STRUCTURED SENTENCING AND PROBATION:
REFRESHER AND ADVANCED ISSUES

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I. Misdemeanor Sentencing

1. Prior conviction level—What counts and what doesn't:
    a. If a defendant was previously convicted of more than one offense in a single session of district court, or in a single week of superior court or a court in another jurisdiction, only one of the convictions may be used to determine prior conviction level. G.S. 15A-1340.2.
        i. If a defendant has one superior court and one district court conviction on the same day, count both convictions. State v. Fuller, 179 N.C. App. 61 (2006).
        ii. Different districts on same day? Probably count both.
    b. Count convictions that are final as of the date of sentencing for the new crime, even if the act on which new crime is based actually happened first.
        i. Convictions that arise between sentencing and re-sentencing of a conviction elevate the defendant's prior record at re-sentencing. State v. Pritchard, 186 N.C. App. 128 (2007).
    c. A prayer for judgment continued (PJC) counts for prior record points (misdemeanor or felony). State v. Hatcher, 136 N.C. App. 524 (2000).
    d. Infractions and juvenile adjudications *never* count.
2. Consecutive and concurrent sentences.
    a. Silence in the judgment means multiple sentences are concurrent
    b. Limitations on consecutive sentences:
        i. If the judge elects to impose consecutive sentences for two or more misdemeanor convictions, the cumulative length of imprisonment may not exceed twice the maximum sentence authorized for the most serious offense. G.S. 15A-1340.22(a).
        ii. Consecutive sentences are not authorized if all convictions are for Class 3 misdemeanors. G.S. 15A-1340.22 (a).
3. Fines
    a. Fines may be imposed in conjunction with any sentence, and Community punishment may consist of a fine only. G.S. 15A-1340.23.
    b. Limits, unless otherwise provided for a specific offense:
        i. Class 3: $200
        ii. Class 2: $1000
        iii. Class 1 & A1: No limit
4. Prayer for Judgment Continued (PJC)
    a. Three types of PJCs:
        i. PJC intended as the final resolution of a case—with the idea that no further sentencing will occur. State v. Lea, 156 N.C. App. 178 (2003).
        ii. PJC from term to term for a specified period (a reasonable time, probably not to exceed 5 years) with the idea that the State may pray for judgment if the defendant commits another crime or engages in other misconduct. State v. Thompson, 267 N.C. 653 (1966).

1. If prayer for judgment is continued to a date certain but judgment is not entered until after that date, the judgment is still valid provided the delay was not unreasonable and the defendant was not prejudiced. State v. Absher, 335 N.C. 155 (1993) (affirming judgment entered 5 months after PJC for 30 days).

iii. PJC to await additional information for sentencing.

b. The defendant's consent is not required if the PJC does not include conditions, but it is required for a PJC with conditions.

c. When a PJC is really entry of judgment:
   i. If the PJC includes conditions that amount to punishment, what you call a "PJC" is really a judgment, and no further punishment may be imposed for that crime. State v. Brown, 110 N.C. App. 658 (1993).
   ii. Conditions that do not convert a PJC into a judgment:
      1. Payment of costs. G.S. 15A-101(4a).
      2. Requirement to obey the law. Brown, 110 N.C. App. 658.
   iii. Conditions that are punishment and convert a PJC into a judgment:
      1. A fine. State v. Griffin, 246 N.C. 680 (1957).
      2. Imprisonment. *Id.*
      3. Restitution or community service.
      4. Condition that defendant get treatment. Brown, 110 N.C. App. 658.

d. When a PJC is prohibited:
   i. Impaired driving. G.S. 20-179. In re Tucker, 348 N.C. 677 (1998); In re Greene, 297 N.C. 305 (1979) (note: these are judicial censure cases).
   ii. Speeding in excess of 25 miles per hour over posted limit. G.S. 20-141(p).

e. Effect of a PJC:
   i. A defendant may not appeal a PJC. State v. Pledger, 257 N.C. 634 (1962).
   ii. For Chapter 20 purposes, a third or subsequent PJC for a N.C. offense within any 5-year period is a conviction. G.S. 20-4.01(4a)(a)(4).
   iii. PJC counts for prior record points. State v. Hatcher, 136 N.C. App. 524 (2000).
   iv. Mandy Locke & David Raynor, *Courts Are Still Soft on Speeders: DAs, judges work around new laws*, NEWS & OBSERVER, March 28, 2009.

II. Felony Sentencing

1. With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or Class I felony. G.S. 7A-272(c).
   a. The superior court has exclusive jurisdiction over probation violation hearings where the district court accepted a plea under G.S. 7A-272(c), except that the district court shall have jurisdiction to hear these matters with the consent of the State and the defendant (note: no judicial consent required).
   b. If an H or I felony sentence is pled in district court under G.S. 7A-272(c) and a subsequent revocation hearing is held in district court, the appeal of the revocation is to the superior court, not to the Court of Appeals. State v. Hooper, 358 N.C. 122 (2004). As a result the State may be unenthusiastic about consenting to hearing a probation violation in district court, because the appeal of a district court revocation is to the superior court. G.S. 7A-271(e).

2. The Blakely v. Washington rule, 542 U.S. 296 (2004):
    a. Any fact, other than a prior conviction, that increases a sentence beyond the presumptive statutory maximum must be proven to a jury beyond a reasonable doubt or admitted to by the defendant.
    b. Only 2% of felonies in North Carolina are sentenced in the Aggravated range
    c. The judge must make written findings of aggravating factors, even if there is a plea agreement about the sentence. G.S. 15A-1340.16(b); State v. Bright, 135 N.C. App. 381 (1999).
3. Substantial similarity of crimes from other jurisdictions:
    a. An out-of-state conviction may count for prior record points equal to its analogous North Carolina offense if the crime is *substantially similar* to an offense here; otherwise, by default, out-of-state felonies count as Class I felonies and misdemeanors count as Class 3 misdemeanors.
    b. *Substantial similarity* is a question of law that cannot be stipulated to by the parties; judicial findings are required. State v. Palmateer, 179 N.C. App. 579 (2006).
4. Confrontation—even after Crawford v. Washington, 541 U.S. 36 (2004), the Confrontation Clause does not apply to testimony given at a sentencing hearing in a non-capital case. State v. Sings, 182 N.C. App. 162 (2007).

III. Sentencing issues in the 2008 gang legislation

1. The new gang laws allow a one-class enhancement of a misdemeanor committed for the benefit of criminal street gang, G.S. 14-50.22, for:
    a. A defendant age 15 or older;
    b. Who commits a misdemeanor;
    c. For the benefit of, at the direction of, or in association with;
    d. A *criminal street gang* (defined as: an organization, association, or group of three or more people that has as one of its primary activities the commission of one or more felonies, has three or more members individually or collectively engaged in *criminal street gang activity*, and may have a common name or identifying sign or symbol.)
2. Determination of whether a crime involves "criminal street gang activity":
    a. The crimes listed in G.S. 14-50.16 through 14-50.20 are always crimes involving criminal street gang activity.
    b. Under G.S. 14-50.25, when a defendant is found guilty of any other offense, the judge should determine whether the offense involved criminal street gang activity. The determination will not result in any additional punishment for that offense, but it will set up a later prosecution for the felony offense of *engaging in a pattern of street gang activity* under G.S. 14-50.16(a). Each judgment form now has a check-box for this finding.
    c. *Criminal street gang activity* is an act committed with the specific intent that it be for the purpose of or in furtherance of the person's involvement in a criminal street gang.
3. Expunction provisions in new gang legislation—see Expunction handout

IV. Probation

1. Length of probation term:
    a. Unless the judge makes a finding that a longer or shorter period of probation is necessary (and if you do, be sure to check the box on the judgment), the length of the original period must fall within the following default ranges:

i. For misdemeanors:
    1. Community: between 6 and 18 months;
    2. Intermediate: between 12 and 24 months.

ii. For felonies:
    1. Community: between 12 and 30 months;
    2. Intermediate: between 18 and 36 months.

[Note: For probation purposes, DCC counts months as calendar months. For example, a 6-month period of probation beginning 10 January 2009 should end 9 July 2009. Arguments that a month is always equal to 30 days under G.S. 12-3 are applying the wrong statutory section.]

b. Numerous appellate decisions have remanded cases for resentencing when a defendant was given a longer probationary period without the requisite findings. *See, e.g.*, State v. Mucci, 163 N.C. App. 615 (2004).

c. The maximum term is 5 years. The only way a probationary term could be longer than 5 years is under the special extension rule discussed below.

d. Consecutive terms of probation are prohibited, although a probation term may be imposed consecutively to a prison sentence. G.S. 15A-1346; State v. Canady, 153 N.C. App. 455 (2002).

2. Extension and modification

a. Ordinary extension—At any time prior to expiration of probation the court may, after notice and hearing and *for good cause shown* (i.e., not necessarily after an allegation of violation) extend a term of probation up to the 5-year maximum. G.S. 15A-1344(d).

i. Watch out for downstream effects of erroneous prior modifications. Even with the defendant's consent, the court lacks jurisdiction to extend probation once the period has expired.

ii. Illustration: A defendant's 36-month term of probation was set to expire on 1 February 2004. On 26 February 2004, with the defendant's consent, the court extended the term by 24 months to 7 February 2006. On 9 January 2006, the defendant consented to another 24-month extension, this time to 6 February 2008. The Court of Appeals vacated the defendant's 30 April 2007 revocation of probation because the trial court lacked subject matter jurisdiction to do the first extension. Though the court didn't have to say it, note also that the second extension was improper in that it extended the total period of probation beyond 5 years without following the special extension provision below. State v. Satanek, __ N.C. App. __, 660 S.E.2d 623 (2008).

b. Special extension—The court may extend the offender's period of probation by up to 3 years, including beyond the 5-year maximum, if all of the following criteria are met:

i. The probationer consents to the extension;

ii. 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

iii. The extension is necessary to complete a program of *restitution* or to complete *medical or psychiatric treatment*. G.S. 15A-1343.2.

3. Intermediate punishment, G.S. 15A-1340.11(6): A sentence to Intermediate punishment must have supervised probation and at least one of the six following conditions (listed from most to least controlling):

a. Special probation (G.S. 15A-1351(a)):

i. Total active component may not exceed one-fourth the maximum sentence of imprisonment *imposed* (*cf*. Impaired Driving, where total active component may not exceed one-fourth the maximum penalty *allowed by law*).
ii. Non-continuous periods must be in jail (not DOC), and must be complete within two years of conviction.
iii. You may credit pre-trial confinement to either the suspended sentence or the active component of the split.

b. Residential Program (length varies; DART-Cherry is 90 days; TROSA is 2 years).
c. EHA (avg. length 3.4 months):
    i. DCC recommends 3-6 month term.
    ii. For now, probationer must have a landline telephone.
d. Day Reporting Center (avg. length 5.5 months):
    i. DCC recommends 6 month minimum term.
    ii. Curfew, warrantless searches, and drug screening required.
e. Drug Treatment Court (avg. length 10 months).
f. Intensive probation (avg. length 5.2 months):
    i. Recommended period is 4-6 months.
    ii. Curfew, warrantless searches, drug screening, multiple contacts weekly, referral to additional resources by PPO.

4. Community punishment may not include any of the Intermediate conditions. (Though Intermediate conditions may be added later if the offender violates probation.)
5. Other conditions of probation in special situations:
    a. Domestic violence abuser treatment program. G.S. 15A-1343(b)(12):
        i. This is a *regular* condition of probation when the court finds the defendant is responsible for acts of domestic violence and there is a Domestic Violence Commission-approved program reasonably available to the defendant, unless the court finds that the program would not be in the best interests of justice;
        ii. DCC will request additional DV conditions, e.g., no weapons, copy of 50-B order in the file, warrantless searches, victim notification.
    b. Mandatory conditions for sex offenders & crimes involving abuse of a minor (note: "physical, mental, or sexual abuse of a minor" is undefined in the General Statutes):
        i. If *sexual* abuse of minor: not reside in household with any minor child (this includes the defendant's own family members, State v. Strickland, 169 N.C. App. 193 (2005)).
        ii. If *physical* or *mental* abuse of minor: only reside in house with any minor child if court expressly finds it unlikely that abusive conduct with recur and it would be in minor child's best interest to allow probationer to remain.
        iii. Sex offender control program if ordered by court (18 additional highly controlling conditions).
    c. A word of caution about AA/NA as a mandatory condition of probation—AA/NA are religious in nature and mandatory attendance may violate the Establishment Clause.
        i. Kerr v. Ferrey, 95 F.3d 472 (7th Cir. 1996) (requiring an inmate to attend NA meetings upon pain of being rated a higher security risk and suffering adverse effects for parole eligibility violated the Establishment Clause).
        ii. Warner v. Orange County Dept. of Probation, 115 F.3d 1068 (2d Cir. 1997) (holding invalid a condition of probation requiring attendance at AA meetings; authorizing

damages against probation department for recommending AA attendance as a condition of probation).

iii. Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007) (holding a parolee's First Amendment rights were violated when his parole officer forced him to attend AA/NA meetings as a condition of parole; holding Establishment Clause jurisprudence on this point sufficiently clearly established to abrogate the parole officer's qualified immunity against a suit for damages).

6. G.S. 90-96 probation without conviction:
   a. G.S. 90-96(a):
      i. This subsection allows a conditional discharge for true first offenders with no prior drug or paraphernalia convictions who plead guilty or are found guilty of:
         1. Misdemeanor possession of schedule II through VI drugs;
         2. Possession of drug paraphernalia; or
         3. Felony possession of less than 1 gram of cocaine.
      ii. Imposition is up to the court (not the DA, though the defendant must consent).
      iii. If the court decides to proceed under subsection (a), there is no immediate adjudication of guilt or entry of judgment. Instead, the judge places the defendant on probation for whatever time period the court sees fit. The court may, but need not, include participation in a DHHS-approved drug education program as a condition of probation.
      iv. If the defendant violates probation, the court enters adjudication of guilt and sentences the defendant.
      v. If the defendant successfully completes probation, the court shall dismiss the charges and the defendant avoids a conviction.
      vi. If the defendant was not over 21 at the time of the offense, he or she may apply for expunction of the charges (see Expunction handout).
   b. G.S. 90-96(a1):
      i. Applies to "any offense included in G.S. 90-95(a)(3)," which means all simple possession offenses, regardless of drug type or quantity (note: broader than subsection (a)).
      ii. This subsection ignores prior offenses more than seven years old for the purpose of determining whether a defendant is a "first offender."
      iii. Probation imposed under this section must be at least one year, and must include a DHHS-approved drug education school (unless there isn't one reasonably available or there are extenuating circumstances).
      iv. Perhaps due to a drafting error, this subsection does not provide for probation "without entering a judgment of guilt," and it fails to make clear what happens if a defendant sentenced under the subsection successfully completes probation. Additionally, the expunction provisions in subsection (b) refer only to subsection (a), not subsection (a1)—so it's not clear what benefit the defendant gets from subsection (a1), if any.
   c. G.S. 90-96(e)—see Expunction handout.
   d. Probation hearings under G.S. 90-96 are subject to the procedures and jurisdictional limitations of regular probation cases under G.S. Ch. 15, Art. 82. State v. Burns, 171 N.C. App. 759 (2005).

V. Probation Violation Hearings

1. Preliminary probation violation hearings:

a. A preliminary hearing on a probation violation must be held within 7 working days of an arrest to determine whether there is probable cause to believe that the probationer violated a condition of probation, unless the probationer waives the preliminary hearing or a final hearing is held first. G.S. 15A-1344(c).
    i. No preliminary hearing is necessary when the defendant is released on bond pending the final revocation hearing. Likewise, no preliminary hearing is necessary if the defendant is being held on a new criminal charge for which he or she is ineligible for pretrial release. State v. O'Connor, 31 N.C. App. 518 (1976).
    ii. If the hearing is not held the probationer must be released seven working days after his arrest to continue on probation pending a hearing. If the hearing is held and probable cause is not found, the probationer must be released to continue on probation. *Id.*
    iii. It appears that a failure to conduct a required preliminary hearing does not deprive the court of jurisdiction to conduct a final probation violation hearing. State v. Seay, 59 N.C. App. 667 (1982).
b. Preliminary hearing procedure:
    i. 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 a district court judge may conduct a preliminary hearing for a superior court case. G.S. 15A-1345(d).
    ii. The probationer is entitled at the hearing to appear and speak on his or her own behalf, to present relevant information, and may, on request, personally question adverse informants. Formal rules of evidence do not apply, and under G.S. 15A-1345(e), "recollection of evidence or testimony introduced at the preliminary hearing on probation violation [is] inadmissible as evidence at the [final] revocation hearing."
c. Right to counsel at the preliminary hearing—Some defendants probably have a right to counsel at the preliminary hearing as a matter of constitutional due process. Under Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973), a probationer has a due process right to counsel at both preliminary and final revocation hearings if:
    i. He or she claims not to have committed the alleged violation;
    ii. There are reasons that justified or mitigated the violation that are complex or difficult to develop or present; *or*
    iii. The probationer is incapable of speaking effectively.
d. Failure to hold a preliminary hearing within seven days did not violate the defendant's due process rights when defendant was held for 11 days without a hearing. State v. Clemmons, 97 N.C. App. 502 (1990).

2. Final probation violation hearing:
    a. Any judge of same level as the sentencing judge, located in the district where (a) the probation was imposed, (b) the alleged violation took place, or (c) the probationer currently resides, has authority to modify, extend, terminate, or revoke probation. G.S. 15A-1344(a). Exception: Under G.S. 15A-1342(h), a judge who sentences the offender to unsupervised probation may limit jurisdiction to alter or revoke the probation to him or herself.
    b. Right to counsel—A probationer has a statutory right to counsel at a probation violation hearing. G.S. 15A-1345(e).

i. Waiver of right to counsel: The court must comply with G.S. 15A-1242 at a probation hearing, just as it would at trial. The judge must make a thorough inquiry and be satisfied that the defendant:
    1. Has been clearly advised of his right to counsel;
    2. Understands the consequences of proceeding without counsel; and
    3. Comprehends the nature of the charges and the range of permissible punishments.
ii. The appellate courts interpret this provision strictly. Even a lengthy exchange between the judge and the defendant about waiving counsel will not suffice if the judge does not inquire into all three prongs of G.S. 15A-1242. State v. Jackson, __ N.C. App. __, 660 S.E.2d 165 (2008).
iii. The presence of a written waiver is no substitute for compliance with G.S. 15A-1242. State v. Evans, 153 N.C. App. 313 (2002).

c. Notice:
    i. The probationer is entitled to 24 hours of notice before a violation hearing; the probation violation report (DCC-10) serves this purpose. G.S. 15A-1345(e).
    ii. The violation report controls the scope of the hearing; the defendant should not be made to answer allegations of violation not included on the violation report.
d. Standard of proof:
    i. The state must present sufficient evidence to *reasonably satisfy* the judge that the defendant has *willfully violated* or *violated without excuse* a valid condition of probation. State v. White, 129 N.C. App. 52 (1998). If the defendant offers evidence of a good faith inability to comply, the court must make findings that the defendant's evidence was considered and evaluated. State v. Hill, 132 N.C. App. 209 (1999).
e. Rules of evidence—do not apply to probation violation hearings, G.S. 15A-1345(e); hearsay is admissible, but should bear some indicia of reliability. Proceedings to revoke probation are not a formal trial. State v. Sellers, 185 N.C. App.726 (2007).
f. Objections to invalid conditions of probation:
    i. Under G.S. 15A-1342(g), a defendant's failure to object to a condition of probation at the time the condition is imposed does not constitute a waiver of the right to object to the condition *at a later time*.
    ii. However, 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).
g. Types of violations:
    i. Failure to pay money—probation may not be revoked solely for a failure to pay money if the defendant shows a good faith inability to pay. Fuller v. Oregon, 417 U.S. 40 (1974); State v. Young, 21 N.C. App. 316 (1974).
    ii. Absconding:
        1. DCC defines an *absconder* as one who actively avoids supervision by making his or her whereabouts unknown to the supervising officer.
        2. By policy, prior to declaring someone an absconder, a probation officer should make due and diligent attempts to locate the offender and document these efforts. Prior to declaring an offender an absconder the officer will:
            a. Telephone the offender;

b. Conduct a home contact, including in the evening or on the weekend, leaving notice to the offender directing him or her to report in;
c. Make a work and/or school contact;
d. Make a relative/reference contact;
e. Conduct a law enforcement check including a jail/hospital check; and
f. Check with the landlord (if applicable).

3. An offender is an absconder when the officer has been unable to locate:
a. Community offenders for 30 days;
b. Intermediate offenders for 2 weeks;
c. Sex offenders for 24 hours.

iii. New crimes:
1. A new crime is only a violation of probation if the offense was committed after the defendant was placed on probation.
2. Probation should not be revoked solely on the basis of a pending criminal charge unless and until there is a conviction or a plea of guilty to that charge. State v. Guffey, 253 N.C. 43 (1960).
3. Probation should not be revoked on the basis of a criminal charge of which the probationer has been acquitted. State v. Hardin, 183 N.C. 815 (1922).
4. Probation may not be revoked solely for a conviction of a Class 3 misdemeanor. G.S. 15A-1344(d).
5. *Tolling* of probation based on new criminal charges is discussed below.

h. The court's options upon finding a violation of probation:
i. Continue under existing term and conditions.
ii. Modify conditions. If the defendant was originally sentenced to Community punishment, the court may add conditions that would otherwise make the sentence Intermediate punishment, including special probation. G.S. 15A-1344(a).
1. Defendants have argued that once a court hears a violation and elects to modify probation, it cannot subsequently revoke probation for other violations that occurred prior to the modification.
2. The Court of Appeals rejected this argument in State v. Bridges, __ N.C. App. __, 658 S.E.2d 527 (2008).
iii. Find the defendant in criminal contempt (requires a plenary contempt proceeding under G.S. Ch. 5A—a more formal proceeding than a probation violation hearing).
iv. Revoke probation and activate a suspended sentence:
1. The revoking judge can reduce the suspended sentence of imprisonment, but only within the original range (i.e., presumptive, mitigated, or aggravated) established for the class of offense and prior record level of the sentence being activated. G.S. 15A-1344(d1).
2. An activated sentence runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject, unless the revoking judge specifies that it is to run consecutively with the other period. G.S. 15A-1344(d). The revoking judge may choose to run sentences consecutively without regard to what the original judgment states. State v. Paige, 90 N.C. App. 142 (1988); State v. Hanner, 188 N.C. App. 137 (2008). If the revoking judge wants to run sentences consecutively, he or she should say so at revocation; silence at

revocation will result in concurrent sentences, even if the original judgment specified consecutive sentences.

3. Though probation can be modified or extended in the defendant's absence, G.S. 15A-1344(d), probation probably should not be revoked without the defendant being present (especially if the judge changes the suspended sentence in any way).

v. Terminate probation—a judge can do this at any time.

i. Probation violation hearings held after the probationary period has expired:

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

ii. Under the amended law (effective for *hearings held after* December 1, 2008, S.L. 2008-129, regardless of when the offender's offense date or when he or she was put on probation), the court may "extend, modify, or revoke probation" (under prior law, the court only had power to revoke, State v. Reinhardt, 183 N.C. App. 291 (2007)) after the expiration of the period of probation if:

1. The State files a written violation report before 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.

iii. The requirement to *file* a written violation report before the expiration of the period of probation means the violation report must be file stamped before the period expires. State v. Hicks, 148 N.C. App. 203 (2001); State v. Moore, 148 N.C. App. 568 (2002). In the absence of a file stamped motion, dated before the period of probation expires, the trial court is without jurisdiction to revoke probation after the end of the probationary period.

iv. Prior to the 2008 amendments to the law, in order to preserve its jurisdiction to revoke 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." The State lost a handful of appeals on this point. *E.g.*, State v. Burns, 171 N.C. App. 759 (2005); 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 effort to preserve its jurisdiction to act after the period of probation. The AOC forms have been changed accordingly.

f. Tolling the probationary period while new charges are pending:

i. "The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation." G.S. 15A-1344(d).

ii. A new charge for any offense other than a Class 3 misdemeanor (because probation cannot be revoked solely for conviction of a Class 3 misdemeanor) *automatically* tolls—that is, stops the clock on—a person's period of probation *immediately* when the charge is

brought. The period is held in abeyance until the charge is resolved (by way of acquittal, dismissal, or conviction), and then resumes when the charge is no longer pending, with as much time remaining on the period as there was when the case was first tolled.

iii. This approach to tolling is based on Court of Appeals decisions in State v. Henderson, 179 N.C. App. 191 (2006) ("Under the statute, a defendant's probationary period is automatically suspended when new criminal charges are brought."), and State v. Patterson, __ N.C. App. __, 660 S.E.2d 155 (2008) (same). Prior policy required tolling of the case only when a probationer had a new charge pending when his or her period of probation was set to expire.

iv. The practical effect of automatic tolling is that many defendants who believe their period of probation has run may have additional time to serve if they ever had new charges pending during their period of probation. Probation officers now receive automated updates from AOC when offenders they supervise have new charges pending, so judges should expect tolling issues to arise more frequently.

g. Credit rules for activated sentences. Upon revocation of probation and activation of a suspended sentence, the court must give a defendant credit for:

i. Time jailed awaiting revocation hearing. G.S. 15-196.1.

ii. Time served during the active portion of a split sentence. State v. Farris, 336 N.C. 553 (1994).

iii. Time spent at DART-Cherry. State v. Lutz, 177 N.C. App. 140 (2006).

iv. Time spent imprisoned for contempt under G.S. 15A-1344(e1). State v. Belcher, 173 N.C. App. 620 (2005).

v. No credit for time under Electronic House Arrest. State v. Jarman, 140 N.C. App. 198 (2000).