

## The Other Special Probation

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*Special probation* is just the statutory term for a split sentence, right? Right. Usually. Did you know there's another "special probation" tucked away in Chapter 90?

In general, when people talk about special probation they are talking about probationary confinement—what everyone usually refers to as a split sentence. Almost every reference to special probation in the General Statutes describes a split. There are minor variations. There's special probation ordered at sentencing under [G.S. 15A-1351\(a\)](#). And special probation ordered in response to a violation of probation under [G.S. 15A-1344\(e\)](#). And special probation to satisfy the mandatory minimum term of imprisonment for a particular level of DWI as described in [G.S. 20-179](#). But those provisions are all talking about incarceration ordered as a condition of probation.

Once in a blue moon, however, somebody asks me about the "special probation" described in [G.S. 90-95\(f\)](#). That provision, part of the Controlled Substances Act, mentions a sentencing option called special probation that is clearly something other than a garden variety split. It's been on the books in one form or another since 1971 (enacted initially by [Session Law 1971-919](#)), which means it actually predates the typical special probation described in G.S. 15A-1351(a). So maybe I should call it the *original* special probation, not the *other* special probation. Either way, recognizing the possibility for confusion, my predecessor here at the School of Government, Stevens Clarke, referred to it in his writing as "post-prison probation for drug offenses." And that's a pretty good description of what it is. Under G.S. 90-95(f),

Any person convicted of an offense or offenses under this Article [the Controlled Substances Act] who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation.

Unpacking the statute a little, you can see there are three eligibility requirements for special probation under G.S. 90-95(f). First, the defendant must be sentenced for a crime in Article 5 of Chapter 90. Those are drug-related crimes, of course, and it appears that any crime set out there—felony or misdemeanor—will do. Second, the defendant must receive an active sentence for that conviction. And third, the sentencing court must not have maxed out the defendant's active term. The defendant must have received some sentence less than the maximum he or she could have received, which I understand to be the highest maximum sentence for which a particular defendant is eligible after proper finding and consideration of aggravating and mitigating factors, if any.

If the defendant meets those requirements, the judge may order a term of special probation to follow the active sentence. Notice that the special probation is *in addition* to the active term—which means it's not really probation in a traditional sense at all. Functionally, I'd say it's more like post-release supervision.

But the statute calls it probation, and specifically says that the administration of it "shall be the same as probation," with conditions "fixed in the same manner as probation." So, unlike post-release supervision, special probation is managed by the courts, and subject to all the usual conditions of probation plus whatever special conditions the court chooses to impose. The length of the probation period may not exceed five years. The statute says that special

probation may be “revoked in the same manner as probation.” I think that means after notice and a hearing, and probably only in response to a new crime or absconding.

An odd thing about this type of special probation is that the defendant’s potential exposure to imprisonment upon revocation isn’t set until probation is actually revoked. Upon revocation, the court decides on the length of the reimprisonment by increasing the original sentence by no more than the difference between the original term of imprisonment and the maximum that could have been imposed. Once the sentence has been increased, the court decides whether the defendant will serve all or part of the increased term.

My sense is that special probation until G.S. 90-95(f) is rarely used now and not likely to be used much in the future. Perhaps there are certain drug cases where a lengthy term of supervision after incarceration makes sense. But nowadays all felons have post-release supervision upon their release from imprisonment from an active term, and that term of PRS probably serves many of the same purposes behind special probation. In fact, it seems to me that a person ordered to this type of special probation would be on both special probation and post-release supervision upon release. There’s nothing inherently wrong with that, but it is a little weird.