THE NORTH CAROLINA

Justice Reinvestment Act

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UNC
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GOVERNMENT

E. Risk Assessment

For probationers sentenced under Structured Sentencing, the JRA requires DAC to use a validated instrument to assess each probationer's risk of reoffending.[37] The law further requires DAC to place probationers into different supervision levels based on the results of that risk assessment and offenders' "criminogenic needs."[38] DAC refers to the assessment process collectively as the "Risk-Needs Assessment," or RNA. By DAC policy the RNA must be completed within the first 60 days of an offender's probation.[39]

37. Though the new statutory risk assessment requirement technically applies only to offenders sentenced under Structured Sentencing (it is included in G.S. 15A-1343.2, which only applies to persons sentenced under Article 81B of G.S. Chapter 15A), DAC uses the assessment on all probationers, including DWI offenders.

38. G.S. 15A-1343.2(b1).

39. State of North Carolina, Dep't of Public Safety, Div. of Adult Correction, Section of Community Corrections, Policy and Procedure Manual (2012) (hereinafter Community Corrections Policy) § D.0503.

Table 2.1. DAC projections of the likelihood of re-arrest within 1 year

OTI-R score range	Risk level	Percentage re-arrested within 1 year
0–10	Minimal	7
11–25	Low	16
26–49	Moderate	31
50–65	High	47
66–100	Extreme	57

Risk Level

DAC has for many years assessed offenders' risk using a risk assessment instrument called the Offender Traits Inventory, or OTI. More recently, DAC has begun to use a revised version of the instrument called the OTI-R. The OTI-R predicts a person's probability of re-arrest through an algorithm that takes into account aspects of his or her criminal record and certain personal characteristics, such as age, employment, and education. The instrument assigns the person one of five risk levels ranging from Extreme to Minimal. Table 2.1 shows DAC's projection of the likelihood of re-arrest within 1 year for offenders in each risk level.

Needs Level

Two assessment tools make up the needs portion of the RNA: the "Officer's Interview/Impressions Worksheet" and the "Offender Self-Report." These tools ask a battery of questions designed to flag a person's criminogenic needs. Criminogenic needs are aspects of an offender's life linked to criminal behavior, such as association with criminal peers, a dysfunctional family, and substance abuse.[40] DAC sorts offenders into one of five needs levels ranging from Extreme to Minimal depending on the particular needs identified by the assessment tools and other factors, such as the offender's record of juvenile delinquency.

40. *See* James Bonta, *Offender Risk Assessment: Guidelines for Selection and Use*, 29 Criminal Justice & Behavior 355 (2002).

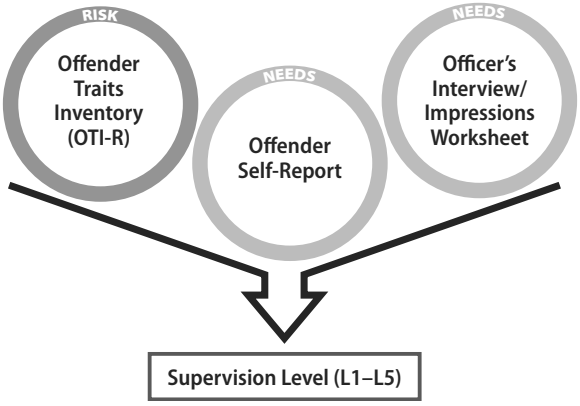
Supervision Level

The results of the risk and needs assessments are blended together to determine an overall supervision level for the probationer. Figure 2.1 represents this relationship.

DAC sorts offenders into five supervision levels. Supervision Level 1 (L1) probationers are the most likely to re-offend and have the greatest need for programming, while L5 probationers are those who are least likely to re-offend. Figure 2.2 shows in greater detail how the results of the risk assessment and the needs assessment are correlated to determine the offender's supervision level.

As a matter of Community Corrections policy, certain offenders are subject to a minimum supervision level regardless of the results of the RNA. For example, offenders under supervision for a reportable sex crime; court-identified domestic violence offenders; Level One, Two, or Three DWI offenders; and validated gang members are never supervised below Supervision Level 3 (L3). All probationers are supervised at L1 for the first 60 days of supervision.[41]

Figure 2.1. DAC determination of offender supervision level



Consequences of the Supervision Level

An offender's supervision level dictates two principal aspects of the way that offender is supervised. First, the supervision level determines the frequency with which the probation officer must contact the offender. Officers must

41. Community Corrections Policy, *supra* note 39, § D.0602.

Figure 2.2. Correlation of risks and needs in determining offender supervision level

Needs level \ Risk level	Extreme	High	Moderate	Low	Minimal
Extreme	L1	L1	L2	L3	L3
High	L1	L2	L3	L3	L3
Moderate	L2	L2	L3	L4	L4
Low	L2	L2	L4	L4	L5
Minimal	L2	L2	L4	L5	L5

have at least one "offender management contact" (a face-to-face contact in which the officer must discuss certain things with the offender) per month with L1, L2, and L3 supervisees. By contrast, L4 and L5 offenders are generally placed on a remote reporting system called Offender Accountability Reporting (OAR), which allows supervisees to report via the Internet or mail. (OAR is not the same as unsupervised probation. OAR offenders have a probation officer and pay supervision fees, for example.) Table 2.2 shows the minimum contact standards applicable to each supervision level. Additional contacts may be required as directed by the court or in the discretion of the probation officer.[42]

Second, a probationer's supervision level influences how the probation officer responds to noncompliance by the probationer. Figure 2.3, derived from Community Corrections policy, shows the various options permissible in response to a particular type of violation by a probationer within a particular supervision level. Note, for instance, that an officer may use option B, a quick dip in the jail through delegated authority, only in response to serious violations (new criminal offenses or recurring technical violations) by L1, L2, and L3 offenders.[43] The supervision level also dictates whether a probation officer may impose certain other conditions through delegated authority without first finding a violation.[44]

42. *Id.*
43. *Id.* § E.0202.
44. *See infra* notes 55–56 and accompanying text.

Table 2.2. Minimum contact standards for supervision levels

Supervision level	L1	L2	L3	L4	L5
Minimum contact standards	1 home contact and 1 offender management contact per month	1 home contact every 60 days and 1 offender management contact per month	1 home contact every 60 days and 1 offender management contact per month	Remote report monthly and one face-to-face contact every 90 days	Remote report monthly

Caseload Goals

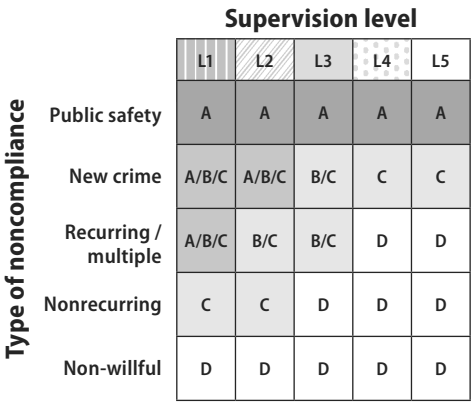
The JRA amended the existing statute on probation caseloads to say that the goal of the General Assembly is that no probation officer will supervise more than an average of 60 high- and moderate-risk offenders.[45] Prior law set the caseload goal at 90 offenders but did not distinguish between offenders of different risk levels. The lower goal takes into account that many offenders assessed as low risk are, because of recently enacted DAC policy, monitored through OAR. As before, the new caseload goal is advisory, subject to the availability of funds, and not tied to any legal requirements.

F. Delegated Authority

For cases sentenced under Structured Sentencing, the law allows a probation officer to impose certain additional probation conditions on an offender without action by the court.[46] That power, referred to as delegated authority, has been a part of North Carolina law since Structured Sentencing first became effective in 1994. As the law was initially enacted, authority to add additional conditions was not granted to the probation officer unless the court expressly delegated it. Under changes made to the law in 1997,[47] however, the default position was reversed so that delegated authority applied unless the judge specifically said it did not.

45. G.S. 15A-1343.2(c).
46. G.S. 15A-1343.2(e) and (f).
47. S.L. 1997-57.

Figure 2.3. Options for responses to probation noncompliance according to violation type and supervision level



Response options

A Probation violation report and arrest

B Delegated authority: quick dip

C Probation violation report and cite
Contempt
Modify/extend probation
Delegated authority: non–quick dip
Increase searches
Increase contacts
Increase drug screens

D Refer to treatment
Reprimand by probation officer
Reprimand by chief probation officer
Modify payment schedule
Initiate contact

Applicability

Delegated authority applies only to cases sentenced under Structured Sentencing;[48] it does not apply in impaired driving cases or any case sentenced under older law. Because an offender must be sentenced to a community or intermediate punishment for delegated authority to apply, it is questionable whether a probation officer may exercise delegated authority in deferred prosecution or G.S. 90-96 cases. In those cases, the defendant has not yet been sentenced and thus has not yet received a community or intermediate punishment—a classification necessary for determining which delegated authority conditions would be permissible under G.S. 15A-1343.2(e) (community) or (f) (intermediate).

Effective for persons placed on probation based on offenses that occurred on or after December 1, 2011,[49] the JRA expanded the authority delegated to probation officers in two ways: first, it added to the list of conditions an

48. G.S. 15A-1343.2(a) ("This section applies only to persons sentenced under Article 81B of this Chapter.").

49. S.L. 2011-192, § 1.(*l*).

officer may impose and second, it broadened the circumstances in which the officer may impose them. As under prior law, the court may find in any case that it is not appropriate to delegate authority to a probation officer. Probationary judgment forms include a check-box for the court to withhold delegated authority. The probation modification form (AOC-CR-609) likewise includes check-boxes for the court to delegate authority that was previously withheld or to withhold authority previously delegated. The statute does not directly address whether judges are permitted to delegate authority to impose some conditions but not others, but it seems reasonable to assume they may.

Conditions a Probation Officer May Impose

Under the new law, a probation officer may require an offender sentenced to community punishment to

- perform up to 20 hours of community service and pay the fee prescribed by law;
- report to the offender's probation officer on a frequency to be determined by the officer;
- submit to substance abuse assessment, monitoring, or treatment;
- submit to house arrest with electronic monitoring;
- submit to "quick-dip" confinement, a period or periods of confinement in a local confinement facility, for a total of no more than 6 days per month in any 3 separate months during the period of probation. This confinement may be imposed only as 2- or 3-day consecutive periods;
- submit to an electronically monitored curfew; or
- participate in an educational or vocational skills development program, including an evidence-based program.[50]

Under prior law, the only conditions a probation officer could impose in a community case were community service; increased reporting frequency; and substance abuse assessment, monitoring, and treatment.

In keeping with the JRA's blending of community and intermediate punishment, the list of conditions an officer may impose through delegated

50. G.S. 15A-1343.2(e).

authority in an intermediate case is largely the same as in a community case. The officer may require the offender to

- perform up to 50 hours of community service and pay the fee prescribed by law;
- submit to an electronically monitored curfew;
- submit to substance abuse assessment, monitoring, or treatment;
- participate in an educational or vocational skills development program, including an evidence-based program;
- submit to satellite-based monitoring (SBM), if the defendant is described by G.S. 14-208.40(a)(2);
- submit to "quick-dip" confinement;
- submit to house arrest with electronic monitoring; or
- report to the offender's probation officer on a frequency to be determined by the officer.[51]

Under prior law, the conditions an officer could impose in an intermediate case were community service; an electronically monitored curfew; substance abuse assessment, monitoring, and treatment; participation in an educational or skills development program; and satellite-based monitoring.

The list of conditions probation officers may impose through delegated authority is similar to the list of community and intermediate probation conditions a judge may impose. Special rules, discussed below, apply to quick dips in the jail imposed by a probation officer through delegated authority. Regarding SBM, probation officers should be wary of imposing it through delegated authority for the same reasons that judges should avoid adding it as a community and intermediate condition of probation.[52]

If an officer imposes any of the conditions set out above, the officer may subsequently reduce or remove them.[53]

Circumstances in Which Probation Officers May Impose Conditions

The circumstances in which officers may exercise delegated authority are identical for community cases and intermediate cases. An officer may exercise delegated authority upon a determination that the offender has failed to comply with one or more court-imposed conditions. An officer may not

51. G.S. 15A-1343.2(f).
52. *See supra* notes 32–35 and accompanying text.
53. G.S. 15A-1343.2(e) and (f).

exercise delegated authority in response to violations of officer-imposed conditions.[54]

Under the JRA a probation officer may also add delegated authority conditions other than quick dips without a violation if the offender is determined to be high risk based on the results of the risk assessment discussed above.[55] The statute does not define *high risk*, but DAC has determined as a matter of policy that it will mean offenders in Supervision Levels 1 and 2.[56]

Whether acting in response to a violation or to a probationer's risk level, the probation officer must obtain administrative approval from a chief probation officer prior to exercising delegated authority.

When a probation officer imposes a delegated authority condition other than a quick dip, the probationer may file a motion with the court to review the new condition. The law does not describe the exact nature of that hearing or set any time line for how quickly it must be held. The offender must be given notice (presumably by the probation officer) of the right to seek court review of any officer-imposed conditions.[57] Apparently the probationer is subject to the condition during the pendency of the review hearing, although the statute does not expressly say so.

Whether a violation to which a probation officer has responded through delegated authority may later serve as the basis for a violation found by the court is not clear. The statutes say that "nothing in [the delegated authority] section shall be construed to limit the availability of the procedures authorized under G.S. 15A-1345"[58] (the probation violation hearing statute), but this provision is susceptible to multiple interpretations. It may, for example, simply mean that a probation officer is not required in any case to exercise delegated authority but rather may always bring violations before the court for review in the first instance. Alternatively the provision could be read to mean that violation proceedings before the court under G.S. 15A-1345 are available without limit even in cases where the officer has already exercised delegated authority.[59]

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54. *Id.*

55. *See supra* "E. Risk Assessment."

56. Community Corrections Policy, *supra* note 39, § E.0205(b)(1).

57. G.S. 15A-1343.2(e) and (f).

58. *Id.*

59. Oregon law is clearer on this point, expressly stating that a judge may not impose additional sanctions after a probationer has completed a sanction imposed by the Oregon Department of Corrections. Or. Rev. Stat. Ann. § 137.595.

Quick Dips through Delegated Authority

The JRA allows a probation officer to impose a short term of jail confinement, referred to colloquially as a "quick dip," in response to a violation. The purpose of the law is to allow a probation officer to impose a "swift and certain" sanction for a violation without a lengthy period of pre-hearing confinement or a hearing process.

Quick-dip confinement ordered by a probation officer is similar in many respects to the short-term confinement a judge may impose as a community and intermediate condition of probation. The officer may impose up to 6 days of confinement per month during any 3 separate months of a period of probation. The time must be served in the local jail in 2- or 3-day increments. When a defendant is on probation for more than one judgment, any quick-dip confinement periods imposed must run concurrently and may total no more than 6 days per month. The probation officer's authority to impose quick-dip confinement is identical in community and intermediate cases, but officers may not impose quick dips in impaired driving cases.

Several special procedural rules apply to the imposition of jail confinement through delegated authority. First, unlike other delegated authority conditions under the new law, quick dips may not be imposed by a probation officer based on the offender's risk level alone. Rather, a probation officer can impose a quick dip only when the Section of Community Corrections has determined that the offender has failed to comply with one or more of the conditions imposed by the court (not a condition imposed earlier by a probation officer).

Second, before imposing a quick dip, the officer must present the probationer with a violation report[60] noting the alleged violations and designating the confinement period the officer plans to impose. The law apparently allows the officer to impose the entire 18-day complement of quick-dip time in response to a single violation (provided it is served in the appropriate 2- or 3-day increments across 3 separate months), but DAC has instructed officers as a matter of policy to impose only one 2- or 3-day dip per incident of noncompliance.[61] The statute does not limit the types of violations for which quick dips may be used in response, but DAC has chosen as a matter

60. The DAC form used for delegated authority violations is DCC-10B.

61. Community Corrections Policy, *supra* note 39, § E.0205(b).

of policy to use them only for serious violations committed by Supervision Level 1, 2, and 3 offenders.[62]

Third, the probation officer must advise the probationer of several rights before imposing a quick dip: (1) the right to a "hearing before the court on the alleged violation, with the right to present relevant oral and written evidence"; (2) the right "to have counsel at the hearing, and that [counsel] will be appointed if the probationer is indigent"; (3) the right "to request witnesses who have relevant information concerning the alleged violations"; and (4) the right "to examine any witnesses or evidence."[63]

If the probationer signs a written waiver of all of those rights, the officer can impose the quick dip. The waiver must also be signed by two probation officers acting as witnesses. As initially enacted in 2011, the statute provided that one of the witnessing officers should be the offender's probation officer and the other had to be a "supervisor," which probably referred to a chief probation–parole officer. Effective July 16, 2012, the 2012 Clarifications Act amended that procedure in both G.S. 15A-1343.2(e) (for community cases) and (f) (for intermediate cases), allowing a probation officer other than a supervisor to witness the waiver.[64] The other officer must be designated by the chief of the Section of Community Corrections in the written policy of DAC. That policy directs that any officer, chief probation–parole officer, surveillance officer, or judicial district manager may serve as a witness.[65] The change was a logistical concession to DAC; in some districts, the supervisor does not work in the same county as some of the officers he or she supervises, making it inconvenient for the supervisor to witness a probationer's waiver of rights.

Offenders who waive their right to a hearing and counsel will be taken to the jail and confined for the period designated in the violation report. Magistrates and sheriffs' personnel should be aware that probation officers have this new authority to order confinement without any action or

62. *See supra* note 43 and accompanying text. Initially, DAC limited quick dips to Supervision Level 1 and 2 offenders. Effective October 9, 2012, the chief of the Section of Community Corrections approved quick dips for Supervision Level 3 offenders. Memorandum by W. David Guice, section chief of the Division of Adult Correction, Section of Community Corrections (Oct. 9, 2012), on file with the author.

63. G.S. 15A-1343.2(e) and (f).

64. S.L. 2012-188, § 8.

65. Community Corrections Policy, *supra* note 39, § E.0205(b)(1)c.

approval by a judicial official and with no paperwork beyond the DCC-10B violation report. If the probationer does not waive his or her rights, the probation officer will choose whether to bring the violation to the court's attention through the regular violation process, to respond to the violation through another form of delegated authority, or to take some other action. Unlike other delegated authority conditions, for which the offender can file a motion with the court to review action taken by the probation officer, the JRA expressly states that the offender "shall have no right of review" of quick-dip confinement after signing the waiver of rights described above.[66]

Whether probation officers and judges draw from a common pool of 18 days when imposing quick dips as a condition of probation is not clear. For example, if a judge imposes 3 days of dip confinement at sentencing as a "community and intermediate" condition of probation, does a probation officer have only 15 days of quick-dip confinement remaining at his or her disposal? To the extent the probation officer's authority flows from the judge, there is some sense that the time is shared—and DAC has chosen to operate under the assumption that it is. On the other hand, there is no explicit connection between the community and intermediate probation condition and the delegated authority condition. Thus, a trial judge probably should not feel that his or her authority to impose dip time is limited by any confinement previously imposed by a probation officer (except to the extent that the prior quick-dip confinement imposed by a probation officer counts for credit against the defendant's suspended sentence and thus reduces the balance on the overall sentence available for the court to impose). Of course, a judge could always use a different form of short-term confinement, such as special probation, contempt, or, in appropriate cases, confinement in response to violation (CRV).

There is no clear basis or mechanism for assessing jail fees for confinement imposed by a probation officer.

Though the effective date of the JRA authorizes use of quick dips for persons placed on probation for offenses committed on or after December 1, 2011, DAC delayed use of the condition until July 2, 2012, to allow for policy development and training.

Finally, the question of effectiveness arises. Apparently no state has an existing delegated authority law precisely like the one in the JRA, so finding a

66. G.S. 15A-1343.2(e) and (f).

model for predicting the law's success in North Carolina is difficult. Similar efforts in Hawaii and Georgia have been successful in reducing the total number of days probationers spend in jail on account of violations.[67] However, a study of Oregon's intermediate sanctions program, after controlling for demographic and crime-related attributes, showed that offenders who served jail time imposed by a probation officer were more likely to have their supervision revoked and were more likely to be convicted for future crimes.[68] Given the differences between North Carolina's new law and the laws in other jurisdictions, it is unclear what lessons can be drawn from these out-of-state programs.

Constitutional Concerns

No North Carolina cases have considered the baseline question of whether allowing probation officers to impose certain conditions of probation is permissible as a matter of constitutional due process or separation of powers. A variety of statutory delegation regimes have been reviewed and, for the most part, upheld in other states.[69] Case law from around the country indicates that a judge generally may not delegate to a probation officer a core judicial function,[70] such as deciding whether a probationer will be required to abide by a condition at all.[71] Judges may, however, delegate logistical or ministerial

67. *See, e.g.*, Angela Hawken and Mark Kleiman, "Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE," (research report submitted to the U.S. Department of Justice, 2009), www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf.

68. Andres F. Rengifo and Christine S. Scott-Hayward, "Assessing the Effectiveness of Intermediate Sanctions in Multnomah County, Oregon," Vera Institute of Justice (2008), www.vera.org/download?file=1790/Final%2BMultnomah%2BReport.pdf.

69. *See, e.g.*, State v. Merrill, 999 A.2d 221, 225–26 (N.H. 2010) ("The trial court retains the power to sentence defendants, and although the executive branch may be authorized by the court to impose conditions of probation, the judiciary retains the ultimate authority to review those conditions and to vacate them if they are unreasonable. Thus, the separation of powers is not violated by the judiciary's delegation of authority to probation officers to impose conditions of probation."); State v. Johnson, 817 A.2d 708 (Conn. Ct. App. 2003).

70. United States v. Johnson, 48 F.3d 806 (4th Cir. 1995) (holding that determination of a restitution amount was a judicial function that could not be delegated to a probation officer).

71. United States v. Esparza, 552 F.3d 1088 (9th Cir. 2009) (vacating a condition that allowed a probation officer to choose whether a defendant would participate in inpatient or outpatient treatment); United States v. Heath, 419 F.3d 1312, 1314 (11th

matters such as where or when a particular condition will be satisfied.[72] An important factor in any arrangement appears to be that the court has authority to review any officer-imposed conditions.[73] Delegated authority conditions like curfews or program participation are probably permissible so long as the probationer retains the right to petition the court for review of the condition.[74]

The quick-dip condition may test the boundaries of what punishments a nonjudicial officer can permissibly impose. A leading treatise on the law of probation and parole describes as "universal" the view that "a sentencing court may not under any circumstances delegate to the department of corrections or to a probation officer authority to order a period of additional incarceration for a probationer who is under their supervision."[75] Appellate courts in other jurisdictions have stricken conditions purporting to allow a probation officer to decide whether a probationer will serve additional jail time.[76] The North Carolina Department of Justice issued similar guidance in response to a question about whether a judge could impose a 30-day split

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Cir. 2005) (striking a condition stating that a defendant was required to participate in mental health programs "*if* and as directed by the probation office").

72. United States v. Stephens, 424 F.3d 876, 884 (8th Cir. 2006) ("[T]he court does not improperly shirk its responsibility to impose the conditions of release merely by allowing the drug treatment professionals to design the course of treatment, where the court has specifically required that the treatment include testing.").

73. United States v. Kerr, 472 F.3d 517 (8th Cir. 2006).

74. *See* State v. Deese, 222 P.3d 647 (Mont. 2009) (unpublished) (upholding a trial judge's delegation of authority to impose a curfew to a probation officer).

75. 1 Neil P. Cohen, Law of Probation and Parole § 7:23 (2d ed. 1999).

76. State v. Fearing, 619 N.W.2d 115 (Wis. 2000) (holding that a trial court exceeded its authority in authorizing a probation officer to determine whether a probationer would be required to serve three additional months in jail); State v. Hatfield, 846 P.2d 1025 (Mont. 1993) (holding that a trial court erred in sentencing a defendant to 180 days of jail time to be served—or not served—in the discretion of the probation officer); State v. Lee, 467 N.W.2d 661, 662 (Neb. 1991) (invalidating a condition purporting to allow a probation officer to "waive" some of the defendant's jail days, noting that "[j]ail time is to be imposed by judges" and that a "court may not delegate the authority to impose a jail sentence, or to eliminate a jail sentence, to a nonjudge"); State v. Paxton, 742 N.E.2d 1171 (Ohio Ct. App. 2000) (reversing a 60-day period of imprisonment imposed by a probation officer on due process and separation of powers grounds); People v. Thomas, 217 Ill. App. 3d 416, 418 (1991) (vacating a condition allowing a probation officer to remit a 30-day jail sentence if a probationer completed a treatment program because that authority was "not a function that could properly be delegated when the question of further incarceration is at stake").

sentence to be used in the discretion of the probation officer "if deemed necessary for minor infractions or technical violations." In a formal opinion letter, the attorney general advised against the practice, concluding that it would violate constitutional due process and the statutory probation violation framework set out in G.S. 15A-1345.[77] However, those courts and the state attorney general might evaluate the delegation differently in light of the new enabling statute.

Even with the statute in place, however, several issues may arise. First, unlike other delegated authority conditions, an offender cannot seek court review of an officer-imposed quick dip. Instead, the statute explicitly states that the probationer has no such right of review if he or she has signed a written waiver of rights. Quick dips were probably excluded from the judicial review process on the rationale that the probation officer could not have imposed the confinement in the first place without the offender waiving his or her right to a hearing before a judge. But the lack of a judicial review process may bear on the separation of powers and due process analyses. By way of comparison, a defendant's failure to object when a judge imposes a probation condition does not constitute a waiver of the right to object to it at a later time.[78] Second, the JRA apparently places North Carolina in a very small minority of states that allow a probation officer to respond administratively to a violation with full-blown jail confinement. Delaware allows its corrections department to respond administratively to certain violations with sanctions less restrictive than "Accountability Level V" (incarceration), including up to 5 consecutive days of supervision at "Accountability Level IV" (house arrest, a halfway house, or residential treatment).[79] Georgia's system includes similar limitations, allowing probation officers to impose conditions such as intensive supervision and electronic monitoring administratively but reserving to administrative hearing officers and judges the authority to impose more restrictive conditions such as confinement in a probation detention center or placement in a residential facility.[80] Oregon, on the other hand, allows an officer to impose jail confinement under its

77. 60 N.C. Op. Atty. Gen. 110 (1992).
78. G.S. 15A-1342(g).
79. Del. Code. Ann. tit. 11, § 4334; § 4204.
80. Ga. Code. Ann. § 42-8-155; § 42-8-153(c).

law, and there do not appear to be any reported cases challenging the law's constitutionality.[81]

In general, before a probationer may be confined in response to a violation of probation, he or she has certain rights as a matter of constitutional due process.[82] Instead of involving a judge or an administrative hearing officer in the procedure (as is generally the case in Hawaii and Georgia), the JRA's approach to quick dips relies on the probationer's written waiver of rights. The statutorily required elements of the waiver, described above, appear to track the minimum requirements of due process for probation violation hearings set out by the United States Supreme Court. But it is questionable whether an interested party (a probation officer) can properly ensure that a probationer's waiver is knowing, voluntary, and intelligent, especially when a defendant who decides not to waive could nonetheless be arrested and jailed in advance of a probation violation hearing before the court. Moreover, to the extent that the waiver incorporates a waiver of counsel, it is unclear whether it comports with North Carolina's statutory requirement for a judge to conduct a "thorough inquiry" of defendants who elect to proceed without a lawyer[83]—a statute that is already a common source of errors for waiver inquiries conducted by judges in criminal trials[84] and probation violation hearings.[85] The form probation officers will use when taking a waiver, a DCC-10B, may be problematic in that it only requires the probationer to acknowledge the waiver of the right to a hearing, not to counsel.

A judge concerned about the constitutionality or effectiveness of delegated authority may choose to withhold the delegation by checking the appropriate box on the judgment form.

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81. Or. Rev. Stat. Ann. § 137.595; Or. Admin. R. 291-058-0045.

82. Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that a probationer is entitled to, among other things, notice of the alleged violations, an opportunity to be heard and to present evidence, a neutral hearing body, and, in some cases, counsel); Morrissey v. Brewer, 408 U.S. 471 (1972) (setting out what process is due in a parole revocation hearing).

83. G.S. 15A-1242; State v. Warren, 82 N.C. App. 84 (1986) (holding that G.S. 15A-1242 applies to waiver of counsel in probation matters).

84. State v. Seymore, ___ N.C. App. ___, 714 S.E.2d 499 (Aug. 16, 2011).

85. State v. Sorrow, ___ N.C. App. ___, 713 S.E.2d 180 (July 19, 2011).

Probation Officer's Finding of Violation Not an Aggravating Factor

A probation officer's determination that a probationer has failed to comply with a condition of probation is not an aggravating factor for sentencing a future felony under G.S. 15A-1340.16(d)(12a). Under the language of that subdivision, only findings of a willful violation by "a court" or by the Post-Release Supervision and Parole Commission qualify a defendant for the aggravating factor.

86. G.S. 15A-1343(b)(3a). The condition was initially made effective for "probation violations occurring" on or after December 1, 2011, S.L. 2011-192, § 4.(d), but that effective date was amended by S.L. 2011-412, § 2.5. The latter session law also reversed changes made to G.S. 15A-1343(b)(2), the "remain within the jurisdiction of the court" condition, by S.L. 2011-62, § 1, returning that condition to its form before any changes came into effect.

87. G.S. 15A-837(a)(6).

88. G.S. 15A-1343(b)(2).

89. G.S. 15A-1343(b)(3).

90. G.S. 15A-1343(b).