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Probation Violations

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Introduction

A defendant sentenced to probation is subject to conditions that he or she must follow as part of the sentence. A willful failure to comply with those conditions is a violation of probation. There are many ways the court can respond to a violation, ranging from doing nothing to revoking probation and activating the defendant's suspended sentence. Before the court can take action, however, a probationer is entitled to notice and a hearing at which the court will determine whether a violation occurred.

This bulletin sets out the law applicable to probation violation hearings in North Carolina. A probation violation hearing is less formal than a criminal trial, but it still requires certain procedures as a matter of state statute and constitutional due process. The traditional view, expressed in many older cases, was that probation was an "act of grace" by the state and that a defendant therefore had little basis upon which to attack any perceived unfairness in the revocation process.[1] Probation was considered a privilege, not a right.

That view was expressly rejected by the United States Supreme Court in the early 1970s in *Morrissey v. Brewer* [2] and *Gagnon v. Scarpelli*,[3] which set out a new framework for the process due an individual before his or her parole or probation could be revoked. The rights and procedures described in those cases—written notice of alleged violations, a preliminary hearing, an opportunity to be heard by a neutral and detached officer, and in some cases counsel—were codified into North Carolina law in 1977.[4]

From the late 1970s until 2011, the laws and procedures applicable to probation violations did not change much. Provided the proper procedures were followed, a judge had broad discretion to respond to any single violation by revoking the defendant's probation and activating his or her suspended sentence. In 2011, the General Assembly passed the Justice Reinvestment Act, making major changes to the law of sentencing and probation.[5] The revised law placed substantial limitations on a judge's authority to revoke probation for violations other than a new criminal offense or absconding, as discussed below.

Unless otherwise indicated, the law and procedure described in this bulletin applies to supervised and unsupervised probation alike and to cases sentenced under both Structured Sentencing and the impaired driving law. The procedures do not, however, apply to alleged violations of post-release supervision or parole. Those violations are handled under similar but statutorily separate procedures outlined in Article 84A (post-release supervision) and Article 85 (parole) of Chapter 15A of the General Statutes (hereinafter G.S.).[6]

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1. *See, e.g.*, State v. Duncan, 270 N.C. 241 (1967).
2. 408 U.S. 471 (1972).
3. 411 U.S. 778 (1973).
4. *See* Section 15A-1345 of the North Carolina General Statutes (hereinafter G.S.) (explicitly described in the Official Commentary as responding primarily to the dictates of *Gagnon* and *Morrissey*).
5. *See generally* James M. Markham, The North Carolina Justice Reinvestment Act (UNC School of Government, 2012).
6. *See* Jamie Markham, *The Post-Release Supervision Violation Hearing Process in a Nutshell*, N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 27, 2013), nccriminallaw.sog.unc.edu/?p=4121.

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Initiating a Violation

Alleging a Violation

In supervised probation cases, the violation process typically begins when a probation officer files a violation report (form DCC-10) with the clerk of court. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged, at least twenty-four hours before the hearing, unless such notice is waived by the probationer.[7]

The DCC-10 constitutes notice of the alleged violations and controls the scope of the ensuing hearing.[8] Probation should only be revoked based on violations alleged in the notice provided to the defendant.[9] A defendant's probation cannot be revoked if the violation report does not allege that he or she committed a new criminal offense, absconded, or had two prior periods of confinement in response to violation, unless the defendant waives the right to such notice.[10] Previously, the law had been more flexible, allowing revocation for violation of a condition not indicated on the violation report, so long as the evidence presented at the hearing established the same facts alleged in the report.[11] In light of the Justice Reinvestment Act, however, the violation report must put the defendant on notice that the specific violation in question is one that could potentially result in revocation.

Though no statute expressly says so, a prosecutor probably may allege a violation of probation.[12] It is also generally understood that a prosecutor may dismiss a probation violation—or at least effectively dismiss it by choosing not to prosecute it. There is no statute governing dismissals of probation violations, but agreed-upon resolutions of probation matters are often included in plea arrangements between the State and a defendant regarding new criminal charges. The parties should note, however, that a defendant is not entitled to a continuance under G.S. 15A-1023 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.[13]

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7. G.S. 15A-1345(e).

8. Other documents could potentially serve as notice of the alleged violation. In *State v. Baines*, 40 N.C. App. 545 (1979), the court of appeals held that an order for arrest indicating that a defendant had "failed to comply with the terms and conditions of the probation" gave the defendant sufficient notice in advance of a probation violation hearing. *Baines* was, however, decided under an "act of grace" rationale, and a bare allegation that probation had been violated probably would not be deemed sufficient notice of a violation today.

9. State v. Cunningham, 63 N.C. App. 470 (1983) (reversing a defendant's revocation based on trespass and damage to real property when the violation report alleged only that he had played loud music and removed signs posted by his neighbors).

10. State v. Tindall, No. COA12-1145, 2013 WL 1876774, at *4 (N.C. Ct. App. May 7, 2013) (reversing a revocation premised on the commission of a new criminal offense when the probation report alleged only technical violations).

11. *See* State v. Hubbard, 198 N.C. App. 154 (2009) (upholding a revocation based on a violation of the intensive supervision condition, even though the probation violation report had couched the probationer's drunken behavior as failure to report in a reasonable manner).

12. *See* G.S. 15A-1344(e) (providing that "the State" must give the probationer notice of the hearing and its purpose).

13. State v. Cleary, ___ N.C. App. ___, 712 S.E.2d 722 (2011).

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Addenda

There is no special statutory rule for amending a violation report. A probationer is entitled to notice of later-alleged violations in the same manner as any violations alleged in the first instance, including all requirements of timeliness, as discussed below.[14]

Alleging a Violation of Unsupervised Probation

In cases of unsupervised probation, violations are generally reported to the court 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 ten days prior to any hearing and must state the nature of the violation.[15] Form AOC-CR-220 may be used to provide notice of a hearing on a 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 driver's 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.[16]

Notice of Failures to Pay Child Support as a Condition of Probation

A special statutory provision, G.S. 15A-1344.1, sets out a procedure to ensure payments of child support ordered as a condition of probation. When a court requires a defendant to support his or her children—a regular condition of probation under G.S. 15A-1343(b)(4)—the court is also empowered under G.S. 15A-1344.1(a) to order that support payments be made to the State Child Support Collection and Disbursement Unit for remittance to the party entitled to receive the payments. If a court were to enter such an order, the clerk of court would be required to maintain records related to the payments.[17] The law then sets out procedures, different for IV-D (referencing Title IV-D of the federal Social Security Act, which provides for state child support systems) and non-IV-D cases, through which the clerk of superior court may notify the defendant of any arrearage in the required payments. If the arrearage is not paid in full, the law requires the clerk to notify the district attorney and the defendant's probation officer, who must then initiate revocation proceedings, make a motion for income withholding under G.S. 110-136.5, or both.[18]

For a variety of reasons, the special procedures set out in G.S. 15A-1344.1 are no longer used as a practical matter. Due to the evolution of centralized child support enforcement over the years, judges no longer need to order in the criminal case that payments be made to the State Child Support Collection and Disbursement Unit; centralized collection is now the default. The special notice procedures set out in G.S. 15A-1344.1(d) are also generally unnecessary, as immediate income withholding is effectively automatic under G.S. 110-136.5. Thus, probation officers

14. *See infra* notes 34–43 and accompanying text.
15. G.S. 15A-1344(b1)(1).
16. G.S. 15A-1344(b1)(2).
17. G.S. 15A-1344.1(b).
18. G.S. 15A-1344.1(d).

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and court officials are much more likely to give notice of alleged violations related to child support obligations through the same mechanisms applicable to other violations—a violation report by the probation officer or a notice of violation of unsupervised probation, depending on whether the case is one of supervised or unsupervised probation.

Notice of Failure to Pay Money by Individuals Not on Probation

Defendants sentenced to a fine or payment of costs but not placed on probation are not subject to the notice and hearing provisions of G.S. 15A-1345. Rather, when it is believed that they have defaulted on payment of a monetary obligation, those defendants may be brought before the court pursuant to the show cause procedure set out in G.S. 15A-1364(a) or the conditional show cause procedure described in G.S. 15A-1362(c). Form AOC-CR-219 may be used for the show cause order.

Arrest or Citation

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 (referred to by probation officers as an "authority to arrest," set out on form DCC-12), accompanied by a violation report.[19] A probation officer may also arrest a probationer without a written order or motion when he or she has probable cause to believe that a violation has occurred,[20] although the policy of the Community Corrections Section of the Division of Adult Correction (DAC) expresses a strong preference that officers seek an order for arrest or complete a DCC-12 before arresting a probationer.[21] In general, a probation officer has the same powers of arrest as a sheriff in the execution of his or her duties,[22] probably including cases supervised pursuant to a deferred prosecution agreement or a conditional discharge under G.S. 90-96.[23] Probation officers should be considered state officers within the meaning of G.S. 15A-402(a), meaning that when they have the power to arrest, they may do so anywhere within the state of North Carolina.

It is not necessary to arrest a probationer in advance of a violation hearing; the hearing may be held without first arresting the probationer.[24] If the probation officer does not think it necessary to arrest the probationer, the probationer is given notice of the alleged violations and the time and place of the hearing and cited to court.

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19. G.S. 15A-1345(a).

20. State v. Waller, 37 N.C. App. 133 (1978).

21. State of N.C., Dep't of Pub. Safety, Div. of Adult Correction, Section of Community Corrections, Policy & Procedure Manual § E.0404 (2013) (hereinafter Community Corrections Policy).

22. G.S. 15-205.

23. *See* Jamie Markham, *Probation Officers' Arrest Authority in Deferral Cases*, N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 14, 2013), nccriminallaw.sog.unc.edu/?p=4099.

24. G.S. 15A-1345(a).

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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.[25]

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 is found to pose a danger to the public, he or she must be denied release pending a revocation hearing. If it is determined that 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 or not, the probationer may be held for up to seven days from the date of arrest so that the judicial official, or a subsequent reviewing judicial official, may obtain sufficient information to determine whether the probationer poses a threat to the public.[26] The requisite findings can be recorded on side two of form AOC-CR-272.

Sometimes the sentencing judge will order in the judgment suspending sentence that a particular appearance bond be set for a defendant in the event of his or her arrest for an alleged violation of probation. Though the court of appeals has urged caution on the part of the trial courts regarding the setting of anticipatory bonds, judicial officials—particularly magistrates—should probably take them into account when they are present.[27]

Failures to Appear; Suspension of Public Assistance

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 has been made to notify him or her.[28] 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 likely violate the defendant's right to be present when the sentence is imposed.[29]

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 G.S. Chapter 15A for a violation of probation.[30]

Effective October 1, 2012, the court may order the suspension of any public assistance benefits that are being received by a probationer for whom the court has issued an order for arrest for violating probation but who is absconding or otherwise willfully avoiding arrest.[31] The

25. G.S. 15A-1345(b).

26. G.S. 15A-1345(b1).

27. *See* State v. Hilbert, 145 N.C. App. 440 (2001) (noting in dicta that the sentencing judge's order that the defendant be arrested and placed under a $100,000 cash bond in response to his first positive drug screen was against the better practice; at most, the sentencing judge could recommend, not order, a particular bond).

28. G.S. 15A-1344(d).

29. State v. Hanner, 188 N.C. App. 137 (2008).

30. G.S. 15A-1344(b1).

31. G.S. 15A-1345(a1); S.L. 2012-170.

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suspension continues until the probationer surrenders or is otherwise brought under the court's jurisdiction. The suspension does not affect the eligibility for public assistance benefits being received by or for the benefit of a family member of the probationer. The court may use Form AOC-CR-650, *Order of Suspension of Public Benefits for Absconder*, to order the suspension.

Notice to Victims

For crimes covered under the Crime Victims' Rights Act (listed in G.S. 15A-830(a)(7)), a victim may elect to receive notice of certain posttrial proceedings involving the defendant, including probation violation hearings.[32] If a victim has elected to receive notifications, Community Corrections must provide him or her with notice of, among other things, the date and location of any hearing to determine whether the defendant's supervision should be revoked, continued, modified, or terminated; the final disposition of any hearing; any modification of restitution; and the addition of any intermediate sanction. The notification must be provided within thirty days of the event requiring notification.[33]

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 has power to act "any time prior to the expiration or termination of the probation period."[34] Once a period of probation expires, the court generally loses jurisdiction over the defendant.[35]

Hearings after Expiration

The main exception to the jurisdictional rule described above 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 a violation report is filed before expiration. This extended jurisdiction becomes important when an offender violates probation before his or her period of probation has expired but a violation hearing cannot be held before expiration because, for example, the alleged violation occurred very near the end of probation or the probationer absconded.

Under G.S. 15A-1344(f), 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.[36]

32. G.S. 15A-832.
33. G.S. 15A-837.
34. G.S. 15A-1344(d).
35. State v. Camp, 229 N.C. 524 (1980).
36. G.S. 15A-1344(f).

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To be considered filed, a violation report should be *file stamped* by the clerk before the probation period expires.[37] In the absence of a file-stamped motion dated before the expiration of probation (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. These jurisdictional provisions apply with equal force to supervised and unsupervised probationers and to those on probation under G.S. 90-96.[38] 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.[39]

The filing of a violation report before a period of probation expires does not itself extend the period of probation beyond the scheduled expiration date. Rather, it merely preserves the court's authority to act on the case at a later hearing. Probation (and the accrual of supervision fees, if any) should cease on the date of expiration unless the court takes separate action to extend the case.

Prior to amendments to the law in 2008, in order to preserve its jurisdiction to act after the period of probation had expired, the court had to make a finding of the State's "reasonable effort to notify the probationer and to conduct the hearing earlier."[40] In 2008, G.S. 15A-1344(f) was amended to remove the reasonable efforts provision. After 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.[41]

If a period of probation expires before a probation violation report is filed, the trial court lacks subject matter jurisdiction over the case. Similarly, if an earlier extension of probation was improper and the period of probation would have expired but for the improper extension, the court loses authority to act on the case.[42] The timely filing of one alleged probation violation does not preserve the court's authority to act on additional violations filed after a period of probation has expired. In other words, amendments or addenda to a violation report must themselves comply with the jurisdictional requirements of G.S. 15A-1344(f) (filing before expiration) in order for the court to act on them.

There is no express statutory provision related to violations that occur *before* a person is placed on probation, but the general understanding is that conduct may only be considered a violation if it occurred while the offender was actually on probation. Thus, when a person commits Crime A before being placed on probation for Crime B, but is convicted of Crime A after being placed on probation for Crime B, the conviction is not a violation of the probation for Crime B.[43]

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37. State v. Hicks, 148 N.C. App. 203 (2001); State v. Moore, 148 N.C. App. 568 (2002).

38. State v. Burns, 171 N.C. App. 759 (2005).

39. G.S. 15A-1342(i).

40. State v. Hall, 160 N.C. App. 593 (2003); State v. Bryant, 361 N.C. 100 (2006).

41. S.L. 2008-129.

42. State v. Gorman, ___ N.C. App. ___, 727 S.E.2d 731 (2012); State v. Satanek, 190 N.C. App. 653 (2008); State v. Reinhardt, 183 N.C. App. 291 (2007).

43. *See, e.g.*, United States v. Drinkall, 749 F.2d 20 (8th Cir. 1984).

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Tolling

Tolling in the probation context means that no time runs off the probationer'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.[44] There are, however, many probationers who were placed on probation before that date and who are thus subject to the law that existed beforehand, described below.

The tolling statute, originally set out in G.S. 15A-1344(d), 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 by the court of appeals, the tolling provision automatically suspended a defendant's probationary period when new criminal charges were brought.[45] Thus, when a probationer had a pending charge for any offense other than a Class 3 misdemeanor (which cannot result in revocation even upon conviction), time stopped running on his or her period of probation immediately (by operation of law) when the charge was brought and did not start running again until the charge was resolved by way of acquittal, dismissal, or conviction.

In 2009 the General Assembly made several changes to the tolling law.[46] First, the law was moved from G.S. 15A-1344(d) to G.S. 15A-1344(g). Second, the law was amended to make clear that a probationer remained 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 was acquitted or had the charge dismissed, he or she would receive credit against the probation period for the time spent under supervision in tolled status. Those provisions applied to "offenses committed" on or after December 1, 2009, which probably was meant to refer to the date of the offense for which the offender was on probation, not the date of the alleged offense that led to the new criminal charge.

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.[47]

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44. S.L. 2011-62.

45. State v. Henderson, 179 N.C. App. 191, 195 (2006); *see also* State v. Patterson, 190 N.C. App. 193 (2008).

46. S.L. 2009-372.

47. There is some argument that the effective date of the 2009 changes to the tolling law left nothing of G.S. 15A-1344(d) for defendants on probation for offenses that occurred before December 1, 2009, who are brought to court for a violation hearing on or after December 1, 2009. 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

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For probationers in the second category mentioned above, it is not entirely clear how a court should handle any violations pending during a tolled probation period if the charge that tolled the case does not result in a conviction and the case ends by virtue of the credit-back provision. If the violation was filed while the probationer was on probation, the court arguably retains jurisdiction over the case after its expiration under G.S. 15A-1344(f).[48]

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 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 or her arrest to continue on probation pending a hearing, unless the probationer is covered under G.S. 15A-1345(b1) and has been determined to be a danger to the public, in which case he or she must be held until the final revocation hearing.[49] The release does not dismiss the violation; rather, it just means that 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."[50] If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the district.[51] No statutory language limits authority to conduct a 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 the ultimate authority to alter or revoke probation). Thus, it appears that any judge—district or superior court—may conduct the preliminary hearing, regardless of which court imposed the probation.

A preliminary hearing only needs to be held when the probationer is detained for a violation of probation; it is not required when the probationer is released on bail pending the final violation hearing.[52] Additionally, it appears that the failure to hold a preliminary hearing does not deprive the court of jurisdiction to conduct a final violation hearing.[53]

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.[54]

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arguably operates to remove the original tolling provision, leaving nothing in its place for a person on probation for an offense that occurred before December 1, 2009.

48. *See* Jamie Markham, *Probation Violations Arising During a Tolled Period*, N.C. Crim. L., UNC Sch. of Gov't Blog (Oct. 11, 2010), nccriminallaw.sog.unc.edu/?p=1666.

49. *See supra* note 26 and accompanying text.

50. G.S. 15A-1345(d).

51. *Id.*

52. State v. O'Connor, 31 N.C. App. 518 (1976).

53. State v. Seay, 59 N.C. App. 667 (1982).

54. G.S. 15A-1345(d).

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Regarding the right to counsel, the statutory subsection setting out the procedure applicable at a preliminary hearing, G.S. 15A-1345(d), is silent. By contrast, the statute applicable to final violation hearings (G.S. 15A-1345(e)) expressly notes an entitlement to counsel, including appointed counsel if the defendant is indigent. Nevertheless, G.S. 7A-451(a)(4) states that an indigent person is entitled to counsel at "a hearing for revocation of probation," which arguably refers to both preliminary and final violation hearings. Notwithstanding the ambiguity in the statutes, there is little question that many probationers have a constitutional right to counsel at the preliminary hearing—including any probationer who denies the alleged violation.[55]

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 the 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.[56] When a probation judgment is subsequently modified, the court in which the modification occurred is considered to have "imposed" the modification within the language of G.S. 15A-1344(a), and is thus a proper venue for a violation hearing.[57] A judge who sentences a defendant to unsupervised probation may limit jurisdiction to alter or revoke the probation to himself or herself.[58] If the sentencing judge does so, the probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced.[59] There is no comparable provision for supervised probation.

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.[60] Second, the district attorney of the prosecutorial district in which probation was imposed must be given reasonable notice of any hearing that will "affect probation substantially."[61] Third, if a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk of court must send a copy of that

55. *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that an indigent defendant has a right to appointed counsel when he or she 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 or herself).

56. G.S. 15A-1344(a).

57. State v. Mauck, 204 N.C. App. 583 (2010).

58. G.S. 15A-1342(h).

59. G.S. 15A-1344(b).

60. G.S. 15A-1344(c).

61. G.S. 15A-1344(a).

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judge's 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.[62]

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.[63] 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 for a de novo hearing, not to the court of appeals.[64]

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.[65] 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.[66] 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.[67]

Hearing Procedure

A probation violation hearing is not a criminal prosecution or a formal trial.[68] Nevertheless, certain procedural requirements 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.[69] The defendant is entitled to a written statement from the court as to the evidence relied on and reasons for revoking probation,[70] but it appears that no verbatim transcript is required.[71]

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62. G.S. 15A-1344(c).

63. G.S. 7A-271(e).

64. State v. Hooper, 358 N.C. 122 (2004).

65. A therapeutic court is one 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).

66. G.S. 7A-271(f).

67. *Id.*

68. State v. Duncan, 270 N.C. 241 (1967); State v. Pratt, 21 N.C. App. 538 (1974).

69. G.S. 15A-1345(e).

70. Morrissey v. Brewer, 408 U.S. 471 (1972).

71. *See* State v. Quick, 179 N.C. App. 647 (2006) (affirming a probation revocation despite the notes and transcript of the revocation hearing being misplaced; the defendant was unable to demonstrate any prejudice resulting from the missing record).

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Confrontation

The probationer may confront and cross-examine witnesses unless the court finds good cause for not allowing confrontation.[72] Confrontation in this context is a due process right, not a Sixth Amendment right under the Confrontation Clause.[73] If the court disallows confrontation it must make findings that there was good cause for doing so. In *State v. Coltrane*, for example, 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.[74]

Right to Counsel

The defendant has a clear statutory right to counsel at the final violation hearing, including appointed counsel if indigent.[75]

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.[76] The court must inquire whether the defendant (1) has been clearly advised of his or her 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. It is unclear whether a waiver of counsel taken at a preliminary hearing is valid for the final violation hearing as well. There is authority to suggest that it is,[77] but the better practice is to conduct the waiver colloquy again before the final violation hearing.[78]

Evidence

The rules of evidence do not apply at probation violation hearings.[79] There is thus no statutory rule against admitting hearsay at the hearing. Nevertheless, the appellate courts have said that hearsay alone is insufficient to support a revocation of probation.[80] The record or recollection of evidence or testimony introduced at the preliminary hearing is inadmissible as evidence at the final violation hearing.[81]

The exclusionary rule does not apply at probation revocation hearings.[82]

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72. *Id.*
73. State v. Braswell, 283 N.C. 332 (1973).
74. State v. Coltrane, 307 N.C. 511 (1983).
75. G.S. 15A-1345(e).
76. State v. Evans, 153 N.C. App. 313 (2002).
77. State v. Kinlock, 152 N.C. App. 84, 88–89 (2002).
78. *See* Jamie Markham, *Waivers of Counsel at Probation Violation Hearings*, N.C. Crim. L., UNC Sch. of Gov't Blog (Aug. 22, 2011), nccriminallaw.sog.unc.edu/?p=2808.
79. G.S. 15A-1345(e); G.S. 8C-1, Art. 11, R. 1101, § (b)(3).
80. *See* State v. Hewett, 270 N.C. 348, 356 (1967) (noting that some of the trial judge's findings of fact were based on hearsay evidence that "should not have been considered by the judge" but upholding the judge's revocation order based on other evidence); State v. Pratt, 21 N.C. App. 538 (1974).
81. G.S. 15A-1345(e).
82. State v. Lombardo, 74 N.C. App. 460 (1985); *see also* Jamie Markham, *The Exclusionary Rule and Probation Hearings*, N.C. Crim. L., UNC Sch. of Gov't Blog (Dec. 1, 2010), nccriminallaw.sog.unc.edu/?p=1785.

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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 has violated a condition without lawful excuse.[83] Proof to a jury is not required, nor must the proof of the violation be made beyond a reasonable doubt.[84]

Admitted Violations

A defendant does not plead "guilty" or "not guilty" to a probation violation. Rather, he or she admits or denies the violation.[85] 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).[86] A defendant is not entitled to a continuance under G.S. 15A-1023 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.[87]

Potential Outcomes of a Violation Hearing

At the conclusion of a proper hearing (or once the defendant has waived his or her right to a hearing), the court may take one or more of the actions described below. The actions are arranged roughly from least restrictive (reinstating probation) to most restrictive (revocation) from the standpoint of the defendant. The sidebar below lists the available options.

In many instances, the response options are not mutually exclusive. For instance, the court may impose a split sentence, extend the period of probation, and modify the conditions of probation all in response to a single violation. In general, changes to probation short of revocation are ordered using form AOC-CR-609, *Order on Violation of Probation or on Motion to Modify*. A judgment revoking probation is entered on form AOC-CR-607 for a felony and form AOC-CR-608 for a misdemeanor.[88]

Except as otherwise indicated, the court has broad discretion when crafting the appropriate response to a violation of probation. The court may not, however, delegate the decision

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83. State v. Duncan, 270 N.C. 241 (1967); State v. White, 129 N.C. App. 52 (1998).

84. State v. Freeman, 47 N.C. App. 171 (1980).

85. State v. Sellers, 185 N.C. App. 726 (2007).

86. *Id.*

87. State v. Cleary, ___ N.C. App. ___, 712 S.E.2d 722 (2011).

88. Court officials should be aware that probation officers are guided by an administrative policy that directs how they respond to perceived violations of probation. The policy includes a chart that directs different types of responses depending on the type of violation at issue and the offender's supervision level. For example, nonrecurring violations by low-risk offenders should be responded to with a modest intervention, such as a reprimand or an additional contact by a probation officer, while new crimes or other violations implicating public safety will lead to the issuance of a probation violation report and the arrest of the probationer. *See* Markham, The North Carolina Justice Reinvestment Act, *supra* note 5, at 49–51 (summarizing the policy set out in Community Corrections Policy, *supra* note 21, at § E.0202). This administrative policy is not binding on the courts, but it helps explains which offenders probation officers bring back before the court for a hearing and the types of actions officers recommend to the court.

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of whether or not a probationer should be revoked to another party, such as a victim.[89] Additionally—though no statute or case explicitly says so—there is a sense that once a court responds to a particular violation of probation, that violation is expended and may not, standing alone, be the basis for subsequent action by the court.[90]

Reinstatement of Probation

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

Modification

After notice and hearing and for good cause shown, the court may at any time prior to expiration or termination modify the conditions of probation.[91] There need not be a finding of violation to empower the court to modify probation; modifications may be made without violation for good cause—although what constitutes good cause has not been explored in the case law. With or without a violation, a defendant has a right to be present at any hearing at which probation is modified, even if the modification is relatively minor.[92] The defendant may waive the rights to notice and hearing and the right to be present.

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.[93]

If any conditions are modified, the probationer must receive a written statement of the modification.[94] Probation may not later be revoked for violation of a new or modified condition unless the defendant had written notice that the condition applied to him or her; oral notice alone is insufficient.[95]

Probation Response Options

- **Terminate Probation**
- **Transfer to Unsupervised Probation**
- **Reinstate Probation**
- **Modify Probation**
- **Extend Probation**
- **Short-Term (2–3 Day) Jail Confinement ("Dip")**
- **Contempt**
- **Special Probation ("Split Sentence")**
- **Confinement in Response to Violation (CRV, or "Dunk")**
- **Revocation**

89. *See* State v. Arnold, 169 N.C. App. 438 (2005) (reversing a probation revocation when the court essentially allowed the victim to decide whether or not the probationer would be revoked).

90. *See* State v. Bridges, 189 N.C. App. 524 (2008) (rejecting a defendant's argument that his probation was revoked based on a violation that had previously been before the court for a modification hearing when the prior modification was not actually based on the alleged violation).

91. G.S. 15A-1344(d).

92. *See* State v. Willis, 199 N.C. App. 309 (2009) (vacating a condition that was modified outside the defendant's presence to prohibit him from having more than one animal "in his possession" to prohibiting him from having more than one animal "in his possession *or on his premises*" (emphasis added)).

93. G.S. 15A-1344(a).

94. G.S. 15A-1343(c).

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

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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).[96] By law, the total maximum probation period for extensions is 5 years (or 2 years in the case of deferred prosecution cases).[97] A defendant's probation period may be extended multiple times under G.S. 15A-1344(d), provided that the total probation period does not exceed 5 years. For instance, a defendant initially placed on probation for 12 months could, under G.S. 15A-1344(d), have that probation extended to 24 months at one hearing then to 60 months at a later hearing. As with modifications of probation generally, the defendant may waive his or her rights to notice and a hearing on the extension.

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 5-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 6 months of the *original* period of probation; and
3. The extension is necessary to complete a program of *restitution* or to complete *medical or psychiatric treatment*.[98]

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. In the typical case, a defendant will only be eligible for one special-purpose extension in the life of a single probation case. A special-purpose extension may not be ordered earlier than 6 months prior to expiration of the original period of probation.[99] If probation has previously been extended, the offender is no longer in his or her *original* period of probation, and is thus ineligible for further extension under G.S. 15A-1343.2 or 15A-1342(a).

Termination

The court may terminate probation at any time if warranted by the conduct of the defendant and "the ends of justice."[100] Although frequently used in practice, the concept of "unsuccessful" or "unsatisfactory" termination does not appear in the General Statutes or appellate case law and carries no defined legal significance.

When a probationer has a probation period greater than 3 years, the probation officer must bring him or her back before the court after he or she has served 3 years on probation so that the court can review the case to determine whether to terminate probation.[101] Though the

96. G.S. 15A-1344(d).
97. G.S. 15A-1342(a).
98. G.S. 15A-1343.2; -1342(a).
99. *See* State v. Gorman, ___ N.C. App. ___, 727 S.E.2d 731 (2012) (vacating an extension order entered in the third year of a 60-month period of probation because it was ordered too early).
100. G.S. 15A-1342(b).
101. G.S. 15A-1342(d).

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statute styles the review as mandatory, a failure to complete it does not deprive the court of later jurisdiction over the case.[102]

Transfer to Unsupervised Probation

A judge generally may transfer a supervised probationer to unsupervised probation at any time. The court may also authorize a probation officer to transfer a defendant to unsupervised probation after all money owed by the defendant is paid to the clerk. A probation officer also has independent authority to transfer a low-risk misdemeanant from supervised to unsupervised probation if the misdemeanant is not subject to any special conditions and was placed on probation solely for the collection of court-ordered payments.[103] For certain impaired driving probationers, a separate statutory provision in G.S. Chapter 20 governs transfers to unsupervised probation.[104] A probationer subject to the special conditions of probation applicable to sex offenders may not be placed on unsupervised probation.[105]

Under prior Community Corrections policy, probation officers would sometimes seek to have a case transferred to unsupervised probation if a probationer absconded and was not found for three years. That transfer was principally a matter of administrative recordkeeping for Community Corrections—similar in some regards to a dismissal with leave—that would allow them to maintain a record of the case in the event of the probationer's capture. However, that transfer did not, standing alone, extend the probation case or the court's jurisdiction over the defendant; jurisdiction could only be preserved by the filing of a violation report or if the probation period was tolled or otherwise extended. By policy, probation officers should no longer seek such transfers. Instead, they are instructed to keep absconders on supervised probation until the case expires and then move them into a recordkeeping status called "expired absconder" when the case ends.[106] Supervision concludes at that point, but Community Corrections maintains oversight of any pending violations or orders for arrest, which, if filed before expiration, remain valid until withdrawn.

Contempt

If a probationer willfully violates a condition of probation, the court may hold him or her in criminal contempt in lieu of revocation.[107] Unlike probation violations generally, violations punished through contempt must be proved beyond a reasonable doubt using the procedures set out in Article 1 of G.S. Chapter 5A. 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 that sentence is eventually activated.[108]

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102. State v. Benfield, 22 N.C. App. 330 (1974).

103. G.S. 15A-1343(g).

104. G.S. 20-179(r). *See generally* Shea Riggsbee Denning, *Sentencing for Impaired Driving under G.S. 20-179*, Admin. Just. Bull. No. 2012/02 (Aug. 2012), sogpubs.unc.edu/electronicversions/pdfs/aojb1202.pdf.

105. G.S. 15A-1343(b2).

106. *See* Community Corrections Policy, *supra* note 21, at § E.0506.

107. G.S. 15A-1344(e1).

108. State v. Belcher, 173 N.C. App. 620 (2005); *see also* Jamie Markham, *Jail Credit for Probation Contempt*, N.C. Crim. L., UNC Sch. of Gov't Blog (Dec. 13, 2012), nccriminallaw.sog.unc.edu/?p=4009.

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Special Probation (Split Sentence)

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). For split sentences added as a modification of probation, no confinement other than an activated sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.[109]

"Dip" Confinement 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 6 days per month during any 3 separate months during the period of probation. That time must be served in 2- or 3-day increments.[110] There is some sense that any "dip" confinement ordered by the court subtracts from the allotment of jail days that a probation officer may impose as a "quick dip" through delegated authority.[111] If a judge wishes to preserve the days allotted to the probation officer, he or she may wish to impose a form of confinement other than a dip as a modification of probation, such as special probation or contempt.

Confinement in Response to Violation (CRV)

For probation violations that occur on or after December 1, 2011, the Justice Reinvestment Act placed substantial statutory limitations on a court's authority to revoke probation. These limitations on authority apply to both felonies and misdemeanors, including impaired driving, and to supervised and unsupervised probationers alike. For offending behavior on or after December 1, 2011,[112] the court may only revoke probation in response to two specific types of violations: (1) committing a new criminal offense under G.S. 15A-1343(b)(1), and (2) absconding under G.S. 15A-1343(b)(3a). For other types of violations that occur on or after that date, the court is limited to the other non-revocation modification or extension options discussed above or to a response option under G.S. 15A-1344(d2), referred to in the statute as "Confinement in Response to Violation" (CRV). CRV has been referred to colloquially as a "dunk," to suggest that it is longer than the 2–3 day "dip" period that may be imposed by a judge or probation officer.

CRV is a period of confinement that may be ordered in response to a so-called "technical" violation of probation—any violation of probation other than a new criminal offense under G.S. 15A-1343(b)(1) or absconding under G.S. 15A-1343(b)(3a). A CRV period is similar in nature to a split sentence or contempt in that the probationer serves time in jail or prison in response to noncompliance, but CRV is governed by a different set of statutory rules than those other types of confinement.

When a defendant has committed a technical violation, the court may (but is never required to) impose CRV. For felons, the CRV period is a flat 90 days unless the probationer has 90 days or less remaining on his or her suspended sentence, in which case the CRV period is for the remainder of the suspended sentence. For misdemeanants, the CRV period is "up to 90 days,"

109. G.S. 15A-1344(e).
110. G.S. 15A-1343(a1)(3).
111. G.S. 15A-1343.2(e) and (f).
112. S.L. 2011-192, § 4.(d), *as amended by* S.L. 2011-412, § 2.5.

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meaning the court may impose a period shorter than 90 days in its discretion.[113] Because the CRV time counts for jail credit, it may never exceed the length of a person's suspended sentence.

A defendant may only receive two CRV periods in a particular probation case. After that, the court can respond to future violations by revoking probation, even if the alleged violation is something other than a new crime or absconding. Even after two CRV periods, the statute does not require the court to revoke upon a subsequent violation. The statute's language does, however, forbid the use of a third or subsequent CRV period. A judge wishing to impose additional confinement short of a full revocation would need to use a mode of imprisonment other than CRV, such as special probation or contempt.

Several additional rules apply to CRV. First, if a defendant is detained in advance of a violation hearing at which CRV is ordered, the judge must apply that prehearing credit to the CRV period, with any excess time to be applied to a later-activated sentence.[114] Second, when a defendant is on probation for multiple offenses, the law requires CRV periods to run concurrently on "all cases related to the violation"; confinement is to be "immediate unless otherwise specified by the court."[115] Together, these statutory rules indicate that multiple CRV periods should not be "stacked" to create a confinement period of longer than 90 days. The statute is silent, however, on the question of whether a CRV period may be run consecutively to other forms of probationary confinement, like special probation.

CRV confinement is similar to special probation (a split sentence) but statutorily distinct from it. For instance, CRV is not subject to the one-fourth rule of G.S. 15A-1351(a) or G.S. 15A-1344(e), which caps the maximum permissible confinement period of a split sentence at one-fourth of the defendant's imposed sentence of imprisonment. Additionally, there is no statutory provision allowing CRV to be served in noncontinuous periods (on weekends, for example), as there is for split sentences under G.S. 15A-1351(a). In the absence of such a provision, CRV periods should probably be served continuously.[116]

G.S. 15A-1344(d2) specifies that CRV periods are served "in the correctional facility where the defendant would have served an active sentence." That rule was made applicable to probation violations occurring on or after December 1, 2011. The simplest reading of that rule is that any CRV period ordered in a case should be served in the place of confinement ordered on the

113. G.S. 15A-1344(d2). As initially enacted in 2011, the rule requiring a CRV period to be for the length of the defendant's remaining suspended sentence if 90 days or less remained on the sentence apparently applied to felonies and misdemeanors alike. Because almost 90 percent of misdemeanor sentences are 90 days or less to begin with, the rule virtually always trumped the court's authority to order a shorter CRV period. That led to the peculiar result that a judge could impose a short CRV period (5 days, for example) for a defendant with a suspended misdemeanor sentence in excess of 90 days, whereas any CRV period ordered for a defendant with a suspended sentence of 90 days or less was required to be a "terminal dunk," using up the entirety of the remaining sentence. Under changes made in the 2012 Justice Reinvestment Clarifications Act, S.L. 2012-188, misdemeanors were excluded from the 90-days-or-less-remaining rule, meaning the judge can, in his or her discretion, impose a shorter CRV period in a misdemeanor case. The new version of the misdemeanor rule simply says that the court may impose a CRV period of up to 90 days in a misdemeanor case. The amendment was effective when it became law on July 16, 2012.

114. G.S. 15A-1344(d2).

115. *Id.*

116. *See* State v. Miller, 205 N.C. App. 291 (2009) (holding that, absent statutory authorization, a judge lacks authority to allow a defendant to serve an active sentence on weekends in a Structured Sentencing case).

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original judgment suspending sentence. Under that approach, in cases with sentences initially imposed on or after January 1, 2012, the proper place of confinement for a felony CRV period is the Division of Adult Correction (DAC), which has identified six facilities that will house CRV inmates. The proper place of confinement for a misdemeanor CRV period will be the local jail, the Misdemeanant Confinement Program, or, in some cases, prison, depending on the length of the suspended sentence and whether it was for a crime sentenced under Structured Sentencing or an impaired driving offense.

For violations that occurred before December 1, 2011, the court does not have authority to impose CRV. The court likewise should not impose CRV in response to a new criminal offense in violation of G.S. 15A-1343(b)(1) or absconding under G.S. 15A-1343(b)(3a).[117] For those violations the court may employ the other response options described above or may revoke probation as described below.

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

Revocation

Revocation means the probationer's suspended sentence is activated and the probationer is ordered to jail or prison. Prior to the Justice Reinvestment Act, the longstanding rule in North Carolina was that any single violation of a valid probation condition was a sufficient basis for revocation.[118] That is still the rule for any violation that occurred before December 1, 2011. For violations occurring on or after December 1, 2011, however, the court's authority to revoke probation is substantially limited. As stated above, for those violations, 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 new statutory "absconding" condition set out in G.S. 15A-1343(b)(3a), described above; and
- any violation by an offender who has previously received a total of two periods of "confinement in response to violation," described above. G.S. 15A-1344(a) and (d2).

In addition to the rules above, probation may not be revoked solely for conviction of a Class 3 misdemeanor.[119]

In general, an activated sentence commences on the day probation is revoked,[120] although a court may probably delay service of the sentence to some future date in its order revoking probation.[121] A judge also apparently may stay execution of an order revoking probation until some future date.[122] Under Structured Sentencing, an activated sentence must be served in a

117. G.S. 15A-1344(d2).

118. *See, e.g.*, State v. Tozzi, 84 N.C. App. 517 (1987).

119. G.S. 15A-1344(d).

120. *Id*.

121. G.S. 15A-1353(a). *See* Official Commentary to G.S. 15A-1353, providing that subsection (a) of the law "applies both to an initial sentence to imprisonment and to the activation of a sentence following probation revocation." The commentary goes on to say that while the "presumptive beginning date for the term of imprisonment is the date of the commitment order, the judge may specify a delayed beginning dated to permit the defendant to get his affairs in order."

122. State v. Yonce, 207 N.C. App. 658 (2010) (speaking approvingly of a trial judge's order staying a defendant's revocation of probation to allow the probationer additional time to pay restitution).

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continuous block; the court may not order it served on weekends.[123] By contrast, active sentences for impaired driving may be served on weekends under G.S. Chapter 20.[124]

Generally a sentence is activated in the same form in which it was entered by the original sentencing judge, but the revoking judge has limited discretion to modify the sentence, as described below.

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 (presumptive, mitigated, or aggravated) established for the class of offense and prior record level of the sentence being activated. For misdemeanors, the sentence may be reduced to as little as 1 day upon revocation, because that is the shortest permissible sentence in every cell on the misdemeanor sentencing grid.[125] The court may only reduce a sentence at the point of revocation; earlier reductions generally are ineffective.[126]

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*" (emphasis added). 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.[127] The revoking judge can, under *State v. Hanner*[128] and *State v. Paige*,[129] turn what would have been concurrent sentences into consecutive sentences—even, apparently, when the original concurrent sentences were entered pursuant to a plea arrangement.[130] The judge may, upon revocation, run an activated sentence consecutive to a later-arising active sentence, even though the later sentence was for an offense that occurred after the original probationary judgment was entered.[131]

123. State v. Miller, 205 N.C. App. 291 (2010).

124. "The judge in his discretion may order a term of imprisonment to be served on weekends." G.S. 20-179(s).

125. G.S. 15A-1344(d1).

126. State v. Mills, 86 N.C. App. 479 (1987).

127. State v. Hanner, 188 N.C. App. 137 (2008); State v. Paige, 90 N.C. App. 142 (1988).

128. 188 N.C. App. 137.

129. 90 N.C. App. 142.

130. The original judgment in *Hanner* was part of a plea arrangement, though it appears that the original sentencing court ran certain sentences concurrently even though the defendant had actually agreed as part of the plea that they would run *consecutively.* Thus, when the revoking judge eventually ran the sentences consecutively, he did not do anything that the defendant had not agreed to in the initial plea arrangement. As a result, *Hanner* probably should not be viewed as strong authority for the idea that a revoking judge can disregard the terms of a plea arrangement calling for concurrent sentences.

131. State v. Campbell, 90 N.C. App. 761 (1988).

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There is no authority to consolidate activated sentences with newly imposed judgments, as the statutes governing consolidation apply only to defendants convicted of more than one offense at the same time.[132]

The authority to reduce a suspended sentence or to change the sentencing judge's decision regarding consecutive or concurrent sentences exists only when the suspended sentence is activated and probation is revoked.[133] There is no authority to reduce a sentence when making other modifications to probation. If the revoking judge does not specifically state on the judgment activating the suspended sentence that it is to run consecutively to another sentence, DAC will run it concurrently with any other sentence the defendant is obligated to serve.

Revocation-Eligible Violations

Each type of revocation-eligible violation (a new criminal offense, absconding, or a technical violation after two previous CRV periods) raises complicated issues. Those issues are explored below.

New Criminal Offense

It is a regular condition of probation that a probationer "[c]ommit no criminal offense in any jurisdiction."[134] A longstanding issue related to the new criminal offense condition is what constitutes a "criminal offense." Does a pending criminal charge suffice? Or must there be a conviction on the criminal charge for it to qualify as a violation of probation? Practice is divided around the state, with some districts routinely holding violation hearings on unconvicted conduct and others having a virtual per se rule against holding a probation violation hearing on a new criminal offense until the defendant is convicted.

It appears that either approach is permissible. 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 the person is convicted of that charge,[135] unless the probation court makes an independent finding, to its reasonable satisfaction, that the defendant committed a crime.[136] 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.

It is apparently permissible for a probation court to find that a probationer has committed a new criminal offense regardless of the State's decision to drop the new criminal charge[137] or to not bring a charge at all.[138] There is also support for the idea that the probation court may revoke probation based on its own independent findings of a criminal act even if the defendant is

132. G.S. 15A-1340.15(b) (consolidation of felonies); -1340.22(b) (consolidation of misdemeanors).

133. *See* State v. Mills, 86 N.C. App. 479 (1987) (holding that a trial court judge erred by reducing and consolidating previously unconsolidated suspended sentences at a hearing at which probation was not revoked).

134. G.S. 15A-1343(b)(1).

135. State v. Guffey, 253 N.C. 43 (1960).

136. State v. Monroe, 83 N.C. App. 143, 145 (1986) ("All that is required in revoking a suspended sentence is evidence which reasonably satisfies the judge in the use of his sound discretion that a condition of probation has been willfully violated.").

137. *See* State v. Debnam, 23 N.C. App. 478 (1974) (upholding the trial court's revocation based on a nolle-prossed charge).

138. *Monroe*, 83 N.C. App. at 145–46.

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acquitted of the new criminal charge,[139] but the appellate courts describe this idea as against the better practice.[140] Revocation in lieu of, or even in addition to, a new criminal conviction does not constitute double jeopardy; the probation revocation is not new punishment for the same act but is, rather, the activation of a punishment previously imposed for conviction of a prior crime.[141]

Sometimes the court sentencing a new conviction will order in the judgment that the conviction shall not violate the defendant's existing probation. There is no statute approving such orders, and as a technical matter the court sentencing the new conviction only has jurisdiction over the probation matter if a violation report has been filed before the same court. As a practical matter, however, such orders are often honored—either because the defendant's guilty plea in the new case was secured pursuant to an agreement that probation would not be revoked or simply as a matter of comity between judges.[142]

Absconding

For probation violations occurring on or after December 1, 2011, the court may revoke probation for a violation of the statutory absconding condition set out in G.S. 15A-1343(b)(3a). That subsection provides that a probationer may not "abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." The absconding condition only applies to defendants on probation for offenses committed on or after December 1, 2011.[143] Violations of other conditions (such as the "remain within the jurisdiction" condition or the "failure to report to the officer" condition) are ineligible for revocation, even if they had previously been referred to by probation officers as absconding. For violations occurring on or after December 1, 2011, court and corrections officials should thus be careful to distinguish true statutory absconders from other violators. 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, that offender would be eligible for revocation under the applicable prior law.

Even for offenders actually subject to the new statutory absconding condition, the language of the condition itself is not clear about what avoiding supervision means or how long a person's whereabouts must be unknown before that person becomes an absconder. Probation officers are required as a matter of their own 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.[144]

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139. *See* State v. Greer, 173 N.C. 759 (1917) (holding that a jury verdict acquitting the defendant of a new criminal charge was not binding on the probation court so long as the court found facts based on the evidence before it).

140. *See Debnam*, 23 N.C. App. at 481 ("It may not be desirable for a judge to activate a suspended sentence upon conduct where a jury has found the defendant not guilty of a charge arising out of that conduct, but it appears to be within the power of the judge to do so.").

141. State v. Monk, 132 N.C. App. 248 (1999).

142. *See* Jamie Markham, *Revocation-Proof Convictions*, N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 15, 2011), nccriminallaw.sog.unc.edu/?p=1955.

143. S.L. 2011-412, § 2.5.

144. *See* Community Corrections Policy, *supra* note 21, at § D.0503.

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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.[145]

Revocation after Two CRV Periods

After 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.[146] In that sense, the law operates as a sort of "three strikes" provision, such that a person may not be revoked until the third technical violation. Only the prior receipt of CRV periods qualifies a person for revocation for a technical violation, not the prior findings of violations themselves. Violations responded to in some other way (by a term of special probation, for example) do not count as strikes. The statute's use of the phrase "previously received" in reference to prior CRV periods indicates that the court may not satisfy multiple CRV strikes by finding multiple violations of probation in the same case at the same time.

Electing to Serve a Sentence

Some probationers ask to "invoke" their sentence—to have their probation revoked so they may serve their remaining suspended sentence. Prior law allowing a defendant to elect to serve a sentence was repealed in 1995, effective for offenses occurring on or after January 1, 1997.[147] A defendant may admit to a violation of probation, but for violations occurring on or after December 1, 2011, the admitted-to violation would need to be a new criminal offense or absconding in order to allow the court to revoke. For many misdemeanors, an admission to a technical violation would allow for a CRV period long enough to use up the defendant's entire remaining suspended sentence—a so-called terminal CRV period, which is the functional equivalent of a revocation.

Defendants on probation for felony offenses committed on or after December 1, 2011, should note that they will be released to post-release supervision upon their release from imprisonment and that, by statute, PRS cannot be refused.[148] Thus, the incentive to elect to serve active time may be diminished.[149]

Credit for Time Served

If probation is revoked and a sentence is activated, the probationer must get credit for the following time under G.S. 15-196.1:

- Pretrial confinement.[150]
- The active portion of a split sentence.[151]

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145. State v. Burns, 171 N.C. App. 759, 762 (2005) ("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].").

146. G.S. 15A-1344(d2).

147. G.S. 15A-1341(c), *repealed by* S.L. 1995-429.

148. G.S. 15A-1368.2(b).

149. For a lengthier discussion of the issues that arise when a probationer attempts to invoke his or her sentence, see Markham, The North Carolina Justice Reinvestment Act, *supra* note 5, at 77–79.

150. G.S. 15-196.1.

151. State v. Farris, 336 N.C. 553 (1994).

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- Time spent at DART Cherry (the state-run residential treatment facility for chemically dependent males) as a condition of probation.[152]
- Presentence commitment for study.[153]
- Hospitalization to determine competency to stand trial.[154]
- Time spent in confinement in another state awaiting extradition when the defendant was held in the other state solely based on North Carolina charges (per federal court interpretation of G.S. 15-196.1).[155]
- Time spent in the now-defunct IMPACT boot camp program.[156]
- Time spent imprisoned for contempt under G.S. 15A-1344(e1).[157]
- "Quick dip" confinement time imposed by a probation officer or judge.
- Time imprisoned as confinement in response to violation (CRV).[158]

Credit should not be awarded for the following:

- Time spent under electronic house arrest.[159]
- Time spent at a privately run residential treatment program as a condition of probation (in a non-DWI case).[160]

Violation Hearings in Deferral Cases

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.[161] 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."[162] The North Carolina Attorney General's office 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."[163] Under G.S. 143B-708(e), violation 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

152. State v. Lutz, 177 N.C. App. 140 (2006). Time spent at Black Mountain Substance Abuse Treatment Center for Women, the equivalent to DART Cherry for women, probably also qualifies.
153. State v. Powell, 11 N.C. App. 194 (1971).
154. State v. Lewis, 18 N.C. App. 681 (1973).
155. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).
156. State v. Hearst, 356 N.C. 132 (2002).
157. State v. Belcher, 173 N.C. App. 620 (2005).
158. G.S. 15A-1344(d2).
159. State v. Jarman, 140 N.C. App. 198 (2000).
160. State v. Stephenson, ___ N.C. App. ___, 713 S.E.2d 170 (2011).
161. G.S. 15A-1342(a1).
162. G.S. 15A-1344(d).
163. Advisory Letter from Elizabeth F. Parsons, N.C. Assistant Attorney Gen., to LaVee Hamer, Gen. Counsel, N.C. Dep't of Correction (Nov. 1, 2010).

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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 authorization.

G.S. 90-96

G.S. 90-96 is a conditional discharge program under which eligible defendants who plead guilty to or are found guilty of certain drug crimes are 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.[164] Subsection (a1) of G.S. 90-96 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.[165] There are, however, some ways in which G.S. 90-96 cases should be handled differently. First, regarding the proper venue for the hearing, there is some sense that the district of conviction is the best venue for a probation hearing under G.S. 90-96 (that is, that violation hearings should not be held in the district where the probationer resides or the district where the violation occurred). G.S. 90-96(a1) specifically provides that a person may obtain a hearing before the court of original jurisdiction prior to revocation of probation. There is no similar provision in G.S. 90-96(a), but because the defendant must be sentenced if revoked, the most efficient practice in many cases may be to hold the violation hearing in the district of conviction.

Under G.S. 90-96(a), the court may, upon violation of a term or condition of probation, revoke the probation, enter an adjudication of guilt, and proceed as otherwise provided. Revocation is not required in the event of a violation but is, rather, within the trial court's discretion. Apparently, any type of violation may serve as a basis for revocation of G.S. 90-96 probation; these cases probably are not subject to the post–Justice Reinvestment Act rule that a person must receive two periods of confinement in response to a violation (CRV) before he or she may be revoked for a technical violation. In fact, CRV is probably inappropriate in G.S. 90-96 cases in any event. The CRV law requires the court to consider how much time remains on the defendant's maximum imposed sentence when determining the length of the CRV, but there is no imposed sentence in a G.S. 90-96 case. For similar reasons, the court probably may not impose special probation (a split sentence) in a G.S. 90-96 case, either at the outset or in response to a violation. There is no suspended sentence in place to serve as a benchmark for determining the permissible length of the active portion of the split sentence under the one-fourth rule of G.S. 15A-1351(a).

Subsection (a1) of G.S. 90-96 does not address violations generally, but it does say that a person's "failure to complete successfully an approved program of instruction at a drug education school" shall constitute grounds to revoke. The subsection defines that failure broadly to include failing to attend classes without an excuse, failing to complete the course in a timely fashion, or

164. S.L. 2011-192.

165. State v. Burns, 171 N.C. App. 759, 761 (2005) ("In the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of [G.S.] Chapter 15A apply to probation imposed under [G.S.] 90-96.").

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failing to pay the required fee. If the court receives an instructor's report about a person's failure to complete the drug education school, it must revoke probation.

Other Issues That May Arise at a Violation Hearing

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.[166] The court may respond to violations of conditions added by a probation officer through delegated authority in the same way it may respond to violations of any other condition. Before responding, the court should verify that the condition was added through a proper exercise of the officer's delegated authority.

Delegated authority applies only to cases sentenced under Structured Sentencing;[167] it does not apply in impaired driving cases or to any case sentenced under older law.

The sentencing 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. If the court has withheld delegated authority, the probation officer may not impose additional conditions of supervision.

Which conditions a probation officer may add through delegated authority depends on whether the probationer was sentenced to community punishment or intermediate punishment. In community punishment cases, the officer may add the following conditions:

- 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.[168]

In intermediate punishment cases, the officer may add any of the conditions permitted in community cases plus the following conditions:

- perform up to 50 hours of community service and pay the fee prescribed by law; and
- submit to satellite-based monitoring (SBM) if the defendant is an offender of the type described by G.S. 14-208.40(a)(2).[169]

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

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

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

169. G.S. 15A-1343.2(f).

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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 exercise delegated authority in response to violations of officer-imposed conditions.[170]

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. The statute does not define *high risk*, but the Division of Adult Correction (DAC) has determined as a matter of policy that it will mean offenders in Supervision Levels 1 and 2.[171]

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 the hearing on such a motion or set any timeline 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.[172]

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"[173] (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. Regardless, Community Corrections policy instructs probation officers that noncompliance addressed through the delegated authority process cannot be included on any future violation report.[174]

Work Release

Under G.S. 15A-1351(f), the sentencing court may recommend or, with the consent of the defendant, may order work release for a misdemeanant. When a defendant is sentenced to probation, that recommendation should not be made until probation is revoked and the sentence of imprisonment is activated.[175]

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170. *Id.*

171. Community Corrections Policy, *supra* note 21, at § E.0205(b)(1). For a discussion of the risk-needs assessment used by DAC's Community Corrections section, including the supervision levels into which probationers are assigned, see Jamie Markham, *Probation's Risk-Needs Assessment Process in a Nutshell*, N.C. Crim. L., UNC Sch. of Gov't Blog (Aug. 8, 2012), nccriminallaw.sog.unc.edu/?p=3772.

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

173. *Id.*

174. Community Corrections Policy, *supra* note 21, at § E.0205(b).

175. G.S. 148-33.1(i).

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Civil Judgments for Monetary Obligations

Generally, restitution may not be 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 civil judgments, and then only when the restitution amount exceeds $250.[176] 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.[177] 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 are 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.[178]

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.[179] The court may use Side Two of form 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."[180] 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 1-month license forfeiture under G.S. 15A-1331.1 (not a 24-month forfeiture period beginning at the time of revocation).[181] 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 driver's license issued to the person until the community service requirement has been met.[182]

Finding of Violation as a Potential Aggravating Factor

If the court finds the defendant to be in willful violation of a condition of his or her supervision, that finding may serve as an aggravating factor in the sentencing of any crime committed during the ten years following the finding.[183] Only findings of violation by the "court" (or by the Post-

176. G.S. 15A-1340.38; -1340.34.
177. G.S. 15A-1340.38.
178. *See* Jamie Markham, *Civil Judgments for Court Costs*, N.C. Crim. L., UNC Sch. of Gov't Blog (Nov. 8, 2012), nccriminallaw.sog.unc.edu/?p=3961.
179. G.S. 15A-1331.1 (formerly G.S. 15A-1331A, *recodified by* S.L. 2012-194, § 45.(a)).
180. G.S. 15A-1331.1(b).
181. State v. Kerrin, 209 N.C. App. 72 (2011).
182. G.S. 143B-708(e).
183. G.S. 15A-1340.16(d)(12a).

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Release Supervision and Parole Commission) qualify the defendant for the aggravating factor. A violation found by a probation officer through delegated authority cannot support the aggravating factor.

Selected 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."[184] The required finding is merely that a longer period of probation is required; the statute does not require the court to offer a detailed rationale.[185] 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.[186]

Sometimes the error is not discovered until the defendant has already violated probation. At that point, the probationer could file a motion for appropriate relief under G.S. 15A-1415(b)(8) on the ground that the sentence was unauthorized at the time imposed. If the case would have expired if the probation term had been within the durational limits set out in the statute, the defendant will have an argument that the court lacks jurisdiction over the violation, 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.[187] The rule has also been stated that a defendant's probation should not be revoked because of circumstances beyond his or her control.[188] For instance, a sex offender probationer's failure to find an approved residence was not a willful violation when he was arrested by his probation officer before having a meaningful opportunity to find a place to live upon his release from prison.[189]

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184. G.S. 15A-1343.2(d).

185. State v. Wilkerson, ___ N.C. App. ___ , 733 S.E.2d 181, 184 (2002) (holding that the trial court "went beyond the statutory requirement" by recording factual support for its decision that a 60-month period of probation was required).

186. *See, e.g.*, State v. Riley, 202 N.C. App. 299 (2010).

187. State v. Hewett, 270 N.C. 348 (1967).

188. State v. Duncan, 270 N.C. 241 (1967).

189. State v. Talbert, ___ N.C. App. ___, 727 S.E.2d 908 (2012); *see also* State v. Askew, ___ N.C. App. ___, 727 S.E.2d 905 (2012) (similar facts).

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On the other hand, a defendant's explanation that he or she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug education program.[190]

Procedurally, 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. 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 of probation.[191] 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 the evidence was considered.[192] For example, in *State v. Floyd*,[193] 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 and that he would have completed the program if he could have afforded it.

When the alleged violation is the nonpayment of a fine or costs, the court must consider the "issues and procedures" specified in G.S. 15A-1364 at the violation hearing.[194] That statute says that the defendant must be given an opportunity to show that his or her inability to pay the money was not attributable to a failure to make 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 to do so.[195] 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.[196]

Invalid Condition of Probation

Probation may not be revoked based on an invalid condition of supervision. By statute, the regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every case valid.[197] Similarly, the statutory special conditions set out in G.S. 15A-1343(b1) are presumptively valid in any case in which they are imposed.[198] If the court adds ad hoc special conditions of probation under authority of G.S. 15A-1343(b1)(10), those conditions must be reasonably related to the offender's rehabilitation. Any ad hoc conditions must also bear a relationship to the defendant's crime, although case law suggests that the nexus between the condition and the crime need not be particularly close.[199] The appellate courts have interpreted the catch-all provision broadly,

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190. State v. Stephenson, ___ N.C. App. ___, 713 S.E.2d 170 (2011); *see also* State v. Tozzi, 84 N.C. App. 517 (1987) (holding that defendant's explanation that he missed required meetings with his probation officer because he was job hunting was not a lawful excuse).

191. State v. Jones, 78 N.C. App. 507 (1985).

192. State v. Hill, 132 N.C. App. 209 (1999).

193. ___ N.C. App. ___, 714 S.E.2d 447 (2011).

194. G.S. 15A-1345(e).

195. *Jones*, 78 N.C. App. 507.

196. G.S. 15A-1345(e); -1364(c).

197. G.S. 15A-1343; -1342(g).

198. 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.").

199. 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.).

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giving trial judges "substantial discretion" in tailoring a judgment to fit a particular offender and offense.[200]

A probation condition is also considered invalid if the defendant does not receive written notice of it under G.S. 15A-1343(c). Probation may not be revoked for a violation of a condition unless the defendant had written notice that the condition applied to him or her.[201] Oral notice is not a satisfactory substitute for the written statement.[202] There is an exception to the written notice rule for the requirement to report to Community Corrections for initial processing. An order to report to probation officials after sentencing is enforceable even before it is received in writing—largely as a concession to the practical reality that a defendant will not actually receive a written copy of the judgment until he or she begins the probation intake process.[203]

No North Carolina criminal appellate case has explored the permissibility of so-called shaming sanctions—such as requiring a defendant to wear a sign announcing his or her criminality. In a juvenile case, the court of appeals struck a condition of a juvenile probation requiring a child to wear a 12-by-12-inch sign saying "I AM A JUVENILE CRIMINAL" any time she went out in public.[204] The court's rationale in that case was very much focused on the particularities of the Juvenile Code (the need for confidentiality and promotion of the child's best interests) and probably should not be read to extend to adult probation.[205]

Probation conditions cannot place unconstitutional constraints on a probationer (such as "Go to church every Sunday" or "Get married"). For example, in *State v. Lambert*,[206] the court of appeals struck a 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 the defendant's fundamental right of access to the courts and his right to conduct his defense pro se. On the other hand, some limitations that would be unconstitutional for ordinary citizens are permissible as applied to probationers. For instance, a probation condition prohibiting a sex offender probationer from residing with his own minor child did not impermissibly infringe on his fundamental liberty interest as a parent to the custody and care of his child.[207]

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. The "at a later time" language of the statute does not, however, grant a perpetual right to challenge a condition of probation. Rather, the defendant must object no later than the revocation hearing.[208] Any later challenge is likely to be viewed as an impermissible collateral attack.[209]

Some older cases describe a contract theory of probation, in which a probationer lacks the right to object to the appropriateness of the conditions of supervision because he or she

200. State v. Harrington, 78 N.C. App. 39 (1985).
201. State v. Seek, 152 N.C. App. 237 (2002); State v. Suggs, 92 N.C. App. 112 (1988).
202. *Lambert*, 146 N.C. App. 360.
203. State v. Brown, ___ N.C. App. ___ , 731 S.E.2d 530 (2012).
204. *In re* M.E.B., 153 N.C. App. 278 (2002).
205. *See* Jamie Markham, *Shaming Sanctions*, N.C. Crim. L., UNC Sch. of Gov't Blog (Dec. 6, 2012), nccriminallaw.sog.unc.edu/?p=3995.
206. 146 N.C. App. 360, 364.
207. State v. Strickland, 169 N.C. App. 193 (2005).
208. State v. Cooper, 304 N.C. 180 (1981).
209. *See infra* notes 218–20 and accompanying text.

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consented to them at the outset.[210] That contract theory of probation may have been appropriate in North Carolina when defendants had a right to refuse probation under G.S. 15A-1343(c). But with the repeal of that subsection in 1995,[211] a defendant should not be considered to have consented to the conditions of supervision, and the right to challenge a condition should not be considered waived.

Insufficient Evidence of a Violation

A defendant may of course argue that he or she did not commit the alleged offending behavior, or that the alleged offending behavior, even if committed, did not actually violate the language of the condition at issue. For example, a probationer successfully argued in *State v. Sherrod*[212] that having bullets alone did not violate the condition restricting possession of firearms, explosive devices, or other deadly weapons. In another case, the court of appeals held that a minor child's temporary visit to a sex offender probationer's residence did not violate the condition prohibiting the probationer from residing with a minor.[213] Finally, in a case where the alleged violations were a failure to complete community service and a failure to pay monetary obligations, and in which the trial judge had left the scheduling for the community service and the repayment of the money to be determined in the discretion of the probation officer, the court of appeals held that there was insufficient evidence of a violation when the State offered no information about the payment plan and community service schedule established by the probation officer.[214]

Appeals

When a district court judge activates a probationer's suspended 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 under the same or modified conditions, 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.[215]

When a superior court judge activates a sentence or imposes special probation, appeal is to the appellate division under G.S. 15A-1347 and G.S. 7A-27. No statutory provision governs the timing of the appeal or the court's authority to impose conditions of release during its pendency. In the absence of statutes specific to probation violations, the provisions governing appeals of convictions probably apply.[216] For appeals from superior court to the appellate division, it

210. *See, e.g.*, State v. Mitchell, 22 N.C. App. 663 (1974).

211. S.L. 1995-429.

212. 191 N.C. App. 776 (2008).

213. State v. Crowder, 208 N.C. App. 723 (2010).

214. State v. Boone, No. COA12-675, 2013 WL 427120, at *2 (N.C. Ct. App. Feb. 5, 2013) (emphasis in original) ("Absent *any* evidence of a required payment schedule . . . conclusory testimony that defendant was in arrears is insufficient to support a finding that defendant had willfully violated the terms of his probation by failing to pay the required fees or perform community service on time.").

215. G.S. 15A-1347.

216. G.S. 15A-1431 (appeals from district court to superior court); -1448 (procedures for appeals from superior court to the appellate division); -1451 (providing for a stay of probation or special probation upon a defendant's appeal).

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appears that Rule 4(a) of the Rules of Appellate Procedure requires oral notice of appeal upon revocation or the filing of a notice of appeal within fourteen days after entry of the judgment revoking probation.[217]

When appealing an order activating a suspended sentence, the defendant generally may not challenge the original judgment suspending sentence, as doing so is an impermissible collateral attack.[218] That prohibition appears to extend to jurisdictional challenges to the underlying conviction made for the first time upon appeal of a revocation, such as arguments that the original charging instrument was defective.[219] A limited exception to the rule against collateral attacks is that the defendant may, upon appeal of suspended sentence, argue for the first time that he or she was unconstitutionally denied counsel at the original trial.[220]

There is no statutory mechanism for a probationer to appeal modifications that do not involve special probation.[221] There is likewise no statutory provision for appeal of a CRV period, either from district to superior court for a de novo violation hearing or from superior court to the appellate division for review. There may, however, be an argument that imposition of a CRV period—especially a "terminal" CRV period that uses up the remainder of a defendant's suspended sentence—fits within the language of G.S. 15A-1347 as an activation, thus allowing an appeal. Even if that statute is not applicable, other avenues for review may be possible. For appeals from superior court to the appellate division, either 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 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 of any revocation order or modification imposing special probation is de novo to superior court, not to the court of appeals.[222] By contrast, 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.[223]

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217. *See* State v. Long, ___ N.C. App. ___, 725 S.E.2d 71 (2012) (granting a defendant's petition for writ of certiorari when defendant counsel failed to file written notice of appeal of a judgment revoking probation within the time set out in Rule 4(a)).

218. State v. Holmes, 361 N.C. 410 (2007); State v. Noles, 12 N.C. App. 676 (1971).

219. State v. Hunnicutt, No. COA12-1018, 2013 WL 1296740 (N.C. Ct. App. Apr. 2, 2013); *Long*, 725 S.E.2d 71. *But see* State v. Simpson, 25 N.C. App. 176, 181 (1975) (allowing the defendant to argue for the first time on appeal of his probation revocation that the original bill of indictment was fatally defective, noting that such motions "may be made at any time, even in the appellate court," but ultimately concluding that the indictment was not defective).

220. State v. Neeley, 307 N.C. 247 (1982).

221. State v. Edgerson, 164 N.C. App. 712 (2004).

222. State v. Hooper, 358 N.C. 122 (2004).

223. G.S. 7A-271(f).

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