**PROBATION REVOCATION HEARINGS - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

Loyal listeners know that we always ask for topic suggestions for future episodes in every episode we record.

*Yeah, what we find interesting or important may not be all that interesting or important to you! (And vice versa)*

Today, we are going to address a topic that has been requested by several listeners, specifically Judge Warren Davis (Gwinnett) and Judge Ana Maria Martinez (Dekalb State Court)

*Shout out to Judges Davis and Martinez for this topic idea. Would you like to be shouted out on our little podcast? Send us a great topic idea (preferrable with all of the research already done) to* *goodjudgepod@gmail.com*

Today, we are going to discuss the topic of probation revocation hearings

*Ah, yes. Probation revocation hearings. Another memory of my prior life on the bench.*

With any further ado, let’s get into it.

So, a sentence has been imposed in a criminal case and the judge probated at least a portion of the sentence.

But wait, there is a problem. The defendant has not complied with the conditions of probation and the probation officer has filed something with the court which requires a probation revocation hearing.

And there are a variety of different ways we can arrive at this point in the proceeding so we will start in the beginning – how does the case get before the court in the first place?

There are a variety of different ways for a probation revocation matter to come before the court but there is one constant – there must be a revocation petition

Before the hearing, the defendant must be served with the revocation petition[[1]](#endnote-1)

But those out there in podcast-land may be saying to yourself, wait – what about the situation where the defendant absconds supervision and cannot be found?

 If we could find him to serve him with the petition, he would not necessarily be considered to have absconded

And you would be absolutely correct – there are ways to handle the absconded defendant – but the point being made is that before there is a probation revocation hearing, there must be a probation revocation petition that has been served on the defendant

There are times when a probation officer will allege that the defendant has absconded supervision (or otherwise cannot be served with the revocation petition) – the officer will present you with a probation (arrest) warrant application.

 These warrant applications are frequently accompanied by a tolling order.

Remember that the time left on probation continues to “run” unless there is a court order to toll the time.

 More on tolling of the time remaining on a probation sentence in a moment.

Not all probation hearings begin with a warrant application – occasionally the officer will schedule the defendant for what we call a “walk in” hearing

That is where the defendant remains free from custody and is allowed to appear at the revocation hearing “off the street”

Again, the probationer must be served with the revocation petition before the hearing.

**The Petition**

What is contained in the revocation petition is very important.

 Probation cannot be revoked for reasons not set forth in the petition;[[2]](#endnote-2)

If the petition does not allege the defendant has absconded supervision, there is no right to toll the probation time. [[3]](#endnote-3)

But variance in proof between what is alleged in the petition and what is proven at hearing is not fatal to revocation;[[4]](#endnote-4)

Inadequacy of petition is not necessarily a basis for setting aside revocation where proof at hearing provides evidentiary support that the violation included in the petition did occur.[[5]](#endnote-5)

So, assuming that the petition alleges that the probation has committed the new offense of felony theft by taking but the proof at trial shows a burglary (or vice versa) – that difference between what was alleged in the petition and what was proved at the hearing is not fatal to the revocation

As we will discuss in a moment, what is contained in the petition dictates the amount of time that may be revoked

Another helpful hint from your friends here at the Good Judge-Ment Podcast – nothing is ever “revocated” (despite the number of times that defendants, lawyers and others use that word. It is revoked or not revoked

**Tolling**

A few minutes ago, we touched on the topic of tolling the time remaining on the probated sentence – usually coincides with the defendant absconding supervision

Probation officers do not have the authority to toll a sentence on their own accord – tolling requires a court order

As to tolling orders, Georgia law provides that a probated sentence can be tolled upon the probationer failing to report to the officer as directed (must have affidavit from the officer alleging that failure) or a non-est inventus or other return of a probation warrant where it is alleged that the defendant cannot be found in his/her county of residence.[[6]](#endnote-6)

If the probated sentence has been tolled, “The effective date of the tolling of the sentence shall be the date the court enters a tolling order and shall continue until the probationer shall personally report to the officer, is taken into custody in this state, or is otherwise available to the court.”[[7]](#endnote-7)

And “Any tolled period of time shall not be included in computing creditable time served on probation or as any part of the time that the probationer was sentenced to serve.”[[8]](#endnote-8)

A tolling order must be accompanied by an affidavit (sworn) from the officer alleging that the probationer has absconded – an unsworn statement is insufficient.[[9]](#endnote-9) Other alternative is a “*non est”* return of a warrant.

“The tolling of a probated sentence following the return of a warrant showing *non est inventus* is intended to prevent the probationer from avoiding the potential adverse impact of revocation merely by avoiding the court.”[[10]](#endnote-10)

**First Offender**

O.C.G.A. § 42-8-60 “When a defendant has not been previously convicted of a felony, the court may, upon a ... plea of guilty ... and before an adjudication of guilt, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and: (1) Place the defendant on **probation**; or (2) Sentence the defendant to a term of confinement.”[[11]](#endnote-11)

“Under the First Offender Act, a person is either exonerated of guilt and stands discharged as a matter of law upon completion of the term of probation ... or adjudicated guilty in a petition filed prior to the expiration of the sentence ... ; the statute does not provide for any other alternative.”[[12]](#endnote-12)

First Offender sentences are often said to have a “good side” and a “down side.” The “good side” is addressed previously – the defendant has not been convicted of a crime during the pendency of the sentence

The judge is careful to note that he/she is withholding adjudication of guilt when sentencing the defendant to a First Offender sentence

The “down side” of First Offender is that the defendant can be revoked, an adjudication of guilt entered and then sentenced to the maximum amount of time would have been allowed under law at the time of sentencing, but credit for time served on probation must be given upon the resentencing.[[13]](#endnote-13)

And that last phrase is important – the defendant must receive credit for time on probation that was “without issue” (or which was not tolled).

**The Hearing**

We have finally made it to the probation revocation hearing

The standard of proof for a probation revocation action is preponderance of the evidence.[[14]](#endnote-14)

A copy of my probation revocation hearing outline is attached to the outline in this case

After assuring the defendant has the right to counsel (right to appointed counsel in Superior Court)[[15]](#endnote-15)

Administer oaths to defendant, probation officer and all witnesses

Ensure everyone is on the same page as to the amount of time that could potentially be revoked

Put on the record whether the probationer is admitting or denying the allegations in the petition

You may have situations where both “technical” violations and “new offenses” are alleged in the petition and the probationer may announce that he/she admits the technical violations but denies the new offense claim.

You will recall that we discussed previously the fact that the revocation petition dictates what acts (or failures to act) can be considered by the court in making a revocation decision

The contents of the petition also dictate the amount of time that can be revoked as we will discuss in a moment

A court may not revoke any part of any probated or suspended sentence unless the defendant admits the violation as alleged or unless the evidence produced at the revocation hearing establishes by a preponderance of the evidence the violation or violations alleged.[[16]](#endnote-16)

Generally speaking, hearsay[[17]](#endnote-17) is not allowed in a probation revocation hearing.[[18]](#endnote-18)

You will note we said “generally” when discussing that hearsay is no admissible. If you find yourself in a situation where a *Crawford* issue has been raised (Confrontation Clause issue), see *Grimes v. State*.[[19]](#endnote-19) (we will not dwell on that Confrontation Cause issue here)

Stated another way, if there is an allegation that the probationer committed a new offense, evidence must be presented, subject to cross-examination, at the probation revocation hearing that would meet the preponderance standard.

**Time that can be revoked: Technical violations, new offenses and special conditions of probation**

If only handling a “technical violation,” the maximum time that can be revoked is the balance of the probation or two (2) years, whichever is less.[[20]](#endnote-20) This would include new misdemeanor offenses.

The court can revoke the entire balance of the sentence for any violation of a special condition of probation.[[21]](#endnote-21)

A special condition of probation is defined in O.C.G.A. § 42-8-34.1.[[22]](#endnote-22)

“the substantive or essential requirements of OCGA § 42–8–34.1(a) are that the trial court warn of the consequences of violating a special condition; that the warning be in writing; and that the warning be in the court's sentence.”[[23]](#endnote-23)

If the evidence (either an admission or preponderance proof) shows that the defendant committed a new felony while on probation, “the court may revoke no more than the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the felony offense constituting the violation of the probation.” Stated another way, the court cannot revoke more probation time than the maximum sentence possible for the new offense.[[24]](#endnote-24)

Unless, of course, the original sentence included a specific condition of probation related to the new offense or the prior sentence was a First Offender sentence.

**Options following revocation petition**

If there is insufficient evidence to support the revocation, make that finding on the record and return the probationer to the original terms and conditions of probation.

If there is sufficient evidence to support a finding that the probationer violated the terms of probation:

1. There is no requirement that probation be revoked. The judge has the right to return the probationer to probation without “revoking” any part of the sentence. (However, a finding of sufficient evidence may allow the trial court to amend the original sentence – just a thought)
2. If there is sufficient evidence of a technical violation (i.e. something other than a new felony offense), the court SHALL consider alternatives such as community service, probation detention centers, special alternative incarceration or any other alternative - if those are not appropriate, no more than the balance of probation or more than 2 years in confinement, whichever is less.[[25]](#endnote-25)
	1. Remember that any revocation for failure to pay financial obligations (fine, supervision fees, restitution) must include an analysis under O.C.G.A. § 42-8-34.2.
3. If there is a violation of a special condition of probation, there is no limit on the amount of time that can be revoked – the trial court can revoke all or any portion of the remaining probated sentence[[26]](#endnote-26)
4. If the original sentence was a First Offender sentence, the trial court may enter an adjudication of guilt, provided that the defendant is given credit for any time he has been on probation “without incident.” This revocation is not required, even where a violation has been proven.[[27]](#endnote-27) But until an adjudication of guilt is entered, trial judge cannot resentence the defendant and change the terms of the original sentence.
5. If there was sufficient evidence (preponderance) that the probationer committed a new felony offense, the amount of time that can be revoked is the lesser of the balance of probation or the maximum time of the sentence authorized for the new offense.

**To revoke or not to revoke, that is the question…**

When it comes to the philosophy of whether to revoke probation, how much to revoke (or not), etc., it would be impossible for us to share our thoughts in a non-biased way.

 Every judge has his/her own predispositions or inclinations

But from a 1,000 foot perspective:

1. I generally try to reward probationers who admit violations and do not demand an evidentiary hearing
	1. In doing so, I may well revoke time and order incarceration – but it will likely not be for the entire balance of the sentence
	2. And when I do revoke less than the balance, I generally terminate the remaining balance of probation – particularly where there are new offenses
		1. Too often, I have seen situations where a defendant is reporting for this case, reporting for that other case, some of the time overlaps and some doesn’t. And then there is the issue of misdemeanor probation vs. felony probation supervision (with attendant supervision fees and reporting obligations).
		2. I honestly try my best to avoid what will inevitably be another probation revocation
2. I do not believe in long probated terms – at some point, your obligations for what you did in 2003 needs to end.
	1. If I handle a revocation for another judge who has retired, etc. and the original sentence involved decades of probation, I will try to cure that as part of the revocation process.
3. I am a fan of second chances (Lord knows the two of us were beneficiaries of not getting caught for everything we did in life). I am not big on third chances – just saying.

So, that’s all for this episode dealing with probation revocation hearings

*There are as many different factual situations as there are hard and fast rules. The reason we have not jumped off of this cliff before is because of the vast factual and procedural differences the judge may face as part of the probation revocation process.*

The outline is full of statutory and case citations and includes Wade’s probation revocation hearing outline. That outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell…There is an iconic video for Twisted Sister’s song,* We’re Not Gonna’ Take It. *You remember, the kid sitting on a bed, listening to the Twisted Sister song while holding a guitar and his dad coming in an yelling at him. Do you know who played the dad in that video? Mark Metcalf. We know you don’t remember that actor by name but I bet you remember another famous role he played in the movie* Animal House. *That’s right – Mr. Metcalf played the role of Douglas C. Niedermeyer in* Animal House. *The kinda’ crazy ROTC leader on campus who famously railed Flounder during the movie. That’s why, in the video, it is funny that he criticizes his kid for wearing a Twisted Sister pin. “IS THAT A PLEDGE PIN ON YOUR UNIFORM?”*

*It really is amazing the things you learn on this podcast, huh?*

**PROBATION REVOCATION HEARING OUTLINE**

1. **CALL OF CASE** [insert style of case, including case number] (use case number for which the defendant was placed on probation).
2. **Present in the courtroom are** (PLACE NAMES ON RECORD):
	1. Defendant
	2. Defense Counsel[[28]](#endnote-28)
	3. Prosecutor
	4. Probation Officer

**☞OATH☜ *SWEAR IN DEFENDANT, PROBATION OFFICER, ALL WITNESSES***

1. **Has the defendant has received a copy of the revocation petition (a/k/a Delinquency Report) in advance of this hearing?[[29]](#endnote-29)** If not, ensure the defendant is provided a copy. If the petition was not served on the defendant well in advance of hearing, get waiver on record.
	1. Probation cannot be revoked for reasons not set forth in the petition;[[30]](#endnote-30)
	2. But variance in proof between what is alleged in the petition and what is proven at hearing is not fatal to revocation;[[31]](#endnote-31)
	3. Inadequacy of petition is not necessarily a basis for setting aside revocation where proof at hearing provides evidentiary support that the violation included in the petition did occur.[[32]](#endnote-32)
2. **Are we handling only a probation revocation or are we also handling a resolution of a new charge?**
	1. **Put on record the amount of time the defendant has remaining on probation**.
		1. Note that the period on probation does not begin to toll until the warrant or affidavit is filed showing the probationer cannot be found.[[33]](#endnote-33)
	2. **Note for record the maximum amount of time that potentially can be revoked**:
		1. If only handling a “technical violation,” the maximum time that can be revoked is the balance of the probation or two (2) years, whichever is less.[[34]](#endnote-34) This would include new misdemeanor offenses.
		2. The court can revoke the entire balance of the sentence for any violation of a special condition of probation.[[35]](#endnote-35)
		3. If the evidence (either an admission or preponderance proof) shows that the defendant committed a new felony while on probation, “the court may revoke no more than the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the felony offense constituting the violation of the probation.” Stated another way, the court cannot revoke more probation time than the maximum sentence possible for the new offense.[[36]](#endnote-36)
	3. **Note whether the original sentence was under the First Offender Act or Conditional Discharge Act.** If so, the defendant may be resentenced to the maximum sentence that would have been allowed under law at the time of sentencing, but credit for time served on probation must be given upon the resentencing.[[37]](#endnote-37)
3. **Is the defendant admitting or denying the allegations contained in the probation revocation notice?** (no requirement of *Boykin* rights to determine if admission is voluntary).[[38]](#endnote-38) If admission:
	1. **Put on record that the defendant is admitting the probation violation;**
	2. **Swear in probation officer and put basis of revocation on record;[[39]](#endnote-39)**
	3. **Allow for cross examination if desired by defendant.**
4. If there is a plea to a new offense and an admission to the probation revocation, put that **new offense case number on the record** and:
	1. **If there is a plea to the new offense and a probation revoca**tion:
		1. **Put on record that the defendant is admitting the probation violation;**
		2. **Swear in probation officer and put basis of revocation on record;**
		3. **Allow for cross examination if desired by defendant;**
		4. **Go through plea colloquy.[[40]](#endnote-40)**
5. Otherwise, the standard for a probation revocation is “preponderance of the evidence.”[[41]](#endnote-41)

***IF THERE IS NOT AN ADMISSION, TAKE EVIDENCE FROM PROBATION OFFICER, WITNESSES AND DEFENDANT (IF APPLICABLE)—ALLOW FOR CROSS EXAMINATION.[[42]](#endnote-42)***

* 1. Hearsay and all other evidentiary rules are applicable to revocation hearings;[[43]](#endnote-43)
	2. Exclusionary rule not applicable to probation revocation hearings;[[44]](#endnote-44)
	3. Drug test results require proper foundation;[[45]](#endnote-45)
	4. Statement to probation officer (i.e. that defendant used drugs) do not require *Miranda* warnings;[[46]](#endnote-46)
	5. No discovery in probation revocation matters.[[47]](#endnote-47) However, the probationer may subpoena the investigative file for the “new charge.”[[48]](#endnote-48)
	6. There is no Double Jeopardy in probation revocation matters.[[49]](#endnote-49)
	7. The defendant has a right to testify but his testimony at a probation revocation hearing can be used against him in other proceedings.[[50]](#endnote-50)
1. If the alleged probation violation is based upon a failure to pay financial obligations, the court cannot revoke any portion of the sentence unless and until the court finds that the defendant had the ability to pay the obligation and willfully failed to do so by a preponderance of the evidence.[[51]](#endnote-51)
2. ***If not convinced by preponderance of the evidence of the violation, return defendant to probation. If the evidence shows by a preponderance that the defendant has violated the terms of probation, proceed.***
3. **The Court finds that you, \_\_\_\_\_\_\_\_\_\_\_, have violated the terms of probation by a preponderance of the evidence. The Court does hereby revoke your probation as follows:**
	1. Court may revoke, modify or continue the probation, in whole or in part;[[52]](#endnote-52)
	2. Except in First Offender cases, court cannot increase the amount of time beyond what was set in initial sentence;
	3. Defendant is entitled to credit for time served on probation in all cases;[[53]](#endnote-53)
	4. Make a decision on whether you will revoke First Offender or Conditional Discharge status, if any:[[54]](#endnote-54)
	5. Sentence the defendant accordingly but within the maximums allowed for the circumstances (see above re: new offenses, technical violations).
	6. Order whether the revoked sentence will run concurrently or consecutively to any existing sentence.[[55]](#endnote-55)
	7. Determine if there any additional conditions of probation being imposed that were not a part of the original sentence.
	8. Order that all conditions of probation previously ordered shall remain in full force and effect, if applicable.
	9. Note-if sentence is revoked in full, all conditions of probation, including monies owed, are negated.[[56]](#endnote-56)
4. **HABEAS S. O. L. ADVISEMENT**:[[57]](#endnote-57)

**In a felony, usually you have a period of four years from the date that your sentence in this Court becomes final to file a habeas corpus petition. In any misdemeanor case, the Statute of Limitations to file a Habeas Petition is normally one (1) year.**

1. **Consider advising the defendant of his right to an appeal.**
1. “Due process requires that a defendant be given written notice of the claimed violation of his probation prior to the revocation hearing. [Cit.] *Collins v. State*, 151 Ga.App. 116, 117(2), 258 S.E.2d 769 (1979).” *Walcot v. State*, 278 Ga. 664, 667 (2004); *Kitchens v. State*, 234 Ga. App. 785 (1998). [↑](#endnote-ref-1)
2. *Henderson v. State*, 167 Ga. App. 808 (1983); *Jones v. State*, 314 Ga. App. 442 (2012). [↑](#endnote-ref-2)
3. *Campbell v. State*, 280 Ga. App. 561 (2006). [↑](#endnote-ref-3)
4. *Jacoway v. State*, 225 Ga. App. 712 (1997). [↑](#endnote-ref-4)
5. *Oliver v. State*, 169 Ga. App. 716 (1984); *Heath v. State*, 156 Ga. App. 172 (1980). [↑](#endnote-ref-5)
6. O.C.G.A. § 42-8-36(a)(2). [↑](#endnote-ref-6)
7. O.C.G.A. § 42-8-36(a)(3). [↑](#endnote-ref-7)
8. O.C.G.A. § 42-8-36(a)(4). [↑](#endnote-ref-8)
9. *Thompson v. State*, 313 Ga. App. 294, 295 (2011). [↑](#endnote-ref-9)
10. *Thompson v. State*, supra at 296. [↑](#endnote-ref-10)
11. *Hendrix v. State*, 351 Ga. App. 584, 587 (2019), citing *Priest v. State*, 261 Ga. App. 217 (1989) and *Sims v. State*, 214 Ga. App. 443 (1994). [↑](#endnote-ref-11)
12. *Hendrix v. State*, 351 Ga. App. 584, 586 (2019), citing *Collins v. State*. 338 Ga. App. 886, 889 (2016). [↑](#endnote-ref-12)
13. See *Hoosline v. State*, 328 Ga. App. 175 (2014) regarding Conditional Discharge sentences. There is a serious debate concerning what that case holds and how it impacts Conditional Discharge cases. Some argue that the case holds that a Conditional Discharge cannot be “resentenced” to a term longer than the original sentence. The author does not share that view and believes that the case stands for the proposition that you cannot accept a “guilty” plea but, rather, must defer further proceedings under the Conditional Discharge Act. [↑](#endnote-ref-13)
14. O.C.G.A. §42-8-34.1(b). There are older cases which refer to the burden as being “slight evidence.” This is NO LONGER the standard. [↑](#endnote-ref-14)
15. O.C.G.A. § 17-12-23(a)(2) circuit public defender shall provide representation in probation revocation hearings in superior court. See *Torregano v. State*, 361 Ga. App. 65 (2021) where remand required where waiver of counsel in a probation revocation hearing is not made a part of the record. [↑](#endnote-ref-15)
16. O.C.G.A. § 42-8-34.1(b). [↑](#endnote-ref-16)
17. It should be noted that while most of our new Evidence Rules track the Federal Rules of Evidence (“FRE”), there is an important difference that applies to probation revocation hearings. FRE 1101(d)(3) specifically provides that the rules of evidence do not apply to “proceedings for sentencing, granting or revoking probation, and criminal summonses.” That language does not appear in O.C.G.A. §24-1-2. That omission was not accidental. Milich, *Ga. Rules of Evidence*, §1:2, p. 8 (2014-2015 ed.). NOTE: I cannot locate that quote in subsequent editions of Milich’s book – but it remains true. [↑](#endnote-ref-17)
18. O.C.G.A. § 24-1-2. Hearsay is allowed in a parole revocation hearing (administrative hearing) but a probation revocation hearing is not among the listed types of hearings in § 24-1-2 which specifically lists the types of hearings where the evidence rules do not apply. [↑](#endnote-ref-18)
19. *Grimes v. State*, 364 Ga. App. 518 (2022). See also *Ware v. State*, 289 Ga. App. 860, 862 (2008). [↑](#endnote-ref-19)
20. O.C.G.A. §42-8-34.1(c); *Henley v. State*,317 Ga. App. 776 (2012); *Hunt v. State*, 327 Ga. App. 692 (2014). [↑](#endnote-ref-20)
21. O.C.G.A. §42-8-34.1(e). Note that a special condition of probation must have been so identified in the original sentence as a Special Condition. The sentence must have included language that, in the event of a violation of a Special Condition, that the balance of the probated sentence could have been revoked. Note that the new Georgia Sentencing Forms include appropriate language for a Special Condition (provided that the Special Condition was identified as such on the form at the time of sentencing). *Polly v. State*, 323 Ga. App. 893 (2013). [↑](#endnote-ref-21)
22. For the purposes of this Code section, the term “special condition of probation or suspension of the sentence” means a condition of a probated or suspended sentence which:

(1) Is expressly imposed as part of the sentence in addition to general conditions of probation and court ordered fines and fees; and

(2) Is identified in writing in the sentence as a condition the violation of which authorizes the court to revoke the probation or suspension and require the defendant to serve up to the balance of the sentence in confinement. [↑](#endnote-ref-22)
23. *Singleton v. State*, 332 Ga. App. 484, 439-440 (2015). [↑](#endnote-ref-23)
24. *Harrison v. State*, 330 Ga. App. 570 (2015); O.C.G.A. §42-8-34.1(d). *Walker v. State*, 289 Ga. App. 879 (2008). [↑](#endnote-ref-24)
25. O.C.G.A. § 42.8.34.1(c). [↑](#endnote-ref-25)
26. O.C.G.A. § 42-8-34.1(e). [↑](#endnote-ref-26)
27. *Benton v. State*, 314 Ga. 498, 502 (2022). There is a huge difference between merely revoking all or part of a probated sentence and revoking the First Offender *status*. Until there is a revocation of the *status* of being sentenced under the First Offender act, the defendant retains the potential benefits of a First Offender sentence. [↑](#endnote-ref-27)
28. Per O.C.G.A. §17-12-23(a)(2), public defender is to represent probationers at revocation hearings. [↑](#endnote-ref-28)
29. “Due process requires that a defendant be given written notice of the claimed violation of his probation prior to the revocation hearing. [Cit.] *Collins v. State*, 151 Ga.App. 116, 117(2), 258 S.E.2d 769 (1979).” *Walcot v. State*, 278 Ga. 664, 667 (2004); *Kitchens v. State*, 234 Ga. App. 785 (1998). [↑](#endnote-ref-29)
30. *Henderson v. State*, 167 Ga. App. 808 (1983); *Jones v. State*, 314 Ga. App. 442 (2012). [↑](#endnote-ref-30)
31. *Jacoway v. State*, 225 Ga. App. 712 (1997). [↑](#endnote-ref-31)
32. *Oliver v. State*, 169 Ga. App. 716 (1984); *Heath v. State*, 156 Ga. App. 172 (1980). [↑](#endnote-ref-32)
33. *Campbell v. State,* 280 Ga. App. 561 (2006). O.C.G.A. §42-8-36(a). [↑](#endnote-ref-33)
34. O.C.G.A. §42-8-34.1(c); *Henley v. State*,317 Ga. App. 776 (2012); *Hunt v. State*, 327 Ga. App. 692 (2014). [↑](#endnote-ref-34)
35. O.C.G.A. §42-8-34.1(e). Note that a special condition of probation must have been so identified in the original sentence as a Special Condition. The sentence must have included language that, in the event of a violation of a Special Condition, that the balance of the probated sentence could have been revoked. Note that the new Georgia Sentencing Forms include appropriate language for a Special Condition (provided that the Special Condition was identified as such on the form at the time of sentencing). *Polly v. State*, 323 Ga. App. 893 (2013). [↑](#endnote-ref-35)
36. *Harrison v. State*, 330 Ga. App. 570 (2015); O.C.G.A. §42-8-34.1(d). *Walker v. State*, 289 Ga. App. 879 (2008). [↑](#endnote-ref-36)
37. See *Hoosline v. State*, 328 Ga. App. 175 (2014) regarding Conditional Discharge sentences. There is a serious debate concerning what that case holds and how it impacts Conditional Discharge cases. Some argue that the case holds that a Conditional Discharge cannot be “resentenced” to a term longer than the original sentence. The author does not share that view and believes that the case stands for the proposition that you cannot accept a “guilty” plea but, rather, must defer further proceedings under the Conditional Discharge Act. [↑](#endnote-ref-37)
38. *Meadows v. State*, 274 Ga. 858 (2002). [↑](#endnote-ref-38)
39. Putting basis of revocation on record even where there is an admission is a good idea to ensure that everyone is on the same page as to potential punishment. [↑](#endnote-ref-39)
40. The full plea colloquy is a separate document that is available on the CSCJCloud. [↑](#endnote-ref-40)
41. O.C.G.A. §42-8-34.1(b). There are older cases which refer to the burden as being “slight evidence.” This is NO LONGER the standard. [↑](#endnote-ref-41)
42. Cases where the revocation has been overturned for insufficient evidence: *Anderson v. State*, 212 Ga. App. 329 (1994) (drugs-mere presence); *Gonzales v. State*, 276 Ga. App. 11 (2005) (theft by receiving-no evidence defendant possessed stolen property on record); *Parker v. State*, 275 Ga. App. 35 (2005) (burglary-no evidence of entry or possession of stolen property); *Young v. State*, 265 Ga. App. 425 (2004) (theft by deception-no proof of fraudulent intent). [↑](#endnote-ref-42)
43. *Overby v. State*, 237 Ga. App. 730 (1999); *Summerford v. State*, 316 Ga. App. 201 (2012). It should be noted that while most of our new Evidence Rules track the Federal Rules of Evidence (“FRE”), there is an important difference that applies to probation revocation hearings. FRE 1101(d)(3) specifically provides that the rules of evidence do not apply to “proceedings for sentencing, granting or revoking probation, and criminal summonses.” That language does not appear in O.C.G.A. §24-1-2. That omission was not accidental. Milich, *Ga. Rules of Evidence*, §1:2, p. 8 (2014-2015 ed.). [↑](#endnote-ref-43)
44. *State v. Thackston*, 289 Ga. 412 (2011). [↑](#endnote-ref-44)
45. *Bowen v. State*, 242 Ga. App. 631 (2000); *Grinstead v. State*, 269 Ga. App. 820 (2004). [↑](#endnote-ref-45)
46. *Simpson v. State*, 252 Ga. App. 1 (2001) “Generally, a probationer has no 5th Amendment privilege with regard to questions relevant to the status of his or her probation.” See also *Nelson v. State*, 259 Ga. App. 584 (2003). Note that this is a unique situation where the probationer is answering questions to the probation officer, not all law enforcement officers. [↑](#endnote-ref-46)
47. *Baltimore v. State*, 165 Ga. App. 741, 742 (1983). However, the defendant is entitled to notice of charges that meet due process expectations. [↑](#endnote-ref-47)
48. *In re Whittle*, 339 Ga. App. 83 (2016). [↑](#endnote-ref-48)
49. *Smith v. State*, 171 Ga .App. 279 (1984). [↑](#endnote-ref-49)
50. *Bobbitt v. State*, 215 Ga. App. 131 (1994). [↑](#endnote-ref-50)
51. O.C.G.A. §42-8-34.1(f). This includes fines, fees, restitution and any other financial obligation that was made a part of the sentence. *Bearden v. Georgia*, 103 S.Ct. 2064 (1983); *Penaherrara v. State*, 211 Ga. App. 162 (1993). [↑](#endnote-ref-51)
52. O.C.G.A. §42-8-38. [↑](#endnote-ref-52)
53. O.C.G.A. §42-8-38(c). [↑](#endnote-ref-53)
54. O.C.G.A. §42-8-60. Even if the court does not revoke the First Offender or Conditional Discharge status of the defendant, note that GCIC may unilaterally revoke the protections under those acts if a new offense is ultimately added to the defendant’s criminal history. However, GCIC cannot “revoke” First Offender—that is left to the court’s discretion. For purposes of a prior conviction, the court must revoke First Offender or the case will not be a prior conviction, regardless of what GCIC does. *McKinney v. State*, 240 Ga. App. 812 (1999). [↑](#endnote-ref-54)
55. Do not get “out of whack” with this issue. You are sentencing an existing case. If there is another criminal case still pending and not resolved today, that case can potentially be made to run consecutively or concurrently with this sentence, but not the other way around. [↑](#endnote-ref-55)
56. O.C.G.A. §42-8-36(b). [↑](#endnote-ref-56)
57. See O.C.G.A. §9-14-42 (c) and (d). A defendant does have habeas rights as to a probation revocation. *Kemp v. Spradlin*, 250 Ga. 829 (1983). Defendant does have discretionary appeal rights and a request for discretionary review must be filed within 30 days of entry of order revoking probation. O.C.G.A. §5-6-35(a)(5); *Todd v. State*, 236 Ga. App. 757 (1999). [↑](#endnote-ref-57)