CHECKLIST FOR PROBATION REVOCATION APPEALS

1	Did you determine whether the indictment was proper? (See pp. 5-7)	
2	Did you determine whether the trial court had subject matter jurisdiction to revoke probation? (See pp. 5-11)	
3	Did you determine whether the defendant was represented by counsel during the original trial or plea hearing? (See pp. 10-11)	
4	Did you determine whether the defendant was represented by counsel during the revocation hearing? (See pp. 10)	
5	If the client's probationary term was extended, did you determine whether the extension was proper? (See pp. 7-9)	
6	Did you determine whether the State gave the defendant notice of the conduct that violated the conditions of probation? (See pp. 13-14)	
7	Did you determine whether the trial court revoked probation for a proper reason? (See pp. 17-18)	
8	Did you determine whether the sentence the trial court activated was proper? (See pp. 22-24)	
9	If the defendant received a split sentence, did you determine whether the active portion of the split sentence was proper and whether the split sentence was stayed pending appeal? (See pp. 24-25)	

COMMON ISSUES IN PROBATION REVOCATION APPEALS

North Carolina Appellate Advocacy Foundations
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Disclaimer: This document is not intended to be an exhaustive list of issues that can be raised in probation revocation appeals. Instead, the purpose of this document is to describe issues that occur with some frequency in such appeals. Please do not rely on this document as a substitute for independent legal research on possible issues.

General Advice: Although probation revocation appeals involve short transcripts and a limited number of issues, they can be very complicated. Below are recommendations for handling some of the complications that arise in probation revocation appeals.

1. For an in-depth discussion of probation cases, be sure to review the Administration of Justice Bulletin on probation violations, which was published by the UNC School of Government. Another helpful resource is Jamie Markham's book, *Probation Violations in North Carolina*, published by the UNC School of Government.

2. Get a complete copy of the court file for your appeal:

    a. If the case involved multiple file numbers, be sure to get the court file for each file number.
    b. Be sure to get all of the documents for each individual file – not just those documents that are directly related to the revocation hearing.
    c. If the case was transferred from another county, be sure to get copies of the files from both counties.

3. Create a timeline of the trial court proceedings:

    a. You should create a numbered list of events in chronological order from the date of offense to the notice of appeal. This list will help you identify which statutes apply to your case and determine whether the trial court had jurisdiction to revoke the defendant's probation.

4. Consider getting transcripts of proceedings that occurred before the revocation hearing:

    a. Some issues in probation revocation appeals require an understanding of proceedings that occurred prior to the revocation hearing. If you believe you need a transcript for a hearing that is not reflected in the order of appellate entries, you should file a motion and proposed order for production of transcript. As part of the motion, you would explain that the additional transcript will facilitate appellate review and enable

you to discharge your duty as the defendant's appellate counsel.

5. Determine which statutes apply to your case:

    a. In recent years, the General Assembly has significantly modified the conditions that can result in revocation and the provisions that involve tolling. Once you have created a timeline for your case, be sure to determine which provisions apply to the appeal.

The Right to Appeal: Be sure to identify the type of order the defendant is appealing. Not every order involving probation can be appealed.

6. Under N.C. Gen. Stat. § 15A-1347, only certain types of orders involving probation can be appealed. Those orders include:

    a. An order that finds the defendant in violation of probation and that activates the defendant's sentence.

    b. An order that finds the defendant in violation of probation and that imposes special probation.
        i. Special probation is a split sentence involving periods of imprisonment as defined in N.C. Gen. Stat. § 15A-1344(e). A blank probation order is included in the appendix. (App. 7-10). The section for special probation is at the top of third page of the form. (App. 9).

    c. An order imposing a terminal period of Confinement in Response to Violation (CRV). The attached order contains a section that a court can use to impose CRV. (App. 10). Although the Court of Appeals has not yet conclusively held that such an order may be appealed, it has suggested that there might be a right to appeal such an order. *State v. Romero*, 228 N.C. App. 348, 351 n.1, 745 S.E.2d 364, 366 n.1 (2013).
        i. In *State v. Wood*, No. COA13-1258, 2014 N.C. App. Lexis 519, *3-4 (May 20, 2014) (unpublished) and *State v. Lancaster*, No. COA14-1018, 2015 N.C. App. Lexis 142, *2-3 (Mar. 15, 2015) (unpublished), the Court also conducted *Anders* review without expressing an opinion about whether there is a right to appeal a terminal CRV.

    d. If you file a brief in a probation appeal, be sure to specify in the Statement of the Grounds for Appellate Review that the defendant appeals pursuant to N.C. Gen. Stat. §§ 7A-27 and 15A-1347.

    e. If a defendant appeals a judgment revoking probation but is released on bail during the appeal, "probation supervision will continue under the same conditions until the expiration of the period of probation or disposition of the appeal, whichever comes first." N.C. Gen. Stat. § 15A-1347(c).

7. There is no right to appeal the following types of orders:

    a. An order modifying probation that does not result in special probation. *State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004).

    b. An order imposing a non-terminal period of Confinement in Response to Violation (CRV). *State v. Romero*, 228 N.C. App. 348, 351-52, 745 S.E.2d 364, 367 (2013).
        i. In *State v. Robinson*, No. COA13-415, 2013 N.C. App. Lexis 1288 (Dec. 3, 2013) (unpublished), the Court of Appeals appeared to hold that a non-terminal CRV in which probation was terminated at the conclusion of the CRV was not appealable (at least from district court to superior court).
        ii. You may seek appellate review of a non-terminal CRV by filing a petition for writ of certiorari. *See State v. McCurry*, No. COA15-271, 2015 N.C. App. LEXIS 1004, *6-8 (Dec. 15, 2015) (unpublished) (reviewing merits of issues at violation hearing resulting in 90-day CRV after Court of Appeals allowed defendant's petition for writ of certiorari in No. COAP14-482).

    c. An order revoking probation based on the defendant's voluntary decision to serve his sentence. *State v. Ikard*, 117 N.C. App. 460, 461, 450 S.E.2d 927, 928 (1994)

    d. If you are appointed to a case involving an order that cannot be appealed, review the court file and transcript for error. If something egregious happened, consider filing a petition for writ of certiorari or an application for writ of habeas corpus in the Court of Appeals. If the court file and transcript do not reveal any significant errors, write a letter to the judge explaining that you have determined that further review in the Court of Appeals is not appropriate. Be sure to send a copy of the letter to the clerk, prosecutor, trial attorney, and defendant.

8. Revocation orders in district court:

    a. If a district court revokes the defendant's probation, the defendant can only appeal to superior court. *State v. Hooper*, 358 N.C. 122, 126, 591 S.E.2d 514, 517 (2004). If the defendant appeals to the Court of Appeals, the appeal will be dismissed for lack of jurisdiction. *Id*. at 127, 591 S.E.2d at 518.

    b. If a defendant waives a revocation hearing in district court, the finding of a violation of probation, activation of sentence, or imposition of special probation may not be appealed to superior court. N.C. Gen. Stat. § 15A-1347(b).
        i. If the defendant gives notice of appeal after waiving a revocation hearing in district court, the superior court will not have jurisdiction to hear the appeal. *State v. Flanagan*, 279 N.C. App. 228, 229, 863 S.E.2d 812, 813 (2021).

9. Mootness:

    a. If it is likely that your client will be released from prison before the client's appeal ends, you need to consider whether the appeal will be moot. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical

effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (*quoting* Moot Case, Black's Law Dictionary (6th ed. 1990)). If your client is released from prison before the Court of Appeals issues its decision in the appeal, the case will satisfy this definition of "moot."

b. However, there are exceptions to mootness. Under well-settled precedent, a case is not moot if the lower court decision entails adverse collateral legal consequences. *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977). One adverse collateral consequence of an order finding the defendant in willful violation of the conditions of probation is that it can be used to impose a higher, aggravated sentence in a future prosecution. *See* N.C. Gen. Stat. § 15A-1340.16(d)(12a). In *State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009), the Court of Appeals held that the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(12a) qualified as an adverse collateral consequence of an order finding the defendant in violation of probation and, thus, that the defendant's appeal was not moot even though he had completed his sentence before the appeal ended.

c. If you have an appeal where the trial court found that the defendant violated multiple conditions of probation, but you only challenge one of the findings (such as absconding), the collateral consequences exception will not apply because there will still be some findings of willful violations even if your appeal is successful. *State v. Posey*, 255 N.C. App. 132, 133, 804 S.E.2d 580, 581-82 (2017) (over a dissent, the Court dismissed the defendant's appeal as moot because although the trial court erred by revoking defendant's probation for absconding, the trial court's written order also found that defendant violated his curfew).

d. Two other exception worth considering are the "capable of repetition yet evading review" and public interest exceptions. Under the capable of repetition yet evading review exception, an appellate court will consider an otherwise moot argument if (1) the duration of the challenged ruling is too short to be fully litigated on appeal and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (2002) (citation omitted). Probation revocation appeals meet the first criterion. Additionally, you could potentially argue that the defendant could encounter a similar problem in a future prosecution. *See State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (reviewing a jail credit argument because it was "not unreasonable to think defendant may encounter this same issue in the future should he face additional convictions"). A case is also not moot under the public interest exception "when the question involved is a matter of public interest. In such cases the courts have a duty to make a determination." *Matthews v. N.C. Dep't of Transp.*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). You could potentially argue that our court system has a significant interest in preventing unwarranted revocations and, therefore, the Court of Appeals should address the merits of an otherwise moot argument about the order revoking probation in your case. *See, e.g., State v. Johnson*, 246 N.C. App. 139, 144, 783 S.E.2d 21, 25 (2016) (observing that the Justice Reinvestment Act "limited a trial court's authority to revoke probation" only involving absconding or the commission of a new offense).

e. There do not appear to be any prior decisions of the North Carolina Court of Appeals or Supreme Court of North Carolina that discuss federal criminal procedure. However, an order revoking probation entered in North Carolina superior court could potentially entail adverse collateral consequences in federal court. *See, e.g., United States v. Wheeler*, 330 F.3d 407, 413 (6th Cir. 2003) (holding that the federal district court properly considered a revocation order entered in Tennessee state court "in calculating the criminal history points applicable to Defendant's prior sentence for his 1995 Conviction, correctly resulting in the assessment of three points under U.S.S.G. § 4A1.1(a)").
    i. Under 18 U.S.C. Appx. § 4A1.2(k), a sentence imposed in state court as part of a judgment revoking probation counts for federal sentencing if it results in the defendant's overall sentence exceeding one year and one month and results in the defendant being incarcerated during fifteen-year period under 18 USCS Appx § 4A1.2(e).

10. *Anders* review.

a. In *State v. Bailey*, 881 S.E.2d 746 (2022), the Court of Appeals held that a defendant in an appeal of an order revoking probation does not have the right to seek review under *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). *Bailey* contradicts a long series of decisions granting *Anders* review in probation revocation appeals. The defendant is currently seeking review of the decision in the Supreme Court of North Carolina.
b. If you are assigned to a probation revocation appeal and determine that there is no meritorious issue that you can pursue, please consider filing a brief and asking for *Anders* review based on the arguments and authorities presented in the brief and petition for discretionary review filed in *Bailey*.

Subject Matter Jurisdiction: Be sure to determine whether the trial court had jurisdiction over the defendant's case when it revoked probation or imposed special probation.

11. Make sure the original charging document was sufficient to confer subject matter jurisdiction onto the trial court.

a. Be sure to review the original charging document and determine whether it is proper:
    i. If the defendant was convicted on an indictment, make sure that the indictment contains all of the essential elements of the original charge. If the defendant pled on an information, make sure that both the defendant and his attorney signed the information as required by N.C. Gen. Stat. §§ 15A-642(c) and 15A-644(b).
    ii. Two good resources for reviewing indictment case law are: (1) The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment by Jessica Smith at the UNC School of Government and (2) 2017 Update to Arrest Warrant and Indictment Forms prepared by Jeffrey B. Welty at the UNC School of Government.

b. **Caution:** If you are assigned to a probation revocation appeal in which there is a defect in the original charging document and the court imposed probation after the defendant pled guilty to the offense in the charging document, be sure to explain the risks of making a jurisdictional challenge as part of the appeal. If the client understands the risks and wants to you to make the argument, be sure to get the client's written permission. The risks that the client faces include the following:
    i. If you win the argument, any concessions that the State offered the defendant as part of a plea agreement will no longer be valid. *State v. Rico*, 218 N.C. App. 109, 720 S.E.2d 801 (2012), *rev'd per curiam*, 366 N.C. 327, 734 S.E.2d 571 (2012).
    ii. If the State re-prosecutes the defendant, he will not be protected from receiving a higher sentence if he committed the offense after December 1, 2013. N.C. Gen. Stat. § 15A-1335 (2013). If the defendant committed the offense before December 1, 2013 and is subject to an earlier version of N.C. Gen. Stat. § 15A-1335, there is still a risk that he will not be protected from receiving a higher sentence because a court might conclude that the statute should not apply to a defendant who successfully attacks a plea agreement that he himself negotiated.
    iii. If you successfully challenge the original judgment through an application for writ of habeas corpus, the defendant should be entitled to jail credit under N.C. Gen. Stat. § 15-196.1 if the State successfully re-prosecutes him later. This is true even if the State prosecutes the defendant for a different charge arising from the incident that led to his original conviction. The statute was amended in 2015 to state that the defendant is entitled to credit toward the "charge that culminated in the sentence or the incident from which the charge arose." N.C. Gen. Stat. § 15-196.1. As explained in the Criminal Law Blog, the amended language "will clearly require the court to credit confinement on an earlier charge for the same behavior that eventually results in a conviction on a different charge . . . .".
    iv. Any relief from a defective charging document will not occur immediately. If you file an application for writ of habeas corpus, the Court of Appeals might remand the case for a hearing or order briefing on the merits.

c. According to *State v. Pennell*, 367 N.C. 466, 471, 758 S.E.2d 383, 387 (2014), a defendant may not challenge a defective indictment on direct appeal from an order revoking probation. Such an argument is an impermissible collateral attack on the original judgment imposing probation. After *Pennell*, there are two ways to challenge a defective charging document on appeal:
    i. Present the argument to the Court of Appeals through a motion for appropriate relief. *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387; *State v. Smith*, No. COA13-742, 2014 N.C. App. LEXIS 874, *4-5 (Aug. 5, 2014) (unpublished).
    ii. Present the argument to the Court of Appeals through an application for writ of habeas corpus under N.C. Gen. Stat. §§ 17-1 *et. seq*. *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387.

12. Make sure the trial court had jurisdiction to revoke probation:

a. Be sure to determine when the probationary term began.
    i. In general, a period of probation "commences on the day it is imposed[.]" N.C. Gen. Stat. § 15A-1346(a).
    ii. If the defendant is already serving a period of imprisonment or the court imposes probation at the same time it imposes a period of imprisonment, the period of probation runs concurrently with any period of imprisonment unless the court states that it should begin at the end of the period of imprisonment. N.C. Gen. Stat. § 15A-1346(b). *State v. Harwood*, 243 N.C. App. 425, 428-30, 777 S.E.2d 116, 119 (2015).

b. Be sure to determine whether the original term of probation was proper.
    i. A defendant sentenced to community punishment for a felony can be placed on probation for not less than 12 nor more than 30 months. N.C. Gen. Stat. § 15A-1343.2(d)(3). A defendant sentenced to intermediate punishment for a felony can be placed on probation for not less than 18 nor more than 36 months. N.C. Gen. Stat. § 15A-1343.2(d)(4).
    ii. Be sure to check the sentencing grid in N.C. Gen. Stat. § 15A-1340.17 to determine whether community punishment or intermediate punishment is allowed for the class of offense and the defendant's prior record level. If the court imposes a probationary sentence that exceeds 30 months as part of a judgment imposing community punishment, the Court of Appeals might consider the mistake to be a clerical error. *See State v. Hauser*, 271 N.C. App. 496, 504, 844 S.E.2d 319, 326 (2020).
    iii. If the trial court determines at sentencing that a longer period of probation is necessary, the court may impose a longer period. N.C. Gen. Stat. § 15A-1343.2(d). However, that period may not exceed five years. *Id*. The court is not required to provide any rationale to impose a longer term. *State v. Wilkerson*, 223 N.C. App. 195, 200, 733 S.E.2d 181, 184 (2012). Instead, all the court needs to do is make a finding that a longer term is needed. *Id*.
    iv. The trial court cannot run multiple periods of probation consecutively. Instead, a period of probation must run concurrently with any other period of probation. N.C. Gen. Stat. § 15A-1346(a). *State v. Canady*, 153 N.C. App. 455, 460, 570 S.E.2d 262, 266 (2002).

c. Be sure to determine whether the trial court extended the probationary term. Three different statutes permit the court to extend probation:
    i. Under N.C. Gen. Stat. §§ 15A-1342(a) and 15A-1343.2(d), the court can extend probation (1) for up to three years, (2) with the consent of the defendant, (3) to complete a program of restitution or medical or psychiatric treatment ordered as a condition of probation, (4) if the extension is ordered in the last six months of the original period of probation. If the sentencing court imposed a five-year probationary period, an extension under this provision could result in an eight-year probationary period. An extension under N.C. Gen. Stat. § 15A-1343.2(d) does not apply to impaired driving or defendants

sentenced as violent habitual felons. N.C. Gen. Stat. § 15A-1343.2(a).

ii. Under N.C. Gen. Stat. § 15A-1344(d), the court can extend probation multiple times "after notice and a hearing and for good cause shown." *See State v. Craig*, No. COA16-1027, 2017 N.C. App. Lexis 287, *17-20 (Apr. 18, 2017) (unpublished) (trial court erred by extending defendant's probation under § 15A-1344(d) where defendant was not given notice of hearing, no hearing was held, and the defendant was not represented by counsel); *State v. Lawrence*, No. COA08-1231, 2009 N.C. App. Lexis 760 (June 16, 2009) (unpublished) (trial court lacked subject matter jurisdiction to revoke defendant's probation where defendant did not receive notice and hearing prior to the earlier extension of his probation). However, an extension under this provision cannot increase the period of probation beyond the statutory maximum of five years.

iii. To determine which kind of extension the court imposed, be sure to review the modification order, which usually appears in form AOC-CR-609. A copy of the form is included in the appendix. (App. 7-10) There is a section at the top of the second page that includes check boxes specifying the type of extension the court imposed. If you get a transcript of the hearing in which probation is extension, the transcript will likely reveal what type of extension was used.

iv. Note that it would be improper for a court to extend a period of probation to five years under N.C. Gen. Stat. § 15A-1344(d) and then extend probation from five to eight years under either N.C. Gen. Stat. §§ 15A-1342(a) or 15A-1343.2(d). Extensions under N.C. Gen. Stat. §§ 15A-1342(a) or 15A-1343.2(d) can only occur in the last six months of the original period of probation. Once the court has issued an extension under N.C. Gen. Stat. § 15A-1344(d), it cannot use N.C. Gen. Stat. §§ 15A-1342(a) or 15A-1343.2(d) to extend the period of probation further. Further discussion of extensions of probation can be found on the North Carolina Criminal Law Blog.

v. In *State v. Guinn*, 281 N.C. App. 446, 868 S.E.2d 672 (2022), the Court of Appeals vacated a revocation order because an earlier extension was entered after an improper waiver of counsel. There was a dissent in *Guinn*, but the State did not pursue an appeal in the Supreme Court of North Carolina.

d. Be sure to determine whether there are grounds to make a jurisdictional challenge:

i. If the trial court revoked the defendant's probation after the original period of probation expired, the defendant may raise a jurisdictional argument on appeal. *State v. Hendricks*, 277 N.C. App. 304, 307, 858 S.E.2d 384, 386 (2021); *State v. Reinhardt*, 183 N.C. App. 291, 644 S.E.2d 26 (2007).

ii. Jurisdiction may only be established by documents that were presented to the trial court. *State v. Peele*, 246 N.C. App. 159, 163-64, 783 S.E.2d 28, 32-33 (2016) (declining to allow State to amend the record to include documents that would confer jurisdiction upon the trial court).

iii. The State must file the violation report *before* the defendant's probation expires. N.C. Gen. Stat. § 15A-1344(f). *See Peele*, 246 N.C. App. at 163-64, 783 S.E.2d at 32-33. The best evidence that the report was timely-filed is a file stamp. *State v. Moore*, 148 N.C. App. 568, 570, 559 S.E.2d 565, 566

(2002). If there is no other evidence that the motion was filed in a timely manner, the lack of a file stamp is "fatal" to the court's jurisdiction to revoke probation. *State v. High*, 230 N.C. App. 330, 336-37, 750 S.E.2d 9, 11 (2013). A sample violation report with a file stamp is included in the appendix. (App. 5-6). In *High*, the Court of Appeals held that a handwritten date and signature of the clerk did not establish that the violation report was filed in a timely manner. *High*, 230 N.C. App. at 336-37, 750 S.E.2d at 11.

iv. If the trial court revoked the defendant's probation *after* purporting to extend the period of probation following the expiration of probation, the defendant may raise a jurisdictional argument on appeal. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008); *State v. Surratt*, 177 N.C. App. 551, 629 S.E.2d 341 (2006).

v. If the trial court revoked probation during the period of probation, but after improperly extending probation, the defendant may raise a jurisdictional argument on appeal. *State v. Peed*, 257 N.C. App. 842, 844, 810 S.E.2d 777, 779-81 (2018) (substance abuse treatment not a permissible ground for special purpose extension of probation); *State v. Gorman*, 221 N.C. App. 330, 334, 727 S.E.2d 731, 734-35 (2012). *See State v. Lawrence*, COA08-1231, 2009 N.C. App. LEXIS 760 (June 16, 2009) (unpublished) (trial court lacked jurisdiction to revoke probation where prior order extending probation was without notice and hearing). However, if the defendant failed to make the jurisdictional argument either when the court extended the period of probation or when it revoked the defendant's probation, the Court of Appeals might consider the argument waived. *See*, *e.g.*, *State v. Rush*, 158 N.C. App. 738, 742, 582 S.E.2d 37, 39 (2003) (stating that the defendant's argument that the trial court improperly extended probation was waived because the defendant "did not raise this issue in the revocation hearing").

vi. Under N.C. Gen. Stat. § 15A-1344(f), a court can extend, modify, or revoke probation *after* the expiration of the probationary period if (1) a violation report was filed before the expiration of the probationary term; (2) the court finds the defendant violated a condition of probation prior to the expiration of the probationary term; and (3) "the court finds for good cause shown and stated that the probation should be extended, modified, or revoked."

    1. In *State v. Morgan*, 372 N.C. 609, 616, 831 S.E.2d 254, 259 (2019), the Supreme Court held that the "specific finding" described in N.C. Gen. Stat. § 15A-1344(f)(3) "must actually be made by the trial court" and that the finding "cannot simply be inferred from the record."
    2. In a follow-up case, the Supreme Court granted trial courts significant leeway to determine whether good cause exists to revoke probation after the period of probation has expired. *State v. Geter*, 382 N.C. 484, 881 S.E.2d 209 (2022). Courts may consider a "variety of circumstances," but the "chief consideration" is whether "substantial justice" would be advanced or offended by the post-expiration revocation. *Id*. at 494, 881 S.E.2d at 216. In *Geter*, the Supreme Court upheld the trial court's revocation of probation based on the commission of a new offense after the State's evidence was suppressed

in the criminal case and the State later sought to use the same evidence at the probation revocation hearing. However, in *State v. Lytle*, 883 S.E.2d 655 (2023), the defendant's probation expired "700 days prior to the revocation hearing" and the trial court failed to make any good cause finding under N.C. Gen. Stat. § 15A-1344(f). Further, the Court reversed the revocation order because "[t]he record on appeal provides no persuasive evidence that the trial court made reasonable attempts to hold the probation revocation hearing prior to the expiration of defendant's probation." *Id*. at 657. Note, however, that *Lytle* is inconsistent with *Geter* because *Lytle* relies on language about the State making "reasonable efforts" to hold the violation hearing earlier, which the Court in *Geter* rejected.

3. Be aware that the remedy for the lack of a good cause finding depends on the record in each case. When the record contains sufficient evidence for the trial court to determine whether there was good cause to revoke probation after the defendant's probation expired, the appellate court will remand the case for the trial court to rule on the question of good cause. *Morgan*, 372 N.C. at 618, 831 S.E.2d at 260. However, if the record does not indicate why the violation hearing was not held until after probation expired, the order revoking probation will be vacated. *State v. Sasek*, 271 N.C. App. 568, 576, 844 S.E.2d 328, 335 (2020).

13. Make sure the defendant's probation was revoked in the proper judicial district:

    a. If the defendant's probation originated in another judicial district, there must be some record or evidence that the defendant's probation was modified in the new judicial district or that the defendant resided in or violated probation in the new judicial district as required by N.C. Gen. Stat. § 15A-1344(a). *State v. Ward*, 278 N.C. App. 128, 136, 862 S.E.2d 20, 26 (2021); *State v. Mauck*, 204 N.C. App. 583, 585, 694 S.E.2d 481, 483 (2010).

The Right to Counsel: Be sure to determine whether the defendant was represented by counsel at the revocation hearing and at the hearing in which the court imposed probation.

14. Make sure the defendant was represented by counsel at his original trial, plea hearing, or earlier hearing that resulted in an extension of probation:

    a. The court cannot revoke probation if the defendant was not represented by an attorney when the original judgment was entered and the record does not show that the trial court complied with N.C. Gen. Stat. § 15A-1242. *State v. Neeley*, 307 N.C. 247, 250, 297 S.E.2d 389, 392 (1982).
        i. Be sure to review to the original judgment to determine whether the defendant had an attorney. A blank judgment form is included in the appendix. (App. 1-4). The section addressing whether the defendant was represented by counsel

is at the top of the first page.

ii. If the judgment indicates that the defendant was not represented by counsel, consider acquiring a transcript of the proceedings to determine whether the trial court engaged in a proper colloquy with the defendant before allowing him to represent himself.

b. A signed and certified waiver of counsel form is proof that the defendant's waiver of counsel was proper. *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). However, if the transcript of the earlier proceeding shows that the trial court failed to comply with N.C. Gen. Stat. § 15A-1242, the written waiver form will not bar relief. *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986).

15. If the defendant waived his right to counsel at the revocation hearing, make sure the trial court conducted a proper colloquy under N.C. Gen. Stat. § 15A-1242.

a. An indigent defendant has the right to counsel at a probation revocation hearing under N.C. Gen. Stat. § 15A-1345(e). *See State v. Moore*, No. COA16-422, 2016 N.C. App. Lexis 1199, *7-10 (Dec. 6, 2016) (unpublished) (reversing revocation order and concluding that defendant did not forfeit right to counsel at probation violation hearing).

b. The trial court's failure to conduct a proper colloquy at a probation hearing is reversible error. *State v. Evans*, 153 N.C. App. 313, 316, 569 S.E.2d 673, 675 (2002).

Capacity to Proceed: Be sure to determine whether the defendant had the capacity to proceed at the revocation hearing.

16. If there is some indication that the defendant lacked the capacity to proceed at the revocation hearing, the defendant can raise the issue of capacity on appeal. *State v. Martin*, No. COA15-566, 2016 N.C. App. LEXIS 156, *4-12 (Feb. 16, 2016) (unpublished); *State v. Jones*, No. COA04-1185, 2005 N.C. App. LEXIS 2425, *3-4 (Nov. 15, 2005) (unpublished).

a. N.C. Gen. Stat. § 15A-1001(a) sets forth the general standard of capacity to proceed. Under the statute, a defendant lacks capacity to proceed if, by reason of mental illness or defect, he or she is unable to understand the nature and object of the proceedings, comprehend his or her situation in reference to the proceedings, or assist in the defense in a rational or reasonable manner.

The Decision to Revoke Probation: Be sure to determine whether the procedures the trial court employed to revoke the defendant's probation were proper.

17. Be aware that while probation revocation hearings are generally informal, defendants still have important rights at such hearings:

a. A defendant must receive "full due process" before a court can revoke probation. *State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986). The right to due process at probation revocation hearings includes: (a) written notice of the alleged violations, (b) disclosure of the evidence of the violations, (c) an opportunity to be heard and present evidence, (d) the right to confront and cross-examine adverse witnesses (unless the judge specifically finds good cause for not allowing confrontation); (e) a neutral and detached judge; and (f) a written statement by the judge of the evidence and reasons for revoking probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 36 L. Ed. 2d 656, 664 (1973). A defendant's due process rights at a probation revocation hearing are codified in N.C. Gen. Stat. § 15A-1345(e). *State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 556 (2017) (Ervin, J., concurring).

b. In *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 58 (1967), our Supreme Court held that probation violation proceedings are informal because "probation or suspension of sentence is an act of grace and not of right." But this assertion is no longer accurate. In *Gagnon*, the Supreme Court stated that it was "clear after *Morrissey v. Brewer*, 408 U.S. 471 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935), that probation is an 'act of grace.'" *Gagnon*, 411 U.S. at 782 n.4, 154 S.E.2d at n.4. The idea that probation is a "grace" has been further eroded by the Justice Reinvestment Act, which limits the authority of trial judges to revoke probation to three conditions specified in N.C. Gen. Stat. § 15A-1344(a). *State v. Moore*, 370 N.C. 338, 343, 807 S.E.2d 550, 554 (2017).

18. "Formal rules of evidence do not apply" in probation revocation hearings. N.C.G.S. § 15A-1345(e) (2013). *See also* N.C. R. Evid. 1101(b)(3) (Rules of Evidence, other than those concerning privileges, do not apply in proceedings for "sentencing, or granting or revoking probation").

    a. Hearsay can also serve as the basis of the court's decision to revoke probation. *State v. Murchison*, 367 N.C. 461, 465, 758 S.E.2d 356, 359 (2014). However, it was proper for the court to rely on hearsay in *Murchison* because the hearsay statements were made by the defendant's mother and were supported by a computer printout from the Administrative Office of the Courts. *Id*. If the trial court relied on less reliable hearsay to revoke the defendant's probation, consider distinguishing *Murchison* and arguing that the revocation was improper.

19. If the defendant admitted to willfully violating the conditions of probation, the State does not need to present evidence to support the violations. *State v. Brown*, 279 N.C. App. 630, 634, 865 S.E.2d 753, 756 (2021).

    a. Even if the defendant admits to violating the conditions of probation, the opinion in *Brown* suggests that the defendant can still contest the sufficiency of the allegations in the violation report. *See Brown*, 279 N.C. App. at 634, 865 S.E.d2d at 757.

b. In addition, the court is not required to personally examine the defendant regarding the voluntariness of his admission. *State v. Sellers*, 185 N.C. App. 726, 728-29, 649 S.E.2d 656, 657 (2007).

20. Make sure the defendant received notice of the conditions of probation:

a. Under N.C. Gen. Stat. § 15A-1343(c), the defendant "must be given a written statement explicitly setting forth the conditions on which he is being released." "Oral notice to defendant of his conditions of probation is not a satisfactory substitute for the written statement required by statute." *State v. Lambert*, 146 N.C. App. 360, 369, 553 S.E.2d 71, 78 (2001).

b. If the trial court modifies the conditions of probation, the defendant must receive written notice of the modifications. N.C. Gen. Stat. § 15A-1343(c). "[T]he provision requiring written notice of any modifications made in the terms of probation is mandatory." *State v. Suggs*, 92 N.C. App. 112, 113, 373 S.E.2d 687, 688 (1988). *But see State v. Ellis*, No. COA16-1220, 2017 N.C. App. Lexis 579, *5-6 (July 18, 2017) (unpublished) (upholding modification of conditions of probation made outside of defendant's presence on the ground that modification was a clerical correction of the special condition of probation announced at sentencing).

c. If the defendant did not assert at or before the revocation hearing that he had no notice of the conditions of probation, the Court of Appeals might consider the argument waived. *See State v. Cooper*, 304 N.C. 180, 183-84, 282 S.E.2d 436, 439 (1981) (holding that a defendant who challenges conditions of probation must do so "no later than the hearing at which his probation is revoked"); *but see State v. Williams*, No. COA10-1343, 2011 N.C. App. LEXIS 1322, *5 (June 7, 2011) (unpublished) (holding that the State's failure to give notice in violation of the statutory mandate in N.C. Gen. Stat. § 15A-1343(c) is preserved without objection). In addition, the Court of Appeals will likely reject an argument that the defendant did not receive notice of the original conditions of probation because the AOC judgment form for judgments imposing probation contains the regular conditions of probation. *See State v. Solomon*, No. COA11-513, 2011 N.C. App. LEXIS 2357, *5 (Nov. 15, 2011) (unpublished) (rejecting argument that the defendant did not receive notice of the original conditions of probation because "the judgment contains all of the terms and conditions of probation in writing, and defendant does not claim she did not receive the written judgment").

21. Make sure the defendant received notice of the conduct that violated the terms of probation:

a. The State must give the defendant notice of the revocation hearing and a copy of the violation report. N.C. Gen. Stat. § 15A-1345(e). A defendant's statutory right to due process requires the State to give the defendant "notice of the hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e). Our Supreme Court interpreted this provision as requiring the State to provide the

defendant with "a statement of the actions that [the] defendant has allegedly taken that constitute a violation of a condition of probation." *State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 555 (2017). The Court explained that N.C. Gen. Stat. § 15A-1345(e) "does not require a statement of the underlying conditions that were violated." *Moore*, 370 N.C. at 341, 807 S.E.2d at 552. Further discussion of the notice requirement and the Supreme Court's decision in *Moore* can be can be found on the North Carolina Criminal Law Blog.

b. In an earlier case, the Court of Appeals said an order for arrest that is served on the defendant and that states the defendant failed to comply with the conditions of probation is sufficient to satisfy the notice requirement. *State v. Gamble*, 50 N.C. App. 658, 659-60, 274 S.E.2d 874, 875 (1981). *Gamble* relied on *State v. Baines*, 40 N.C. App. 545, 551, 253 S.E.2d 300, 304 (1979), which held that a defendant is only entitled to a statement that the defendant "has willfully failed, without lawful excuse, to abide by the conditions of probation or suspended sentence." The holdings in *Gamble* and *Baines* conflict the Supreme Court's decision in *Moore*, which holds the State must give the defendant a "statement of the actions that [the] defendant has allegedly taken that constitute a violation of a condition of probation." *Moore*, 370 N.C. at 345, 807 S.E.2d at 555. Therefore, it appears *Gamble* and *Baines* are no longer good law.

c. "Without prior and proper statutory notice and a statement of violations provided to Defendant, the trial court lack[s] jurisdiction" to revoke a defendant's probation. *State v. McCaster*, 257 N.C. App. 824, 828, 811 S.E.2d 211, 214 (2018). In addition, a defendant does not waive his right to prior statutory notice by voluntarily appearing before the court and participating in his revocation hearing. *Id.* at 826-27, 811 S.E.2d at 213-15 (trial court lacked jurisdiction to revoke defendant's probation where trial court did not inform defendant that the purpose of the hearing was to revoke probation or provide defendant with any notice of the alleged violations).

22. Be sure to compare the allegations in the violation report to the evidence at the probation violation hearing.

a. "Just as with the notice provided by criminal indictments," the purpose of the notice provided in violation reports is to allow the defendant to prepare a defense. *State v. Moore*, 370 N.C. 338, 341, 807 S.E.2d 550, 555 (2017). Revocation of a defendant's probation is therefore improper when based, even in part, on violations involving conduct for which the defendant has not received notice. *State v. Walton*, No. COA17-1359, 2018 N.C. App. Lexis 847 (Sep. 4, 2018) (unpublished); *State v. Cunningham*, 63 N.C. App. 470, 475, 305 S.E.2d 193, 196-97 (1983); *cf. State v. Hubbard*, 198 N.C. App. 154, 157-59, 678 S.E.2d 390, 393-94 (2009) (concluding the defendant received sufficient notice under N.C. Gen. Stat. § 15A-1345(e) where the evidence at the violation hearing established the "same facts" alleged in the violation report).

b. Because the State is required to give the defendant notice of the conduct that violated

probation, the State may not rely on evidence of conduct not described in the violation report to revoke the defendant's probation. *See State v. Melton*, 258 N.C. App. 134, 137, 811 S.E.2d 678, 681 (2018) (explaining trial court's finding of a violation is limited to the dates and conduct alleged in the violation report).

c. In two decisions from 2013, the Court of Appeals held that the State was required to give the defendant notice of the condition of probation that he violated. *State v. Kornegay*, 228 N.C. App. 320, 745 S.E.2d 880 (2013); *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013). However, the Supreme Court overruled *Kornegay* and *Tindall* in *State v. Moore*, 370 N.C. 338, 807 S.E.2d 550 (2017). According to Moore, the violation report must contain "a statement of the actions defendant allegedly took that constituted a violation of a condition of probation—that is, a statement of what defendant allegedly did that violated a probation condition." *Id*. at 344, 807 S.E.2d at 554-55.

d. Although *Moore* does not require the State to allege the specific condition of probation that the defendant violated, if it chooses to do so, then it is arguably bound by that decision at the probation violation hearing.
    i. In criminal cases, the State is often not required to allege certain facts in the indictment – such as the specific felony the defendant intended to commit with a burglary charge or the specific sex act in a sex offense case. However, when the State takes the extra step in the indictment and chooses the specific felony or the specific sex act, it is "bound to prove that theory" at trial. *State v. Fletcher*, 370 N.C. 313, 333, 807 S.E.2d 528, 542 (2017). That is, the State is then "bound by its allegations, even as other litigants are bound by theirs." *State v. Loudner*, 77 N.C. App. 453, 454, 335 S.E.2d 78, 79 (1985).
    ii. Under a notice argument based on cases like *Fletcher* and *Loudner*, the trial court may not revoke probation when the only notice State gave the defendant was that he violated a non-revocable condition of probation. For example, this potential argument would arise where the violation report alleges a non-revocable violation, such as possessing a controlled substance, but the court revokes probation on the ground that possession a controlled substance involved the revocable condition of committing a new crime.

23. Determine whether the trial court violated the defendant's right to confrontation:

a. At a revocation hearing, the defendant "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e). A discussion of the defendant's right to confrontation at a probation violation hearing can be found on the North Carolina Criminal Law Blog.

b. Issue Preservation:
    i. The defendant must object on confrontation grounds in order to "trigger the trial court's obligation under section 15A-1345(e) to either permit cross-examination . . . or find good cause for disallowing confrontation." *State v. Thorne*, 279 N.C. App. 655, 661, 865 S.E.2d 768, 772 (2021). The Supreme

Court also reached a similar conclusion in *State v. Jones*, 382 N.C. 267, 275, 876 S.E.2d 407, 412 (2022). As part of its analysis, the Court also held that a confrontation argument could not be preserved as part of the violation of a statutory mandate because N.C. Gen. Stat. § 15A-1345(e) "cannot be said to contain a statutory mandate." *Id*.

ii. If the defendant did not preserve a confrontation argument, consider raising the issue under plain error or ineffective assistance of counsel claim. There do not appear to be any published opinions applying plain error in a probation revocation appeal. However, under Rule 10(a)(4), plain error is available for evidentiary errors in criminal appeals. With respect to the effective assistance of counsel, a defendant at a probation revocation hearing has a statutory right to counsel that is "akin to the right enjoyed in a criminal trial." *State v. Scott*, 187 N.C. App. 775, 777, 653 S.E.2d 908, 909 (2007). For a discussion of ineffective assistance of counsel claims in cases involving a statutory right to counsel, see *State v. Spinks*, 277 N.C. App. 554, 860 S.E.2d 306 (2021).

iii. When the *Jones* case was in the Court of Appeals, that Court held in part that the defendant failed to preserve a confrontation argument because he did not issue a subpoena for the police officer whose out-of-court statements served as the basis for the revocation order. *State v. Jones*, 269 N.C. App. 440, 445, 838 S.E.2d 686, 690 (2019). This part of the Court's reasoning did not appear in the Supreme Court's opinion for the case. The Court of Appeals also held that this part of the Court's reasoning did not apply where the defendant had no knowledge of the identity of the State's witness, a paid informant. *State v. Hemingway*, 278 N.C. App. 538, 551, 863 S.E.2d 279, 287 (2021).

iv. Further, the reasoning of the Court of Appeals in *Jones* arguably constitutes burden-shifting. The State bears the burden of proving that the defendant violated the conditions of probation. *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965). Requiring the defendant to issue a subpoena for the purpose of questioning a State's witness would shift the burden of presenting witnesses from the State to the defendant. With respect to the Sixth Amendment right to confrontation, the United States Supreme Court has rejected similar reasoning, holding that confrontation "imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 174 L. Ed. 2d 314, 330 (2009). Additionally, the reasoning employed by the Court of Appeals in *Jones* was based on *State v. Terry*, 149 N.C. App. 434, 438, 562 S.E.2d 537, 540 (2002). However, in *Terry*, the defendant lost because she failed to subpoena a witness who would have testified as part of her own affirmative defense. In other words, *Terry* does not stand for the proposition that a defendant is required to subpoena the State's witnesses in order to preserve a confrontation argument for appeal.

24. Make sure the court revoked probation for a proper reason:

    a. The decision to revoke probation is governed by N.C. Gen. Stat. § 15A-1344. In 2011, the General Assembly amended N.C. Gen. Stat. § 15A-1344 to limit the circumstances in which a court can revoke probation. Session Law 2011-192. The amendment applies to "probation violations" occurring on or after December 1, 2011. *Id*. According to the amendment, the trial court can only revoke probation in the following three circumstances:
        i. The defendant committed a criminal offense.
        ii. The defendant violated the absconding condition as defined by N.C. Gen. Stat. § 15A-1343(b)(3a).
        iii. The defendant previously received two CRV periods.

    b. What happens when the trial court's oral pronouncement contains different findings than the written judgment revoking the defendant's probation? The Court of Appeals has answered this question differently on many occasions:
        i. The following cases are examples of when the trial court's <u>oral pronouncement</u> controlled: *State v. Trent*, 254 N.C. App. 809, 821, 803 S.E.2d 224, 232-33 (2017) (remanding for correction of clerical error where the trial court's written findings differed from the court's oral findings); *State v. Jones*, 225 N.C. App. 181, 185-87, 736 S.E.2d 634, 637-638 (2013) (remanding for correction of a clerical error contained in the written judgment so that the judgment would contain the finding stated in open court); *State v. Odum*, No. COA11-610, 2011 N.C. App. LEXIS 2654, *5-6 (Dec. 20, 2011) (unpublished) (remanding for correction of "clerical error" stating variance in oral pronouncement and written findings "was a mistake in recording the trial court's oral findings"); *State v. Green*, No. COA11-109, 2011 N.C. App. LEXIS 2303, *14 (Nov. 1, 2011) (unpublished) (finding clerical error where written judgment included violation that was dismissed during violation hearing); *State v. Thompson*, No. COA12-1193, 2013 N.C. App. LEXIS 244, *3 fn.1 (March 19, 2013) (unpublished) (clerical error in written judgment); *State v. Osborne*, No. COA06-191, 2007 N.C. App. LEXIS 571, *7-8 (March 20, 2007) (unpublished) (remanding to correct "clerical mistakes in the recording of the trial court's judgment" revoking probation).
        ii. The following cases are examples of when the trial court's <u>written order</u> controlled over the trial court's oral pronouncement: *State v. Hancock*, 248 N.C. App. 744, 748-49, 789 S.E.2d 522, 525 (2016); *State v. Bailey*, No. COA16-356, 2016 N.C. App. Lexis 1084, *3-5 (Nov. 1, 2016) (unpublished).

25. If the trial court revoked probation based on the defendant's commission of a new criminal offense, make sure the court followed the proper procedure:

    a. The court cannot revoke probation based solely on a conviction for a Class 3 misdemeanor. N.C. Gen. Stat. § 15A-1344(d).
        i. Effective December 1, 2013, the following three offenses were changed from Class 1 misdemeanors to Class 3 misdemeanors and, thus, cannot support an

order revoking probation. Session Law 2013-360.

1. Driving while license revoked (except revocation for impaired driving, which remains a Class 1 misdemeanor). N.C. Gen. Stat. § 20-28.
2. Conversion by bailee. N.C. Gen. Stat. § 14-168.1.
3. Operation of a motor vehicle without insurance. N.C. Gen. Stat. § 20-313(a).

ii. Possession of marijuana drug paraphernalia is also a Class 3 misdemeanor. N.C. Gen. Stat. § 90-113.22A.

b. The court cannot revoke probation based solely on the existence of a pending criminal charge. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960). Rather, the court can revoke probation if the State presents evidence that the defendant committed a new crime and the court makes independent findings based on the evidence of new crime. *State v. Monroe*, 83 N.C. App. 143, 146, 349 S.E.2d 315, 317 (1986). If the only evidence is that the defendant was arrested for committing a new crime, the order revoking probation must be reversed. *See State v. Graham*, 282 N.C. App. 158, 160, 869 S.E.2d 776, 778 (2022) (reversing revocation order because the State presented "no evidence beyond the fact that defendant was arrested that tended to establish he committed a crime").

c. If the new criminal charge stemmed from a warrantless probation search, determine whether the underlying search was proper.

i. Since 2009, all probationers are subject to a regular condition of probation allowing warrantless searches of their person, vehicle, and premises by a probation officer. Since 2009, a warrantless probation search must be "for purposes *directly related* to the probation supervision." N.C. Gen. Stat. §15A-1343(b)(13).

ii. In *State v. Powell*, 253 N.C. App. 590, 601-06, 800 S.E.2d 745, 752-54 (2017), the Court of Appeals held that the trial court erred by denying the defendant's motion to suppress evidence of firearm because warrantless search violated N.C. Gen. Stat. § 15A-1343(b)(13) because the warrantless search was not "directly related" to the defendant's probation. The Court of Appeals' decision in *Powell* is discussed in more detail on the North Carolina Criminal Law Blog.

26. If the trial court revoked probation based on absconding, make sure the evidence showed that the defendant violated that condition:

a. "Absconding" is defined as "willfully avoiding supervision or…willfully making the defendant's whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a). Absconding is one of the most commonly-discussed topics on the Criminal Law Blog. If you believe absconding is an issue in your case, be sure to search for "absconding" on the Criminal Law Blog. Absconding does not occur when the defendant violates other regular conditions of probation such as leaving the jurisdiction or failing to notify the State of a change in address. *State v. Williams*, 243

N.C. App. 198, 205, 776 S.E.2d 741, 746 (2015): *State v. Nolen*, 228 N.C. App. 203, 205-206, 743 S.E.2d 729, 731 (2013). Instead, absconding occurs through "persistent avoidance of supervision and a continual effort to make [the defendant's] whereabouts unknown." *State v. Newsome*, 264 N.C. App. 659, 665, 828 S.E.2d 495, 500 (2019).

b. Absconding can be proven by showing that the defendant committed a series of non-revocable violations, including that the defendant "willfully (1) failed to report to the office as directed by his supervising officer, (2) failed to return his supervising officer's telephone calls, (3) failed to provide a certifiable address, and (4) generally failed to make himself available for supervision as directed by his officer." *State v. Crompton*, 380 N.C. 220, 226, 868 S.E.2d 48, 52 (2022).

c. Absconding can be proven with evidence that the defendant committed a series of non-revocable violations. *State v. Crompton*, 380 N.C. 220, 226, 868 S.E.2d 48, 52 (2022). Specifically, the State can show that the defendant absconded by failed to report to his probation officer, failed to return his probation officer's phone calls, failed to provide a certifiable address, and "generally failed to make himself available for supervision as directed by his officer." *Id*.

d. Examples of cases where the defendant absconded include the following:
    i. *State v. Newsome*, 264 N.C. App. 659, 828 S.E.2d 495 (2019): The defendant's probation officer was unable to locate the defendant during a two-month period "after numerous attempts to contact [him] at the last known address" and where defendant admitted at the violation hearing that he knew he had to report to probation office within 72 hours of release from jail and failed to do so.
    ii. *State v. Trent*, 254 N.C. App. 809, 817-21, 803 S.E.2d 224, 228-32 (2017): The defendant admitted that, over the course of two weeks, he made no attempt to contact his probation offer, was not home for two home visits, and failed to notify his probation officer that he would be out of town over an eight-day period.
    iii. *State v. Johnson*, 246 N.C. App. 132, 136-38, 782 S.E.2d 549, 553-54 (2016): The defendant moved from Nash County to McDowell County without notifying probation officer and did not contact probation officer for several months.

e. Examples of cases where the defendant's conduct did <u>not</u> satisfy the definition of absconding:
    i. *State v. Krider*, 258 N.C. App. 111, 810 S.E.2d 828, *modified and aff'd by*, 371 N.C. 466, 818 S.E.2d 102 (2018): The defendant was not present at his reported address when his probation officer visited the residence on one date, the probation officer was advised by an unidentified woman that defendant did not live at the address, and the probation officer did not subsequently try to contact defendant or verify the unidentified woman's claim.
    ii. *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018): The defendant

failed to attend scheduled meetings, and the defendant's probation officer was unable to reach the defendant after two days of attempts and leaving messages with defendant's relatives.

iii. *State v. Johnson*, 246 N.C. App. 139, 783 S.E.2d 21 (2016): The defendant told his probation officer he would not attend an office visit the following day and the failed to report for the visit.

iv. *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015): Despite lack of valid North Carolina address, repeated travel to New Jersey, and multiple missed appointments, the Court of Appeals concluded the defendant was <u>not</u> absconding where the defendant's whereabouts were generally known based on phone conversations with his probation officer. The Court deemed the absconding violation as "simply a re-alleging" of technical violations for change of address, leaving the jurisdiction, and failing to report.

27. Make sure the evidence was sufficient to establish that the defendant violated the conditions of probation:

    a. The State bears the burden of proving that the defendant violated the conditions of probation. *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965). "There must be substantial evidence of sufficient probative force to generate in the minds of reasonable men the conclusion that defendant has in fact breached the condition in question. In the absence of such proof, the defendant is entitled to his discharge as a matter of right and not of discretion." *State v. Millner*, 240 N.C. 602, 605, 83 S.E.2d 546, 547-48 (1954). More recent decisions use a different formulation for evaluating the evidence presented at probation violation hearings. *See State v. Pettiford*, 282 N.C. App. 202, 205, 869 S.E.2d 772, 775 (2022) (holding that it is the role of the appellate court "to determine if evidence existed so as to reasonably satisfy the trial court judge that a violation of probation occurred").

    b. Be sure to determine whether the defendant's failure to comply with the condition of probation was willful or without lawful excuse.
        i. "Willful" is defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965).
        ii. In the past, a lack of willfulness was a defense to violating probation. *State v. Sellars*, 61 N.C. App. 558, 561, 301 S.E.2d 105, 106 (1983); *State v. Floyd*, 213 N.C. App. 611, 612-15, 714 S.E.2d 447, 449-50 (2011).

    c. The order revoking probation must be supported by "competent evidence." *State v. Sherrod*, 191 N.C. App. 776, 777, 663 S.E.2d 470, 472 (2008). *See State v. Millner*, 240 N.C. 602, 605, 83 S.E.2d 546, 548 (1954); *State v. Rogers*, No. COA16-1087, 2017 N.C. App. Lexis 446, *2-4 (Jun. 6, 2017) (unpublished) (trial court erred by revoking defendant's probation where the record contained no competent evidence defendant previously served two periods of confinement in response to violations).
        i. In 1967, our Supreme Court held that a verified violation report is competent evidence to revoke a defendant's probation. *State v. Duncan*, 270 N.C. 241,

246, 154 S.E.2d 53, 58 (1967). *Duncan* is the basis for a line of cases supporting this assertion from *State v. Gamble*, 50 N.C. App. 658, 274 S.E.2d 874 (1981) through *State v. Hancock*, 248 N.C. App. 744, 789 S.E.2d 522 (2016). However, *Duncan* predated *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 36 L. Ed. 2d 656, 664 (1973), and the enactment of N.C. Gen. Stat. § 15A-1345. Under *Gagnon* and N.C. Gen. Stat. § 15A-1345, the trial court may not revoke the defendant's probation unless the State presents evidence that the defendant violated the conditions of probation. *Gagnon* and N.C. Gen. Stat. § 15A-1345 also grant the defendant the right to confront and cross-examine adverse witnesses. Because a verified violation report alone could not satisfy these due process requirements, *Duncan* is no longer controlling. Therefore, if the State relies on *Duncan* to assert that the revocation order should be upheld, you should argue that the State cannot rely solely on a verified violation report to establish the alleged violation.

d. Be sure to compare the specific violations that the trial court found with the evidence presented at the revocation hearing. If the court revoked probation based on a violation in a report from a specific date, but the evidence does not support that violation, you should argue that the court revoked probation based on insufficient evidence. A sample revocation order is included in the appendix. (App. 11-12). In the "Findings" section on the second page of the order, the court is required to specify the violations that support its order. (App. 12).

e. If the trial court checked the box stating that "each violation is, in and of itself, a sufficient basis to revoke probation," and you have a case where the court found both revocable and non-revocable violations, you should challenging the revocation order as an abuse of discretion. The box appears under number 4 in the "Findings" section of the attached revocation order. (App. 12). The Court of Appeals sometimes characterizes the trial court's decision to check this box as a "clerical error." *State v. Newsome*, 264 N.C. App. 659, 828 S.E.2d 495 (2019). However, please see Issue I in this brief for an example of how the argument could be presented.

28. Make sure the trial court did not revoke probation for a violation that was litigated at an earlier hearing:

a. In *State v. Schimmelpfenning*, No. COA15-1315, 2016 N.C. App. LEXIS 886, *6-10 (Sep. 6, 2016) (unpublished), the Court of Appeals held that the trial court cannot revoke probation for a new criminal conviction if the same conviction or pending charge was the basis of a previous modification. The Court relied on an earlier case, *State v. Bridges*, 189 N.C. App. 524, 526-27, 658 S.E.2d 527, 528 (2008), which suggested that trial courts lack jurisdiction to respond to violations that were adjudicated at prior hearings).
b. Be aware that the Court of Appeals considered this problem under theories of collateral estoppel and *res judicata* in *State v. Jacobs*, No. COA11-679, 2012 N.C. App. LEXIS 363 (Mar. 20, 2012) (unpublished). However, a claim of collateral estoppel or *res judicata* is waived if it is not raised in trial court. *In re D.R.S.*, 181

N.C. App. 136, 140, 638 S.E.2d 626, 628 (2007). The Court of Appeals has also held that theories like collateral estoppel (which are based on double jeopardy) do not apply at probation revocation hearings. *State v. Powell*, No. COA16-499, 2016 N.C. App. Lexis 1143, *3-4 (Nov. 15, 2016) (unpublished). For additional information about this issue, please see this post on the North Carolina Criminal Law Blog.

29. Make sure the trial court exercised discretion before revoking the defendant's probation:

a. It is error for the trial court to revoke probation on the ground that it has no discretion in determining whether to revoke, modify, or extend probation after finding a revocable violation. *State v. Bailey*, No. COA16-356, 2016 N.C. App. LEXIS 1084, *3-4 (Nov. 1, 2016) (unpublished) (noting that failure to exercise discretion at probation violation hearing is error); *State v. Everette*, No. COA12-1500, 2013 N.C. App. LEXIS 973, *13-14 (Sep. 17, 2013) (unpublished).

b. An error in the findings may be deemed harmless if the revocation order was supported by at least one proper finding that the defendant violated a revocable condition of probation. *State v. Hancock*, 248 N.C. App. 744, 748, 789 S.E.2d 522, 525 (2016) ("A trial court's ruling must be upheld if it is correct upon any theory of law[,] and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it]."). However, if the trial court failed to check the box on the judgment specifying that "each violation in and of itself" would be a sufficient reason for revocation, the Court of Appeals may remand the case to superior court to determine whether the court would have revoked probation if it had not found that each violation was sufficient to revoke probation. *State v. Sitosky*, 238 N.C. App. 558, 565, 767 S.E.2d 623, 627–28 (2014).

Activating the Defendant's Sentence: Be sure to determine whether the trial court's decisions regarding the defendant's sentence were proper.

30. Make sure any decisions about reducing the defendant's sentence were proper:

a. Courts generally prohibit a defendant from challenging the sentence that the trial court imposed in the original judgment placing the defendant on probation. Such a challenge is normally considered an impermissible collateral attack. *State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007). Appellate courts reason that if the defendant wanted to challenge the original judgment, he should have done so through a direct appeal from the original judgment itself. *Id*.

b. Nevertheless, there are some sentencing arguments that can be made on appeal from the order revoking probation. For example, under N.C. Gen. Stat. § 15A-1344(d1), the trial court may reduce the defendant's sentence when it revokes probation. If the sentence the court initially imposed was too high, you should consider arguing that the court's failure to reduce the sentence at the end of a revocation hearing was an abuse of discretion. *But see State v. Leonard*, No. COA14-182, 2015 N.C. App.

LEXIS 53, *4-5 (Feb. 3, 2015) (unpublished) (holding that a challenge to the original sentence constituted an impermissible collateral attack).

c. If the trial court believed that it did not have authority to reduce the sentence, the defendant "is entitled to a new revocation of probation hearing." *State v. Partridge*, 110 N.C. App. 786, 788, 431 S.E.2d 550, 551-52 (1993); *see also State v. Holmes*, No. COA18-1023, 2019 N.C. App. Lexis 287, *5-6 (March 26, 2019) (unpublished).

31. Make sure any decisions about the structure of the defendant's sentence were proper:

a. If the trial court re-structured the defendant's sentences to run consecutively without the defendant present, the case must be remanded for resentencing. *State v. Hanner*, 188 N.C. App. 137, 142, 654 S.E.2d 820, 823 (2008).

b. If the transcript indicates that the trial court decided to run the defendant's sentences consecutively because the defendant contested the allegations in the violation report, you should consider arguing that the trial court improperly punished the defendant for exercising his right to a revocation hearing. *See*, *e.g.*, *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (holding that the trial court cannot impose a higher sentence based on the defendant's demand for a jury trial).

32. Make sure the trial court gave the defendant sufficient credit for time served:

a. Be sure to determine from the court file how much credit the defendant was due for time served in jail and compare that to the credit the judge gave the defendant in the judgment revoking probation.

b. Under N.C. Gen. Stat. § 15-196.1, the defendant is entitled to credit for time served in jail before the revocation hearing or as part of special probation. *State v. Farris*, 336 N.C. 552, 556, 444 S.E.2d 182, 184-85 (1994).

c. In 2016, the legislature amended the CRV jail credit rules for defendants subject to multiple sentences. The legislature amended N.C. Gen. Stat. § 15-196.2, effective for offenses committed on or after December 1, 2016, to state that upon revocation of two or more consecutive sentences as a result of a probation violation, credit for time served on concurrent CRVs may be credited to one sentence only. Session Law 2016-77, § 5. The new jail credit provision is explained in more detail on the North Carolina Criminal Law Blog.

d. Be aware that if the defendant did not ask the trial court to give him credit for time served, the Court of Appeals will not review the defendant's jail credit for the first time on appeal. *State v. Cloer*, 197 N.C. App. 716, 722, 678 S.E.2d 399, 403 (2009). If the defense attorney did not ask the trial court to give the defendant jail credit, you should consider raising the issue under Appellate Rule 2. As an alternative, you should consider asking the trial attorney to ask the judge to give the defendant the correct amount of jail credit. This might require you to assemble the relevant

documents from the court file and draft a letter outlining the number of days that should be credited to the client.

Special Probation / Split Sentences: Be sure to determine whether the trial court sentenced the defendant to proper periods of active time and probation.

33. Make sure the active portion of the split sentence is proper:

    a. Special probation, commonly referred to as a "split sentence," allows a judge to impose a mix of imprisonment and probation when sentencing a defendant to intermediate punishment. Split sentence confinement occurs *within* the period of probation. N.C. Gen. Stat. § 15A-1351(a).

    b. The active portion of the split sentence counts against the total length of the probation period. N.C. Gen. Stat. § 15A-1351(a). The combined length of the split sentence and probation cannot exceed sixty months except as provided in N.C. Gen. Stat. § 15A-1342(a).

    c. The total of all periods of special probation confinement (split sentence) "may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense[.]" N.C. Gen. Stat. § 15A-1351(a).

    d. A detailed discussion on special probation can be found on the North Carolina Criminal Law Blog.

34. Make sure the defendant received the proper jail credit:

    a. In imposing a split sentence, the judge may credit any time spent as a result of the charge "to either the suspended sentence or to the imprisonment required for special probation." N.C. Gen. Stat. § 15A-1351(a).

    b. Upon revocation of probation, a defendant is entitled to receive credit for any active time served as part of a split sentence. *State v. Farris*, 336 N.C. 552, 555-56, 444 S.E.2d 182, 184-85 (1994).

35. Determine whether the split sentence was stayed when the defendant gave notice of appeal:

    a. "When a defendant has given notice of appeal . . . special probation is stayed." N.C. Gen. Stat. § 15A-1451(a)(4).

    b. If you determine from the court file that the defendant received a term of special probation that was not stayed, you should consider filing a petition for writ of supersedeas early in the appeal to enforce the stay. *State v. Stover*, 200 N.C. App. 506, 510, 685 S.E.2d 127, 131 (2009).
        i. Be aware that on remand, the trial court may impose conditions of release as

part of an appeal bond under N.C. Gen. Stat. § 15A-536. Even though confinement as part of special probation is stayed when a defendant gives notice of appeal, trial courts are permitted to impose a bond and set conditions of release as part of their authority to oversee defendants with probationary sentences. *State v. Howell*, 166 N.C. App. 751, 603 S.E.2d 901 (2004). Further, confinement as part of an appeal bond lasts as long as the appeal, which is often longer than the period or periods of special probation. If you have a client who has appealed and who is incarcerated as part of special probation, you should explain that you can file a petition for writ of supersedeas, but that the client may end up incarcerated for a period longer than the period of special probation.