STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

---------- COUNTY SUPERIOR COURT DIVISION

 FILE NO. -------------

--------------------, )

 Petitioner, )

 v. )

 )

FRANK L. PERRY, Secretary )

Department of Public Safety, )

--------------, Superintendent of )

-----------------------------------, )

 )

Respondents. )

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

PETITION FOR WRIT OF HABEAS CORPUS

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TO THE HONORABLE -----------------, SENIOR RESIDENT SUPERIOR COURT JUDGE:

Pursuant to N.C. Const. art. 1, § 21 and N.C. Gen. Stat. § 17-1 *et seq*., Petitioner ------------- through undersigned counsel, respectfully applies to the Court for its writ of habeas corpus and release from imprisonment. Petitioner is unlawfully restrained of his liberty by the North Carolina Department of Public Safety Division of Adult Correction at --------------- because the trial court lacked subject matter jurisdiction to revoke his probation and activate his sentence. Specifically, the trial court did not have authority to revoke the Petitioner’s probation and activate his suspended sentence because Petitioner’s probation had already expired.

STATEMENT OF THE GROUNDS FOR REVIEW

“Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed.” N.C. Const. art. 1, § 21; N.C. Gen. Stat. § 17-1. The party seeking relief or any person acting on his behalf may apply for the writ of habeas corpus with any one of the superior court judges, either during a session or in vacation. N.C.G.S. §§ 17-5, -6. “In habeas corpus proceedings, the court has jurisdiction to discharge petitioner . . . when the record discloses that the court which imprisoned him did not have jurisdiction of the offense . . . , or that the judgment was not authorized by law.” *In re Burton*, 257 N.C. 534, 541, 126 S.E.2d 581, 586 (1962).

FACTS

1. On ----------, Petitioner pled guilty to and was convicted of --------------- for an incident that occurred on ------------. The trial court imposed a sentence of ----------. The sentence was suspended for a period of ------- months and Petitioner was placed on supervised probation (Exhibit). Petitioner’s probation commenced on ---- and was completed on ----.

2. On \_\_\_\_\_\_\_\_\_\_, Petitioner’s probation officer filed a probation violation report. (Exhibit)

3. After a hearing on ---------, the Honorable ----------- found that the trial court had authority to revoke Petitioner’s probation. (Exhibit) Judge ----- activated Petitioner’s ------- sentence.

4. Petitioner began serving an active sentence in DAC custody on ----------- and is presently incarcerated at \_\_\_\_\_\_\_\_\_\_\_\_. (Exhibit – Offender Profile).

REASONS WHY WRIT SHOULD ISSUE

The trial court lacked subject matter jurisdiction to revoke Petitioner’s probation in ------- because the violation reports were not filed until after Petitioner’s probation expired and his probation had not been tolled. For these reasons, the order of revocation which activated Petitioner’s sentence should be vacated and he must be released immediately.

Until 1 December 2009, tolling of a probationary period was governed by N.C.G.S. § 15A-1344(d) which stated that

[t]he probation period shall be tolled if the probationer shall have pending against him criminal charges in any of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation.

This provision was repealed pursuant to 2009 N.C. Sess. Law 372, s. 11(a) for “hearings held on or after 1 December 2009.” 2009 N.C. Sess. Law 372, s. 20.

In the same session law, the legislature replaced § 15A-1344(d) with a new provision, § 15A-1344(g), which stated 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.

2009 N.C. Sess. Law 372, s. 11(b). This new provision became effective “1 December 2009” and applied only to “offenses committed on or after that date.” 2009 N.C. Sess. Law 372, s. 20.

In *State v. Sitosky*, \_\_ N.C. App. \_\_, 767 S.E.2d 623 (2014), *petition for discretionary review denied*, \_\_ N.C. \_\_, 768 S.E.2d 847 (2015), the Court of Appeals ruled that under the plain language of the statutes, the tolling provisions do not apply when the offense is committed before December 1, 2009 and the revocation hearing is held after December 1, 2009. (Exhibit) Petitioner’s offense was committed on ---- and Petitioner’s revocation hearing was held on ------. Thus, because Petitioner’s case falls into this gap, his probationary period was not tolled. Accordingly, Petitioner completed his probation on ----- and the trial court did not have jurisdiction to enter judgment revoking Petitioner’s probation and ordering him to serve an active sentence.

 Consequently, Petitioner’s judgment upon revocation of probation must be vacated and he must be released immediately.

 Therefore, Petitioner respectfully requests this Court to issue a writ of habeas corpus and:

1. Order Petitioner’s immediate release and provide a copy of the order to the Office of Combined Records for his immediate release;
2. Alternatively, order Respondents to bring Petitioner before this Court at a time and place to be set by the Court without delay for a hearing, pursuant to N.C.G.S. §§ 17-13, -15, -32.

 This \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_, 2015.

 EXHIBITS

VERIFICATION

The undersigned, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, having been duly sworn, says and deposes that she is counsel of record for the Petitioner in this matter, that the factual allegations contained herein are all derived from undersigned counsel’s examination of the court file in the Petitioner’s case available from the Clerk of Court, and that on the basis of undersigned counsel’s examination of these documents, undersigned counsel is informed and believes the allegations herein to be true and accurate.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attorney for Petitioner

Sworn and subscribed before me

this \_\_\_\_ day of January, 2015.

Notary Public: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ County, North Carolina

My commission expires: \_\_\_\_\_\_\_\_\_\_

CERTIFICATE OF SERVICE

 I hereby certify that a copy of the foregoing Petition for Writ of Habeas Corpus, exhibits, and Verification have this day been served by first-class mail, postage prepaid upon:

Frank L. Perry, Secretary

N.C. Department of Public Safety

 4201 Mail Service Center

Raleigh, NC 27699-4201

 Lewis Gray, Superintendent

Carteret Correctional Center

P.O. Box 220
Newport, NC 28570

Deborah L. McSwain, Interim General Counsel

N.C. Department of Public Safety

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District Attorney’s Office, District 7

P.O. Box 232

Rocky Mount, NC 27802

 The Honorable Roy Cooper

Attorney General

N.C. Department of Justice

 9001 Mail Service Center

 Raleigh, NC 27699-9001

Respectfully submitted, this \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_, 2015.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Attorney for Petitioner