

**Probation Reform  
Common Sentencing Errors**

Judge Greg Horne  
Jamie Markham

June 2010




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**Probation changes, generally**

- Effective for offenses committed on/after December 1, 2009
- Be sure to use the proper form!




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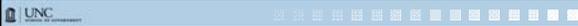
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**Access to juvenile records**

- Probation officer access w/o court order
- Offenders under age 25 at time of offense
- For risk assessment purposes only




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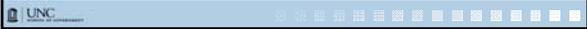
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### Warrantless searches by default

- By probation officers:
  - Of probationer’s person, vehicle, or premises
  - Reasons *directly related* to probation supervision
  - Level of suspicion required?
- By law enforcement officers:
  - Of probationer’s person or vehicle (not premises)
  - With *reasonable suspicion* of criminal activity or possession of a deadly weapon




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### Random drug screening

- Old special condition #15, “Supply a breath, urine, or blood sample...when directed,” not on new forms
- Do you need it?




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### Random drug screening

- Drug tests are a warrantless search
- “Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse [DOC] for the actual cost of drug screening and drug testing, if the results are positive.”




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### Random drug screening

- The problem: random = suspicionless
- You could add old special condition #15 under new box #20




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### Default intermediate conditions

- Community service as required by PPO
- Not use, possess, control alcohol
- Remain in county of residence
- Evaluation, counseling, treatment, or education as directed by probation officer




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### Tolling

- “The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which, upon conviction, could result in revocation . . . .”

G.S. 15A-1344(g)




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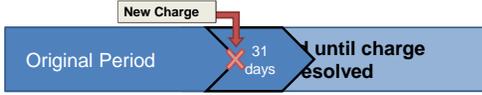
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### Jurisdiction: Tolling

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



- Defendant remains subject to supervision during the tolled period



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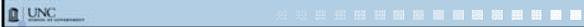
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### Tolling: New credit-back rule

If acquitted or charge dismissed, time spent in tolled status gets credited back



Applies to offenses committed on/after Dec. 1, 2009



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### Deferred prosecution

- Violations must be brought before court



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### Transfer to unsupervised

- Probation officer may transfer certain misdemeanants to unsupervised probation
  - No special conditions
  - Low risk
  - On probation solely for collection of money




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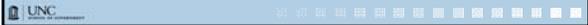
### New pretrial release rules

#### **New felony charge while on probation**

- If not dangerous, set conditions
- If dangerous, secured bond or EHA
- If unknown, detain until information available (1st app. in 96 hours)

#### **Prob. violation while felony charge pending**

- If not dangerous, set conditions
- If dangerous, no bond pending PV hearing
- If unknown, detain for up to 7 days to get information




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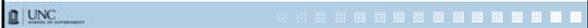
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### Tampering with EHA equipment

- New crime, one offense class lower than offense requiring supervision
- Class 1 for pretrial defendants




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### EHA leave

- Probation officer can authorize EHA leaves for reasons not specified by the court

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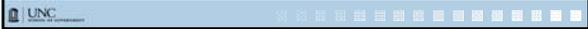
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### Common Sentencing Errors

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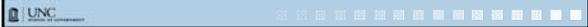
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### Question 1: Error

- Default probation lengths:
  - Misdemeanor/Community: 6 – 18 months
  - Misdemeanor/Intermediate: 12 – 24 months
  - Felony/Community: 12 – 30 months
  - Felony/Intermediate: 18 – 36 months
- Up to 5 years with finding of necessity

**SUSPENSION OF SENTENCE**

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

1. The Court finds that a  longer  shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).

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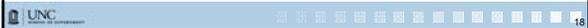
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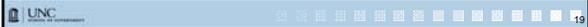
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### Question 2: No error

- G.S. 15A-1344(d) allows the revoking judge to change the consecutive/concurrent decision set out in the original judgment.
  - State v. Hanner, 188 N.C. App. 137 (2008)
- If you want activated sentences to run consecutively, be sure the revocation judgment says so.




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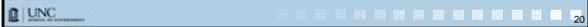
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### Question 3: No error

- It's permissible to count all of these offenses for points when sentencing for a later offense
  - State v. Hyden, 175 N.C. App. 576 (2006)
- Don't confuse this situation with the rule from State v. Gentry, 135 N.C. App. 107 (1999)
  - When sentencing a defendant for habitual DWI, don't count points for the three misdemeanor DWIs that were used to "habitualize" the defendant




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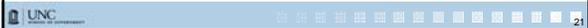
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### Question 4: Error

- DART-Cherry is "confinement" and thus counts for credit under G.S. 15-196.1
  - State v. Lutz, 177 N.C. App. 140 (2006)




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### Question 5: No error

- EHA is not confinement.
  - State v. Jarman, 140 N.C. App. 198 (2000)




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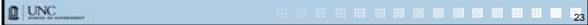
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### Question 6: No error

- Time spent jailed for contempt counts for credit under G.S. 15-196.1.
  - State v. Belcher, 173 N.C. App. 620 (2005)




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### Question 7: Error?

1. Yes
2. No

CLASS	I	II	III
	No Prior Convictions	One to Four Prior Convictions	Five or More Prior Convictions
1	1 - 45 days C	1 - 45 days C/A	1 - 120 days C/A




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### Question 7: Error

- The total of all special probation confinement may not exceed one-fourth of the maximum sentence imposed (100 days), not the maximum allowed by law (120 days).

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### Question 8: No error

- In DWI cases, the total of all special probation confinement may not exceed one-fourth of the maximum sentence of allowed by law (12 months for a Level Two).

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### Question 9: Error

- Under G.S. 15A-1343(b2), a defendant convicted of a reportable crime must abide by the special conditions set out in that section.
  - Constitutional, even when it keeps a parent from living with his child. 169 N.C. App. 193 (2005).

**MANDATORY SPECIAL CONDITIONS FOR SEX OFFENDERS AND PERSONS CONVICTED OF OFFENSES INVOLVING PHYSICAL, MENTAL, OR SEXUAL ABUSE OF A MINOR - G.S. 15A-1343(b2)**

**NOTE:** The following are not defined as intermediate punishments under G.S. 15A-1340 (1)(b).  
**NOTE:** Select only one of the three sets of conditions below.

**7. Special Conditions For Reportable Convictions - G.S. 15A-1343(b2)**  
**NOTE:** Impose only for a reportable conviction under G.S. 14-208 E.  
 The defendant has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208-6(a) and must:  
 1. Register as a sex offender  and enroll in satellite-based monitoring as required on the attached AOC-CRM-15, Side Two.  
 2. Participate in each evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.  
 3. Not communicate with, be in the presence of or found in or on the premises of the victim of the offense.  
 4. If the Court finds physical, mental or sexual abuse of a minor has resulted in a household with:  
 a. the smallest minor only under 10;  b. other than the defendant's parent/guardian, for whom the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the best interest of the child(ren) named below to reside in the same household with the defendant, those minor child(ren) may reside in the same household.  
 5. Submit all reasonable access to electronic messages by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, if the following processes which are reasonably related to the defendant's probation supervision:  (a) cell photography.

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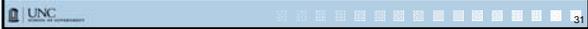
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### Question 13: Error

- When a PJC includes conditions that amount to punishment, it loses its character as a PJC and becomes a final judgment. State v. Popp, 676 S.E.2d 613 (2009).
- Once the judgment is final, the court loses authority to modify it after adjournment of the term.




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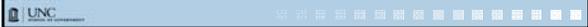
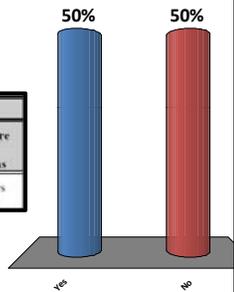
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### Question 14: Error?

1. Yes
2. No

CLASS	I	II	III
	No Prior Convictions	One to Four Prior Convictions	Five or More Prior Convictions
1	1 - 45 days C	1 - 45 days C/A	1 - 120 days C/A




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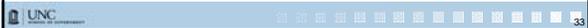
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### Question 14: Error

- For misdemeanors, the cumulative length of consecutive sentences may not exceed twice the maximum sentence authorized for the class and prior record level of the most serious offense. G.S. 15A-1340.22.
- 2 x 45 = 90 days
- This rule applies regardless of whether sentences are suspended.




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### Question 15: No error

- Assault on a female is covered under the Crime Victims' Rights Act when committed between a defendant & victim with a personal relationship
- CVRA restitution orders over \$250 may be treated as a civil judgment upon revocation or termination



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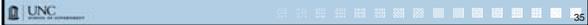
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### Question 16: Error

- Once a district court probation case is appealed to superior court, it's a superior court case from that point on.

G.S. 15A-1347



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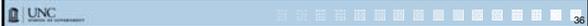
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### Question 17: Error

- The court may delegate determination of a payment schedule to a probation officer, but the court should determine the total amount.



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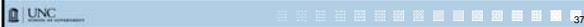
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### Question 18: No error

- The court may extend, modify, or revoke probation after expiration if a probation violation report was filed before the term ended. G.S. 15A-1344(f).
- For hearings held on/after December 1, 2008, the “reasonable efforts” finding is no longer required. S.L. 2008-129.




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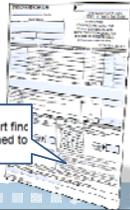
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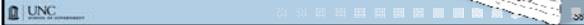
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### Question 19: Error

- Substantial similarity is a question of law— stipulations are invalid
  - State v. Palmateer, 179 N.C. App. 579 (2006)
- Judicial findings required if either party seeks a departure from the default
  - Class 1 for felonies
  - Class 3 for misdemeanors



For each out-of-state conviction listed in Section IV on the reverse, the Court find to a North Carolina offense and that the North Carolina classification assigned to




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### Question 20: Error

- There are two kinds of extensions
  - Ordinary (15A-1344(d)): At any time, *for good cause shown*, the court may extend probation to the 5-year maximum
    - No violation needed; no limitation to last 6 months
  - Special purpose (15A-1343.2): If the following requirements are met, the court may extend probation by up to 3 years beyond the original period
    - Probationer consents
    - During last 6 months of **original** period, and
    - Extension for restitution or med/psych treatment




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