

# Probation Violations

## New Misdemeanor Defender Training

Jamie Markham  
September 2012



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- 100,000 probationers
- About 35% get revoked
- Over half of new prison admissions come from probation violations



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“Probation is an act of grace . . .”



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## Notice

- DCC-10 (Violation Report)
- 24 hours minimum (unless waived)
- **Controls scope of the hearing**

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## Arrest and Bail

- Probationers generally entitled to bail
- Exceptions for “dangerous” probationers:
  - With felony charges pending
  - Ever convicted of a sex crime

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## Preliminary Hearings

- Required under G.S. 15A-1345(c)
  - Within 7 working days of arrest
  - Only required if probationer is detained
- If not held within 7 working days, probationer must be released pending final violation hearing

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## Final Violation Hearings

- Proper venue:
  - Where probation imposed
  - Where violation occurred
  - Where probationer resides
- The court may return a case to the district of origin or residence
- Sentencing judge may limit jurisdiction (unsupervised only)

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## Final Violation Hearings

- Class H & I felonies in district court
  - By default, violation hearing in *superior court*
  - May be held in district court with consent of the State and the defendant

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## Hearing Procedure

- Not a formal trial
- Probationer may confront, cross-examine
- Rules of evidence don't apply
  - Hearsay admissible
  - Exclusionary rule inapplicable
- Proof to judge's "reasonable satisfaction"

## Hearing Procedure

- Violations must be "willful or without lawful excuse"
  - State shows violation
  - Burden shifts to defendant to show "good faith inability to comply"

## Hearing outcomes



## Hearing Outcomes

- Termination
- Transfer to unsupervised
- Continuation (reinstate probation)
- Modification
- Extension
- Contempt
- Special probation (split)
- Confinement in Response to Violation (CRV, or “dunk”)
- Revocation

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## Termination

- Court may terminate probation at any time
- “Terminate unsuccessfully”

## Transfer to Unsupervised

- Upon payment of moneys

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## Modification

- At any time, for good cause shown
  - No violation need have occurred
- Form AOC-CR-609

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## Extending Probation

- Two types: *ordinary* and *special purpose*
- *How long can someone be on probation?*

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## Ordinary Extensions

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

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## Special Purpose Extensions

- 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
- Only this type of extension may go beyond the 5-year maximum

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## Contempt

- Chapter 5A procedures apply
  - Proof beyond a reasonable doubt
- Up to 30 days in jail
- Note: Counts for credit (*State v. Belcher*)

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## Special Probation

- A “split sentence”
- May be added in response to violation
- Continuous or noncontinuous (weekends)
- Max jail time:  $\frac{1}{4}$  of imposed maximum
  - Note: For DWI, it’s  $\frac{1}{4}$  of statutory maximum

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## Revocation

- Activate a suspended sentence
- Upon revocation, judge may:
  - Reduce sentence within the same grid cell
  - Change the sentencing judge’s decision on consecutive/concurrent sentences

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## Limit on Court's Authority to Revoke

- Court may only *revoke* probation for:
  - New criminal offense
  - Absconding (under new statutory condition)
  - Offenders who have already received two prior “CRV” confinement periods

## Confinement in Response to Violation (CRV)

- Permissible in response to violations other than “commit no criminal offense” and “absconding”
  - Misdemeanor CRV: “Up to” 90 days
  - Felony CRV: 90 days
- After two CRV periods, the court may revoke for any violation

## “Elect to Serve”/Invoke

- No longer an option by statute
- Probationer can admit to a violation





## Credit upon Revocation

- Pre-trial confinement
- Pre-hearing confinement
- Active portions of prior split sentences
  - But NOT electronic house arrest
- DART—Cherry
  - But NOT private treatment
- Contempt (*Belcher*)
- Prior CRV periods

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## Appeals

- Statutory right to appeal revocation or imposition of a split sentence to superior court
  - No clear authority to appeal CRV
- Class H/I felony revocations in district court are appealed to superior court

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## Defenses

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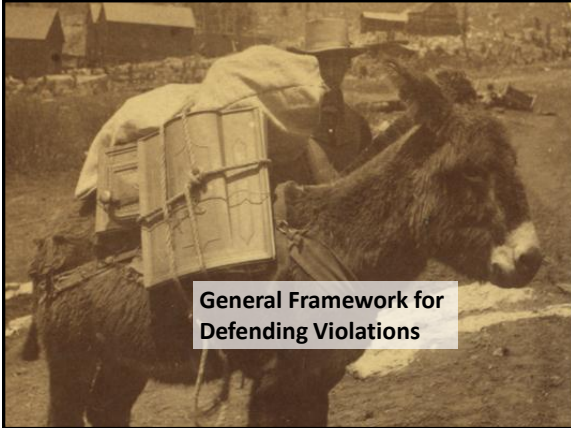
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## Jurisdiction

- The court may act... “[a]t any time prior to the expiration or termination of the probation period”
- Court may act after expiration if violation report filed before probation ends (G.S. 15A-1344(f))




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## Jurisdiction

- Was a violation report filed (and file stamped) before the probation period expired?
  - Consider the possible effect of “tolling” if probationer had pending charges (p. 3-4)




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## Jurisdiction

- Was the initial period of probation lawful to begin with?

## Improper Probation Period

- 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 ~~X~~ longer ☐ shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).

## Jurisdiction

- Has there ever been an unlawful extension of the defendant's probation?



## Improper Extension

- 1 Feb 2001: 36-month probation
- 1 Feb 2004: probation set to 5 years
- 26 Feb 2004: defendant convicted of another crime; probation extended (to Feb 2006)
- 9 January 2006: defendant convicted of another crime; probation extended another 24-month (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)

## Proper Condition?

- Did the defendant receive written notice of the condition?
- Was the condition valid?
  - Regular conditions are valid
  - Statutory special conditions valid
  - Ad hoc conditions must be reasonable

## Willfulness

- "Good faith inability to pay"
- Be prepared to show defendant's living expenses, employment, etc.



## Consider alternatives

- Extend probation
- House arrest
- “Quick dip” or weekend split
- Substance abuse treatment

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## If revocation, mitigate

- Reduce sentence
- Run sentences concurrently
- Make sure all jail credit applied

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# Probation Violations

2012 New Misdemeanor Defender Training

Jamie Markham  
September 2012

This paper sets out the law and procedures applicable to probation violation hearings in North Carolina. Unless otherwise indicated the discussion applies to supervised and unsupervised probationers alike.

## Preliminary Issues

**Notice.** In supervised probation cases, the violation process typically begins when a probation officer files a violation report (form DCC-10) with the clerk. 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 constitutes notice of the alleged violations, and probation should only be revoked based on violations alleged in the notice provided to the defendant. *State v. Cunningham*, 63 N.C. App. 470 (1983). 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*, 198 N.C. App. 154 (2009).

In cases involving unsupervised probation, violations are generally reported by the clerk’s office or by community service staff. Notice of a hearing in response to a violation of unsupervised probation must be given by either personal delivery to the probationer or by U.S. Mail addressed to the last known address available to the preparer of the notice and reasonably believed to provide actual notice. If mailed, the notice must be sent at least 10 days prior to any hearing and must state the nature of the violation. G.S. 15A-1344(b1). Form AOC-CR-220 may be used to provide notice of a hearing on violation of unsupervised probation.

Community service staff must report significant violations of cases under their purview either in person or by mail as provided in G.S. 143B-708(e). In those cases, the court must conduct a hearing even if the person ordered to perform community service fails to appear. If the court determines that there was a willful failure to comply it must revoke the person’s drivers license until the community service requirement is met. Only when the person is present, however, may the court take other actions generally authorized in response to violations of probation. *Id.*

**Arrest.** A probationer is subject to arrest for violation of a condition of probation by a law enforcement officer or by a probation officer, upon either an order for arrest issued by a judicial official or upon the written request of a probation officer, accompanied by a violation report. G.S. 15A-1345(a). A probation officer may arrest a probationer without a written order or motion when he or she has probable cause to believe that a violation has occurred. *State v. Waller*, 37 N.C. App. 133 (1978).

**Bail for alleged probation violators.** A probationer arrested for an alleged violation of probation must be taken without unnecessary delay before a judicial official to have conditions of release set in the same manner as provided in G.S. 15A-534 for criminal charges. G.S. 15A-1345(b).

Some probationers are subject to rules that potentially delay the setting of release conditions. If a probationer either has pending charges for a felony offense or has ever been convicted of an offense that would be a reportable sex crime if committed today, the judicial official setting release conditions must, before imposing conditions of release, determine (and record in writing) whether the probationer poses a danger to the public. If the probationer poses a danger to the public, he or she must be denied release pending a revocation hearing. If the probationer does not pose a danger, release conditions are set as usual. If the judicial official has insufficient information to determine whether the probationer poses a danger, the probationer may be held for up to seven days from the date of arrest for a judicial official, or a subsequent reviewing judicial official, to obtain sufficient information to determine whether the probationer poses a threat to the public. G.S. 15A-1345(b1). The requisite findings can be recorded on side two of form AOC-CR-272.

**Failures to appear.** When a probationer fails to appear for a probation violation hearing the court may issue an order for arrest under G.S. 15A-305(4). A hearing extending or modifying probation may be held in the absence of a probationer who fails to appear after a reasonable effort to notify him or her. G.S. 15A-1344(d). Probation should not, however, be revoked in the defendant's absence—particularly if the suspended sentence is modified in any way upon revocation, as this would violate the defendant's right to be present when the sentence is imposed. *State v. Hanner*, 188 N.C. App. 137 (2008).

If an unsupervised probationer does not appear in response to a mailed notice, the court may either (a) terminate the probation and enter appropriate orders for the enforcement of any outstanding monetary obligations as otherwise provided by law, or (b) provide for other notice to the person as authorized by Chapter 15A for a violation of probation. G.S. 15A-1344(b1).

## **Violation Hearings**

**Jurisdiction.** A court's jurisdiction to review a probationer's compliance with the terms of his or her probation is limited by statute. The court generally has power to act "at any time prior to the expiration or termination of the probation period." G.S. 15A-1344(d). Once a period of probation expires, the court generally loses jurisdiction over the defendant. *State v. Camp*, 229 N.C. 524 (1980).

An exception to that rule is set out in G.S. 15A-1344(f), which grants a court jurisdiction to hear probation matters after a period of probation has expired if certain conditions are met. This extended jurisdiction becomes important when an offender violates probation before his or her period of probation has expired but the violation hearing cannot be held before expiration because, for example, the alleged violation occurred very near the end of the period of probation or the probationer absconded.

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.

To be considered filed, a violation report should be *file stamped* by the clerk 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 (or some other evidence proving beyond a reasonable doubt that a violation report was timely filed), the trial court is without jurisdiction to conduct a probation violation hearing after the end of the probationary period. Those jurisdictional provisions apply with equal force to supervised and unsupervised probationers and to those on probation under G.S. 90-96. *State v. Burns*, 171 N.C. App. 759 (2005). The provisions likely also apply in deferred prosecution cases, although there is no appellate case saying so. Generally, upon expiration or early termination of a period of probation imposed as part of a deferred prosecution, the defendant is immune from prosecution on the charges deferred. G.S. 15A-1342(j).

Prior to amendments to the law in 2008, 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. Those changes were made effective for violation hearings held on or after December 1, 2008. S.L. 2008-129.

If a period of probation expires before a probation violation report is filed, the trial court lacks subject matter over the case. *State v. Camp*, 299 N.C. 524 (1980). Similarly, if an earlier extension of probation was improper, the court loses authority to act on the case. *State v. Reinhardt*, 183 N.C. App. 291 (2007); *State v. Sataneck*, 190 N.C. App. 653 (2008).

*Tolling.* “Tolling” in the probation context means that no time runs off the offender’s period of probation while he or she has a criminal charge pending. In 2011, the General Assembly repealed the tolling law for persons placed on probation on or after December 1, 2011. S.L. 2011-62. There are, however, many probationers who were placed on probation before that date, and thus subject to the law that existed beforehand, described below.



The tolling statute, formerly set out in G.S. 15A-1344, provided that “[i]f there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved.” As interpreted in *State v. Henderson*, 179 N.C. App. 191 (2006), and *State v. Patterson*, 190 N.C. App. 193 (2008), under G.S. 15A-1344, “a defendant’s probationary period is automatically suspended when new criminal charges are brought.” So, when a probationer has a pending charge for any offense other than a Class 3 misdemeanor (which, by statute, could not result in revocation even upon conviction), 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 2009 the General Assembly made several changes to the tolling law. S.L. 2009-372. First, the law was moved from G.S. 15A-1344(d) to G.S. 15A-1344(g). Second, the law made clear that a probationer remains subject to the conditions of probation, including supervision fees, during the tolled period. Third, the law provided 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. Those provisions apply to “offenses committed” on or after December 1, 2009, which probably means offenders on probation for offenses committed on or after that date.

With that recent legislative history in mind, there are probably three classes of probationers when it comes to tolling: (1) those placed on probation on or after December 1, 2011, for whom the tolling law is repealed; (2) those placed on probation before December 1, 2011, with offense dates on after December 1, 2009, who are subject to the tolling law but who are eligible for credit back against their probation period if the charge that tolled their probation is dismissed or they are acquitted; and (3) those placed on probation before December 1, 2011, for an offense that occurred before December 1, 2009, who are probably subject to tolling and not entitled to any credit back against the tolled period even if the charge that tolled the probation is dismissed or acquitted.<sup>1</sup>

### **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

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<sup>1</sup> There is some argument that the effective date of the 2009 changes to the tolling law left nothing of G.S. 15A-1344(d). As stated in the main text, the tolling law was moved from G.S. 15A-1344(d) to G.S. 15A-1344(g) in 2009 by S.L. 2009-372 (SB 920). G.S. 15A-1344(g) was created in section 11(b) of that bill; the tolling portion of 1344(d) was stricken in section 11(a) of the bill. The bill’s effective date states that section 11(b) of the bill is effective for offenses committed on or after December 1, 2009; section 11(a) of the bill was made effective for “hearings held on or after December 1, 2009.” Thus, for a hearing held after December 1, 2009, section 11(a) of the bill arguably operates to remove the original tolling provision, leaving none in its place for a person on probation for an offense that occurred before December 1, 2009.

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 (unless the probationer has been determined to be a danger to the public pursuant to G.S. 15A-1345(b1), in which case he or she must be held until the final revocation hearing). The release does not dismiss the violation; rather, 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, it appears that any judge—district or superior court—may conduct the preliminary hearing, regardless of whether the underlying crime is a misdemeanor or felony.

A preliminary hearing is not required when the probationer is released on bail pending the final violation hearing. *State v. O’Connor*, 31 N.C. App. 518 (1976). Failure to hold a preliminary hearing does not deprive the court of jurisdiction to hear a final violation hearing. *State v. Seay*, 59 N.C. App. 667 (1982).

The State must give the probationer notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the probationer may appear and speak in his or her own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply. G.S. 15A-1345(d). There is no clear statutory right to counsel at the preliminary hearing, but many probationers probably have a constitutional right to counsel at that hearing. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (noting that counsel should be provided in cases where the probationer denies the alleged violation, in cases where there are substantial reasons which justified or mitigated the violation and those reasons are complex or otherwise difficult to develop or present, and in cases where it appears the probationer may have difficulty speaking effectively for himself).

If probable cause is found at the preliminary hearing (or if the hearing is waived), the probationer may be detained for a final violation hearing. If probable cause is not found, the probationer must be released to continue on probation.

## **Final Violation Hearings**

**Proper court and venue.** Any judge of same level (district or superior court) 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 for unsupervised probationers: 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 himself or herself.

Some additional rules apply when probation matters arise in places other than the district in which the probation was initially imposed. First, a court may always on its own motion return a probationer for hearing to the district where probation was imposed or the district where the probationer resides. G.S. 15A-1344(c). Second, the district attorney of the prosecutorial district in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially. G.S. 15A-1344(a). Third, if a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. If probation is revoked, the clerk in the county of revocation issues the commitment order. G.S. 15A-1344(c).

*Deferred prosecutions.* When a person on probation pursuant to a deferred prosecution agreement under G.S. 15A-1341(a1) is alleged to have violated probation, the violation must be reported to the court and to the district attorney in the district in which the agreement was entered. G.S. 15A-1342(a1). The court, not the district attorney, determines through ordinary probation hearing procedures whether a violation occurred and whether to “order that charges as to which prosecution has been deferred be brought to trial.” G.S. 15A-1344(d). The North Carolina Attorney General has advised that probation matters in deferred prosecution cases should be managed only by the court of the district in which the agreement was entered into, as “[b]ringing the charges to trial would be the responsibility of only the district attorney who brought the charges.” Advisory Letter from Assistant Attorney General Elizabeth F. Parsons to Department of Correction General Counsel LaVee Hamer, Nov. 1, 2010. Under G.S. 143B-708(e), hearings initiated by community service staff may be held in the county in which a deferred prosecution agreement was imposed, the county in which the alleged violation occurred, or the offender’s county of residence. In light of the guidance from the Attorney General’s office, however, the best practice is probably to hold the hearing where the agreement was imposed, notwithstanding the statute’s broader language.

*G.S. 90-96.* G.S. 90-96 is a conditional discharge program that allows eligible defendants who plead guilty to or are found guilty of certain drug crimes to be placed on probation without entry of judgment. For persons entering a plea or found guilty on or after January 1, 2012, deferral under G.S. 90-96(a) is mandatory for eligible, consenting defendants. S.L. 2011-192. Subsection G.S. 90-96(a1) provides for a similar conditional discharge program that is available to a broader group of defendants in the discretion of the trial court judge. Under either subsection, if the defendant succeeds on probation the court discharges the defendant and dismisses the proceeding without adjudication of guilt. If the defendant violates probation, the court may enter an adjudication of guilt and sentence the defendant.

In general, violation hearings for cases falling under G.S. 90-96 should be treated under the same rules applicable to ordinary probation cases. *State v. Burns*, 171 N.C. App. 759 (2005) (“In the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of Chapter 15A apply to probation imposed under [G.S.] 90-96.”). There are, however, some differences between violations of G.S. 90-96 probation and violations of ordinary probation matters. First, because there is no underlying

suspended sentence in a G.S. 90-96 probation case, there does not appear to be any basis for the court to order special probation (a split sentence); confinement in response to violation (CRV, discussed below); or “quick dip” confinement in a G.S. 90-96 case. Second, the limitations on the court’s revocation authority set out in G.S. 15A-1344(a) (discussed below), allowing revocation only in response to a new criminal offense or absconding, do not appear to apply in G.S. 90-96 cases. Rather, G.S. 90-96(a) provides that the court may enter an adjudication of guilt “upon violation of a term or condition”—which presumably includes any type of violation. Third, there is some sense that the district of conviction is the only proper venue for a probation hearing under G.S. 90-96 (and that violation hearings should not be held in the district where the probationer resides or the district where the violation occurred). Even if a return to the district of origin is not technically required, because the defendant must be sentenced if revoked, the most efficient practice is probably to hold the violation hearing in the district of conviction.

The court may use Form AOC-CR-622 to revoke or modify G.S. 90-96 probation, or to dismiss the case when a defendant has successfully fulfilled the terms and conditions of the probation.

*Class H and I felonies pled in district court.* 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 (consent of the judge is not required under the statute). 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).

*Supervision of felony drug treatment court or a therapeutic court in district court.* With the consent of the chief district court judge and the senior resident superior court judge, the district court has jurisdiction to preside over the supervision of a probation judgment entered in superior court in which the defendant is required to participate in a drug treatment court program or a therapeutic court (a court that promotes activities designed to address underlying problems of substance abuse and mental illness that contribute to a person’s criminal activity). G.S. 7A-272(e). In cases where the requisite judges give their consent, a district court judge may modify or extend probation judgments supervised under G.S. 7A-272(e). The superior court has exclusive jurisdiction to revoke probation of cases supervised under G.S. 7A-272(e), except that the district court has jurisdiction to conduct the revocation proceeding when the chief district court judge and the senior resident superior court judge agree that it is in the interest of justice that the proceedings be conducted by the district court. G.S. 7A-271(f). Unlike non-drug treatment court cases, however, if the district court exercises jurisdiction to revoke probation in a case supervised under G.S. 7A-272(e), appeal of an order revoking probation is to the appellate division, not to the superior court. G.S. 7A-271(f).

**The nature of the final probation violation hearing.** A probation violation hearing is not a criminal prosecution or a formal trial. *State v. Duncan*, 270 N.C. 241 (1967); *State v. Pratt*, 21 N.C. App. 538 (1974). Nevertheless, certain procedural protections apply as a matter of statute and constitutional due process. At the hearing, evidence against the probationer must be

disclosed to him or her, and the probationer may appear, speak, and present relevant information.

The probationer may confront and cross-examine witnesses unless the court finds good cause for not allowing confrontation. Confrontation in this context is a due process right, not a Sixth Amendment right under the Confrontation Clause. *State v. Braswell*, 283 N.C. 332 (1973). If the court disallows confrontation it must make findings that there was good cause for doing so. *State v. Coltrane*, 307 N.C. 511 (1983). In *Coltrane*, the supreme court reversed a probation revocation when the trial court did not allow the probationer to confront her probation officer (who was not present at the hearing) without making findings of good cause for not allowing confrontation.

The defendant has a statutory right to counsel at the final violation hearing, including appointed counsel if indigent. G.S. 15A-1345(e).

**Evidence.** The rules of evidence do not apply at probation violation hearings. 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. *State v. Lombardo*, 74 N.C. App. 460 (1985). The record or recollection of evidence or testimony introduced at the preliminary hearing is inadmissible as evidence at the final violation hearing. G.S. 15A-1345(e).

**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).

**Admitted violations.** A defendant does not plead "guilty" or "not guilty" to a probation violation. Rather, he or she admits or denies the violation. *State v. Sellers*, 185 N.C. App. 726 (2007). When a defendant admits to a violation, there is no requirement that the court personally examine him or her pursuant to G.S. 15A-1022 (unlike when a defendant pleads guilty to a criminal charge). *Id.* A defendant is not entitled to a continuance on matters related to probation when a trial judge rejects a plea bargain in a new criminal case that includes an agreement to continue the defendant on probation in a prior case. *State v. Cleary*, \_\_ N.C. App. \_\_, 712 S.E.2d 722 (July 5, 2011).

**Waiver of counsel.** The court must comply with G.S. 15A-1242 when accepting a waiver of the right to counsel at a probation violation hearing, just as it must at trial. *State v. Evans*, 153 N.C. App. 313 (2002). The court must inquire whether the defendant (1) has been clearly advised of his right to counsel; (2) understands the consequences of a decision to proceed without counsel; and (3) comprehends the nature of the charges and the range of permissible punishments.

## Potential Outcomes of a Violation Hearing

**Reinstate probation.** Whether or not a violation is found, the court may continue a probationer on probation under the same conditions.

**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). Upon a finding that an offender sentenced to community punishment has violated one 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).

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. Seek*, 152 N.C. App. 237 (2002); *State v. Suggs*, 92 N.C. App. 112 (1988).

**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. (The terms “ordinary” and “special-purpose” are used here 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). A person may receive more than one ordinary extension over the life of his or her probation case.

*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; -1342(a).

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. *See State v. Gorman*, \_\_ N.C. App. \_\_ (June 19, 2012).

**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.

**Transfer to unsupervised probation.** The court may authorize a probation officer to transfer a defendant to unsupervised probation after all money owed is paid to the clerk. G.S. 15A-1343(g). A probation officer also has independent authority to transfer a low risk misdemeanor from supervised to unsupervised probation if the misdemeanor is not subject to any special conditions and was placed on probation solely for the collection of court-ordered payments. *Id.*

**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 proved beyond a reasonable doubt using the procedures set out in Article 1 of Chapter 5A of the General Statutes. A sentence for criminal contempt may not exceed 30 days. Time spent imprisoned for contempt under this provision counts for credit against the suspended sentence if it is ever activated. *State v. Belcher*, 173 N.C. App. 620 (2005).

**Special probation.** With a finding of violation the court may modify probation to add special probation (a split sentence). The court may require that the defendant submit to continuous or noncontinuous periods of imprisonment, but the total amount of confinement may not exceed one-fourth the maximum sentence imposed (or, in the case of impaired driving, one-fourth the maximum penalty allowed by law). G.S. 15A-1344(e); -1351(a).

**“Quick dip” ordered by the court.** For offenders on probation for Structured Sentencing offenses that occurred on or after December 1, 2011, the court may order jail confinement of no more than six days per month during any three separate months during the period of probation. That time must be served in two- or three-day increments. G.S. 15A-1343(a1)(3).

**Confinement in Response to Violation.** The Justice Reinvestment Act of 2011 substantially limited a court’s authority to revoke an offender’s probation. Under G.S. 15A-1344(a) and (d2), for violations that occur on or after December 1, 2011, the court may only revoke probation for:

- Violations of the “commit no criminal offense” condition set out in G.S. 15A-1343(b)(1);
- Violations of the statutory “absconding” condition set out in G.S. 15A-1343(b)(3);
- Any violation by an offender who has previously received a total of two periods of “confinement in response to violation,” described below.

For other violations—hereinafter referred to as “technical violations”—a court may not revoke probation. It may instead impose a period of “confinement in response to violation” (CRV) under G.S. 15A-1344(d2). Some have referred to CRV informally as a “dunk,” with the idea that it is a period of confinement that is generally shorter than a revocation but longer than a “quick dip.” The terminology is useful, but it should be noted that there is no express statutory connection between “dips” and “dunks.” It is not, for example, a prerequisite to a dunk that a person have already served a dip, and different procedures apply to each type of confinement.

The court's limited authority to revoke applies in supervised and unsupervised probation cases, Structured Sentencing and impaired driving cases, and to all probationers regardless of the date of the offense for which they are on probation.

The court should use a modification order, form AOC-CR-609, to impose CRV.

**Felony CRV.** For a person on probation for a felony, a CRV period must be a flat 90 days, no more and no less. If the person has 90 days or less remaining on his or her suspended sentence the duration of the CRV period is for that remainder of the suspended sentence. A CRV period entered pursuant to this 90-days-or-less-remaining rule is sometimes referred to as a "terminal CRV" or "terminal dunk," because it brings the person to the end of his or her sentence.

**Misdemeanor CRV.** For misdemeanants, the CRV period is "up to 90 days," allowing a judge to impose a period shorter than 90 days in his or her discretion.

### ***Additional rules related to CRV***

**Jail credit.** If a defendant is detained in advance of a violation hearing at which CRV is ordered, the judge must first credit that pre-hearing confinement to the CRV period, with any excess time to be applied in the event that the suspended sentence is activated. G.S. 15A-1344(d2). For instance, if a felony probationer is jailed for 20 days in advance of a probation violation hearing, and the result of that hearing is a CRV period, the court will order a 90-day CRV period with 20 days credit applied to that 90-day period. The defendant will be imprisoned for 70 days. If the defendant has already been held in pre-hearing confinement in excess of 90 days, any CRV ordered would be to time served, with the remainder of the credit to be applied to the suspended sentence in the event of activation.

**Multiple CRV periods.** When a defendant is on probation for multiple offenses, G.S. 15A-1344(d2) requires CRV periods to run concurrently on "all cases related to the violation." Confinement is to be "immediate unless otherwise specified by the court," suggesting a preference—but not an absolute requirement—for immediate service of the confinement.

**Place of confinement for CRV.** General Statute 15A-1344(d2) specifies that CRV periods are served "in the correctional facility where the defendant would have served an active sentence." The proper place of confinement for a felony CRV period is thus the Division of Adult Correction, which has identified six facilities that will house CRV inmates.<sup>2</sup> The proper place of confinement for a misdemeanor CRV period will be either the local jail, the Misdemeanant Confinement Program, or, in some cases, prison, depending on the length of the sentence and whether it was for a crime sentenced under Structured Sentencing or an impaired driving offense.

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<sup>2</sup> Those facilities are Dan River, Greene, Odom, Tyrrell, Western Youth Institution and, for women, Fountain Correctional.



## Revocation

Revocation means a probationer's suspended sentence is activated and the probationer is ordered to jail or prison. For violations of probation before December 1, 2011, any single violation of a valid probation condition is a sufficient basis for revocation, *State v. Tozzi*, 84 N.C. App. 517 (1987), with the caveat that by statute probation may not be revoked solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d).

Under Structured Sentencing, an activated sentence must be served in a continuous block; the court may not order it served on weekends. *State v. Miller*, \_\_ N.C. App. \_\_, 695 S.E.2d 149 (2010). (Note: Active sentences for impaired driving may be served on weekends under G.S. 20-179(s).)

Generally a sentence is activated in the same form it was entered by the original sentencing judge, but the revoking judge has limited discretion to modify the sentence in several ways:

*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. For misdemeanors, the court is restricted to the range of sentence durations set out on the misdemeanor sentencing grid (every cell on the misdemeanor grid begins at 1 day). 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 that 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*.)

## Revocation-Eligible Violations after Justice Reinvestment

For violations occurring on or after December 1, 2011, the court may (but is not required to) revoke a person's probation for two types of probation violations: new criminal offenses and absconding under G.S. 15A-1343(b)(3a). Issues associated with each category of revocation-eligible violation are discussed below.

*New criminal offense.* Under G.S. 15A-1343(b)(1), it is a regular condition of probation that a person “commit no criminal offense in any jurisdiction.” For many years there has been a division of opinion on whether that condition is violated only when a person is convicted of a new criminal offense, or whether a pending charge or even uncharged criminal conduct could be the basis of a violation. Practice is divided around the state, with some districts routinely holding violation hearings on unconvicted conduct and others having a per se rule against holding a probation violation hearing on a new criminal offense until the defendant is convicted.

The rule that emerges from a patchwork of cases decided over the past century is that a person’s probation should not be revoked based on a new criminal offense until he or she is convicted of that charge, *State v. Guffey*, 253 N.C. 43 (1960), unless the probation court makes an *independent finding*, to its “reasonable satisfaction,” that the defendant committed a crime. *State v. Monroe*, 83 N.C. App. 143 (1986). Probation should never be revoked based on the mere fact that a new criminal charge is pending; rather, there must be a conviction *or* some inquiry by the probation court into the alleged criminal behavior itself. Any “independent finding” of a new criminal offense must be a finding of behavior that clearly constitutes a crime. *State v. Hardin*, 183 N.C. 815 (1922) (setting aside a trial court order activating a suspended judgment when the probationer’s alleged criminal act, possessing 150 gallons of wine, was not a crime at the time). For instance, a positive drug screen does not, without more, constitute substantial evidence sufficient to prove that a defendant committed the crime of knowingly and intentionally possessing a controlled substance. *State v. Harris*, 361 N.C. 400 (2007).

*Absconding.* Under the JRA, the court may revoke probation for a violation of the statute absconding condition set out in G.S. 15A-1343(b)(3a). That condition only applies to persons on probation for offenses that occurred on or after December 1, 2011. S.L. 2011-412, sec. 2.5. Violations of other conditions (like the “remain within the jurisdiction” condition or the “failure to report to the officer” condition) are ineligible for revocation, even if the Section of Community Corrections refers to them colloquially as absconders. For violations occurring on or after December 1, 2011, court and corrections officials should thus be careful to distinguish between *statutory absconders* and *policy absconders*. Only the former may be revoked, whereas the latter are technical violators subject to CRV or other non-revocation response options. If an offender allegedly absconded before December 1, 2011, he or she would be eligible for revocation under the applicable prior law.

Even for offenders actually subject to the new statutory absconding condition, it is not entirely clear from the language of the condition itself what it means for a probationer to avoid supervision, or how long a person’s whereabouts must be unknown before he or she becomes an absconder. Those thresholds will, to some degree, be shaped by other conditions to which the probationer may be subject and by the contact frequency standards associated with his or her supervision level. Additionally, probation officers are still required as a matter of their internal policy to conduct a specialized investigation before declaring that an offender has absconded. That investigation includes attempting to contact the offender by telephone, visiting the offender’s residence in the daytime and in the evening, contacting the offender’s landlord and neighbors, visiting the offender’s workplace or school, contacting the offender’s relatives and associates, and contacting local law enforcement, including the jail.

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. *Burns*, 171 N.C. App. at 762 (“The mere notation of “absconder” on the order for arrest did not relieve the State of its duty to make reasonable efforts to notify defendant under [G.S. 15A-1344].”).

**Revocation after two CRV periods.** When a defendant has previously received two periods of confinement in response to violation, the court may revoke probation for any subsequent violation, including a technical violation. G.S. 15A-1344(d2). The law thus operates as a sort of “three strikes” provision, such that a person may not be revoked for a technical violation until his or her third strike. Note, however, that it is only the prior receipt of CRV periods that qualifies a person for revocation for a technical violation, not the prior findings of violation themselves. In other words, violations responded to in some other way (by a term of special probation, for example) do not count as “strikes.”

A defendant may only receive two CRV periods in a particular probation case. A defendant may not receive a third CRV period for a third or subsequent technical violation. At that point the court must either revoke probation or impose some other form of modification, including special probation or contempt, for example, if the court is inclined to use a form of non-revocation confinement.

**Elections to serve a sentence.** Technically a probationer may not “elect to serve” his or her sentence; G.S. 15A-1341(c) used to allow for that, but it was repealed in 1995 (S.L. 1995-429). A defendant can, of course, admit to a violation of probation. But note that for violations occurring on or after December 1, 2011, the court may only revoke probation for new criminal offenses or absconding.

**Civil judgments for monetary obligations.** Generally, restitution may not be ordered docketed as a civil judgment upon revocation or termination of probation. Only in cases covered under the Crime Victims’ Rights Act (CVRA) may restitution orders be “enforced in the same manner as a civil judgment,” and only when the restitution amount exceeds \$250. G.S. 15A-1340.38; -1340.34. In those cases, the judgment may not be executed upon the defendant’s property until the clerk is notified that the defendant’s probation has been terminated or revoked and the judge has made a finding that restitution in a sum certain remains owed. G.S. 15A-1340.38. The finding that a restitution balance is due upon revocation or termination of probation should be made on form AOC-CR-612.

Attorney fees owed by indigent defendants may be docketed under the procedure set out in G.S. 7A-455. Unpaid fines and costs may be docketed under the procedure set out in G.S. 15A-1365.

**License forfeiture upon revocation.** If a felony probationer either “refuses probation” or has probation revoked for failing, in the revoking court’s estimation, “to make reasonable efforts to comply with the conditions of probation,” the probationer automatically forfeits all licensing privileges. G.S. 15A-1331A (recently recodified as G.S. 15A-1331.1. S.L. 2012-194, sec. 45.(a).

Judges can use Side Two of AOC-CR-317 to order the forfeiture, which covers driver's licenses (regular and commercial), occupational licenses, and hunting and fishing licenses.

The forfeiture lasts "for the full term of the period the individual is placed on probation by the sentencing court at the time of conviction for the offense." G.S. 15A-1331A(b). The forfeiture period must end when the probationer's original term of probation would have expired. For instance, a person whose probation is revoked 23 months into a 24-month period of probation can face only a one-month of license forfeiture under G.S. 15A-1331A (not a 24-month forfeiture period beginning at the time of revocation). *State v. Kerrin*, \_\_ N.C. App. \_\_, 703 S.E.2d 816 (2011). For purposes of filling out the AOC-CR-317, the beginning date of the forfeiture typically will be the date of the revocation hearing and the end date will be the date the original period of probation ordered by the sentencing court would have expired.

**Driver's license forfeiture for violations related to community service.** If a court determines that a defendant has willfully failed to comply with a requirement to complete community service, the court shall revoke any drivers license issued to the person and revoke any drivers license until the community service requirement has been met. G.S. 143B-708(e).

**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 when the defendant was held in the other state solely based on North Carolina charges. *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);
- Confinement in Response to Violation under G.S. 15A-1344(d2).
- Short-term ("quick dip") confinement as a condition of probation, imposed by a judge under G.S. 15A-1343(a1)(3), or by a probation officer under G.S. 15A-1343.2.

Credit should not be awarded for time spent under electronic house arrest, *State v. Jarman*, 140 N.C. App. 198 (2000), or for time spent at a privately run residential treatment program as a condition of probation (in a non-DWI case), *State v. Stephenson*, \_\_ N.C. App. \_\_ (July 19, 2011).

**Work release.** Under G.S. 15A-1351(f), the sentencing court may recommend or, with the consent of the defendant, order work release for a misdemeanor. When a defendant is sentenced to

probation, that recommendation should not be made until probation is revoked and the sentence of imprisonment is activated. G.S. 148-33.1(i).

### **Defenses to Probation Violations**

**Improper period of probation.** G.S. 15A-1343.2(d) sets out the presumptive lengths for periods of probation imposed under Structured Sentencing 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 sentencing 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 suspended sentence judgment forms to indicate that the judge has made the requisite finding.

Sometimes a court sentences a defendant to a probation term longer than the defaults set out above without making the requisite findings. When the error is discovered early on and the defendant appeals, the appellate courts remand the case for resentencing with instructions to the trial court to make the requisite finding or order a shorter period of probation. *See, e.g., State v. Riley*, 202 N.C. App. 299 (2010). The probationer could also file a motion for appropriate relief at any time under G.S. 15A-1415(b)(8) on the ground that the sentence was unauthorized at the time imposed.

Sometimes the error is not discovered until the defendant has already violated probation. It is not clear whether the court retains power to act over a case that would have expired if the probation term had been within the durational limits, especially if the violation occurred after a lawful period would have ended.

**Willfulness.** Probation may not be revoked unless a violation was willful or without a lawful excuse. *State v. Hewett*, 270 N.C. 348 (1967). Once the state establishes that a defendant failed to comply with a condition of probation, the burden is on the defendant to produce evidence that the failure to comply was not willful. 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 defendant shows a good faith inability to pay a fine or court cost, the court may (1) allow additional time for the defendant to pay, (2) reduce the amount owed, or (3) remit the obligation altogether. G.S. 15A-1345(e); -1364(c).

If the defendant does not offer evidence of his or her inability to comply, the State’s evidence of the failure to comply is sufficient to justify revocation. *State v. Jones*, 78 N.C. App. 507 (1985). If a defendant does put on evidence of his or her inability to comply, the court must consider that

evidence and make findings of fact clearly showing that it did so. *Id.* For example, the trial court erred by failing to make findings of fact that clearly showed it considered the defendant's evidence that he was unable to pay the cost of his sexual abuse treatment program. The defendant presented evidence, corroborated by his probation officer, that he was unable to pay for the program because he had lost his job. *State v. Floyd*, \_\_ N.C. App. \_\_ (July 19, 2011). On the other hand, a defendant's explanation that she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug education program. *State v. Stephenson*, \_\_ N.C. App. \_\_ (July 19, 2011).

**Invalid conditions of probation.** Probation may not be revoked based on an invalid condition of probation. The regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every case valid. Similarly, the statutory special conditions set out in G.S. 15A-1343(b1) are presumptively valid. *State v. Lambert*, 146 N.C. App. 360, 367 (2001) (“[W]hen the trial judge imposes one of the special conditions of probation enumerated by N.C. Gen. Stat. § 15A-1343(b1), the condition need not be reasonably related to defendant's rehabilitation because the Legislature has deemed all those special conditions appropriate to the rehabilitation of criminals and their assimilation into law-abiding society.”).

Ad hoc special conditions (those not set out in the General Statutes) must be reasonably related to the offender's rehabilitation and reasonably necessary to insure that the defendant will lead a law-abiding life. Any ad hoc conditions must also bear a relationship to the defendant's crime. *State v. Cooper*, 304 N.C. 180 (1981) (upholding a special condition prohibiting a defendant, convicted of possession of stolen credit cards, from operating a vehicle between midnight and 5:30 a.m.). The appellate courts have interpreted the catch-all provision broadly, giving trial judges “substantial discretion” in tailoring a judgment to fit a particular offender and offense. *State v. Johnston*, 123 N.C. App. 292 (1996).

Probation conditions obviously cannot place unconstitutional constraints on a probationer (e.g., “Go to church every Sunday,” or “Get married”). In *Lambert*, for example, the court of appeals noted the invalidity of special probation condition prohibiting a defendant from filing court documents unless they were signed and filed by a licensed attorney, as it unreasonably infringed on his fundamental right of access to the courts and his right to conduct his defense pro se. 146 N.C. App. at 364.

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. 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. *State v. Cooper*, 304 N.C. 180 (1981).

### **Delegated Authority**

In Structured Sentencing cases (but not in impaired driving cases), a probation officer can, in certain circumstances, impose some conditions of probation without action by the court. The delegated authority law was expanded considerably in 2011 as part of Justice Reinvestment. What conditions the officer may impose and when depends on the date of the offense for which the offender is under supervision. In all cases, though, the trial court judge has discretion to find in its

judgment that delegation is not appropriate, essentially un-delegating the authority that is otherwise delegated by default. If the judge checks the box on the judgment form indicating that delegation is not appropriate, the probation officer does not have the authority described below.

*For offenses committed on or after December 1, 2011* and sentenced to community punishment, the probation officer may require the offender to do any of the following:

- (1) Perform up to 20 hours of community service, and pay the fee prescribed by law for this supervision.
- (2) Report to the offender's probation officer on a frequency to be determined by the officer.
- (3) Submit to substance abuse assessment, monitoring or treatment.
- (4) Submit to house arrest with electronic monitoring.
- (5) Submit to a so-called "quick dip" in the jail, a period or periods of confinement in a local confinement facility for a total of no more than six days per month during any three separate months during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as two-day or three-day consecutive periods. When a defendant is on probation for multiple judgments, confinement periods imposed under this subdivision shall run concurrently and may total no more than six days per month.
- (6) Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically.
- (7) Participate in an educational or vocational skills development program, including an evidence-based program. G.S. 15A-1343.2(e).

The list of available conditions for offenders sentenced to intermediate punishment is the same as for community punishment, with two exceptions. First, in intermediate cases the officer may order up to 50 hours of community service instead of 20. And second, in intermediate cases the officer may require the offender to submit to satellite-based monitoring if the defendant is a sex offender described by G.S. 14-208.40(a)(2). G.S. 15A-1343.2(f).

For offenders on probation for offenses that occurred on or after December 1, 2011, the officer may impose any of the above-listed conditions except the "quick dip" in the jail if the officer has determined that the offender has failed to comply with one or more of the conditions imposed by the court *or* if the offender is determined to be high risk based on the results of the risk assessment completed by Community Corrections. The officer may only impose the quick dip condition if Community Corrections determines that the offender failed to comply with one or more court-imposed condition, and then only if the offender waives his or her right to counsel and a violation hearing as provided in G.S. 15A-1343.2.

When a probation officer adds a condition or conditions through delegated authority, he or she must give the offender notice of the right to seek court review of the officer's action. The probationer is entitled to file a motion with the court for review (although the statute is silent as to how and how quickly that hearing must be held), except in the case of the quick dip condition, for which the offender shall have no right of review if he or she has signed a waiver of his or her right

to counsel and a hearing. Any conditions added by the officer may subsequently be reduced or removed by the officer. G.S. 15A-1343.2.

If properly added by a probation officer through delegated authority, a new condition of probation is enforceable like any condition imposed by the court.

## **Appeals**

When a district court judge activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. If, at the de novo hearing, the superior court continues the defendant on probation, the case is considered to be a superior court case from that point forward; all future proceedings in the case are handled in superior court. G.S. 15A-1347. When a superior court judge activates a sentence or imposes special probation, appeal is to the appellate division under G.S. 7A-27; G.S. 15A-1347.

There is no statutory mechanism for a probationer to appeal modifications that do not involve special probation. *State v. Edgerson*, 164 N.C. App. 712 (2004).

There is no clear statutory provision for appealing a CRV period. 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, however, be an argument that imposition of a CRV period—especially a terminal CRV period—fits within the language of G.S. 15A-1347 as an activation or partial activation, although other provisions in that law reference “judgments *revoking* probation.” Even if that statute is not applicable, other avenues for review may be possible. For appeals from superior court to the appellate division, G.S. 15A-1442(6) (providing that a defendant may appeal other prejudicial errors of law) or G.S. 7A-27(b) (granting jurisdiction to the court of appeals to review any final judgment of a superior court) may be deemed a sufficient basis for appeal. Aside from those provisions, a defendant might also seek review through a petition for a writ of certiorari, motion for appropriate relief, petition for a writ of habeas corpus, or other extraordinary writ, depending on the nature of the alleged error.

When a violation hearing for a Class H or I felony pled in district court is held in district court, the appeal is de novo to superior court, not to the court of appeals. *State v. Hooper*, 358 N.C. 122 (2004). If the district court exercises jurisdiction to revoke probation in a case supervised under G.S. 7A-272(e), which governs supervision of certain drug treatment court or therapeutic court cases, appeal of an order revoking probation is to the appellate division. G.S. 7A-271(f).

## **Aggravating factor based on prior violation**

Under G.S. 15A-1340.16(d)(12a), it is a statutory aggravating factor for felony sentencing purposes that the defendant has, during the 10-year period before the commission of the



offense for which he or she is now being sentenced, been found in a prior case to be in willful violation of the conditions of probation or post-release supervision.

## **Defending a probation violation—A general framework**

### 2012 New Misdemeanor Defender Training

Jamie Markham  
September 2012

1. Does the court have jurisdiction to act?
  - Did the defendant receive proper notice of the alleged violation?
  - Was the original period of probation lawful (was it within statutory defaults or did the court find that a longer period was necessary)?
  - Has there ever been an unlawful extension of probation?
  - Was the probation violation report filed and file stamped before the period of probation expired (consider the effect of any tolling that may have applied based on new criminal charges)?
2. Did the defendant violate a proper condition?
  - Did the defendant have written notice of the condition on his or her judgment?
  - If a condition other than a regular condition, was it reasonably related to the defendant's rehabilitation and the defendant's crime?
3. Was the violation willful?
  - If a monetary condition, can the defendant show a good faith inability to pay?
4. Did the court consider alternatives to revocation?
  - House arrest
  - "Quick dip"
  - Special probation (split sentence)
  - DART-Cherry/Black Mountain for substance abuse treatment
  - 90-day confinement in response to violation ("dunk")
5. Was the violation revocation-eligible after Justice Reinvestment?
  - New criminal offense (Has the defendant been convicted of that offense? If not, did the court make independent findings that the criminal act occurred?)
  - Absconding under G.S. 15A-1343(b)(3a) (Is the defendant on probation for an offense that occurred after 12/1/11? If not, he or she is not subject to the "don't abscond" probation condition. Did the probation officer follow the Community Corrections investigation policy before declaring the person to be an absconder?)
6. If revocation, did the court consider mitigating the suspended sentence?
  - Reducing the suspended sentence
  - Making consecutive sentences concurrent