criminal charge should not serve as the sole basis for revoking an offender's probation "unless there is a conviction on the pending charge or there is a plea of guilty entered thereto." State v. Guffey, 253 N.C. 43 (1960). Subsequent cases have, however, indicated that a probationer is not entitled to a jury trial on a new charge before probation may be revoked based on the commission of a new criminal offense. Instead, the court hearing the probation violation can make independent findings—to its reasonable satisfaction—that the offender violated probation by committing a new criminal act. See, e.g., State v. Monroe, 83 N.C. App. 143 (1986).

23. A person on probation for impaired driving violates probation in early 2012 by failing a drug screen. Can the court revoke his probation?

    No. The limitations on revocation for violations occurring on or after December 1, 2011, apply to impaired driving cases just as they do for Structured Sentencing cases. G.S. 15A-1341(a).

    Can the court impose CRV in response to the violation?

    Yes.

24. A person on probation for assault on a female is convicted of second-degree trespass, a Class 3 misdemeanor. May the court revoke his probation based on the new criminal offense?

    No. This would be a violation of the "commit no criminal offense" condition, and thus generally eligible for revocation under Justice Reinvestment. However, there is a separate rule barring revocation "solely for conviction of a Class 3 misdemeanor." G.S. 15A-1344(d).

    The even trickier aspect of this scenario is that CRV does not appear to be an appropriate response to this violation either, as it is a violation under G.S. 15A-1343(b)(1). Thus, the court would appear to be limited to responses other than revocation or CRV, such as a split sentence, contempt, or some other modification of probation.

25. A defendant whose suspended sentence was initially 150 days has had two prior technical violations of probation (i.e., violations other than a new crime or absconding), both of which were responded to with 20-day CRV periods. Can the court revoke the person's probation in response to a third violation?

    Yes. After a person has received two periods of CRV, the court may revoke his or her probation. G.S. 15A-1344(d2).

    Must the court revoke the person's probation in response to a third violation?

    No, the court is never required to revoke probation.

    Can the court order a third CRV period in response to a third technical violation?

    No. A defendant may receive only two periods of CRV in a case. G.S. 15A-1344(d2).

26. A defendant with a 6-month suspended sentence for DWI is brought before the court for a technical violation that occurred in June 2012. The court finds a violation. The defendant has served one 30-day CRV period in response to a prior violation. He served a 3-day split sentence immediately after sentencing and later completed the 90-day program at DART-Cherry. He had 2 days of pretrial confinement that were not credited to his split sentence and 1 day of jail credit from his arrest on the probation violation. What is the longest CRV period the court may impose in response to the violation? Can the court impose a shorter CRV period?

    54 days. This example shows how the court must take all of a person's prior jail credit into account when determining the appropriate length of a CRV period. The defendant gets credit against his suspended sentence for the prior CRV period. G.S. 15A-1344(d2) ("Confinement under this section shall be credited

pursuant to G.S. 15-196.1"). The defendant must receive credit for the time spent at DART-Cherry. State v. Lutz, 177 N.C. App. 140 (2006). The defendant must receive credit for the split sentence. State v. Farris, 336 N.C. 553 (1994). The 1 day of pre-hearing confinement must be applied to the CRV period (it cannot be banked and applied to any later-activated suspended sentence. G.S. 15A-1344(d2) [see pp. 48–49 of the Justice Reinvestment tab for the final version of the law]. And the 2 days of pretrial confinement that were not credited to the split sentence must now be considered in determining the "time remaining" on the defendant's sentence. [See pp. 4–5 of the Active Sentence tab for a summary of what counts for jail credit.] Taking all of that time into account, 54 days remain on the defendant's suspended sentence.

As to whether the court could order a shorter period, that issue is discussed above in the answer to Exercise 18. The prevailing interpretation is that the CRV period would need to be for the entire remaining 54 days, no less.

27. A defendant is on probation in two cases for two convictions of assault with a deadly weapon. He has two 50-day suspended sentences that are set to run consecutively in the event of revocation. The defendant violates probation in February 2012 by failing to complete a court-ordered program. If the court orders CRV in response to the violation in both cases, how are the CRV periods served?

Concurrently. Under G.S. 15A-1344(d2) [see pp. 48–49 of the Justice Reinvestment tab for the final version of the law], the "period of confinement imposed under this subsection on a defendant who is on probation for multiple offenses shall run concurrently on all cases related to the violation. Confinement shall be immediate unless otherwise specified by the court." The clear legislative intent is that CRV periods will run concurrently with one another.

28. A probationer with a 120-day suspended sentence is convicted of a new criminal offense based on a crime that took place before he was placed on probation. Facing an active sentence for the new conviction, he asks to invoke his sentence on the probation case so the time may be served concurrently. Can the court activate the first sentence at his request?

There is no clear way for this probationer to "elect to serve" his sentence. The law that expressly allowed an offender to refuse probation and elect to serve a suspended sentence (G.S. 15A-1341(c)) was repealed in 1995. S.L. 2005-429. Without a violation based on a new criminal offense or absconding, the court cannot revoke his probation. (The new criminal offense here occurred before he was placed on probation, and so it is not a violation in the probation case.) Even if the offender admitted to a technical violation, the court could not order a CRV period long enough to use up his entire remaining suspended sentence.

There is a question as to whether the court reduce the defendant's suspended sentence to 90 days or less under authority of G.S. 15A-1344(d) and (d1), and then impose CRV for the entire remainder of the suspended sentence. Under that law a court may, "before activating a sentence," reduce a misdemeanor sentence before activating it. The issue is whether the court may do the same thing at the point of imposing CRV. Under prior law, "activate" and "revoke" always went hand in hand, and so the meaning of G.S. 15A-1344(d) was clear. To the extent that CRV can be styled as a partial activation of sorts, perhaps there's an argument that the authority to reduce the sentence also applies at that point. A cleaner way to accomplish virtually the same thing might be to simply terminate the defendant's probation upon completion of the CRV period. The court can terminate probation at any time under G.S. 15A-1342(b).

29. A probationer with a 45-day suspended sentence is alleged to have committed a technical violation of probation in January 2012. A violation hearing is held in March 2012, by which point the defendant has only 3 days remaining on her period of probation. The court finds a violation and imposes a 45-day CRV period. How long will the defendant be in jail for the CRV?

    45 days. There is no express rule saying a CRV period may not extend beyond the period of probation itself. By contrast, when special probation (a split sentence) is added in response to a violation of probation, G.S. 15A-1344(e) says that "no confinement other than an activated suspended sentence may be required beyond the period of probation . . . ."

    The CRV confinement time will not, however, "toll" the person's probation period. Thus, she will no longer be on probation upon her release from jail.

30. A probationer has a 120-day suspended sentence. At a violation hearing, the court finds that he committed a technical violation of probation and orders a 30-day CRV period. The defendant appeals. What happens?

    There is no clear statutory authority for appealing CRV. Under G.S. 15A-1347 and existing case law, there is no right to appeal probation matters other than activation of a sentence or imposition of special probation. State v. Edgerson, 164 N.C. App. 712 (2004) ("Defendant's sentence was neither activated nor was it modified to 'special probation.' Defendant therefore has no right to appeal." (citations omitted)). There may be an argument that CRV is a partial activation of sorts; if it is, it would be appealable under G.S. 15A-1347. If the superior court hears the appeal, it seems the case would be in superior court from that point forward. G.S. 15A-1347.