

## PROBATION: RECENT DEVELOPMENTS



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### DCC Policy and Practice Update

**The impact of recent events on Division of Community Corrections (DCC) policy and practice.** The past 15 months have been challenging ones for DCC. The two men charged with killing UNC student Eve Carson in Chapel Hill on March 5, 2008—Demario Atwater and Laurence Lovett—were on supervised probation when the alleged murder occurred. One of the men, Mr. Lovett, has also been charged with the murder of Duke graduate student Abhijit Mahato in Durham. A technical assistance report from the National Institute of Corrections (NIC), performed at the request of then-Secretary of Correction Theodis Beck and available at <http://www.wral.com/asset/news/local/2008/08/19/3402795/NICReport.pdf>, highlighted the supervision failings in both probationers' cases. The *News & Observer* covered the story extensively in a series of articles collected at <http://www.newsobserver.com/probation>, frequently citing the statistic that 580 people under some form of DCC supervision have killed, accounting for 17% of all convictions for intentional killings since 2000. Robert Guy, head of DCC since 1997, resigned in early 2009.

Among the failures outlined in the NIC report and newspaper articles were lengthy time gaps without face-to-face contact between probation officer (PPO) and probationer, failures to issue probation violation reports in a timely fashion, late data entries into DCC's Offender Population Unified System (OPUS), excessive and unmanageable caseloads, and poor communication between district probation offices and among DCC, law enforcement, and the Administrative Office of the Courts (AOC). Regarding the last point, it became clear that DCC's OPUS computer system lacked interoperability with the AOC's Automated Criminal and Infraction System (ACIS)—meaning PPOs were often unaware when their probationers had new arrests or criminal charges pending.

The NIC report offered recommendations for how the system might be improved, including, among many others: reducing caseloads by hiring additional officers; upgrading the OPUS interface and improving communication between OPUS and ACIS; and allowing DCC staff to access probationers' juvenile history. Each of these recommendations has been addressed in some form through existing resources, additional funding, changes in policy, or proposed legislation.

**OPUS/ACIS connectivity (“AOC Alerts”).** One of the first changes DCC made in the wake of the NIC report was the adoption of a Web-based platform to inform probation officers via OPUS when probationers on their caseload have new criminal matters pending in AOC’s ACIS database. DCC calls the system “AOC Alerts”; the screen captures below demonstrate how the program works.

**Figure 1.** A probation officer logs in and selects his or her name from the “PPO ID” pull-down menu. The program informs the PPO how many offenders on his or her caseload have pending alerts. In this example, there are 10 offenders with 17 new alerts assigned to PPO Williams.

The screenshot shows a web interface for a Probation Officer (PPO) to view a Roster Review List. At the top, there is a form with the following fields:

- PPO ID:** A dropdown menu showing "WCM04" and "...OR..." followed by "WILLIAMS, CYNTHIA M. - - - DISTRICT 08B UNIT A - - - (33 Cases)".
- Report Type:** A dropdown menu showing "PPO Roster Review List".
- A "Search" button and an empty search input field.

Below the search fields, there is a message: "Searches may take 30 to 60 seconds. Please be patient." and a note: "\* Indicates fields required for completion."

The main content area has a blue header with the text: "PPO Roster Review List For: WCM04 - WILLIAMS, CYNTHIA M." Below this header are three notes: "(Note 1: \*\* = past due)", "(Note 2: \* = Not Complete)", and "(Note 3: Only active CTG/STG levels are shown)".

At the bottom, there is a red bar with the text: "AOC Alerts: There are 10 offender(s) with a total AOC Alerts of **New: 17** and **Investigating: 0**." To the right of this bar is a "Force Refresh" button.

**Figure 2.** The PPO views a list of all probationers on his or her caseload (the names are blurred in this screen-capture). The shaded blocks in the left-hand column (they are red in the Web interface) indicate

which offenders have pending alerts. The PPO can click on the hyperlinks in those blocks to investigate the nature of the alert.

3 <a href="#">New(2) Inv(0)</a>	<p><a href="#">View Contact Info</a></p> <p><b>Begin:</b> 05/12/2008 <b>Term:</b> 05/12/2009 <b>Type:</b> COMMUNITY SS (DCC) <b>Level:</b> DOM. VIOL.</p>	<p><b>Next OC:</b> <b>Last OMC:</b> <a href="#">09/12/2008</a> <b>Last HC:</b> <a href="#">09/07/2008</a></p>	<p><b>Last CR:</b> <a href="#">10/10/2008</a> - VIOLATION STAFFING <b>Last FMS:</b> <a href="#">09/12/2008</a> <b>Last CRC:</b> <a href="#">10/13/2008</a></p>
4 <a href="#">New(1) Inv(0)</a>	<p><a href="#">View Contact Info</a></p> <p><b>Begin:</b> 10/06/2008 <b>Term:</b> 10/06/2009 <b>Type:</b> COMMUNITY SS (DCC) <b>Level:</b> NOT ESTAB.</p>	<p><b>Next OC:</b> 10/24/2008 10:00 <b>Last OMC:</b> <a href="#">10/15/2008</a> <b>Last HC:</b> <a href="#">10/07/2008</a></p>	<p><b>Last CR:</b> <b>Last FMS:</b> <a href="#">10/15/2008</a> <b>Last CRC:</b> <a href="#">10/15/2008</a></p>
5	<p><a href="#">View Contact Info</a></p> <p><b>Begin:</b> 09/10/2008 <b>Term:</b> 03/09/2010 <b>Type:</b> INTERMEDIATE SS <b>Level:</b> DOM. VIOL.</p>	<p><b>Next OC:</b> 11/05/2008 14:30 <b>Last OMC:</b> <a href="#">10/10/2008</a> <b>Last HC:</b> <a href="#">10/14/2008</a></p>	<p><b>Last CR:</b> <b>Last FMS:</b> <a href="#">10/10/2008</a> <b>Last CRC:</b> <a href="#">10/10/2008</a></p>

**Figure 3.** Clicking on the alert hyperlink (e.g., “[New\(1\) Inv\(0\)](#)”) opens a screen that shows information about any new charges or convictions the probationer might have in AOC’s computer system.

AOC's Offense Information			
Line	Charged Offense Charged Date Arraigned Offense Arraigned Date	Convicted Offense Court Type Plea Verdict	Method of Disposition Disposition Date Other Items of Note
01	<p><b>Charged:</b> 1389 - ASSAULT ON A FEMALE <b>Date:</b> 09/01/2008 <b>Arraigned:</b> 1389 - ASSAULT ON A FEMALE <b>Date:</b> 09/01/2008</p>	<p><b>Convicted:</b> 1389 - ASSAULT ON A FEMALE <b>Court Type:</b> <b>Plea:</b> GUILTY <b>Verdict:</b> GUILTY</p>	<p><b>Disposition:</b> JUDGE <b>Disposition Date:</b> 10/06/2008 <b>Minimum Sentence:</b> 45 DAYS <b>Probation Length:</b> 12 DAYS <b>Supervised Probation:</b> Yes <b>Active Sentence:</b> C <b>Limit Driving Privilege:</b> No</p>

  

AOC's Witnesses for Offender				
Line Number	Witness Name	Witness Type	Service Type	Agency
01	JOHNSON,R	COMPLAINANT		CITY POLICE DEPT

It is difficult to measure the impact of the AOC Alert system, which has been in use only since late 2008. A month-on-month comparison with data from previous years indicates a higher number of violations initiated and a slightly higher revocation rate in late 2008 and early 2009 compared to prior-year data. The greatest jump in violations initiated occurred in December of 2008 (5,649 violations initiated, compared to 4,099 in December of 2007, a 37% increase)—the month the *News & Observer* ran its main three-part series on the state’s probation system. Not surprisingly, the revocation rate reached a two-year high (35.5%, compared to an average of about 32%) the following month (January of 2009). In the two months after that, however, the number of violations initiated and the revocation rate hewed closer to monthly norms.

**Tolling.** Under G.S. 15A-1344(d), a “probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation.” This is not a new law—it has existed in the same form since its enactment in 1977. DCC has, however, recently changed its policy with respect to tolling. Previously, the Division interpreted “tolled” to mean something like “held open.” If a probationer had a new criminal charge pending when his or her case was about to expire, the tolling provision of G.S. 15A-1344(d) would give the district attorney time to address the new criminal matter before the court lost jurisdiction to conduct a probation violation hearing on the alleged criminal behavior.

Today, in response to two Court of Appeals decisions interpreting the law, DCC applies a more literal reading of what “tolled” means. In *State v. Henderson*, 179 N.C. App. 191 (2006), and *State v. Patterson*, \_\_\_ N.C. App. \_\_\_, 660 S.E.2d 155 (2008), the court held that under G.S. 15A-1344(d), “a defendant’s

probationary period is automatically suspended when new criminal charges are brought,” regardless of when the charge arises. So, when a probationer has a pending charge for any offense other than a Class 3 misdemeanor (under G.S. 15A-1344(d), probation cannot be revoked solely based on a conviction for a Class 3 misdemeanor), time stops running on the person’s period of probation immediately, by operation of law, when the charge is brought, and doesn’t start running again until the charge is resolved, by way of acquittal, dismissal, or conviction. In other words, when a probationer is charged with a new crime, you effectively push pause on a clock counting down how much time the person has left on probation, and you don’t un-pause it until the charge is resolved.

As you probably know, a lot of probationers get charged with new crimes. And as you now know based on the discussion above regarding the new AOC Alerts system, probation officers now *know* when their supervisees are charged with new crimes anywhere in the state. By policy, when an officer gets an alert that a new charge is pending, he or she tolls the case in OPUS immediately. According to one of DCC’s administrators, about 10% of probation cases are currently in tolled status.

This rule is harsh when viewed retrospectively for a probationer who is eventually acquitted or has a new charge dismissed. In some of those cases, the court might grant (and DCC might not oppose) a request to terminate probation under G.S. 15A-1342(b) for a probationer whose term would have ended had it not been tolled by a charge that did not result in a conviction. Legislation proposed this term (S 920) would credit any tolled period against the term of probation if the probationer is acquitted or if the new charge is dismissed.

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

Under the amended law (effective for hearings held after December 1, 2008, regardless of when the offender originally was placed on probation), 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. Note that under

prior law, the court only had power to *revoke* probation under G.S. 15A-1344(f). The amended law does not change the requirement that to be *filed*, a violation report must be file stamped before the period expires. *State v. Hicks*, 148 N.C. App. 203 (2001), *State v. Moore*, 148 N.C. App. 568 (2002). In the absence of a file stamped motion, dated before the period of probation expires, the trial court is without jurisdiction to conduct a probation violation hearing after the end of the probationary period.

Prior to the 2008 amendments to the law, in order to preserve its jurisdiction to act after the period of probation expired, the court had to make a finding of the State's "reasonable effort to notify the probationer and to conduct the hearing earlier." The State lost a handful of appeals on this point. *State v. Burns*, 171 N.C. App. 759 (2005); *State v. Hall*, 160 N.C. App. 593 (2003); *State v. Bryant*, 361 N.C. 100 (2006). Under the 2008 amendments to the law, **the court no longer has to make a finding of the State's "reasonable efforts" to preserve its jurisdiction to act after the period of probation.** The AOC forms have been changed accordingly.

## Recurring Issues and Frequently Asked Questions

**Absconders.** Judges, lawyers, and probation officers sometimes misstate the legal effect of an allegation that a probationer has "absconded." "Absconder" is not a statutory term; rather, it is defined in DCC's Policies and Procedures as follows:

STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION <i>Division of Community Corrections</i> <b>POLICIES - PROCEDURES</b>	Number: V.I Page: 1 Subject: <b>Absconders</b> Date: February 1, 2008
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**GENERAL PROVISIONS**

An *absconder* is an offender who is actively avoiding supervision by making his/her whereabouts unknown to the supervising officer. Prior to declaring an offender as an absconder by using a *Violation Report* (see V.H, *Violations*), the officer will make due and diligent attempts to locate the offender and will document these efforts in the automated narrative system..

**1. REQUIREMENTS FOR DECLARING AN OFFENDER AN ABSCONDER**

Prior to declaring an offender as an absconder the officer will:

- Telephone the offender, if he/she has a telephone;
- Conduct a home contact, including a contact in the evening or on the weekend. The officer must leave a notice to the offender directing them to report for an office contact or otherwise contact their officer;
- Make a work and/or school collateral contact;
- Make relative/reference contact(s) based on information in the file;
- Conduct a law enforcement check including a jail/hospital check; and
- Check with the landlord if applicable.

This process will begin when the officer has specific information that the offender has absconded or when the officer has been unable to locate:

- Community offenders for thirty (30) days;
- Intermediate offenders for two (2) weeks; or

Multiple conditions of probation might be violated when a person “absconds”—G.S. 15A-1343(b)(2) (remain within the jurisdiction), G.S. 15A-1343(b)(3) (report to a probation officer as directed), and other conditions in certain cases—but there is nothing legally special about a violation report alleging absconding. For instance, 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. Many judges do not believe that to be the case.

**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 arrest to continue on probation pending a hearing. That doesn’t mean the violation is “dismissed”; it just means the probationer cannot be detained any longer without a hearing. If the hearing is held and probable cause

is not found, the probationer must be released to continue on probation—in other words, that ends the matter.

The preliminary hearing only needs to be held when the probationer is detained solely for a violation of probation. A preliminary hearing is not required when the probationer is released on bail pending the final violation hearing, and is likewise unnecessary when the defendant is also being held on a new charge for which he or she is unable to obtain pretrial release. *State v. O'Connor*, 31 N.C. App. 518 (1976). In any event, the failure to hold a preliminary hearing apparently does not deprive the court of jurisdiction to hear a final violation hearing. *State v. Seay*, 59 N.C. App. 667 (1982).

Under G.S. 15A-1345(d), the preliminary hearing should be conducted by “a judge sitting in the county where the probationer was arrested or where the alleged violation occurred.” That statute does not include the limiting language of G.S. 15A-1344(a), which extends jurisdiction to hold a final violation hearing only to judges “entitled to sit in the court which imposed probation.” Therefore—though many district court judges are unhappy when I say it—I think any judge, district or superior court, in the proper county may conduct the preliminary hearing.

**“Terminate unsuccessfully.”** Judges often ask me what it means for a probationer to be “terminated unsuccessfully.” My response is that the term has no legal significance. It is merely a notation that DCC uses to indicate that a probationer’s term of probation ended without revocation, but perhaps under other-than-ideal circumstances. It’s analogous in some ways to a dishonorable discharge from the military—you’re out, but you probably won’t go around bragging about it in the future. A common example arises when a probationer owes restitution as a condition of probation, but has demonstrated a good-faith inability to pay the money; absent a collateral public safety concern, DCC may recommend “unsuccessful termination.” About 300 probationers are terminated unsuccessfully each month, compared to about twice that many who are terminated successfully.

I advise judges not to use “unsuccessful termination” as a formal adjudication of a probation violation hearing. The only type of termination contemplated by the General Statutes is that in G.S. 15A-1342(b), which the judge may do at any time if “warranted by the conduct of the defendant and the ends of justice.” The circumstances of a probationer’s termination obviously provide relevant and valuable information to probation officers and judges who might come into contact with the person in the future, but this strikes me as a matter of internal DCC recordkeeping. There’s really no basis for the sort of judicial imprimatur “unsuccessful termination” implies.

**Revocation hearings for H/I felonies pled in district court.** I am sometimes asked which court, district or superior, should hold a revocation hearing for a Class H or I felony pled in district court. Under G.S. 7A-271(e), the superior court has default jurisdiction over these matters, but the district court can also hear them if the State and the defendant consent. In some cases, of course, the State may be unenthusiastic about consenting to hearing a probation violation in district court, because the appeal of a district court revocation is to the superior court, not to the Court of Appeals. *State v. Hooper*, 358 N.C. 122 (2004).

## Recurring Errors

**Improper term of probation.** This is probably the most common sentencing error I see. G.S. 15A-1343.2 sets out the presumptive lengths for periods of probation 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 court may always deviate from these defaults and order probation of up to 5 years if it “finds at the time of sentencing that a longer period of probation is necessary.” There is a check-box on the AOC forms to indicate that the judge has made the requisite finding. Apparently, it often goes unchecked.

SUSPENSION OF SENTENCE	
Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on	<input type="checkbox"/> supervised <input type="checkbox"/> unsupervised
probation for _____ months.	
<input type="checkbox"/> 1. The Court finds that a	<input type="checkbox"/> longer <input type="checkbox"/> shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).

When representing a probationer at a revocation hearing, check to make sure the period of probation was within the presumptive statutory range, or, if not, whether the court made the necessary finding that a longer period was necessary. If the period was improper, a motion for appropriate relief (MAR) may be filed at any time under G.S. 15A-1415(b)(8) to correct an unauthorized sentence.

**Improper extensions.** Many probation officers (and judges) have as a rule of thumb that the maximum time a person may be on probation is eight years. That's technically correct for some probationers, but not all. Many PPOs (and judges) also think probation may only be extended during the last six months of a probationary term. That is also true only in certain circumstances. These errors stem from a failure to recognize that 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. (I use the terms "ordinary" and "special-purpose" for clarity; they do not appear in the General Statutes.)

**Ordinary extensions** may, after notice and hearing, be ordered at *any time* prior to the expiration of probation for "good cause shown" (no violation need have occurred). The total maximum probation period for extensions under this provision is 5 years, not 8 years. G.S. 15A-1344(d).

**Special-purpose extensions** can be used to extend the probationer's period of probation by up to 3 years beyond the original period of probation, including beyond the five-year maximum, if all of the following criteria are met:

1. The probationer **consents** to the extension;
2. The extension is being ordered during the **last six months** of the *original* period of probation (note: if probation has previously been extended, the offender is no longer in his or her *original* period of probation); and
3. The extension is necessary to complete a program of **restitution** or to complete **medical or psychiatric treatment**. G.S. 15A-1343.2.

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.

**Consecutive/concurrent sentences upon revocation.** Under G.S. 15A-1344(d), a "sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period *unless the revoking judge specifies that it is to run consecutively with the other period.*" The Court of Appeals has interpreted the last clause of this provision to mean that the revoking judge can, at revocation, change the concurrent/consecutive decision rendered by the original sentencing judge. *State v. Hanner*, 188 N.C. App. 137 (2008); *State v. Paige*, 90 N.C. App. 142 (1988). The bad news from your perspective is that the revoking judge can, under *Hanner* and *Paige*, turn what would have been concurrent sentences into consecutive sentences—even, apparently, when the original concurrent sentences were entered pursuant to a plea. (The original judgment in *Hanner* was part of a negotiated plea, though it appears that the original sentencing court ran certain sentences concurrently even

though the defendant had actually *agreed* that they would run *consecutively*. In that regard *Hanner* is not a good case to test whether G.S. 15A-1344 is trumped by a contract theory of plea negotiation.) The good news, however, is that if the revoking judge does not specifically state on the judgment activating the suspended sentence that it is to run consecutive to another sentence, DOC will run it concurrent with any other sentence the defendant is obligated to serve.