

## PROBATION & PAROLE

### **Probation Modifications May Only Be Made After Notice and Hearing, And If Good Cause Is Shown**

*State v. Willis*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Aug. 18, 2009). Although a trial court has authority under G.S. 15A-1344(d) to modify conditions of probation, modifications only may be made after notice and a hearing, and if good cause is shown. Although one modification made in this case was permissible as a clerical change, a second modification was substantive and was invalid as it was made without notice and a hearing.

### **A Probation Report Setting Forth Specific Facts At Issue gives Defendant Sufficient Notice Of Alleged Violation**

*State v. Hubbard*, \_\_ N.C. App. \_\_, 678 S.E.2d 390 (July 7, 2009). Although the probation report might have been ambiguous regarding the condition allegedly violated, because the report set forth the specific facts at issue (later established at the revocation hearing), the report gave the defendant sufficient notice of the alleged violation, as required by G.S. 15A-1345(e). The State presented sufficient evidence that the defendant violated a special condition of probation requiring compliance with the rules of intensive probation. The State's evidence included testimony by probation officers that they informed the defendant of his curfew and their need to communicate with him during curfew checks, and that compliance with curfew meant that the defendant could not be intoxicated in his home. During a curfew check, the defendant was so drunk that he could not walk; later that evening the defendant was drunk and disruptive, to the extent that his girlfriend was afraid to enter the residence.

### **(1) Trial Court Was Without Jurisdiction to Conduct Probation Revocation Hearing After Probation Term Had Expired Because State Failed to Comply With G.S. 15A-1344(f) (2) Court States That Recently-Enacted Aggravating Factor G.S. 15A-1340.16(d)(12a) (Defendant Willfully Violated Probation or Parole Condition During Ten-Year Period Before Commission of Offense for Which Defendant Being Sentenced) Applies to Probation or Parole Violations That Occurred Before Enactment of Legislation Creating Aggravating Factor**

*State v. Black*, \_\_ N.C. App. \_\_, 677 S.E.2d 199 (2 June 2009).

(1) The court ruled that the trial court was without jurisdiction to conduct a probation revocation hearing after the probation term had expired because the state failed to comply with the version of G.S. 15A-1344(f) applicable to this case—specifically, the state failed to make reasonable efforts to notify the probationer and to conduct the hearing earlier. [Author's note: S.L. 2009-129, effective for 32 probation revocation hearings conducted on or after December 1, 2008, deleted the state's duty to make reasonable efforts to notify the probationer and to conduct the hearing earlier.] (2) The court stated that the recently-enacted aggravating factor G.S. 15A-1340.16(d)(12a) (defendant willfully violated probation or parole condition during ten-year period before commission of offense for which defendant being sentenced), applicable to offenses committed on or after December 1, 2008, includes probation or parole violations that occurred before the enactment of the legislation (S.L. 2008-129) creating the aggravating factor.

**Term “Explosive Device” in G.S. 15A-1343(b)(5) Does Not Include Firearm Ammunition, and Thus Possession of Bullets Was Not Ground for Probation Revocation**

*State v. Sherrod, \_\_\_ N.C. App. \_\_\_, 663 S.E.2d 470 (5 August 2008).*

The court ruled that the term “explosive device” in G.S. 15A-1343(b)(5) does not include firearm ammunition, and thus possession of bullets was not a ground for probation revocation.

**Trial Court Had Jurisdiction to Revoke Probation After Probation Period Would Have Otherwise Ended Because G.S. 15A-1344(d) Provides That Probation Period Is Tolloed When Probationer Has Pending Criminal Charges That Upon Conviction Could Result in Revocation of Probation**

*State v. Patterson, \_\_\_ N.C. App. \_\_\_, 660 S.E.2d 155 (6 May 2008).*

The court ruled that the trial court had jurisdiction to revoke the defendant’s probation after the probation period would have otherwise ended because G.S. 15A-1344(d) provides that the probation period is tolled when a probationer has pending criminal charges that upon conviction could result in revocation of probation. During the period of probation, the probation officer filed probation revocation reports about the pending charges and that their disposition was not expected until after the probationary period had ended. (See the court’s detailed discussion of the facts in this case.)

**Probation and Parole -- Revocation -- Firearms Possession -- Sufficiency of Evidence**

*State v. Young, (07-671) (6 May 2008)*

A judge's decision to revoke a probationary sentence was supported by competent evidence showing constructive possession of firearms in violation of a condition of the probation. Although the State was not able to show that defendant had exclusive possession of the premises, defendant knew the precise location of several firearms during a search by an officer, needed no assistance in locating them, appeared to make statements demonstrating ownership, did not object to statements suggesting ownership, and offered no evidence to the contrary.

**Double Jeopardy Clause Does Not Bar Criminal Prosecution of Registered Sex Offender for Failing to Register Change of Address With Sheriff After Same Conduct Was Basis to Revoke Offender’s Post-Release Supervision—Ruling of Court of Appeals Is Affirmed**

*State v. Sparks*, 362 N.C. 181, 657 S.E.2d 655 (7 March 2008), affirming, 182 N.C. App. 45 (2007).

The court ruled that the Double Jeopardy Clause did not bar the criminal prosecution of a registered sex offender for failing to register a change of address with a sheriff after the same conduct had been basis to revoke the offender's post-release supervision. The court concluded: (1) a post-release revocation hearing (as well as a probation or parole revocation hearing) is not a criminal prosecution subject to the Double Jeopardy Clause; and (2) the Double Jeopardy Clause does not bar a criminal prosecution for conduct that also serves as the basis for a revocation of post-release supervision (as well as revocation of probation or parole).

### **Defendant's Admission Through Counsel That He Had Violated Probation Conditions Was Sufficient; Trial Judge Did Not Need to Personally Examine Defendant Concerning His Admission**

*State v. Sellers*, \_\_\_ N.C. App. \_\_\_, 649 S.E.2d 656 (4 September 2007).

A probation violation report was filed against the defendant. The defendant through counsel admitted to two of the violations alleged in the report. The trial judge heard from the probation officer concerning the violations. The trial judge found that the defendant willfully violated the terms of his probation, revoked the probation, and activated his suspended sentence. The court ruled that unlike when a defendant pleads guilty, a trial judge is not required to personally examine a defendant concerning his admission that he violated probation. The defendant's admission through counsel was sufficient.

### **When Defendant Violated Many Probation Conditions Warranting Revocation, Imposition of Improper Probation Condition That Defendant Admit Responsibility for Offenses Was Harmless Error**

*State v. Howell*, 184 N.C. App. 369, 646 S.E.2d 622 (3 July 2007).

The defendant was convicted of several sexual offenses and placed on probation. One of the probation conditions (admit responsibility for offenses) was invalid under *In re T.R.B.*, 157 N.C. App. 609 (2003). The court ruled, however, that when the defendant violated many other conditions warranting revocation, imposition of the improper condition was harmless error.

### **Defendant Appealing Revocation of Probation May Not Collaterally Attack on Blakely Grounds Suspended Sentence in Aggravated Range Imposed When Defendant Was Convicted and Placed on Probation**

*State v. Holmes*, 361 N.C. 410, 646 S.E.2d 353 (28 June 2007), reversing, 177 N.C. App. 565, 629 S.E.2d 520 (2006).

The defendant was convicted and placed on probation with suspended sentences in the aggravated range. He did not appeal his sentences. His probationary sentences were later revoked. He argued on appeal that the suspended sentences in the aggravated range violated the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004). The court ruled, relying on the reasoning in *State v. Noles*, 12 N.C. App. 676 (1971), and *State v. Rush*, 158 N.C. App. 738 (2003), that a defendant appealing a revocation of probation may not collaterally attack on *Blakely* grounds an aggravated suspended sentence imposed when the defendant was convicted and placed on probation. The court stated that a direct appeal from an original judgment lies only when the sentence is originally entered.

### **Trial Court Had Jurisdiction to Hold Probation Revocation Hearing After Probation Term Had Ended Because Trial Court Found That Probationer Had Absconded**

*State v. High*, 183 N.C. App. 443, 645 S. the hearing earlier. The probation officer had filed a probation report before the term ended that stated the defendant had violated probation by absconding. The court ruled that the state satisfied the “reasonable efforts” standard because the trial court found that the defendant had absconded, and the probation officer had turned the case over to a surveillance officer who from time to time checked to see if there was any record of the defendant’s arrest or whether the defendant was in jail.

### **Trial Court Did Not Have Jurisdiction to Revoke Probation When Hearing Was Conducted After Probationary Period Had Ended, and Judge Failed to Make Required Finding Under G.S. 15A-1344(f)(2)—Ruling of Court of Appeals Is Affirmed**

*State v. Bryant*, 361 N.C. 100, 637 S.E.2d 532 (15 December 2006), affirming, 176 N.C. App. 190, 625 S.E.2d 916 (21 February 2006) (unpublished opinion).

The court ruled that the trial court did not have jurisdiction to revoke the defendant’s probation when the revocation hearing was conducted after the probationary period had ended, and the judge revoking probation failed to make a finding required under G.S. 15A-1344(f)(2) that the state had made a reasonable effort to notify the probationer and to conduct the hearing earlier.

### **(3) Court Rules on Validity of Various Conditions of Juvenile Probation**

*In re S.R.S., 180 N.C. App. 151, 636 S.E.2d 277 (7 November 2006).*

The juvenile was adjudicated delinquent of communicating threats. As the juvenile was being restrained in an elementary school from going into a hallway, he shouted at a teacher in the hallway that he was going to bring a gun to school the next day and kill the teacher's daughter. The teacher's daughter was a student in the school whom the juvenile had previously assaulted. (3) The court ruled on the validity of the following conditions of special probation: (i) the juvenile must abide by rules set out by the court counselor and the juvenile's parents, including, but not limited to, curfew rules and rules concerning those with whom he may or may not associate (ruled valid); (ii) the juvenile must cooperate with any out-of-home placement if deemed necessary, or if arranged by the court counselor, including, but not limited to, a wilderness program (ruled invalid, an impermissible delegation to the court counselor of the judge's authority; the court noted that the record did not show any statement by the court counselor indicating that an out-of-home placement was recommended or necessary); and (iii) two conditions, the juvenile must cooperate with any counseling recommended by the court counselor and comply with any assessment recommended by the court counselor (ruled invalid, an impermissible delegation to the court counselor of the judge's authority without a more specific statement by the judge concerning what type of counseling or assessment).

#### **1) Probation and Parole-Revocation-Waiver of right to counsel**

*State v Quick 179 N.C. App. 647 (2006)*

Defendant knowingly and voluntarily waived his right to appointed counsel for a probation revocation hearing by he signing a waiver and indicating to the court that he was going to hire his own attorney. He forfeited his right to proceed with the counsel of his choice by not retaining counsel over roughly eight months, which amounted to an obstruction and delay of the proceedings.

#### **2) Probation and Parole-Revocation after expiration of probation period-Jurisdiction**

*State v Henderson 179 N.C. App. 219 (2006)*

The trial court lacked jurisdiction to revoke the first of defendant's two probations where the revocation hearing was held after the expiration of his probation period. Defendant's arrest on an assault charge tolled the period of probation, but the remaining time expired after his plea to that

charge and before the hearing. The court could have revoked defendant's probation if the State had filed a written motion before the expiration of the probation period indicating intent to conduct a hearing and the court had found that the State had made a reasonable effort to conduct the revocation hearing earlier, but these conditions did not occur. N.C.G.S. § 15A-1344(d) and (f).

### **3) Probation and Parole-Revocation new probation officer-Non-hearsay testimony sufficient**

*State v Henderson 179 N.C. App. 219 (2006)*

There was sufficient non-hearsay evidence to support a probation revocation, even if the Rules of Evidence applied in probation proceedings.

### **Probation and Parole-Modifications after expiration of original term-No pending violation Allegations-No jurisdiction**

*State v. Surratt, 177 N.C. App. 551 (2006)*

The trial court lacked jurisdiction to revoke defendant's probation on 7 April 2005 where the five year term of probation had begun on 24 September 1995 and had expired on 23 September 2000 without pending allegations of violations. The court lacked jurisdiction to modify the probation judgment (as it did several times) after that date.

### **Probation and Parole-Revocation credit for time served substance abuse program (ie DART)**

*State v. Lutz, 177 N.C. App. 140 (2006).*

Defendant was confined and in custody while in a substance abuse program and the trial court erred by denying his motion for credit for that time when his probation was revoked.

### **Sentencing--Aggravating factors--Failure to submit to jury--Blakely error--Prob. Revocation**

*State v McMahan, 174 N.C. App. 586 (2005)*

The trial court erred by activating defendant's suspended sentences arising from embezzlement convictions when those sentences were unconstitutionally aggravated in violation of *Blakely v. Washington, U.S. (2004)*, without defendant's stipulation or submission to and finding by the jury beyond a reasonable doubt, and the case is remanded for a new

sentencing hearing. N.C. Gen. Stat. § 15A-1446(d)(18) permits a review of sentencing errors even though the defendant failed to object at trial.

### **Probation and Parole--Probation revocation--Credit for prior confinement**

*State v Belcher, 173 N.C. App. 620 (2005)*

The trial court erred in a probation revocation hearing by failing to award defendant credit on her activated sentence for her prior confinement for violation of her probation, and the case is remanded for entry of a new judgment crediting defendant for her prior confinement, because: 1) N.C.G.S. § 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the charge; 2) our Supreme Court has held that a defendant receives credit for time previously spent incarcerated for violation of probation upon the revocation of probation and activation of a suspended sentence; and 3) defendant is entitled to a thirty-day credit for that time she previously spent incarcerated for violation of her probation.

### **Probation and Parole—Revocation of probation after probationary period – Reasonable efforts to notify defendant of hearing—Court erred**

*State v. Burns, 171 NC App 759 (2005)*

Probation Revocation – Probation revocation provisions in GS 15A-1344(f) are applicable to probation under G.S. 90-96, and Judge did not have jurisdiction to revoke probation without making required finding under G.S. 15A-1344(f), when probation hearing was conducted after probation had expired. A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. Except as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term. In order to revoke a defendant's probation after the probationary period has expired, a trial court must find that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier. N.C. Gen. Stat. § 15A-1344(f)(2) (2004). The requirement contained in N.C. Gen. Stat. § 15A-1344(f) does apply to N.C. Gen. Stat. § 90-96.

### **Probation and Parole—Probation in district court—Appeal to superior court—Pretrial release—probation violation report**

*State v. Smith, 359 NC 618 (2005)*

A probation violation report was timely filed where probation for one year was imposed by a district court judge, defendant appealed to superior court but thereafter withdrew the appeal, the matter was remanded to district court for execution of judgment, and the probation violation report was filed within one year of remand to district court but more than one year from the time probation was originally imposed. N.C.G.S. § 15A-1431(e) provides that a defendant appealing a conviction to superior court for a trial de novo is subject to pretrial release; it is a logical impossibility for a defendant to be simultaneously on pretrial release and on probation for the same offense so that his probation did not begin until his case was remanded to the district court for execution of the judgment and did not expire until one year after that date.

**Probation and Parole--Indecent liberties--Special condition of probation--  
Defendant cannot reside in home with minor child**

*State v. Strickland, 169 N.C. App. 193 (2005)*

N.C.G.S. § 15A-1343(b2)(4), which mandates a special condition of probation that defendant may not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor, was a valid condition for defendant's probation arising out of multiple convictions for taking indecent liberties with a child based upon his sexual contact with his thirteen-year-old sister-in-law and did not violate defendant's due process rights. Further, the trial court did not err by activating defendant's sentence based on a violation of this special condition of probation based on defendant residing in a home with his wife and minor son, because: 1) defendant was not losing custody of his child, but instead his right of association with his child was being restricted for a probationary period of 36 months; 2) defendant was not prohibited by the contested condition from seeing his child nor did it prevent defendant from visiting his child in the home where his wife and child were residing; 3) defendant had the potential, through good conduct, to shorten the term of his probation; 4) defendant took advantage of the fact that he was residing with the minor victim to facilitate the abuse and the thirteen-year-old victim in the instant case was related to defendant through marriage; 5) N.C.G.S. § 15A-1343(b2)(4) serves the purpose of the goals of sentencing and probation to protect the public, assist the offender toward rehabilitation, and providing a general deterrent; 6) a restriction prohibiting defendant from residing in a household with any child, regardless of the gender or relationship of defendant to the child, is not unreasonable or violative of defendant's constitutional rights; and 7) our legislature decided to err on the side of caution by making N.C.G.S. § 15A-1343(b2)(4) a mandatory condition, and one that does not permit exceptions for defendant's own children.

## **Probation and Parole--Probation revocation--Improperly allowing victim to give opinion**

*State v. Arnold, 169 N.C. App. 438 (2005)*

The trial court erred in a probation revocation case by allowing the victim to give his opinion as to whether defendant's probation should be revoked, because: 1) the trial court did not exercise its discretion in revoking defendant's probation, but instead allowed the victim to determine whether defendant's probation should be revoked; and 2) defendant is entitled to have and receive such punishment for his offenses as the judge may impose and as the law allows.

## **Sentencing--Consecutive probationary sentences--Sexual exploitation of minor**

*State v. Howell, 169 N.C. App. 58 (2005)*

The trial court did not err in a multiple third-degree sexual exploitation of a minor case by allegedly imposing consecutive probationary sentences in violation of N.C.G.S. § 15A-1346, because: 1) defendant did not receive consecutive probationary sentences; 2) the judgment indicated that defendant was subject to six consecutive suspended sentences and a total of five years of probation, that defendant would serve six consecutive sentences if defendant's probation is revoked, and the trial court in its discretion may sentence a defendant this way; and 3) the trial court imposed 60 months of supervised probation only after making a finding that a longer period was necessary than that prescribed in N.C.G.S. § 15A-1343.2(d).

### **1) Probation and Parole--Probation violation report--Timeliness**

*State v. Smith 165 N.C. App. 256 (2004)*

The superior court erred in a probation violation case by concluding that the State's violation report was timely, because: (1) the State's probation revocation complaint was not filed prior to the expiration of defendant's probation term as required by N.C.G.S. § 15A-1344(f)(1); and (2) defendant's probation was not stayed while defendant appealed his conviction from district court to superior court.

### **2) Probation and Parole--Probation violation--Appeal to superior court**

*State v. Hooper 358 NC 122 (2004)*

The Court of Appeals' decision in a probation violation case is vacated

because when the district court revokes a defendant's probation, defendant's appeal is to the superior court, N.C.G.S. § 15A-1347. Defendant is permitted to refile his notice of appeal to the superior court notwithstanding time and procedural constraints resulting from this misdirected appeal.

### **Probation and Parole--Probation revocation--Appeal from district court**

*State v. Harless, 160 N.C. App. 78 (2003)*

A defendant's appeal from a judgment of the trial court revoking his probation and activating his sentence in a misdemeanor and felonious possession of marijuana, possession of drug paraphernalia, and possession of non-tax paid alcohol case is dismissed, because N.C.G.S. § 15A-1347 provides that a defendant must first appeal the revocation of probation by the district court to the superior court, and therefore, defendant did not have the right to appeal the revocation of his probation by the district court directly to the Court of Appeals.

### **Probation and Parole--Revocation--After expiration of probation period**

*State v. Hall, 160 N.C. App. 593 (2003)*

A judgment was arrested where the court attempted to revoke defendant's probation after the probation period expired without findings or evidence of a reasonable effort to conduct the hearing earlier.  
N.C.G.S. § 15A-1344(f).

### **Juveniles - Probation violation hearing - Assault - Motion to dismiss - Double jeopardy**

*In Re: O'Neal, 160 N.C. App. 409 (2003)*

The trial court did not violate a juvenile's double jeopardy rights by denying his motion to dismiss the assault charge even though the juvenile had previously admitted to the same offense at the juvenile's probation violation hearing, because: 1) double jeopardy protections do not apply to probation revocation hearings when a probation violation hearing is not a criminal prosecution; 2) the imposition of a new term of probation or possibly confinement in juvenile cases is punishment for the original offense for which the juvenile was adjudicated delinquent and not for any of the offenses that form the basis of the trial court's determination that a probation violation has occurred; and 3) the juvenile was not punished twice for the same offense.

### **Probation and Parole--Longer period of probation--Specific findings of fact**

## **required**

*State v. Love* 156 N.C. App. 309 (2003)

The trial court erred in a communicating threats case by extending defendant's probationary period to twenty-four months without making the required specific findings of fact that a longer period of probation was necessary as required by N.C.G.S. § 15A-1343.2(d).

### **1) Probation and Parole--Probation conditions--Conduct in jail--DOC rules--Applicable to local jail**

*State v. Payne* 156 N.C. App. 687 (2003)

A defendant who was serving an active term in a local jail as a condition of probation was bound by Department of Correction rules and regulations even though the probation judgment which referred to DOC rules and regulations did not address conduct in a local jail.

### **2) Probation and Parole--Probation conditions--Active term in local jail--Defendant not told of state rules--Similar local rule**

*State v. Henderson* 179 N.C. App. 219 (2006)

There was sufficient evidence for the trial court to conclude that a defendant who threatened jail officers violated a probation condition requiring obedience to State Department of Correction rules, even though defendant was in a local jail and had not been told of those rules, where the local jail and DOC had similar prohibitions on threatening and abusive language toward staff members.

### **Constitutional Law; Probation and Parole--Right to assistance of counsel--Probation revocation hearing**

*State v. Evans* 153 N.C. App. 313 (2002)

The trial court erred in a probation revocation hearing by allowing defendant to proceed pro se without conducting an inquiry as required by N.C.G.S. § 15A-1242, because: 1) the execution of a written waiver of the right to assistance of counsel does not abrogate the trial court's responsibility to ensure the requirements of N.C.G.S. § 15A-1242 are fulfilled; 2) although the trial court ascertained that defendant did not have counsel, did not desire counsel, and that defendant understood that he could have had counsel appointed, there is no indication in the record that the trial court made an inquiry as to whether defendant understood and appreciated the consequences of his decision; and 3) the trial court

failed to ascertain whether defendant comprehended the nature of the charges and proceedings and the range of permissible punishments that he faced.

### **1) Probation and Parole—Consecutive five year terms—Prohibited**

*State v. Canady 153 N.C. App. 455 (2002)*

The trial court erred by imposing two consecutive five year probation periods for indecent liberties. A trial court is prohibited from imposing such a sentence under the plain terms of N.C.G.S. § 15A-1346.

### **2) Probation and Parole—restitution—victims' future treatment--not punitive**

*State v. Canady 153 N.C. App. 455 (2002)*

The trial court did not err by imposing restitution of up to \$2,000 for future treatment of indecent liberties victims as a condition of probation where the record contained supporting evidence other than statements of the prosecutor, there was testimony tending to show that the victims were still undergoing treatment and that insurance would not cover the total cost, and the court's allowance for the cost of treatment being less than \$2,000 supports the inference that the restitution was not punitive.

### **3) Probation and Parole - Eligibility dates - Life sentences - Gain and merit**

*Teasley v. Beck, 155 N.C. App. 282 (2002)*

Plaintiffs' parole eligibility dates for life sentences under the Fair Sentencing Act were calculated correctly, and the trial court erred by concluding otherwise, where defendants applied good behavior time reductions ("good time") to plaintiff's life sentences but not gain and merit time (awarded for work and program participation). Some aspects of the statutory parole scheme are ambiguous and deference must be given to reasonable agency interpretation.

### **4) Probation and Parole - Eligibility date - Time credits - Consecutive sentences**

*Teasley v. Beck, 155 N.C. App. 282 (2002)*

The Department of Correction's application of time credits to a Fair Sentencing Act burglary sentence served consecutively with a life term did not violate statutory and case law prohibitions on "paper parole" (whereby inmates serving consecutive sentences are required to be paroled from the first sentence before beginning the second for purposes of determining

parole eligibility).

**Probation Sentencing–Probation revocation–Activation of suspended sentence–Time served credit for attending IMPACT**

*State v. Hearst, 356 NC 132 (2002)*

The trial court erred in a probation violation case activating a suspended sentence of six to eight months by refusing to credit the eighty-one days defendant spent attending the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), and the case is remanded because: 1) N.C.G.S. § 15- 196.1 allows credit for commitment to or confinement in a state or local correctional, mental, or other institution; 2) defendant’s decision to either attend IMPACT or be sentenced to a longer period of incarceration cannot be found to be voluntary; 3) the conditions at IMPACT resembled imprisonment even though there are no locked gates or fences; and 4) trainees had no control over any daily activities while at IMPACT except for thirty minutes a day, and a defendant placed on house arrest or one required to visit a probation officer has no such restrictions.

**Probation and Parole–Ex parte probation modification–Written notice requirement**

*State v. Seek, 152 N.C. App. 237 (2002)*

The trial court erred in an indecent liberties with a minor case by finding an ex parte probation modification entered on 26 June 2000 was valid even though defendant’s probation officer gave defendant oral notice of the modification, because: 1) defendant did not receive adequate notice of the modification since he never received written notice as required by N.C.G.S. § 15A-1343(c); and 2) contrary to the State’s assertion, the lack of written notice is not moot based on the original order’s condition of probation requiring defendant to complete a parenting class before he could stay in a residence with his own child since the allegations against defendant and the evidence presented at trial do not mention defendant either completing or failing to complete any parenting class.

**Probation and Parole–Violation report–Signed within probation term--No revocation motion during probation**

*State v. Moore, 148 N.C. App. 568 (2002)*

The trial court lacked jurisdiction to conduct a probation revocation hearing after defendant’s period of probation had expired where a probation officer signed and dated a probation violation report prior to the

expiration of defendant's period of probation, but there was no evidence that the report was filed with the clerk of court during defendant's probation and that the State filed during the probation period a written motion with the clerk of court indicating its intent to conduct a revocation hearing as required by N.C.G.S. § 15A-1344(f).

### **Probation and Parole–Revocation hearing–Opportunity to cross-examine**

*State v. Terry 149 N.C. App. 434 (2002)*

The trial court did not err in a probation revocation proceeding by not giving defendant the opportunity to cross-examine a professor who had told defendant's probation officer that defendant did not have a mandatory Saturday class where defendant had testified under oath that she had a mandatory Saturday class which interfered with her weekend sentence. Evidence that defendant did not report to the detention center on four occasions and that her stated reason for not reporting was unfounded was sufficient to satisfy the State's burden. The communication with defendant's professor served merely to confirm what had already been presented, and defendant did not at any time request that the professor be subpoenaed. Moreover, defendant admitted to having been untruthful about having a mandatory Saturday class.

### **Probation and Parole–Work release–Fines, fees, and costs**

*State v. Wingate 149 N.C. App. 879 (2002)*

The trial court in a probation revocation was permitted to recommend that defendant pay costs and attorney fees as a condition if work release was granted, was not permitted to recommend a fine as a condition of work release, and was permitted to recommend a community service fee as a condition of work release provided the fee had been incurred by the State and constituted damages instead of additional punishment. The proceeding was remanded for the trial court to determine whether the fee was a cost actually incurred by the State.

### **Probation and Parole---Anticipatory violation bond**

*State v. Hilbert, 145 N.C. App. 440 2001*

A probationary term requiring defendant to be arrested and placed under a \$100,000 cash bond upon a positive drug or alcohol test was not properly before the Court of Appeals where the convictions for which probation was imposed were not included in the petition for certiorari in a burglary conviction or in the order allowing the petition, defendant failed to object at sentencing, defendant failed to cite authority other than generalized

constitutional references, and the issue was not within the categories previously accorded plain error review. However, the trial courts were urged to exercise caution in setting anticipatory probation violation appearance bonds.

### **1) Probation and Parole--Term longer than statutory period--No findings**

*State v. Lambert, 146 N.C. App. 360, 2001*

The trial court erred at a resentencing for the unauthorized practice of law by ordering a term of probation longer than the statutorily prescribed period without making the required findings that a longer term of probation was necessary. N.C.G.S. § 15A-1343.2(d).

### **2) Probation and Parole--Probation--Condition--Curfew--Relation to rehabilitation**

*State v. Lambert, 146 N.C. App. 360, 2001*

The trial court did not err when sentencing defendant for the authorized practice of law by imposing as a condition of probation that defendant remain in his residence from 7:00 p.m. until 6:00 a.m. The challenged condition is permitted by N.C.G.S. § 15A-1343(b1) (1999); the legislature has deemed all of the special conditions enumerated by the statute appropriate to the rehabilitation of criminals and their assimilation into a law-abiding society and the condition need not be reasonably related to defendant's rehabilitation.

### **3) Probation and Parole--Conditions--Written notice required**

*State v. Lambert, 146 N.C. App. 360, 2001*

The trial court erred when sentencing defendant for the unauthorized practice of law by imposing as a condition of probation that defendant file documents with the court only when the documents were signed and filed by a licensed attorney. The record on appeal was devoid of any evidence that defendant was served with a written copy of this particular condition of probation; oral notice of conditions of probation is not a satisfactory substitute for the written statement required by statute.

### **Probation and Parole--Revocation--After expiration of probation period**

*State v. Hicks, 148 N.C. App. 203 (2001)*

The trial court erred by revoking defendant's probation where defendant received an eighteen-month probation on 18 February 1998; his probation

was scheduled to expire on 18 August 1999; and the violation report was signed on 23 July 1999 but not filed until 18 September 2000, thirteen months after the probation period expired. For a court to retain jurisdiction over a probationer after the period of probation has expired, the plain language of N.C.G.S. § 15A-1344(f)(1) requires the State to file a written motion with the clerk indicating the State's intent to conduct a revocation hearing before the period of probation expires.

### **Probation and Parole--Condition of probation--Sex offender treatment program--Alford plea**

*139 N.C. App. 787, State v. Alston 2000*

The trial court did not abuse its discretion in its determination that defendant violated the probationary condition that he actively participate in and successfully complete a sex offender treatment program, because: 1) defendant presented no competent evidence of his inability to comply, and the evidence of his failure to pursue the program was sufficient within itself to sustain the trial court's finding that defendant's failure to comply was without lawful excuse; and 2) defendant's reliance upon his Alford plea as a lawful excuse for non-compliance with the program condition requiring defendant to acknowledge having committed the charged offenses before inclusion in the program was unfounded.

### **Probation and Parole--Indecent liberties--Knowing and willful violation of probation condition-- Activation of sentence**

*State V. Tennant, 141 N.C. App. 524, 2000*

The trial court did not err in an indecent liberties case by revoking defendant's probation and activating his sentence based on his knowing and willful violation of the condition of probation that he have no contact with the victim, even though defendant contends he did not have contact with the victim when he went to the victim's mother's residence where the victim lived, because: 1) the evidence was uncontested that defendant had been told by a probation officer on numerous occasions that he could not have contact with the victim, and that the probation officer repeatedly explained to defendant what was meant by contact; 2) defendant willfully telephoned the victim's mother at her home, drove there, and went inside without a lawful excuse for his action; and 3) defendant's suggestion that he must have touched or visually observed the victim in order to have had contact with her is unpersuasive in light of the fact that defendant was repeatedly instructed to stay away from the victim's home and place of employment, and to cease all communication with her.

### **Criminal Law 1442 (NCI4th) - Probation revocation -Credit for active**

### **sentence on special probation**

*State v. Farris, 111 N.C. App. 254 (1993) 431 S.E.2d 803*

A defendant who has served an active ninety-day sentence as a condition of special probation pursuant to N.C.G.S. 15A-1351 is entitled to credit for that time on the sentence imposed upon revocation of his probation. The fact that the trial judge reduced defendant's original seven-year sentence to six years and nine months, a reduction of ninety days, does not satisfy the requirement that defendant be given a ninety-day credit.

### **Criminal Law 1510 (NCI4th) - Restitution as probation condition - Inability of defendant to pay**

*State v. Hayes, 113 N.C. App. 172 (1993) 437 S.E.2d 717*

The trial court erred in conditioning defendant's probation on an amount of restitution that defendant clearly cannot pay where defendant was ordered to pay an embezzlement victim restitution of \$208,899.00 at a rate of more than \$3,000.00 per month over a five-year probationary period,

### **Criminal Law 1493 (NCI4th) - Driving while impaired - Condition of probation - Alcoholics Anonymous - Reasonably related to rehabilitation**

*State v. McGill, 114 N.C. App. 479 (1994) \_\_\_ S.E.2d \_\_\_*

### **Criminal Law § 1526 (NCI4th Rev.) - probation condition - avoiding "presence" of children - not unconstitutionally vague**

*State v. White, 129 N.C. App. 52 (1998)*

A modified condition of probation that prohibits defendant sex offender from being in the "presence" of any child under the age of sixteen was not unconstitutionally vague.

### **1) Probation and Parole - Probation violation - Lawful excuse rule**

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

Under the "lawful excuse rule," a defendant's probation may not be revoked if he can demonstrate a lawful excuse for violating his probationary conditions.

### **2) Probation and Parole - Probation violation - Lawful excuse -**

## **Consideration of evidence - Findings**

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

A trial court must consider and evaluate evidence brought forth by a probationer in a probation revocation proceeding which demonstrates a lawful excuse for his violation; moreover, the trial court must make findings of fact which clearly show that it considered and evaluated such evidence.

## **Constitutional Law, Federal - Double jeopardy - Probation revocation hearing**

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

Defendant was neither subjected to successive criminal prosecutions for the same offense nor subjected to multiple punishments for the same offense where he was on probation for an unrelated drug offense when he was charged with first-degree statutory rape, taking indecent liberties with a minor, attempted murder, and assault with a deadly weapon; defendant's probation officer filed a probation violation report; and a probation violation hearing was held but continued and judgment on the alleged violation was not entered prior to trial. It has been held that the double jeopardy clause of the Fifth Amendment to the U.S. Constitution does not prevent the prosecution of a defendant for the substantive offense used as the basis of revocation of probation.

## **Probation and Parole - No findings longer period necessary - Intermediate punishment**

*State v. Hughes, 136 N.C. App. 92 (1999)*

The trial court erred in placing defendant on supervised probation for a period of sixty months without making findings that a period longer than thirty-six months was necessary because defendant received intermediate punishment, and therefore, N.C.G.S. § 15A-1343.2(d) provides that he should not receive probation for more than thirty-six months unless on remand the trial court makes findings that a longer period of probation is necessary.