

Appellate Cases: Structured Sentencing Act and Firearm Enhancement

I. Structured Sentencing Act Cases—*Blakely v. Washington* Cases

Author’s Note: For a discussion of *Blakely v. Washington* and North Carolina legislation implementing the *Blakely* ruling, see Jessica Smith, “North Carolina Sentencing after *Blakely v. Washington* and the *Blakely* Bill,” (School of Government, September 2005), available online at <http://ncinfo.iog.unc.edu/programs/crimlaw/Blakely%20Update.pdf>.

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

State v. Holmes, 361 N.C. 410, 646 S.E.2d 353 (28 June 2007), *reversing*, 177 N.C. App. 565, 629 S.E.2d 520 (2006). The defendant was convicted and placed on probation with suspended sentences in the aggravated range. He did not appeal his sentences. His probationary sentences were later revoked. He argued on appeal that the suspended sentences in the aggravated range violated the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004). The court ruled, relying on the reasoning in *State v. Noles*, 12 N.C. App. 676 (1971), and *State v. Rush*, 158 N.C. App. 738 (2003), that a defendant appealing a revocation of probation may not collaterally attack on *Blakely* grounds an aggravated suspended sentence imposed when the defendant was convicted and placed on probation. The court stated that a direct appeal from an original judgment lies only when the sentence is originally entered.

No *Blakely* Error Because Defendant Admitted Existence of Factor That Provides One Additional Point in Sentencing

State v. Cupid, 361 N.C. 417, 646 S.E.2d 348 (28 June 2007), *affirming in part and reversing in part*, 173 N.C. App. 448, 618 S.E.2d 874 (2005). The defendant during his sentencing hearing stated to the trial judge that he “was . . . on probation” when the offenses were committed. The court ruled, relying on *State v. Hurt*, 361 N.C. 325 (2007), that the defendant’s statement was an admission of the factor (committing offense while on probation) found by the trial judge that provides one additional point for sentencing. Thus, there was no *Blakely v. Washington*, 542 U.S. 296 (2004), error.

- (1) Court Discusses Use of Special Verdicts in Criminal Cases**
- (2) Court Rules Trial Judge’s Finding of Aggravating Factor in Violation of *Blakely v. Washington* Was Harmless Error Beyond Reasonable Doubt**
- (3) Trial Judge’s Finding of Aggravating Factor Did Not Violate Constitution of North Carolina**

State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006). The defendant was convicted of second-degree murder and other offenses when he drove his vehicle while impaired and crashed into another vehicle, killing one of the occupants. In a sentencing hearing held before the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), the trial judge found the statutory aggravating factor that the defendant was on pretrial release for another charge and imposed a sentence in the aggravated range for the second-degree murder conviction and two other felony

convictions. (1) In responding to one of the defendant's arguments that *Blakely* error was not harmless beyond a reasonable doubt because trial judge allegedly lacked a procedural mechanism by which to submit the aggravating factor to the jury, the court discussed the use of special verdicts in criminal cases. The court stated that North Carolina law permits the submission of aggravating factors to a jury by using a special verdict. [Author's note: The court's discussion was in the context of a sentencing hearing conducted before the *Blakely* ruling and the enactment of the legislation setting out procedures for the jury to find aggravating factors.] (2) The court reviewed the state's evidence at trial, the defendant's failure to object to the prosecutor's statement at sentencing about the defendant being on pretrial release, and the defendant's failure at sentencing to present any arguments or evidence contesting the aggravating factor. It then ruled that the trial judge's finding of aggravating factor in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), was harmless error beyond reasonable doubt. (3) The court ruled that the trial judge's finding of the aggravating factor did not violate Article I, Section 24 of the Constitution of North Carolina. *See also* *State v. Speight*, 361 N.C. 106, 637 S.E.2d 539 (15 December 2006) (court set aside North Carolina Court of Appeals ruling that sentence was erroneously imposed under *Blakely* and remanded case to that court for harmless error analysis not inconsistent with ruling in *State v. Blackwell*, discussed above).

- (1) Trial Judge Did Not Violate Ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), When Judge Found Aggravating Factor But Imposed Sentence in Presumptive Range—Ruling of Court of Appeals Is Reversed**
- (2) Court States That *Blakely* Error Is Not Structural Error, Based on United States Supreme Court Ruling in *Washington v. Recuenco*, and Reversal of a Sentence Is Not Required If Error Is Harmless Beyond a Reasonable Doubt**

State v. Norris, 360 N.C. 507, 630 S.E.2d 915 (30 June 2006), *reversing*, 172 N.C. App. 722, 617 S.E.2d 298 (16 August 2005). (1) The trial judge found an aggravating factor and multiple mitigating factors and sentenced the defendant in the presumptive range. The court ruled, reversing the ruling of the Court of Appeals, that the trial judge did not violate the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), because the sentence was in the presumptive range. The court also noted that while a judge is required to consider evidence of aggravating and mitigating factors in each case, a judge is required to make findings of such factors only if the judge does not sentence a defendant in the presumptive range. (2) The court stated in footnote two that *Blakely* error is not structural error, based on the United States Supreme Court ruling in *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and reversal of a sentence is not required if the error is harmless beyond a reasonable doubt. The court recognized that its prior ruling in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (*Blakely* error is structural error automatically requiring reversal of sentence), was in direct conflict with *Washington v. Recuenco*.

- (1) Overruling Ruling in *State v. Lucas* About What Constitutes “Statutory Maximum,” Court Rules That Under *Blakely v. Washington* Other Than Fact of Prior Conviction, Any Fact That Increases Punishment for Crime Beyond Prescribed Presumptive Range Must Be Submitted to Jury and Proved Beyond Reasonable Doubt**
- (2) Overruling Ruling in *State v. Lucas*, Court Rules That Sentencing Factors That Might Lead to Sentencing Enhancement Are Not Required to Be Alleged in Indictment; Aggravating Factors Are Not Required to be Alleged in Indictment Under *Blakely***
- (3) Court Rules that Provisions in G.S. 15A-1340.16 That Require Judge to Consider Existence of Aggravated Factors Not Admitted to By Defendant or Found By Jury and Permit Judge to Impose Aggravated Sentence After Judge's Finding Aggravating Factors by Preponderance of Evidence Violate Ruling in *Blakely v. Washington***

- (4) Error in Failing to Submit Aggravating Factors to Jury Is Structural Error Under United States Supreme Court Rulings and Harmless Error Review Cannot Be Applied to Defendant's Sentence; Defendant Is Entitled to Resentencing Hearing**
- (5) Court's Rulings Apply to Cases in Which Defendants Have Not Been Indicted As of Certification Date of Opinion (July 21, 2005), and to Cases Now Pending on Direct Review or Are Not Yet Final**

State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), *modifying and affirming*, 166 N.C. App. 139, 601 S.E.2d 299 (7 September 2004). The defendant was convicted by a jury of felonious child abuse inflicting serious bodily injury. At a sentencing hearing without a jury, a judge found an aggravating factor by a preponderance of evidence and sentenced the defendant in the aggravated range. The court stated that the primary question before it was whether sentencing errors that violate a defendant's Sixth Amendment right to a jury trial under *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), may be considered harmless. The court stated that preliminarily it must also examine the effect of *Blakely* on criminal sentencing in North Carolina, and it concluded that *Blakely* applies to the Structured Sentencing Act and provisions in G.S. 15A-1340.16, which is part of that act, violated the Sixth Amendment as interpreted in *Blakely*. What follows is a brief summary of the court's rulings in this case.

(1) Overruling a ruling in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), about what constitutes the "statutory maximum" for an offense, the court ruled that under *Blakely v. Washington* other than fact of prior conviction, any fact that increases punishment for crime beyond the prescribed presumptive range must be submitted to jury and proved beyond reasonable doubt.

(2) Overruling a ruling in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), that the factors constituting a firearm sentencing enhancement under G.S. 15A-1340.16A must be alleged in an indictment, the court ruled that sentencing factors that might lead to a sentencing enhancement are not required to be alleged in an indictment. The court concluded that aggravating factors are not required to be alleged in an indictment under *Blakely*. [Author's note: First, G.S. 15A-1340.16 was amended after the *Lucas* ruling to require the state to allege firearm sentencing enhancement factors in an indictment. Second, Session Law 2005-145 (House Bill 822), effective for offenses committed on or after June 30, 2005, requires that the state to allege non-statutory aggravating factors, see G.S. 15A-1340.16(d)(20), in an indictment. These statutory requirement remain the law notwithstanding the court's ruling that *Blakely* does not require an indictment under federal constitutional law. State statutes may provide greater protections for defendants than provided by federal constitutional law. Third, the court's ruling impacts the charging requirements for offenses not subject to the Structured Sentencing Act, such as DWI and commercial DWI. Under the court's ruling, neither grossly aggravating or aggravating factors need to be alleged in a criminal pleading charging these offenses. *See also* *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (1 July 2005) (applying ruling in *State v. Allen* to DWI trial in superior court). Session Law 2005-145 only affects the charging requirements for offenses subject to the Structured Sentencing Act.]

(3) The court ruled that the provision in G.S. 15A-1340.16 that requires a judge to consider the existence of aggravated factors not admitted to by the defendant or found by the jury and permits a judge to impose an aggravated sentence after the judge finds aggravating factor(s) by a preponderance of evidence violates the ruling in *Blakely v. Washington*. [Author's note: The court clearly indicated that a defendant may admit to the existence of an aggravating factor.]

(4) The court ruled that the sentencing judge's error in failing to submit the aggravating factor in this case to the jury is structural error under United States Supreme Court rulings and harmless error review cannot be applied to the defendant's sentence. The court ruled that the defendant is entitled to a resentencing hearing.

(5) The court ruled that its rulings in this case applied to cases in which defendants have not been indicted as of the certification date of its opinion (July 21, 2005), and to cases now pending on direct review or are not yet final.

- (1) **Under Ruling in *State v. Allen*, Defendant in Superior Court Trial Was Entitled to Jury Determination of Aggravating Factors for Involuntary Manslaughter Convictions and (Non-Conviction) Grossly Aggravating and Aggravating Factors for DWI Conviction**
- (2) **Under Ruling in *State v. Allen*, State Was Not Required to Allege Aggravating Factors in Indictments for Involuntary Manslaughter and Grossly Aggravating and Aggravating Factors in Indictment for DWI**

State v. Speight, 359 N.C. 602, 614 S.E.2d 262 (1 July 2005), *modifying and affirming*, 166 N.C. App. 106, 602 S.E.2d 4 (7 September 2004) The defendant was convicted in a superior court trial of two counts of involuntary manslaughter and one count of DWI involving the crash of his vehicle into another vehicle, killing two of the other vehicle's occupants. At a sentencing hearing without a jury, the trial judge found both statutory and non-statutory aggravating factors by a preponderance of evidence and sentenced the defendant in the aggravated range for the two involuntary manslaughter convictions. At the same sentencing hearing without a jury, the judge found a non-conviction grossly aggravating factor (defendant caused serious injury to another person) and a non-conviction aggravating factor (defendant used a motor vehicle in the commission of a felony that led to the deaths of two people) and sentenced the defendant to a Level Two punishment for the DWI conviction. (1) The court ruled that under the ruling of *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), discussed above, the defendant in the superior court trial of the involuntary manslaughter and DWI offenses was entitled to a jury determination of the aggravating factors in the involuntary manslaughter cases and the (non-conviction) grossly aggravating and aggravating factors in the DWI case. [Author's note: Note that the DWI factors were non-conviction factors and thus subject to the *Blakely* ruling.] The court upheld the remand by the court of appeals to the trial court for resentencing for all three convictions that was consistent with the ruling in *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). (2) The court ruled that under the ruling of *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), discussed above, that the state was not required to allege the aggravating factors in the indictments for involuntary manslaughter and the grossly aggravating and aggravating factors in the indictment for DWI. [Author's note: (1) This ruling would clearly apply to a criminal pleading used by the state in prosecuting DWI in district court. (2) See the author's note in the discussion above in *State v. Allen* concerning Session Law 2005-145, which requires an indictment for non-statutory aggravating factors in Structured Sentencing Act cases for offenses committed on or after June 30, 2005. DWI is not subject to the Structured Sentencing Act.]

- (1) **Trial Judge Erred Under *Blakely v. Washington* in Finding Aggravating Factor (Defendant Committed Offense While on Pretrial Release on Another Charge) and Sentencing Defendant to Aggravated Sentence—Ruling of Court of Appeals Is Affirmed**
- (2) **Court Rules, Relying on Similar Ruling in *State v. Allen*, That It Has Constitutional Authority to Review Court of Appeals Ruling on Defendant's Motion for Appropriate Relief**

State v. Blackwell, 359 N.C. 814, 618 S.E.2d 213 (19 August 2005), *modifying and affirming*, 166 N.C. App. 280, 603 S.E.2d 168 (7 September 2004) (unpublished opinion). (1) The defendant was convicted of second-degree murder and other felonies. The court ruled that the trial judge erred under *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), in finding an aggravating factor (defendant committed offense while on pretrial release on another charge) and

sentencing the defendant to an aggravated sentence. (2) The court ruled, relying on a similar ruling in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), that it has the constitutional authority under Art. IV, Sec. 2, Clause 1 of the Constitution of North Carolina to review a ruling of the North Carolina Court of Appeals on the defendant's motion for appropriate relief made in that court. G.S. 15A-1422(f) (ruling of court of appeals on motions for appropriate relief under G.S. 15A-1415(b) are final and not subject to further review) cannot restrict the supreme court's constitutional authority to do so.

***Blakely v. Washington* Error in Judge's Finding of Aggravating Factors in DWI Sentencing Hearing Was Harmless Beyond Reasonable Doubt**

State v. McQueen, 181 N.C. App. 417, 639 S.E.2d 131 (16 January 2007). The court ruled, relying on *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that *Blakely v. Washington*, 542 U.S. 296 (2004), error in the judge's finding of two aggravating factors in a DWI sentencing hearing was harmless beyond a reasonable doubt. The court ruled that there was overwhelming evidence to support the two aggravating factors (accident caused personal injury and property damage in excess of \$500.00).

Trial Judge Had Authority to Submit Aggravating Factors to Jury as Required by *Blakely v. Washington* Even Though There Was No Statutory Authority to Do So

State v. Johnson, 181 N.C. App. 287, 639 S.E.2d 78 (2 January 2007). The court ruled, relying on *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that the trial judge had the authority to submit aggravating factors to the jury as required by *Blakely v. Washington*, 542 U.S. 296 (2004), even though there was no statutory authority to do so. (Author's note: The trial occurred when statutory law required a judge to make findings of the existence of aggravating factors.)

***Blakely v. Washington* Ruling Was Not Retroactively Applicable to Judgment Entered on 1998 Guilty Plea Because Defendant Did Not Take a Direct Appeal from That Judgment, and Appellate Court Issued Writ of Certiorari in 2002 Limited to Issues That Could Be Raised on Direct Appeal; Case Was Not Pending on Direct Review When *Blakely* Was Decided**

State v. Hasty, 181 N.C. App. 144, 639 S.E.2d 94 (2 January 2007). The court ruled, relying on *State v. Pender*, 176 N.C. App. 688, 627 S.E.2d 343 (21 March 2006), that the *Blakely v. Washington*, 542 U.S. 296 (2004), ruling was not retroactively applicable to a judgment entered on a 1998 guilty plea because the defendant did not take a direct appeal from the judgment, and the North Carolina Court of Appeals had issued a writ of certiorari in 2002 limited to issues that could be raised on direct appeal. The case was not pending on direct review when *Blakely* was decided.

Aggravating Factor (Taking Property of Great Monetary Value) Was Property Found for Class C Felony Embezzlement

State v. Cobb, 187 N.C. App. 295, 652 S.E.2d 699 (20 November 2007). The court ruled, relying on *State v. Simmons*, 65 N.C. App. 804 (1984), and other cases, that the aggravating factor of taking property of great monetary value [G.S. 15A-1340.16(d)(14)], was properly found for two counts of Class C felony embezzlement, which requires proof of loss of \$100,000 or more. One count involved a loss of \$404,436.00 and the other count a loss of \$296,901.00.

- (1) When Court of Appeals Granted Defendant's Writ of Certiorari and Limited Review to Defendant's Sentence Under G.S. 15A-1444(a1) and (a2) Resulting From Defendant's 1995 Guilty Plea, Defendant Could Not Raise *Blakely* Issue**
- (2) Trial Judge Erred in Finding Statutory Aggravating Factor for Sentencing of Armed Robbery Conviction That \$1,300 Taken in Robbery Was Property of Great Monetary Value**

State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343 (21 March 2006). (1) The court ruled that when it granted the defendant's writ of certiorari and limited review to the defendant's sentence under G.S. 15A-1444(a1) and (a2) resulting from 1995 guilty plea, defendant could not raise *Blakely* issue. The court's ruling rested on the retroactivity ruling in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). (2) The court ruled, distinguishing *State v. Simmons*, 65 N.C. App. 804, 310 S.E.2d 139 (1984) (\$2,500 was property of great monetary value), that the trial judge erred in finding a statutory aggravating factor for sentencing of an armed robbery conviction that \$1,300 taken in the robbery was property of great monetary value.

- (1) Alleged *Blakely v. Washington* Error Not Retroactively Applicable to Defendant's Case That Became Final As of December 23, 2003**
- (2) Defendant Did Not Receive Ineffective Assistance of Appellate Counsel Who Had Not Asserted Sentencing Error After Rulings in *Apprendi v. New Jersey* and *Ring v. Arizona* But Before Ruling in *Blakely v. Washington***

State v. Simpson, 176 N.C. App. 719, 637 S.E.2d 271 (21 March 2006). In July 2002 the defendant pled guilty to various offenses. The trial judge found as an aggravating factor that the victim was physically infirm and sentenced the defendant in the aggravated range. The defendant appealed his sentence to the North Carolina Court of Appeals, which upheld his sentence in a ruling that became "final" on December 23, 2003 (for retroactivity purposes, the date the defendant's time expired for seeking discretionary review by the North Carolina Supreme Court of the North Carolina Court of Appeals opinion). On October 15, 2004, a trial judge denied the defendant's motion for appropriate relief based on *Blakely* error (failing to submit aggravating factor to jury when sentence had been imposed in aggravated range). The North Carolina Court of Appeals allowed the defendant's writ of certiorari limited to the issues of retroactive application of *Blakely* and ineffective assistance of counsel. (1) The court noted that the defendant's case was before it on collateral, not direct review. The court ruled, relying on *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (ruling applicable to cases not yet indicted, on direct review, or not yet final as of *Allen*'s certification date, July 21, 2005). that *Blakely* was not retroactively applicable to defendant's sentence because his case had become final before July 21, 2005. (2) The court ruled that the defendant did not receive ineffective assistance by appellate counsel who had not asserted sentencing error after the rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), but before the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004). The court also rejected an ineffective-assistance-of-counsel claim based on the assertion that appellate counsel in 2003 should have pursued the case to the North Carolina Supreme Court and United States Supreme Court. The court ruled that the defendant had no constitutional right to counsel after the initial appeal, and thus there cannot be ineffective assistance of counsel for failing to pursue an appeal after the initial appeal.

Court Applies Ruling in *Blakely v. Washington* to 1988 Conviction When Direct Appellate Review Had Been Allowed by Writ of Certiorari in 2000 and Was Pending in 2004 When *Blakely* Was Decided

State v. Upshur, 176 N.C. App. 174, 625 S.E.2d 911 (21 February 2006). The defendant was convicted in 1988 of first-degree rape and assault with a deadly weapon inflicting serious injury. The defendant did not exercise his right to appeal his convictions. The court of appeals in 2000 allowed review of the convictions by writ of certiorari. The court applied the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), to the imposition of an aggravated range sentence for the 1988 conviction of assault with a deadly weapon inflicting serious injury and remanded for a new sentencing hearing. The court noted that the defendant's appeal of this conviction was pending in the court of appeals when *Blakely* was decided.

There Was No Factual Basis to Find That Any Stipulation to Aggravating Factors by Defendant or Defense Counsel Was Knowing and Intelligent Waiver of Constitutional Right to Jury Determination of Existence of Aggravating Factors Under *Blakely v. Washington*

State v. Harris, 175 N.C. App. 360, 623 S.E.2d 588 (3 January 2006). The defendant was convicted of second-degree murder and was sentenced by a judge to an aggravated range punishment. The judge, not a jury, found the existence of the aggravating factors. The court ruled that there was no factual basis to find that any stipulation to aggravating factors by the defendant or defense counsel was a knowing and intelligent waiver of the constitutional right to a jury determination of the existence of aggravating factors under *Blakely v. Washington*, 542 U.S. 296 (2004). The court stated that in light of *Blakely* and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), the relevant inquiry is not whether the defendant stipulated to a factual basis for a finding of an aggravating factor by the trial judge, but rather whether the defendant effectively waived his or her constitutional right to have a jury determine the existence of an aggravating factor. The court remanded for a resentencing hearing where the state either proves aggravating factors before a jury or the defendant admits to the existence of aggravating factors by a waiver of the constitutional right to a jury trial through a knowing and intelligent surrender of that right.

No *Blakely v. Washington* Error When Judge Found Aggravating Factor and Sentenced Defendant to Minimum Term of Imprisonment in Aggravated Range for Class C Felony, Prior Record Level IV, When Minimum Term Was the Same Number of Months (133) as Highest Number of Months (133) Authorized in Presumptive Range for Class C Felony, Prior Record Level IV

State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292 (15 November 2005). The court ruled that there was no error under *Blakely v. Washington*, 542 U.S. 296 (2004), when the sentencing judge found an aggravating factor and sentenced the defendant to a minimum term of imprisonment in the aggravated range for a Class C felony, Prior Record Level IV, when the minimum term was the same number of months (133) as the highest number of months (133) authorized in the presumptive range for a Class C felony, Prior Record Level IV. The court stated, relying on the ruling in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), that because the defendant's sentence fell within the presumptive range, the trial judge's finding of an aggravating factor not admitted by the defendant or submitted to the jury did not violate *Blakely*.

Error Under Ruling in *Blakely v. Washington* Occurred When Judge Revoked Probation and Activated Suspended Sentences That Had Been Unconstitutionally Aggravated Under *Blakely*

State v. McMahan, 174 N.C. App. 586, 621 S.E.2d 319 (15 November 2005). The court ruled that error occurred under the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), when a judge revoked the defendant's probation and activated suspended sentences that had been unconstitutionally aggravated under *Blakely*. The judge who imposed the probationary sentence

had found an aggravating factor and imposed a suspended sentence in the aggravated range. The court also ruled that the *Blakely* rulings in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), and *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005), applied to this case because the defendant's assignment of sentencing error was pending on appeal on the date the *Allen* and *Speight* opinions were certified.

No Error Under *Blakely v. Washington* When Superior Court Judge in DWI Sentencing Hearing Found Existence of Grossly Aggravating Factors Involving Prior DWI Convictions

State v. Tedder, 169 N.C. App. 446, 610 S.E.2d 774 (5 April 2005). The defendant was convicted of DWI in superior court. The judge at the sentencing hearing found the existence of two grossly aggravating factors consisting of two prior convictions of DWI committed within seven years preceding the offense for which the defendant was being sentenced. The court rejected the defendant's argument that a jury must make the finding of these grossly aggravating factors, noting the exception from the jury requirement in *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), for the finding of prior convictions in imposing aggravated sentences.

Aggravating Factors Must Be Proved Before Jury Under *Blakely v. Washington*: (1) Defendant Committed Offense While on Pretrial Release on Another Charge; (2) Defendant Joined With More Than One Other Person in Committing Offense and Was Not Charged with Committing Conspiracy; (3) Defendant Had Previously Been Adjudicated Delinquent for Offense That Would Be Class A Through E Felony If Committed By Adult

State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258 (2 August 2005). The court ruled that the following aggravating factors must be proved before a jury (unless admitted by the defendant) under *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004): (1) the defendant committed the offense while on pretrial release on another charge; (2) the defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy; and (3) the defendant had previously been adjudicated delinquent for an offense that would be a Class A, B, B1, B2, C, D, or E felony if committed by an adult. The court stated that factors (1) and (2) were not prior convictions excepted from the *Blakely* ruling. The court stated that factor (3) is not a prior conviction under the statutory language in G.S. 7B-2412 ("adjudication that a juvenile is delinquent . . . shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights.") [Author's note: The ruling concerning the aggravating factor in (3) above effectively invalidates the provision in Session Law 2005-145 (House Bill 822), effective for offenses committed on or after June 30, 2005, that would permit the determination of that aggravating factor by a judge instead of by a jury. See G.S. 15A-1340.16(d), as amended by the session law.]

Under *Blakely v. Washington*, Defendant Has Right to Jury Determination Concerning Assigning One Point to Prior Record Level Under G.S. 15A-1340.14(b)(7) (Offense Committed While Defendant on Probation, Parole, Etc.)

State v. Wissink, 172 N.C. App. 829, 617 S.E.2d 319 (16 August 2005). The court ruled that under *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), a defendant has the right to a jury determination concerning the assignment of one point to a defendant's prior record level under G.S. 15A-1340.14(b)(7) (offense committed while defendant was on probation, parole, etc.). [Author's note: Session Law 2005-145 (House Bill 822), effective for offenses committed on or after June 30, 2005, is consistent with this ruling.]

Neither *Blakely v. Washington* Nor *State v. Allen* Bar Sentencing Judge from Finding One Point Under G.S. 15A-1340.14(b)(6) (All Elements of Present Offense Are Included in Prior Offense For Which Defendant Was Convicted) in Calculating Defendant's Prior Record Level

State v. Poore, 172 N.C. App. 839, 616 S.E.2d 639 (16 August 2005). The court ruled that neither *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), nor *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), bar a sentencing judge from finding one point under G.S. 15A-1340.14(b)(6) (all elements of present offense are included in prior offense for which defendant was convicted) in calculating the defendant's prior record level. The court stated that this finding is akin to the judge's determination that the defendant had in fact been convicted of a prior offense. Thus, a defendant is not entitled to a jury trial on this issue. [Author's note: Session Law 2005-145 (House Bill 822), effective for offenses committed on or after June 30, 2005, would permit the determination of the point by a judge instead of by a jury. See G.S. 15A-1340.14(a), as amended by the session law.]

- (1) Defendant's Stipulation to Aggravating Factor at Sentencing Hearing Held Before Rulings in *Blakely v. Washington* and *State v. Allen* Was Insufficient Admission to Aggravating Factor**
- (2) Court Under Ruling in *State v. Allen* Remands Case for Resentencing Hearing**

State v. Everette, 172 N.C. App. 237, 616 S.E.2d 237 (2 August 2005). [Author's note: There was a dissenting opinion in this case, but not on these rulings.] (1) The defendant was convicted of various offenses. At a sentencing hearing conducted before the rulings in *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), there was a colloquy that included a stipulation by defense counsel to the aggravating factor that the defendant was on pretrial release when committing the offenses for which he was convicted. The court noted that the defendant was not aware of his right to have a jury determine the existence of aggravating factors, and thus the defendant's stipulation to the aggravating factor was not a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. The court ruled that the defendant did not knowingly and effectively stipulate to this aggravating factor nor waive his right to a jury trial on this issue. See also *State v. Meynardie*, 172 N.C. App. 829, 616 S.E.2d 21 (2 August 2005) (similar ruling); *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319 (16 August 2005) (similar ruling). (2) The defendant argued that the case should not be remanded for a new sentencing hearing because there are no statutory provisions by which a jury can determine whether aggravating factors exist. Instead, the defendant argued, the defendant should be resentenced at not greater than the mitigated range because the trial judge had correctly found a mitigating factor. The court ruled that the North Carolina Supreme Court in *State v. Allen* had stated that the proper procedure when appellate review reveals a *Blakely* error is to simply remand for resentencing. The court therefore remanded the case for resentencing. [Author's note: In *State v. Norris*, 360 N.C. App. 507, 617 S.E.2d 298 (16 August 2005), *reversed on other grounds*, 360 N.C. 507, 630 S.E.2d 915 (30 June 2006), the court stated that on remand for resentencing for *Blakely* error, the trial court is instructed to submit any aggravating factor to the jury for proof beyond a reasonable doubt. If the jury finds an aggravating factor, the trial court may then balance aggravating and mitigating factors and impose a sentence.]

No Error Under *Blakely v. Washington* or *State v. Allen* When Trial Judge Found Aggravating Factor and Sentenced Defendant in Aggravated Range Based on Defendant's Oral Stipulation and Written Plea Agreement That He Would Be Sentenced in Aggravated Range

State v. Dierdorf, 173 N.C. App. 753, 620 S.E.2d 305 (18 October 2005). At the defendant's guilty plea hearing, he orally stipulated that he would be sentenced in the aggravated range for the three convictions to which he had pled guilty. The defendant's written plea agreement stated that upon the defendant's guilty pleas, he stipulated that he shall be sentenced in the aggravated range for each of the three convictions. The court quoted from language in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (allowing a sentence in the aggravated range to be based on the defendant's admission to an aggravating factor), and discussed the ruling in *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005), about what constitutes a stipulation to a prior record level. The court noted that the defendant did not object to the state's summation of the facts nor to the trial judge's finding of an aggravating factor. The court ruled that because the defendant agreed to be sentenced in the aggravated range and did not object to the trial judge's finding of an aggravating factor, the defendant stipulated to the existence of the aggravating factor. Thus, the defendant's sentence in the aggravated range was not error under *Blakely v. Washington*, 542 U.S. 296 (2004), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). [Author's note: Compare this ruling with rulings in *State v. Everette*, 172 N.C. App. 237, 616 S.E.2d 237 (2 August 2005) (stipulation to aggravating factor when neither *Blakely* nor *Allen* had been decided was not knowing and effective stipulation); *State v. Meynardie*, 172 N.C. App. 829, 616 S.E.2d 21 (2 August 2005) (similar ruling); and *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319 (16 August 2005) (similar ruling concerning stipulation to probationary status when offense committed).]

No Right to Jury Trial Under *Blakely v. Washington* on Finding of Prior Convictions in Determining Defendant's Prior Record Level or Finding That Defendant's Out-of-State Convictions Were Substantially Similar to Offense Under North Carolina Law

State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417 (17 January 2006). The court ruled, distinguishing *Shepard v. United States*, 544 U.S. 13 (2005), that the defendant in this case did not have a right to a jury trial under *Blakely v. Washington*, 542 U.S. 296 (2004), concerning the findings of prior convictions in determining the defendant's prior record level or that the defendant's out-of-state convictions were substantially similar to offenses under North Carolina law.

United States Supreme Court Rules That "Statutory Maximum" for Purposes of Ruling in *Apprendi v. New Jersey* Is Maximum Sentence Judge May Impose Solely Based on Facts Reflected in Jury Verdict or Admitted by Defendant

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (24 June 2004). The defendant in a Washington state court pled guilty to kidnapping, which was a Class B felony punishable by imprisonment up to 10 years. However, other provisions of state law limited the sentence to a "standard range" of 49 to 53 months. The judge conducted a hearing, heard evidence, found as an aggravating factor that the defendant had acted with "deliberate cruelty," and imposed a sentence of 90 months, which exceeded the standard range maximum, but not the 10-year maximum for Class B felonies. A Washington appellate court upheld the defendant's sentence. The Court reversed. The Court stated that this case required it to apply the *Apprendi* ruling, which it quoted: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." The Court noted that the defendant was sentenced to more than 3 years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by the

defendant nor found by a jury beyond a reasonable doubt. The Court stated that its precedents make clear that

the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority (emphasis in original opinion; citations and internal quotations omitted).

The Court stated that the sentencing judge in this case could not have imposed the 90-month sentence solely based on the facts admitted in the defendant’s guilty plea. The judge’s authority to impose to impose the 90-month sentence came only from finding the additional fact that the defendant had acted with “deliberate cruelty.” The Court concluded that because this additional fact was not admitted by the defendant or submitted to a jury and proven beyond a reasonable doubt, the defendant’s sentence was constitutionally invalid.

II. Structured Sentencing Act Cases

Conviction After Original Sentencing Was Properly Used to Calculate Defendant’s Prior Record Level at Resentencing Hearing

State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917 (18 September 2007). The defendant was convicted of two offenses and sentenced under Prior Record Level I. He appealed to the North Carolina Court of Appeals, which ordered a new sentencing hearing. The defendant was convicted of another offense after the original sentencing hearing and before the resentencing hearing. The trial judge at the resentencing hearing determined based on the new conviction that the defendant must be sentenced under Prior Record Level II. The court ruled that the trial judge did not err in using the new conviction to calculate the defendant’s prior record level at the resentencing hearing. (Author’s note: The length of the defendant’s sentence imposed at the resentencing hearing did not exceed the original sentence.)

(1) Rules of Evidence Do Not Apply to Sentencing Hearings

(2) Ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), Does Not Apply to Non-Capital Sentencing Hearing

State v. Sings, 182 N.C. App. 162, 641 S.E.2d 370 (6 March 2007). (1) The court ruled, citing Rule 1101(b)(3) and G.S. 15A-1334(b), that the rules of evidence do not apply at a sentencing hearing. (2) The court ruled, relying on the rationale of *State v. Phillips*, 325 N.C. 222, 381 S.E.2d 325 (1989), and distinguishing *State v. Bell*, 359 N.C. 1, 603 S.E.2d 2004, that the ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to a non-capital sentencing hearing.

“Law of the Case” Doctrine Did Not Bar State at Resentencing Hearing From Presenting New Evidence and Arguing for Higher Prior Record Level

State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357 (6 March 2007). The defendant was convicted of second-degree sexual offense and was sentenced to an aggravated sentence in Prior Record Level I. The defendant appealed and the North Carolina Court of Appeals ordered a new

sentencing hearing based on *Blakely v. Washington*, 542 U.S. 296 (2004). The state did not appeal any issue relating to the defendant’s sentence. The trial judge on remand sentenced the defendant to a presumptive sentence in Prior Record Level I. Two days later during the same superior court term, the state presented evidence of a prior conviction that it had just discovered. The trial judge accepted the state’s evidence and modified the sentence to a presumptive sentence in Prior Record Level II. The court ruled that the “law of the case” doctrine did not bar state at resentencing from presenting new evidence and arguing for a higher prior record level even though it had not previously raised the issue of an incorrect prior record level by appeal to the court of appeals from the original sentence. The court stated that the doctrine is limited to issues actually presented and necessary for the determination of the case.

Trial Judge’s Calculation of Defendant’s Prior Record Level Was Proper, Based on Two Independent Grounds: (1) Defendant Stipulated to Prior Record Worksheet, and (2) Judge Used Reliable Method to Calculate Prior Record Level—Ruling of Court of Appeals Is Reversed

State v. Alexander, 359 N.C. 824, 616 S.E.2d 914 (2005), *reversing*, 167 N.C. App. 79, 604 S.E.2d 361 (2004). The defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury under a plea agreement for a presumptive sentence of 80 to 105 months’ imprisonment, which constituted the minimum and maximum term of imprisonment in the presumptive range under Prior Record Level II for a Class C felony. The trial judge calculated the defendant’s Prior Record Level as level II, based on a conviction of a Class A1 misdemeanor listed on the prior record level worksheet. Defense counsel remarked to the trial judge at the sentencing hearing that the defendant was a single man with no prior felony convictions, as indicated by the prior record worksheet. The court stated that counsel’s statement indicated not only that he was cognizant of the contents of the worksheet, but also that he had no objections to it. He implicitly indicated that the defendant’s prior misdemeanor conviction was properly reflected in the worksheet. The court ruled, relying on *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985), that under these circumstances counsel’s statement constituted a stipulation to the defendant’s prior record level and thus it was properly found by the trial judge. The court also ruled that the trial judge properly calculated the defendant’s prior record level because the judge used a “method found by the court to be reliable” under G.S. 15A-1340.14(f)(4)—relying on defense counsel’s statements concerning the defendant’s prior record level, counsel’s invitation to consult the prior record worksheet, and the judge’s knowledge of the plea agreement.

Defense Lawyer’s Colloquy With Judge at Sentencing Hearing Constituted Stipulation to Defendant’s Convictions Set Out in Sentencing Worksheet

State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677 (4 April 2006). The court ruled, relying on *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005), that although a sentencing worksheet, without more, is insufficient to prove the defendant’s convictions set out in the worksheet, the defense lawyer’s colloquy with the trial judge at the sentencing hearing constituted a stipulation to the defendant’s convictions. Defense counsel specifically acknowledged some of the convictions in the worksheet and then used information in it to minimize the defendant’s prior record as nonviolent. Counsel never disputed any of the convictions in the worksheet.

Stipulation Signed by Prosecutor and Defense Counsel in Section III of AOC-CR-600 Supported Judge’s Finding of Defendant’s Prior Record Level

State v. Hussey, ___ N.C. App. ___, ___ S.E.2d ___ (16 December 2008). The court ruled that a stipulation signed by the prosecutor and defense counsel in Section III of AOC-CR-600

(worksheet on prior record level) supported the judge's finding of the defendant's prior record level. The court distinguished *State v. Jeffrey*, 167 N.C. App. 575 (2004) (presentation of worksheet to judge is insufficient to support judge's finding of prior record level), because AOC-CR-600 in that case did not contain a stipulation. [Author's note: The worksheet in *Hussey* apparently did not contain out-of-state convictions that would require an appropriate judicial finding; see *State v. Palmateer*, 179 N.C. App. 579 (2006).]

Stipulation to Existence of One Point for Prior Record Level Based on All Elements in Current Offense Are Included in Prior Offense Was Ineffective Because Stipulation to Legal Issue Is Not Permitted

State v. Prush, 185 N.C. App. 472, 648 S.E.2d 556 (21 August 2007). The court ruled, relying on *State v. Hanton*, 175 N.C. App. 250 (2006), that a stipulation to the existence of one point for a prior record level based on all the elements in the current offense are included in a prior offense was ineffective because a stipulation to a legal issue is not permitted.

Defendant Cannot Stipulate in Prior Record Worksheet That Out-of-State Conviction Was Substantially Similar to North Carolina Offense Because Stipulation to Question of Law Is Invalid

State v. Palmateer, 179 N.C. App. 579, 634 S.E.2d 592 (19 September 2006). The court ruled, relying on *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006), that a defendant cannot stipulate in a prior record worksheet that an out-of-state conviction is substantially similar to a North Carolina offense because a stipulation to a question of law is invalid.

Defendant's Stipulation That Out-of-State Conviction Was Substantially Similar to North Carolina Offense Was Ineffective Because Judge Must Make Finding

State v. Lee, ___ N.C. App. ___, 668 S.E.2d 393 (18 November 2008). The defendant stipulated during the sentencing hearing that a New Jersey conviction was substantially similar to a North Carolina offense for the prior record level points allocation. The court ruled, relying on *State v. Palmateer*, 179 N.C. App. 579 (2006), that the stipulation was ineffective because the "substantially similar" issue is a question of law that the judge must make.

Stipulation Signed by Prosecutor and Defense Counsel in Section III of AOC-CR-600 Supported Judge's Finding of Defendant's Prior Record Level

State v. Hussey, ___ N.C. App. ___, 669 S.E.2d 864 (16 December 2008). The court ruled that a stipulation signed by the prosecutor and defense counsel in Section III of AOC-CR-600 (worksheet on prior record level) supported the judge's finding of the defendant's prior record level. The court distinguished *State v. Jeffrey*, 167 N.C. App. 575 (2004) (presentation of worksheet to judge is insufficient to support judge's finding of prior record level), because AOC-CR-600 in that case did not contain a stipulation. [Author's note: The worksheet in *Hussey* apparently did not contain out-of-state convictions that would require an appropriate judicial finding; see *State v. Palmateer*, 179 N.C. App. 579 (2006).]

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Trial Judge Did Not Err in Finding as Non-Statutory Aggravating Factor That Defendant Joined With One Other Person in Committing Offense and Was Not Charged with Committing Conspiracy to Rob Victim—Ruling of Court of Appeals Is Reversed

State v. Hurt, 359 N.C. 840, 616 S.E.2d 910 (19 August 2005), *reversing*, 163 N.C. App. 429, 594 S.E.2d 51 (6 April 2004). The defendant was convicted of second-degree murder. The evidence showed that the defendant and one other person murdered and robbed the victim. The court ruled, relying on *State v. Manning*, 327 N.C. 608, 398 S.E.2d 319 (1990), that the trial judge did not err in finding as a non-statutory aggravating factor that the defendant joined with one other person in committing the offense and was not charged with committing a conspiracy to rob the victim. The evidence supporting this aggravating factor was reasonably related to the purposes of sentencing. The court rejected the defendant’s argument that such evidence was insufficient for a non-statutory aggravating factor because the legislature has already determined that increased culpability stems from a defendant’s participation with “more than one other person” in committing an offense and not charged with conspiracy, a statutory aggravating factor under G.S. 15A-1340.16(d)(2).

**(1) Plea of No Contest and PJC Is Conviction under Structured Sentencing Act (SSA)
(2) Judge Properly Found Aggravating Factor under SSA that Offense Was Committed Against Victims Because of Their Nationality [G.S. 15A-1340.16(d)(17)]**

State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815 (1 February 2000). The defendant was convicted of two counts of armed robbery. (1) The court ruled that the trial judge did not err—in determining the defendant’s prior record level under the Structured Sentencing Act (SSA)—by including an offense to which he had pleaded no contest and for which prayer for judgment was continued. The court noted that G.S. 15A-1340.11(7) provides that a defendant “has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime . . . ,” and G.S. 15A-1331(b) provides that “[f]or the purpose of imposing sentence, a person has been convicted when he had been adjudged guilty or entered a plea of guilty or no contest.” (2) The court ruled that the trial judge did not err in finding the aggravating factor under SSA that the armed robbery offenses were committed against the Hispanic victims because of their nationality. See G.S. 15A-1340.16(d)(17). The accomplice had testified that he and the defendant had selected the victims because they thought Hispanics carried large sums of cash and were less likely to report crimes committed against them. The court rejected the defendant’s argument that this aggravating factor required evidence that the defendant had some animus against the victim because of the victim’s nationality.

PJC in District Court Properly Counted as Prior Conviction for Felony Sentencing Under Structured Sentencing Act

State v. Graham, 149 N.C. App. 215, 562 S.E.2d 286 (5 March 2002). Relying on *State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000), the court ruled that a PJC entered in district court was properly counted as a prior conviction for felony sentencing under the Structured Sentencing Act. [Author’s note: although not stated in the court’s opinion, presumably the PJC was for a Class A or A1 misdemeanor—see G.S. 15A-1340.14(5)].

Defendant's Guilty Plea to Assault on Female Resulting in PJC Is Conviction Under Structured Sentencing Act

State v. Canellas, 164 N.C. App. 775, 596 S.E.2d 889 (15 June 2004). The court ruled, relying on *State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000), that the defendant's guilty plea to assault on a female that resulted in a PJC is a conviction under the Structured Sentencing Act. Thus the trial judge did not err in using the PJC as a conviction in determining the defendant's prior record level.

Although Judge Must Consider Mitigating Factors, Judge Has No Duty to Find Mitigating Factors, Even If Preponderance of Evidence Supports Their Finding, When Judge Imposes Sentence in Presumptive Range

State v. Brown, 176 N.C. App. 72, 626 S.E.2d 307 (21 February 2006). The court noted that although a judge must consider evidence of mitigating factors, it is within the judge's discretion whether to depart from the presumptive range. A judge has no duty to find mitigating factors, even if a preponderance of evidence supports their finding, when the judge imposes a sentence in the presumptive range.

Trial Judge Committed Plain Error By Sentencing Defendant in Presumptive Range Without Allowing Defendant Opportunity to Present Evidence of Mitigating Factors

State v. Knott, 164 N.C. App. 212, 595 S.E.2d 172 (4 May 2004). The court ruled, relying on *State v. Kemp*, 153 N.C. App. 231, 569 S.E.2d 717 (2002), the trial judge committed plain error by sentencing the defendant in the presumptive range without allowing the defendant an opportunity to present evidence of mitigating factors.

Proper Remedy Under Defendant's Motion for Appropriate Relief When Defendant Was Sentenced to Illegal Concurrent Sentence Pursuant to Plea Agreement Was to Allow Defendant to Withdraw Guilty Plea; Judge Had No Authority to Order Sentence to Run Concurrently

State v. Ellis, 361 N.C. 200, 639 S.E.2d 425 (26 January 2007), *reversing*, 167 N.C. App. 276, 605 S.E.2d 168 (7 December 2004). The defendant pled guilty to armed robbery in 1992 when the law required the sentence to run consecutively to any sentences being served. However, the state and the defendant in the plea agreement agreed that the sentence would run concurrently with the sentences the defendant was then serving. The judge sentenced the defendant for the armed robbery, but did not indicate whether it was to run concurrently or consecutively. The Department of Correction recorded the sentence as consecutive to the sentence he then was serving. The defendant filed a motion for appropriate relief requesting that he be allowed to withdraw his guilty plea. The trial court judge hearing the motion for appropriate relief instead ordered the sentence to run concurrently. The court ruled, relying on *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), that the proper remedy was to allow the defendant to withdraw his guilty plea, and the defendant could proceed to trial or attempt to negotiate another plea agreement. The judge at the MAR hearing had no authority to order the sentence to run concurrently. The defendant was not entitled to specific performance of the plea agreement that would result in an illegal sentence.

Department of Correction Has No Authority to Modify Illegal Sentence, But Department Must Notify Trial Court and Parties That Sentence and Judgment Are Not in Accordance With State Law and Must Be Vacated

Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856 (20 November 2001). This case involved a lawsuit by several prisoners against the Department of Correction concerning the department's modifications of their sentences that disadvantaged them. The department determined that a prisoner, who was sentenced to CYO (Committed Youthful Offender) status under the Fair Sentencing Act, did not qualify for that status and refused to consider her for immediate parole. The department determined that two prisoners who received concurrent sentences were ineligible for concurrent sentences and informed them that their sentences would run consecutively. The court, distinguishing *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), upheld the trial court's ruling that the Department of Correction has no authority to modify an illegal sentence, but the department must notify the trial court and parties that the sentence and judgment are not in accordance with state law and must be vacated.

Trial Judge under Structured Sentencing Act Must Make Written Findings in Imposing Sentence in Other Than Presumptive Range Even If Plea Agreement Gave Trial Judge Discretion in Sentencing

State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138 (19 October 1999). The defendant pleaded guilty pursuant to a plea agreement that provided that the defendant would receive a Class E, Level I, sentence "in the court's discretion." The trial judge sentenced the defendant in the aggravated range for Class E, Level I, but without making written findings of aggravating factor(s) and mitigating factor(s) and that the aggravating factor(s) outweighed the mitigating factor(s). The court ruled that the trial judge erred in failing to make the proper findings [see G.S. 15A-1340.16(b) and (c)] when sentencing the defendant in the aggravated range. The court noted that the Structured Sentencing Act, unlike the Fair Sentencing Act, does not contain a specific statutory exception to required findings when deviating from the presumptive range if a sentence is imposed pursuant to a plea agreement.

No Error in Calculating Prior Record Level For Murder and Attempted Murder Convictions to Assign Points to Both Prior Felony Drug Conviction and To Prior Conviction of Possession of Firearm by Felon, in Which Felony Drug Conviction Was Element of Possession of Firearm by Felon

State v. Goodwin, ___ N.C. App. ___, 661 S.E.2d 46 (20 May 2008). The court ruled that there was no error in calculating the defendant's prior record level for second-degree murder and attempted first-degree murder convictions to assign points to both a prior felony drug conviction and to a prior conviction of possession of firearm by felon, in which the felony drug conviction was an element of possession of firearm by felon. The court reasoned, distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), that possession of firearm by felon is a separate substantive offense from the defendant's prior felony drug conviction on which his status as a felon was based.

Impaired Driving Convictions Used to Prove Offense of Habitual Impaired Driving May Not Be Used to Calculate Defendant's Prior Record Level

State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (21 September 1999). The defendant was convicted of habitual impaired driving (G.S. 20-138.5). When calculating the defendant's prior record level at sentencing, the judge included points for the three DWI convictions that were used at trial to prove the offense. The court ruled that the judge erred. The court noted the specific statutory restriction in G.S. 14-7.6 that prohibits the use of convictions in establishing habitual felon status to calculate a defendant's prior record level, and concluded that the legislature

intended that impaired driving convictions used to prove habitual impaired driving may not also be used to calculate a defendant's prior record level.

Defendant's Prior Record Calculation Properly Included Three Prior DWI Convictions Even Though Those Convictions Formed Basis for Two Habitual DWI Convictions, Which Also Were Included in Calculation

State v. Hyden, 175 N.C. App. 576, 625 S.E.2d 125 (17 January 2006). The court ruled, relying on *State v. Vardiman*, 146 N.C. App. 381, 552 S.E.2d 697 (2001), and distinguishing *State v. Baldwin*, 117 N.C. App. 713, 453 S.E.2d 193 (1995), that the defendant's prior record calculation properly included three prior DWI convictions even though those convictions formed the basis of two habitual DWI convictions, which also were included in the calculation. The trial judge properly counted all five convictions in determining the defendant's prior record level. Each conviction resulted from a separate offense.

Prior DWI Convictions Admitted at Trial to Prove Malice for Second-Degree Vehicular Murder Were Properly Used as Points in Calculating Defendant's Prior Record Level

State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700 (7 March 2006). (Author's note **There was a dissenting opinion in this case, but not on this issue.**) The defendant was convicted of second-degree murder involving a vehicular crash. The court ruled that the defendant's prior DWI convictions admitted at trial to prove malice for second-degree vehicular murder were properly used as points in calculating the defendant's prior record level. The court stated that the prohibition in G.S. 15A-1340.16(d) (proof of element of offense may not also be used to prove aggravating factor) does bar the use of the same evidence to calculate a prior record level. The court noted that the legislature in G.S. 14-7.6 has specifically prohibited using prior convictions to calculate a prior record level when the convictions were used to prove habitual felon status. [Author's note: The court also ruled in *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999), that DWI convictions used to prove habitual DWI may not be used to calculate the defendant's prior record level.]

Felony Conviction That Triggered Requirement Defendant Register as Sex Offender Was Properly Used to Determine Defendant's Prior Record Level

State v. Harrison, 165 N.C. App. 332, 598 S.E.2d 261 (6 July 2004). The defendant, a registered sex offender, was convicted under G.S. 14 208.11(a)(2) of failing to notify the registering sheriff of a change of address. The court ruled that the felony conviction (second-degree rape) that triggered the requirement that the defendant register as a sex offender was properly used to determine the defendant's prior record level. It did not violate double jeopardy to do so.

- (1) Trial Court Erred in Sentencing Habitual Felon to Less Than Required Minimum and Maximum Terms of Imprisonment for Class C Felon, Prior Record Level IV**
- (2) Trial Court Erred in Requiring Habitual Felon Sentence to Run Concurrently with Federal Prison Sentence That Defendant Was Then Serving**

State v. Watkins, ___ N.C. App. ___, 659 S.E.2d 58 (15 April 2008). The defendant pled guilty to financial card theft and habitual felon status. The trial judge sentenced him as a Class C felon with Prior Record Level IV to a minimum term of 64 months and a maximum term of 86 months. The judge also entered findings of extraordinary mitigation and ordered the sentence to run concurrently with the federal sentence the defendant was then serving. (1) The court ruled that the state had a right of appeal from the trial court's sentencing the defendant below the statutory

minimum and maximum sentences. The court then ruled that the trial court erred in sentencing the defendant below the required minimum and maximum sentences, which for a Class C felony in Prior Record Level IV was 80 months for the minimum and 107 months for the maximum. (2) The court ruled that the state did not have a right of appeal from the trial judge's imposing a concurrent sentence for habitual felon. However, the court suspended the appellate rules and elected to treat the state's appeal as a petition for a writ of mandamus, for the reasons set out in *State v. Ellis*, 361 N.C. 200 (2007). The court ruled that defendant's concurrent sentence was contrary to G.S. 14-7.6, and the court directed the trial judge on remand to enter a judgment that comports with that statute.

In Determining Prior Record Level Under Structured Sentencing Act, Prior Conviction of Felonious Breaking or Entering Is Considered a Class H Felony for Determining Points, Even Though Defendant Was Sentenced as Class C Felon for Being Habitual Felon

State v. Vaughn, 350 N.C. 88, 511 S.E.2d 638 (4 March 1999), *affirming per curiam*, 130 N.C. App. 456, 503 S.E.2d 110 (4 August 1998). The court affirmed per curiam the opinion of the North Carolina Court of Appeals, which is summarized as follows: The defendant was sentenced for a felony under the Structured Sentencing Act. He had a prior felonious breaking and entering conviction in 1984, for which he was sentenced as a habitual felon. The trial judge treated this 1984 conviction as a Class C felony (the punishment for habitual felon), rather than a Class H felony, the punishment for felonious breaking and entering. The court ruled that the trial judge erred. Being an habitual felon is not a felony; it is a status that provides for increased punishment on conviction of a felony. The term "prior felony . . . conviction" in G.S. 15A-1340.14(b) (number of points for prior felony conviction) refers to the adjudication of guilt or entry of a guilty or no contest plea, not the sentence for the conviction.

Certified AOC Computer Printout of Prior DWI Conviction Was Admissible to Prove Prior Conviction in Habitual Impaired Driving Prosecution

State v. Ellis, 130 N.C. App. 596, 504 S.E.2d 787 (18 August 1998). The court ruled that a certified AOC computer printout of one of the defendant's prior DWI convictions was admissible to prove a prior DWI conviction in a habitual impaired driving prosecution. The court, while noting the provisions of G.S. 8-35.2, rested its ruling on G.S. 15A-1340.14(f) (but note that this statute permits the use of AOC records to prove convictions under the Structured Sentencing Act, while this case involved proof of a conviction at trial.)

- (1) **Computer Printouts of Defendant's Prior Convictions from Other Jurisdictions Were Admissible at Sentencing Hearing Under G.S. 15A-1340.14(f)(4)**
- (2) **State Failed to Prove Defendant's Out-of-State Convictions Were Felonies and Substantially Similar to North Carolina Class I Felony Offenses**

State v. Cao, 175 N.C. App. 434, 626 S.E.2d 301 (17 January 2006). (1) At a sentencing hearing, the state submitted computer printouts as evidence of the defendant's prior convictions in other jurisdictions. The printouts stated that they contain information from "NLETS," "Crime Records Service DPS Austin TX," and the FBI. The court ruled that these printouts were admissible under G.S. 15A-1340.14(f)(4). (2) The court ruled that the state failed to prove defendant's out-of-state convictions were felonies and substantially similar to North Carolina Class I felony offenses.

Fax of Certified Copy of Conviction Was Sufficient to Prove Conviction in Habitual Felon Hearing, Based on Facts in This Case

State v. Wall, 141 N.C. App. 529, 539 S.E.2d 692 (29 December 2000). The court ruled that a fax of a certified copy of a conviction was sufficient to prove a conviction in a habitual felon hearing. The court stated, relying on the reasoning in *State v. Jordan*, 120 N.C. App. 364, 462 S.E.2d 234 (1995) [faxed copy of prior conviction admissible under former G.S. 15A-1340.4(e) in Fair Sentencing Act hearing] that the methods of proving a conviction in G.S. 14-7.4 are permissive, not mandatory. The court noted that the judge carefully examined the fax, which showed that it represented a document that was stamped with a seal showing it to be a true copy of the original that was signed by the clerk of superior court. The judge found that the fax was a reasonable copy of the seal. The defendant did not contend that the fax was inaccurate or incomplete, but only that its admission did not comply with G.S. 14-7.4.

- (1) Division of Criminal Information (DCI) Printout Was Admissible Evidence to Prove Convictions under Structured Sentencing Act (SSA)**
- (2) Copies of Statutes from Other States Were Sufficient to Classify Offense under SSA**
- (3) No Time Limitation for Prior Convictions in Establishing Prior Record Level under SSA**

State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (7 July 1998). The defendant was sentenced for felonies under the Structured Sentencing Act (SSA). (1) The court ruled that a Division of Criminal Information (DCI) printout was admissible evidence to prove convictions as provided by G.S. 15A-1340.14(f). The printout contained sufficient identifying information about the defendant to make the printout reliable. (2) The court ruled that copies of New Jersey and New York statutes, and comparison of their provisions to the criminal laws of North Carolina, were sufficient to prove by a preponderance of evidence that the crimes for which the defendant was convicted in those states were substantially similar to classified crimes in North Carolina under G.S. 15A-1340.14(e). (3) The court ruled that the SSA does not place any time limitations on prior convictions used to establish prior record level under the act.

State Failed to Prove New Jersey Convictions Were Substantially Similar to North Carolina Offenses

State v. Morgan, 164 N.C. App. 298, 595 S.E.2d 804 (18 May 2004). The court ruled that the state at the defendant's sentencing hearing failed to prove that a New Jersey conviction of homicide in the third degree was substantially similar to voluntary manslaughter in North Carolina. Although the state presented a copy of the 2002 New Jersey homicide statute [which the court noted is admissible under G.S. 8-3(a)], it failed to show that the 2002 statute was unchanged from the 1987 version under which the defendant was convicted. The state also presented no evidence to prove that New Jersey misdemeanor convictions were substantially similar to offenses classified as Class A1 or 1 misdemeanors in North Carolina.

Trial Judge Did Not Err in Finding Virginia Conviction to Be Substantially Similar to North Carolina Class A1 or 1 Misdemeanor and Assigning One Point in Calculating Defendant's Prior Record Level

State v. Sapp, ___ N.C. App. ___, 661 S.E.2d 304 (3 June 2008). The court ruled that the trial judge did not err in finding a Virginia conviction to be substantially similar to a North Carolina Class A1 or 1 misdemeanor and assigning one point in calculating the defendant's prior record level. The Virginia conviction involved an assault on an employee of a secure juvenile facility while the defendant was confined there and the employee was attempting to break up a fight between prisoners. The court found the Virginia conviction to be "substantially similar" [statutory wording in G.S. 15A-1340.14(e)] to assault on a governmental employee under G.S. 14-33(c)(4),

a Class A1 misdemeanor. The court noted that the Virginia statute need not contain the precise wording of the North Carolina statute to meet the “substantially similar” standard. Thus, the absence of language in the Virginia statute concerning the discharge of an official duty was not dispositive.

During Sentencing Hearing Before Jury on Existence of Aggravating Factor in Non-Capital Case, Prosecutor’s Jury Argument Reviewing Sentencing Grid Was Improper Because It Was Irrelevant to Finding of Aggravating Factor

State v. Lopez, ___ N.C. App. ___, 655 S.E.2d 895 (5 February 2008). The defendant was convicted of several offenses arising from a vehicle crash that resulted in the death of one person and injuries to another. During the sentencing hearing before the jury on the existence of an aggravating factor, the prosecutor in jury argument reviewed the sentencing grid and explained the effect of a finding of an aggravating factor on the defendant’s sentence and also explained the doctrine of merger of the convictions of involuntary manslaughter and felony death by vehicle. The court ruled that the jury argument was improper because it was irrelevant to the finding of the aggravating factor.

- (1) Defendant’s Stipulation at Sentencing Hearing That Ohio Convictions Were Substantially Similar to North Carolina Offenses Was Ineffective Because Sentencing Judge Must Make Finding**
- (2) Trial Judge Did Not Err in Using Fact That Defendant Was on Probation and Pretrial Release When He Committed Offenses To Increase Both His Prior Record Level and To Aggravate His Sentence**

State v. Moore, ___ N.C. App. ___, 656 S.E.2d 287 (5 February 2008). The court ruled: (1) the defendant’s stipulation that his Ohio convictions were substantially similar to North Carolina offenses was ineffective because the sentencing judge must make that finding, based on the ruling in *State v. Palmateer*, 179 N.C. App. 579 (2006); and (2) the trial judge did not err in using the fact that the defendant was on probation and pretrial release when he committed the offenses to increase both his prior record level and to aggravate his sentence.

1972 Kidnapping Conviction Was Properly Assigned Four Points as Second-Degree Kidnapping under Structured Sentencing

State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (16 June 1998). The defendant pleaded guilty to second-degree murder committed when the Structured Sentencing Act (SSA) was effective. In determining the defendant’s prior record level, a 1972 North Carolina kidnapping conviction was assigned four points under SSA as second-degree kidnapping. The 1972 kidnapping conviction was based on common law kidnapping, which does not have the same elements of second-degree kidnapping. The court ruled that the 1972 kidnapping offense was “substantially similar” to the second-degree kidnapping offense that existed when the second-degree murder was committed, and therefore the sentencing judge properly assigned four points to the 1972 kidnapping conviction.

- (1) Each Act of Embezzlement Constitutes Separate Offense, But State Has Discretion to Charge Only One Offense**
- (2) When Offense Began When Fair Sentencing Act Was Effective and Ended When Structured Sentencing Act Was Effective, Defendant Must Be Sentenced under Structured Sentencing Act**

State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (19 May 1998). The defendant was charged with one count of embezzlement for a series of acts of embezzlement that were committed over a period of time when the Fair Sentencing Act (FSA) was effective (acts committed before October 1, 1994) and when the Structured Sentencing Act (SSA) was effective (acts committed on or after October 1, 1994). (1) The court ruled, relying on statements in *State v. Rupe*, 109 N.C. App. 601, 428 S.E.2d 480 (1993) and *State v. Thompson*, 50 N.C. App. 484, 274 S.E.2d 381 (1981), that each act of embezzlement constitutes a separate offense which may be charged separately, but the state has the discretion to charge one embezzlement. [Note, however, that the court did not discuss G.S. 15A-924(a)(2), which requires that a criminal pleading must contain a separate count for each offense charged, and G.S. 15A-924(b), which provides that if a count charges more than one offense, a defendant by timely motion may require the state to elect and state a single offense alleged in the count on which the state will proceed to trial. In addition, the court did not discuss the state constitutional requirement that a verdict be unanimous; a charge submitted to the jury that contains more than one offense implicates that requirement—see *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991).] (2) Because there was one indictment alleging acts of embezzlement committed both under FSA and SSA, the trial judge was required to sentence the defendant under SSA; the court’s ruling relied on federal cases applying new federal sentencing guidelines when an offense began before the guidelines became effective but concluded after the guidelines became effective.

In Determining Points for Prior Record Level under Structured Sentencing, Conviction in District Court Is Date Judgment Was Entered, Not Date Case Was Remanded From Superior Court After Withdrawal of Notice of Appeal

State v. Wilkins, 128 N.C. App. 315, 494 S.E.2d 611 (6 January 1998). On August 9, 1990, the defendant was convicted of communicating threats in district court and gave notice of appeal for trial de novo in superior court. On November 5, 1990, the defendant was convicted of misdemeanor breaking or entering and gave notice of appeal for trial de novo in superior court. On November 6, 1990, he withdrew his notice of appeal for the communicating threats conviction, and the case was apparently remanded to district court for compliance with the judgment on November 8, 1990. On November 8, 1990, the defendant withdraw his notice of appeal for the misdemeanor breaking or entering conviction. When sentencing the defendant for a felony in superior court, the trial judge assigned one point for each of the misdemeanor convictions. The defendant argued on appeal that only one point should be assigned for these two convictions, because both of them occurred during the same session of district court (November 8, 1990); see G.S. 15A-1340.14(d). The court rejected the defendant’s argument. The court ruled that the date of a conviction for a misdemeanor appealed for trial de novo—and later remanded or the appeal withdrawn—is the date of the entry of judgment in district court. Thus the two misdemeanor convictions in this case did not occur during the same session of district court, and the trial judge correctly assigned one point for each of the convictions.

Defendant Was Entitled to Be Resentenced under Structured Sentencing Act When Prior Record Level V Included Prior Conviction That Later Was Reversed on Appeal, Which Would Result in Prior Record IV

State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198 (19 June 2001). The defendant was convicted of first-degree rape and sentenced under Prior Record Level V in accordance with the Structured Sentencing Act. While the defendant’s case was pending in the court of appeals, a prior conviction that was used to support Prior Record Level V was reversed on appeal. The reversal of this conviction would result in Prior Record Level IV. The court ruled that the legislature did not intend in G.S. 15A-1340.11(7)(b) (prior conviction includes conviction on

appeal to appellate division) to allow the sentence to stand under these circumstances. The court ordered resentencing for the first-degree rape conviction.

Finding of Criminal Contempt When Punishment Is Maximum of 30 Days' Imprisonment Is Not Prior Conviction for Misdemeanor Sentencing under Structured Sentencing Act

State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253 (3 April 2001). The court ruled that a finding of criminal contempt when the punishment is a maximum of 30 days' imprisonment is not a prior conviction for misdemeanor sentencing under the Structured Sentencing Act.

Judge Properly Determined Prior Record Level Under Structured Sentencing in Assigning One Point Each for:

- (1) All Elements of Current Offense Included in Prior Offense, and**
 - (2) Current Offense Committed While on Probation for Prior Offense**
- Even Though Prior Offense Was Included in Establishing Habitual Felon Status**

State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (4 June 1996). The defendant pled guilty to two felony charges (felonious breaking and entering and felonious larceny) and to being an habitual felon. The prior convictions that established habitual felon status were (1) felonious breaking and entering and felonious larceny; (2) larceny of a firearm; and (3) possession of cocaine. In determining the defendant's prior record level, the trial judge assigned one point under G.S. 15A-1340.14(b)(6) because all the elements of the current offense were included in a prior offense [see (1) above] and one point under G.S. 15A-1340.14(b)(7) because the defendant committed the offenses for which he had pled guilty while he was on probation for a prior offense [see (3) above]. The defendant, citing G.S. 14-7.6 (which prohibits—in determining prior record level for sentencing as an habitual felon—convictions used to establish habitual felon status), argued that the trial judge erred in assigning one point each as described above. The court ruled that the trial judge did not err. The court reasoned that both G.S. 15A-1340.14(b)(6) and (b)(7) address the gravity and circumstances surrounding the offense for which the defendant is now being sentenced, rather than the mere existence of the prior offense.

Trial Judge Properly Found One Point Under G.S. 15A-1340.16(b)(6) in Determining Defendant's Prior Record Level in Sentencing for Habitual Felon

State v. Ford, ___ N.C. App. ___, 672 S.E.2d 689 (3 February 2009). The defendant was convicted of attempted felony larceny and then pled guilty to being an habitual felon. The defendant had previously been convicted of felony larceny. The court ruled, relying on *State v. Bethea*, 122 N.C. App. 623 (1996), that the judge properly found one point under G.S. 15A-1340.16(b)(6) (all elements of current offense are included in offense for which defendant was previously convicted) in calculating the defendant's prior record level; G.S. 15A-1340.16(b)(6) is not contrary to the provisions of G.S. 14-7.6. Attempted felony larceny is a lesser-included offense of felony larceny regardless of the theory of felony larceny. It was irrelevant that the defendant's prior felony larceny convictions did not include the element that the defendant took property valued over \$1,000.

When Defendant's Convictions Were Consolidated for Sentencing Judgment, Trial Judge Did Not Err in Finding Aggravating Factor of Abusing Position of Trust for Most Serious Felony, Even Though Factor Could Not Have Been Found for Less Serious Consolidated Felony—Court of Appeals Ruling Reversed

State v. Tucker, 357 N.C. 633, 588 S.E.2d 853 (5 December 2003), *reversing*, 156 N.C. App. 53, 575 S.E.2d 770 (4 February 2003). The trial judge consolidated for a sentencing judgment convictions of statutory sex offense of a person aged 13, 14, or 15 (Class B1 felony), sexual offense by a person in a parental role (Class E felony), and indecent liberties (Class F felony). The judge found the statutory aggravating factor that the defendant, the stepfather of the victim, abused a position of trust, G.S. 15A-1340.16(d)(15). The court noted that in a consolidated sentencing judgment any aggravating factors found are applied only to the offense in the judgment that provides the basis for the sentencing guidelines; in this case, the most serious offense—statutory sexual offense of person aged 13, 14, or 15 (Class B1 felony). Because the aggravating factor found for this offense is not prohibited by G.S. 15A-1340.16(d) (evidence necessary to prove an element of the offense may not be used to prove an aggravating factor), even though it would be prohibited for sexual offense by a person in a parental role (Class E felony), the court ruled, relying on *State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) and *State v. Wright*, 319 N.C. 209, 353 S.E.2d 214 (1987), that the judge did not err in finding the aggravating factor in the consolidated sentencing judgment.

When Multiple Offenses Are Consolidated for Judgment and Each Offense Is Equally the Highest Classified Offense, Consolidated Judgment May Be Aggravated by Any Factor That Is Element of One, But Not All, Offenses

State v. Harrison, 164 N.C. App. 693, 596 S.E.2d 834 (1 June 2004). The defendant pled guilty to multiple felonies, all of which were punished as Class C felonies because the defendant was an habitual felon. All the offenses were consolidated for judgment, and the sentencing judge found two aggravating factors and sentenced him in the aggravated range. The defendant argued that these factors constituted elements of the offenses to which the defendant pled guilty, which is prohibited by G.S. 15A-1340.16(d). The court ruled, distinguishing *State v. Tucker*, 357 N.C. 633, 588 S.E.2d 853 (2003), that when multiple offenses are consolidated for judgment and each offense is equally the highest classified offense, a consolidated judgment may be aggravated by any factor that is element of one, but not all, offenses.

Proper to Use Conviction to Determine Prior Record Level Even Though It Had Been Consolidated for Judgment with Another Conviction That Was Used to Establish Habitual Felon Status

State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (20 August 1996). The defendant had previously been convicted of two felonies on October 18, 1988, two felonies on June 14, 1991, and four felonies on June 25, 1992. The state used one conviction from each of these three days to prove the defendant's habitual felon status. The trial judge then used another conviction from each day to determine the defendant's prior record level. The defendant argued on appeal that the judge could not use convictions consolidated with other convictions used to establish habitual felon status to determine his prior record level. The court rejected this argument. The court noted that G.S. 14-7.6 prohibits using the *same* conviction to establish both habitual felon status and prior record level, and G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained during the same calendar week to increase the defendant's prior record level. The court concluded, however, that these statutes do not prohibit a trial judge from using one conviction obtained in a single calendar week to establish habitual felon status and using another *separate* conviction obtained the same week to determine prior record level, even if the convictions were consolidated for judgment.

Trial Judge Did Not Err in Calculating Defendant’s Prior Record Level By Counting Two Convictions on Same Day in Same County When One Conviction Was in District Court and Other Conviction Was in Superior Court

State v. Fuller, 179 N.C. App. 61, 632 S.E.2d 509 (1 August 2006). The court ruled that the trial judge did not err under G.S. 15A-1340.14(d) in calculating the defendant’s prior record level by counting two convictions on the same day in the same county when one conviction was in district court and other conviction was in superior court.

When Calculating Points for Prior Convictions to Establish Prior Record Level, Convictions Obtained During a Single Trial Cannot Be Used in Establishing Prior Record Level for One of the Convictions

State v. West, 180 N.C. App. 664, 638 S.E.2d 508 (19 December 2006). The defendant at a single trial was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a vehicle. Before recessing for lunch, the trial judge sentenced the defendant for the convictions of the two larcenies and breaking and entering a vehicle. After lunch, the judge sentenced the defendant for second-degree murder and calculated the defendant’s prior record level for the second-degree murder by assigning two points for one of the felony larceny convictions. The court ruled that the judge erred in doing so in contravention of legislative intent in calculating a prior record level for convictions obtained at a single trial.

When Judge Finds That Defendant Provided “Substantial Assistance” under G.S. 90-95(h)(5), Judge’s Discretion in Departing from Mandatory Minimum for Drug Trafficking Offense Is Not Limited by Structured Sentencing Act’s Minimum for Offense of Same Class

State v. Saunders, 131 N.C. App. 551, 507 S.E.2d 911 (1 December 1998). The defendant pleaded guilty to a trafficking offense. The sentencing judge found that the defendant provided “substantial assistance” under G.S. 90-95(h)(5), but the judge believed that his discretion in departing from the mandatory minimum sentence for the trafficking offense was limited to sentencing in the Structured Sentencing Act’s (SSA’s) minimum for an offense of the same class. The court ruled that the sentencing judge erred. The sentencing judge was not limited by the SSA’s minimum for an offense of the same class; the judge was free to depart in any manner in imposing a sentence.

Two Drug Trafficking Sentences Imposed at Same Sentencing Hearing Are Not Required Under G.S. 90-95(h)(6) to Be Imposed Consecutively to Each Other

State v. Walston, ___ N.C. App. ___, 666 S.E.2d 872 (7 October 2008). The court ruled, relying on *State v. Bozeman*, 115 N.C. App. 658 (1994), that two drug trafficking sentences imposed at the same sentencing hearing are not required under G.S. 90-95(h)(6) to be imposed consecutively to each other.

Defendant’s Guilty Plea to Felony Cocaine Offense under G.S. 90-96(a) and His Still Being on Probation under G.S. 90-96(a) at Time of Sentencing for Armed Robbery Offenses, Constituted a Conviction under Structured Sentencing Act

State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (15 June 1999). In June 1997, the defendant pleaded guilty to a felony cocaine offense and was placed on probation under G.S. 90-96(a). In September 1997, he committed two armed robberies and was later convicted of these offenses. At the time of sentencing for the armed robberies, the defendant was still on probation under G.S.

90-96(a) for the felony cocaine offense. The court ruled that the trial judge properly considered the felony cocaine offense as a prior conviction under the Structured Sentencing Act. The court noted the definition of “prior conviction” in G.S. 15A-1340.11(7) and that G.S. 15A-1331(b) provides that “a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.” Even though G.S. 90-96(a) provides for a dismissal of the offense if the defendant complies with the conditions of probation, the defendant was still on probation when he was being sentenced for the armed robbery convictions. Thus the defendant’s plea of guilty to the felony cocaine offense constituted a prior conviction. The court relied on *State v. Sidberry*, 337 N.C. 779, 448 S.E.2d 798 (1994) and *Britt v. Sheriffs’ Education and Training Standards Comm’n*, 348 N.C. 573, 501 S.E.2d 75 (1998).

Court Rejects Defendant’s Federal and State Constitutional Arguments That Her Sentence Was Disproportionate to Accomplices’ Sentences

State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2 May 2000). The defendant was tried and convicted of two drug trafficking offenses and received consecutive sentences. Two accomplices received lesser sentences under a plea agreement. Another accomplice received the same sentence as the defendant (under a plea agreement). The court, relying on *State v. Shane*, 309 N.C. 438, 306 S.E.2d 765 (1983) and other cases, rejected the defendant’s federal and state constitutional arguments that her sentence was disproportionate to the crimes because her more culpable accomplices received lesser or equivalent sentences.

- (1) Judge May Not Consolidate for Judgment Sentences Arising from Both Fair Sentencing Act and Structured Sentencing Act**
- (2) State Did Not Violate Plea Bargain When Defendant Was Resentenced Due to Illegal Sentence**
- (3) Judge Had Authority to Correct Illegal Sentence After Term of Court Had Ended**

State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (17 August 1999). The defendant pleaded guilty to four offenses, two of which occurred under the Fair Sentencing Act (FSA) and two of which occurred under the Structured Sentencing Act (SSA). The judge consolidated the sentences for one judgment and imposed an active sentence. The Department of Correction informed the court that consolidated judgment was unauthorized. As a result, a judge resentenced the defendant by imposing separate sentences under FSA and SSA, respectively. (1) The court ruled that a judge may not consolidate for judgment sentences for offenses arising from both the Fair Sentencing Act and the Structured Sentencing Act. (2) The defendant’s pleas were the result of a plea bargain in which the state agreed to dismiss two other charges. The court ruled that the state did not violate the plea bargain as a result of the resentencing, because it kept its bargain and did not reinstate the two other charges. The court noted that the judge’s consolidation of the sentences had occurred after the plea bargain had been entered. (3) The court ruled that the judge had the authority to correct the illegal sentence, even if the term of court had ended in which the illegal sentence had been imposed.

Original Sentence, Which Violated Structured Sentencing Act, Was Properly Corrected at Later Time

State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (4 February 2000). The defendant was sentenced to a minimum term of eight months and a maximum term of ten months’ imprisonment for a Class E, Level II felony. Later, the North Carolina Department of Correction notified the superior court of the county in which the defendant was sentenced that the sentence did not fall within the sentencing range for a Class E, Level II felony under the Structured Sentencing Act (SSA). A

judge then resentenced the defendant, in the absence of the defendant and his attorney, to a minimum of twenty-nine months and a maximum of forty-four months' imprisonment. The defendant then filed a motion for appropriate relief asserting that he was not given notice or an opportunity to be heard and requested that the new sentence be set aside. At a hearing on the motion (in which both the defendant and his attorney was present), a judge ruled that the new sentence had not been entered properly, set aside that sentence, and then resentenced the defendant to a minimum of twenty-nine months and a maximum of forty-four months' imprisonment. The court ruled that the judge had the authority in the hearing on the motion for appropriate relief to resentence the defendant under G.S. 15A-1417(a)(4) (court can grant "[a]ny other appropriate relief" when granting a motion for appropriate relief). Because the original sentence violated the SSA, the judge had properly resentenced the defendant.

Defense Counsel's Stipulation Moots Appellate Issue under G.S. 15A-1444(a2), But It Was Unclear in This Case That Defense Counsel Was Stipulating That Out-of-State Convictions Were Substantially Similar to Felony Offenses under North Carolina Law

State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376 (5 December 2000). The defendant was convicted after a jury trial, and a sentencing hearing was held. The prosecutor at the sentencing hearing presented an SSA points worksheet and computer printout showing 18 points, which included out-of-state convictions counting for points as similar felonies in North Carolina that were higher class felonies than Class I [Author's note: Class I is the presumptive class set out in G.S. 15A-1340.14(e) for an out-of-state felony conviction unless the state proves by a preponderance of evidence that the offense should be classified as a higher class]. Defense counsel denied that he had been convicted of a New York kidnapping offense that appeared on the state's worksheet. The prosecutor then removed it. When the trial judge asked defense counsel whether, "with the exception of the kidnapping charge, is there any disagreement with other convictions on there?", defense counsel answered, "No." The court first ruled that, whether sentencing occurs after a plea bargain or after a conviction, a defense counsel's stipulation moots an appellate sentencing issue under G.S. 15A-1444(a2) [thus extending a ruling in *State v. Hamby*, 129 N.C. 366, 499 S.E.2d 195 (1998) that involved sentencing after a plea bargain]. The court then ruled that although defense counsel's statement in this case might reasonably be construed as an admission that the defendant had been convicted of the offenses on the worksheet, it is not clear that the defendant was stipulating that the out-of-state convictions were substantially similar to felony offenses under North Carolina law that were higher than Class I felonies. The court remanded the case to superior court for a resentencing hearing.

Record Check Handed to Sentencing Judge, Although Not Introduced into Evidence, Was Sufficient to Support Judge's Finding That Defendant Was on Probation When He Committed Offense

State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601 (15 July 2003). The court ruled that a record check handed to the sentencing judge, although not introduced into evidence, was sufficient to support the judge's finding that defendant was on probation when he committed the offense—thus adding an additional point to the defendant's prior record level determination. The record check showed that the defendant was sentenced to 24 months probation on January 26, 2000, and the offense in this case was committed on October 21, 2000. [Author's note: Federal law prohibits a DCI printout from becoming a public record. This ruling would allow the state to hand the DCI printout to the sentencing judge to prove convictions in determining a defendant's prior record level without having to introduce the DCI printout into evidence. Of course, the defendant's prior convictions may be proved without the offer or introduction of evidence if the state and the defendant enter into a stipulation.]

Prior Record Level Worksheet Without Further Documentation or Defense Stipulation Is Insufficient Evidence to Establish Prior Record Level

State v. Smith, 155 N.C. App. 500, 573 S.E.2d 618 (31 December 2002). The court ruled, relying on *State v. Goodman*, 149 N.C. App. 57, 560 S.E.2d 196 (2002), that a prior record level worksheet submitted to the sentencing judge by the state without further documentation or defense stipulation is insufficient evidence to establish the defendant's prior record level.

Prosecutor's Statement Announcing Defendant's Sentencing Points and Prior Record Level at Sentencing Hearing Without Documentation or Defense Stipulation Was Insufficient to Establish Prior Record Level IV

State v. Bartley, 156 N.C. App. 490, 577 S.E.2d 319 (18 March 2003). The prosecutor at the sentencing hearing stated that the defendant had 11 prior sentencing points, which placed him in prior record level IV. The prosecutor did not provide any documentation nor was there a defense stipulation to the prior record level. The court ruled that under G.S. 15A-1340.14(f) the prosecutor's statement was insufficient to support the judge's finding of this prior record level.

Prosecutor's Statement to Sentencing Judge and Offer of Worksheet, Absent Defense Stipulation or Record Evidence, Was Insufficient to Establish Prior Record Level for Sentencing

State v. Riley, 159 N.C. App. 546, 583 S.E.2d 379 (5 August 2003). The court ruled, citing *State v. Mack*, 87 N.C. App. 24, 359 S.E.2d 485 (1987) and *State v. Hanton*, 140 N.C. App. 679, 540 S.E.2d 376 (2000), the prosecutor's statement to the sentencing judge and the offer of worksheet, absent a defense stipulation or record evidence, was insufficient to establish the defendant's prior record level for sentencing.

State Failed to Offer Any Evidence of Prior Convictions to Support Defendant's Sentencing in Prior Record Level III; Court Orders Resentencing

State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864 (3 May 2005). The defendant, pursuant to a plea agreement, pled no contest to possession of cocaine and being an habitual felon. The agreement provided for a specific sentence at the lowest end of the mitigated range in Prior Record Level III. However, the state failed to offer any evidence of the prior convictions to support the defendant's sentence in Prior Record Level III. Also, there was no stipulation concerning these prior convictions. The court reversed the defendant's sentence and remanded for resentencing.

Submission of Sentencing Worksheet in Conjunction with Plea Agreement Was Insufficient Evidence to Support Prior Record Level III

State v. Jeffery, 167 N.C. App. 575, 605 S.E.2d 672 (21 December 2004). Evidence that the state submitted a sentencing worksheet in conjunction with a plea agreement requiring six presumptive consecutive sentences of specified lengths was insufficient to prove prior record level III. There was no implied stipulation to that prior record level based on the plea agreement, and there was no explicit stipulation by defense counsel.

Finding of Aggravating Factor Is Not Required When Defendant Is Sentenced in Presumptive Range With Minimum Sentence That Overlaps With Same Minimum Sentence in Aggravated Range

State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311 (18 January 2005). The court ruled, relying on *State v. Ramirez*, 156 N.C. App. 249, 576 S.E.2d 714 (2003), that a finding of an aggravating factor is not required when a defendant is sentenced in the presumptive range with a minimum sentence that overlaps with the same minimum sentence in the aggravated range.

(1) Trial Judge Did Not Err in Awarding Restitution

(2) Court Sets Out Allocation of Burdens of Proof Concerning Award of Restitution

State v. Tate, ___ N.C. App. ___, 653 S.E.2d 892 (18 December 2007). (1) The court ruled that the trial judge did not err in awarding restitution in the amount of \$40,588.60 for damages resulting from felonious assault and other offenses for which the defendant was convicted. The court noted that although the trial judge did not make specific findings of fact concerning the defendant's ability to pay restitution, such findings were not required [see G.S. 15A-1340.36(a)], and it was clear from the record that the trial judge considered the defendant's financial ability to pay restitution. The defendant failed to present evidence showing that he would not be able to make the required restitution payments. (2) Concerning the allocation of burdens of proof for an award of restitution, the court agreed with an analogous federal statute. The burden of proof on showing the amount of loss is on the state. The burden of proof on showing the defendant's financial resources is on the defendant as well as the financial needs of the defendant's dependents.

Trial Judge Erred in Awarding Restitution

State v. Southards, ___ N.C. App. ___, 657 S.E.2d 419 (4 March 2008). The defendant was convicted of felonious possession of stolen goods. The court ruled that the trial judge erred in awarding restitution to the victim. The defendant could not be required to make restitution for the victim's unrecovered tools or lost wages when those losses were neither related to the criminal offense for which the defendant was convicted nor supported by evidence in the record.

Trial Judge Did Not Err in Ordering Defendant to Pay Restitution to One of Five Victims of Felonious Hit and Run For Which Defendant Was Convicted, Even Though Jury Was Unable to Reach Verdict on Felonious Assault of Same Victim

State v. Valladares, 182 N.C. App. 525, 642 S.E.2d 489 (3 April 2007). The defendant was convicted of one count of felonious hit and run involving five victims. The court ruled that the trial judge did not err in ordering the defendant to pay restitution to one of those five victims, even though the jury was unable to reach a verdict on a felonious assault of the same victim.

Judge in Juvenile Disposition Order Did Not Impermissibly Delegate Authority by Allowing Others to Determine Amount of Restitution and Specifics of Residential Treatment Program

In re M.A.B., 170 N.C. App. 192, 611 S.E.2d 886 (3 May 2005). The judge's disposition order for a juvenile adjudicated delinquent of a misdemeanor assault included, among other matters, that the juvenile: (1) pay restitution "in an amount to be determined" for the victim's medical bills; and (2) "cooperate and participate in a residential treatment program as directed by court counselor or mental health agency." The court ruled, distinguishing *In re Hartsock*, 158 N.C.

App. 287, 580 S.E.2d 395 (2003), the judge did not impermissibly delegate his authority concerning these two matters.

Defense Lawyer's Comments Were Stipulation to Defendant's Prior Convictions on State's Worksheet Presented to Judge for Sentencing

State v. Eubanks, 151 N.C. App. 499, 565 S.E.2d 738 (16 July 2002). The defendant was convicted of second-degree murder. At the sentencing hearing, the state presented to the judge a prior record level worksheet listing five prior convictions. The defense lawyer responded "yes" when the judge asked whether he had seen the worksheet. Then he responded "no" when the judge asked whether he had any objections to the worksheet. The court ruled, relying on *State v. Hanton*, 140 N.C. App. 679, 540 S.E.2d 376 (2000), that the defense lawyer's statements may reasonably be construed as a stipulation by the defendant that he had been convicted of the offenses on the worksheet.

(1) Juvenile Court Judge Erred in Entering Separate Dispositions for Juvenile Adjudicated Delinquent of Two Offenses in Same Court Session

(2) Juvenile Stipulated to Delinquency History Points and History Level

In re D.R.H., ___ N.C. App. ___, ___ S.E.2d ___ (2 December 2008). The juvenile was adjudicated delinquent of armed robbery and conspiracy to commit armed robbery. (1) The court ruled that juvenile court judge erred under G.S. 7B-2508(h) (requires single disposition for consolidated offenses during juvenile court session) in entering separate dispositions for the juvenile who had been adjudicated delinquent of these two offenses in the same court session. (2) The court ruled that the juvenile stipulated to six delinquency history points and a high delinquency level. Relying on case law involving adult sentencing, *State v. Boyce*, 175 N.C. App. 663 (2006), and *State v. Eubanks*, 151 N.C. App. 499 (2002), the court ruled that the juvenile stipulated to the court counselor's prior history report when the juvenile's attorney received and reviewed the report and failed to object to it. The attorney had responded, "yes" to the judge's question whether the attorney had had an opportunity to review the report. In addition, the juvenile did not assert in his appellate brief that any of the prior adjudications in the report did not exist.

Defendant Convicted of Class C Felony with Prior Record Level IV Was Not Eligible for Finding of Extraordinary Mitigation

State v. Messer, 142 N.C. App. 515, 543 S.E.2d 195 (20 March 2001). The court ruled that the defendant, who was convicted of a Class C felony with a Prior Record Level IV, was not eligible for a finding of extraordinary mitigation under G.S. 15A-1340.13(g) because G.S. 15A-1340.15(h)(3) bars a finding of extraordinary mitigation when the defendant has five or more points. The court also noted that extraordinary mitigation, when authorized and found, does not allow a judge to impose a shorter minimum term of imprisonment than required for the class of offense and prior record level—it only authorizes the imposition of intermediate punishment instead of an active punishment.

Judge Did Not Abuse Discretion in Failing to Find Extraordinary Mitigation

State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1 April 1997). The defendant was convicted of assault with a deadly weapon inflicting serious injury, a Class E felony. The court ruled that the sentencing judge did not abuse his discretion in failing to find extraordinary mitigation. [Author's note: A finding of extraordinary mitigation only applies to Prior Record Levels I and II for Class

B2, C, and D felonies to allow a judge to impose an intermediate punishment when only an active punishment is permitted. See G.S. 15A-1340.13(g), (h). The judge already had the authority to impose an intermediate punishment in this case, assuming the defendant was in Prior Record Levels I and II, without a finding of extraordinary mitigation. A finding of extraordinary mitigation is not permitted for Prior Record Levels III through VI.]

Fine of \$50,000 for Corporation's Conviction of Disseminating Obscenity Was Not Constitutionally Excessive, Based on Facts in This Case

State v. Sanford Video & News, Inc., 146 N.C. App. 554, 553 S.E.2d 217 (16 October 2001). The court ruled, distinguishing *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), that a fine of \$50,000 for a corporation's conviction of disseminating obscenity, a Class I felony, was not constitutionally excessive, based on the facts in this case.

Unsworn Victim Impact Statement Is Admissible at Sentencing Hearing

State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896 (5 July 2000). A larceny victim testified at the defendant's sentencing hearing without being sworn. The court noted that the rules of evidence do not apply to sentencing hearings [G.S. 15A-1334(b)], and ruled, citing *State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981), that the trial judge did not err by allowing the unsworn victim's impact statement into evidence.

No Ex Post Facto Violation When Defendant's Points for Prior Record Level Were Increased Under G.S. 15A-1340.14(c) Because of Change in Classification of Prior Conviction

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (3 February 2009). When the defendant committed the offenses for which he was being sentenced, the punishment for the sale of cocaine was a Class G felony. When the defendant was convicted in 1997 of sale of cocaine, the punishment was a Class H felony. As required by G.S. 15A-1340.14(c), the prior conviction was treated as a Class G felony in determining the defendant's prior record level. The court ruled, relying on *State v. Mason*, 126 N.C. App. 318 (1997), and *State v. Wolfe*, 157 N.C. App. 22 (2003), that there was no ex post facto violation in determining the defendant's prior record level.

No Ex Post Facto Violation in Using Prior Juvenile Adjudication as Aggravating Factor in Structured Sentencing Hearing When Legislature Had Enacted That Aggravating Factor After Date of Prior Juvenile Adjudication

State v. Taylor, 349 N.C. 219, 504 S.E.2d 785 (9 October 1998), *affirming per curiam*, 128 N.C. App. 394, 496 S.E.2d 811 (1998). The court affirmed per curiam the opinion of the North Carolina Court of Appeals, which is summarized as follows: The defendant was convicted of second-degree rape, which was committed on March 19, 1995. The trial judge, in sentencing the defendant under the Structured Sentencing Act, found as an aggravating factor under G.S. 15A-1340.16(d)(18a) that the defendant had been previously adjudicated delinquent for an offense that would be a Class C felony if committed by an adult. The adjudication of delinquency occurred in 1993. The legislature enacted this aggravating factor, effective October 1, 1994. Relying on *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), the court ruled that the use of this aggravating factor did not violate the Ex Post Facto Clause.

Length of Maximum Term Set Out in Structured Sentencing Act Is Not Subject to Judge's Discretion

State v. Parker, 143 N.C. App. 680, 550 S.E.2d 174 (5 June 2001). The court ruled that the length of a maximum term set out in the Structured Sentencing Act is not subject to a judge's discretion. It is mandatory.

When Revoking Defendant's Probation, Judge Erred in Recommending That as Condition of Work Release That Defendant Pay Fine Owed in Probationary Judgment

State v. Wingate, 149 N.C. App. 879, 561 S.E.2d 911 (16 April 2002). In January 2000, the defendant was placed on probation. Among the probation conditions was an order to pay \$231 in costs, a \$1,500 fine, a \$100 community service fee, and \$400 in attorney fees. In October 2000, a judge revoked the defendant's probationary sentence and activated his sentence. The judge recommended that as a condition of work release that the defendant pay monies owed in the probationary sentence. The court noted that a judge may recommend restitution or reparation be imposed as a condition of attaining work release. The court ruled that the money owed for costs and attorney's fees was properly included in the recommendation. The court also ruled that if the community service fee had been incurred by the state and constituted damages as a result of the defendant's commission of the crime for which he was placed on probation, then it was properly included in the recommendation. The court rejected the defendant's argument that the community service fee is a normal operating expense of government and cannot be considered restitution. The court ruled that the judge erred in recommending payment of the fine as a condition of work release because a fine is not restitution or reparation; the court cited *State v. Alexander*, 47 N.C. App. 502, 267 S.E.2d 396 (1980).

- (1) Aggravating Factors Were Properly Found in Second-Degree Vehicular Murder Conviction**
- (2) Conducting Sentencing Hearing in Defendant's Absence Was Not Error, Based on Facts in This Case**

State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201 (20 March 2001). The defendant was convicted of second-degree vehicular murder based on his collision with another vehicle. He was driving while impaired (blood alcohol concentration of 0.22) and collided head on with a vehicle in the other lane of traffic. Before the collision, the defendant had caused another vehicle to leave the road. While the jury was deliberating, the defendant absconded from the courthouse. The trial judge waited for his return to resume court, but the defendant could not be located. The judge resumed the proceedings, the jury returned its verdicts, and the judge conducted the sentencing hearing in the defendant's absence. (1) The court ruled that the judge properly found (i) the statutory aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person [G.S. 15A-1340.16(d)(8)]; and (ii) the non-statutory aggravating factor that the defendant refused to participate in the proceedings and fled the courthouse while being a convicted felon with a prison sentence. (2) The court ruled that the trial judge did not err in conducting the sentencing hearing in the defendant's absence. The court noted that the defense counsel never requested the judge to continue the sentencing hearing and did not offer any evidence constituting good cause to support continuing the hearing. The court stated that, in any event, the defendant's flight and refusal to participate in the proceedings despite being a convicted felon did not constitute good cause.

Finding of Aggravating and Mitigating Factors Is Not Required When Presumptive Sentence Imposed Under Structured Sentencing Act

State v. Caldwell, 125 N.C. App. 161, 479 S.E.2d 282 (7 January 1997). The court ruled that a finding of aggravating and mitigating factors is not required when a presumptive sentence is imposed under the Structured Sentencing Act.

- (1) **Trial Judge Properly Found Aggravating Factor in Second-Degree Murder Case That Victim Suffered Serious Injuries That Were Permanent and Debilitating**
- (2) **Court Orders Reduction in Maximum Sentence under G.S. 15A-1335 (No Greater Sentence After Appeal)**

State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148 (5 June 2001). The defendant was convicted of second-degree murder involving a child abuse homicide. On July 7, 1994, the child suffered a severe head trauma as well as significant brain damage. After this initial injury, the child lived for about 22 months until she died; during that time, she was in a vegetative state with various debilitating injuries. The acts resulting in the child's death occurred when the Fair Sentencing Act (FSA) was effective and the child died when the Structured Sentencing Act (SSA) was effective. The trial judge sentenced the defendant under the SSA as a Class B2 felon and to a term of imprisonment of 196 to 245 months. On a prior appeal in this case, the court ruled that the defendant should have been sentenced under the FSA because the acts resulting in death occurred then. On resentencing, the judge sentenced the defendant under the FSA as a Class C felon and to a term of life imprisonment (the punishment for a Class C felon under FSA was presumptive sentence of 15 years and up to 50 years or life imprisonment). (1) The court ruled that the trial judge properly found the nonstatutory aggravating factor under the FSA that the victim suffered serious injuries that were permanent and debilitating. The court rejected the defendant's argument that these injuries were used to prove malice, an element of second-degree murder, and thus constituted an improper aggravating factor. The court noted that this nonstatutory aggravating factor was based on the injuries over the 22-month period before the child died, not the severe head trauma she suffered on July 7, 1994. (Note that this nonstatutory aggravating factor under FSA is a statutory factor under SSA.). (2) The court ruled that because G.S. 15A-1335 bars a greater sentence after appeal (except, the court noted, when a mandatory sentence must be imposed), that the life sentence was improper and remanded for resentencing in which the maximum sentence may not exceed 245 months.

Trial Judge Erred, in Sentencing for Indecent Liberties Conviction in Which Victim Was Seven Years Old, by Finding Statutory Aggravating Factor That Victim Was "Very Young" [G.S. 15A-1340.16(d)(11)], Based on Facts in This Case

State v. Rudisill, 137 N.C. App. 379, 527 S.E.2d 727 (4 April 2000). The court ruled, relying on *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986), that the trial judge erred, in sentencing a defendant for an indecent liberties conviction in which the victim was seven years old, by finding the statutory aggravating factor that the victim was "very young" [G.S. 15A-1340.16(d)(11)]. Like *Sumpter*, the victim's age alone did not demonstrate that he was more vulnerable to the assault in this case than an older child would have been. There was no finding that this victim was more vulnerable simply because of his age. The court noted that this statutory aggravating factor may be found without a special showing that the victim was vulnerable when the victim is especially young, such as the two-year-old victim in *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

Trial Judge Properly Found Statutory Aggravating Factor G.S. 15A-1340.16(d)(15) (Defendant Took Advantage of Position of Trust or Confidence to Commit Offense) for False Pretenses Convictions

State v. Murphy, 152 N.C. App. 335, 567 S.E.2d 442 (20 August 2002). The defendant pleaded guilty to several counts of obtaining property by false pretenses. The defendant offered to broker commercial loans and told clients that to prove their good faith and ability to repay the loans, they would need to pay the defendant a first and last month installment payment on the loans. The defendant took the payments, did not broker the loans, and did not return the payments. The court reviewed the case law on statutory aggravating factor G.S. 15A-1340.16(d)(15) (defendant took advantage of position of trust or confidence to commit offense), and ruled that the trial properly found this aggravating factor in these cases. The defendant's loan brokering scheme demonstrated the existence of a relationship between the defendant and the victims generally conducive to reliance of one on the other. The victims placed trust and confidence that the defendant would follow through with his representations and not defraud them of their money.

Provision in G.S. 15A-1340.16(d) That Same Item of Evidence Shall Not Be Used to Prove More Than One Aggravating Factor Restricts Use of Same Facts, Not Same Source of Facts—Ruling of Court of Appeals Is Reversed

State v. Beck, 359 N.C. 611, 614 S.E.2d 274 (1 July 2005), *reversing*, 163 N.C. App. 469, 594 S.E.2d 94 (16 November 2004). The defendant was convicted of second-degree murder. At the sentencing hearing, the state presented a certified copy of a fugitive warrant from the State of Florida that stated: "Fugitive—FTA [failure to appear]—Burglary." The judge found two aggravating factors based on information in the fugitive warrant: (1) the defendant committed the murder while on pretrial release for another charge; and (2) the defendant was a fugitive from Florida because of his failure to appear for trial in that state. The court ruled that the provision in G.S. 15A-1340.16(d) that the same item of evidence shall not be used to prove more than one aggravating factor restricts the use of the same facts, not the same source of facts. Thus, the judge did not err in finding two aggravating factors from the same source of facts, the fugitive warrant in this case. The same facts were not used to prove both aggravating factors.

Trial Judge Did Not Err in Finding Aggravating Factor of Violating Position of Trust and Confidence for Convictions of Statutory Rape and Statutory Sexual Offense

State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (16 December 2003). The defendant was convicted of several counts of statutory rape and statutory sexual offense of a person 13, 14, or 15 by a defendant who was more than six years older than the victim. The defendant was the victim's father. The court ruled that the trial judge did not err in finding the aggravating factor that the defendant violated a position of trust and confidence. The court rejected the defendant's argument that because he could have been charged with incest, the ruling in *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985), barred the finding of this aggravating factor because it was evidence of a joinable offense with which the defendant had not been charged. The court noted that this ruling had been questioned in a later case, and also that the statutory language underlying *McGuire* had been repealed when the Structured Sentencing Act (SSA) had been enacted, and in any event that language applied only to an aggravating factor relating to prior convictions. The sentencing in this case was under SSA, not the Fair Sentencing Act.

Trial Judge Erred in Finding Statutory Aggravating Factor G.S. 15A-1340.4(a)(1)(n) [now, G.S. 15A-1340.16(d)(15)] (Defendant Took Advantage of Position of Trust or Confidence to Commit Offense) for Defendant's Murder of His Wife

State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237 (3 September 2002). The defendant was convicted of second-degree murder for killing his wife. He was sentenced under the Fair Sentencing Act. The court ruled, distinguishing *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822

(1991), that the trial judge erred in finding statutory aggravating factor G.S. 15A-1340.4(a)(1)(n) [now, G.S. 15A-1340.16(d)(15)] (defendant took advantage of position of trust or confidence to commit offense). There was no evidence that the defendant exploited his wife's trust in order to kill her.

Trial Judge in Noncapital Sentencing Improperly Found Aggravating Factor Under G.S. 15A-1340.16(d)(15) (Defendant Took Advantage of Position of Trust or Confidence to Commit Offense)

State v. Mann, 355 N.C. 294, 560 S.E.2d 776 (5 April 2002). The court ruled that the trial judge improperly found in noncapital sentencing the aggravating factor under G.S. 15A-1340.16(d)(15) (defendant took advantage of position of trust or confidence to commit offense). The defendant lured the victim to lunch to talk about a work-related matter, committed armed robbery and financial transaction card theft against her, and eventually killed her. The defendant and victim worked together. While the evidence showed that they enjoyed an amiable working relationship, perhaps even a friendship, it did not show a relationship between them generally conducive to reliance on the other to support this aggravating factor; the court cited *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987).

Trial Judge in Sentencing Defendant for First-Degree Kidnapping Did Not Err in Finding Statutory Aggravating Factor That Victim Suffered Serious, Permanent, and Debilitating Injury [G.S. 15A-1340.16(d)(19)]

State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103 (17 June 2003). The court ruled, relying on *State v. Crisp*, 126 N.C. App. 30, 483 S.E.2d 462 (1997), and *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994), that the trial judge in sentencing the defendant for first-degree kidnapping did not err in finding the statutory aggravating factor that the victim suffered serious, permanent, and debilitating injury [G.S. 15A-1340.16(d)(19)]. Although serious injury elevates second-degree kidnapping to first-degree kidnapping, the finding of this aggravating factor requires more evidence than proving serious injury and thus does not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element may not be used to prove an aggravating factor). In this case, the shooting of the victim supported the finding of serious injury and the resulting paralysis supported the aggravating factor.

Aggravating Factors for Convictions of G.S. 14-258.4 for Spitting on Correctional Officers Were Properly Found

State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902 (18 November 2003). The defendant was convicted of two counts of malicious conduct by a prisoner under G.S. 14-258.4 for spitting in the faces of two prison guards while he was an inmate in the Department of Correction. He was also convicted of assault on a government employee arising out of another incident. He was also punished for criminal contempt of court for overturning a table and shouting epithets at trial. The court ruled that the trial judge, in sentencing the defendant for the two counts of malicious conduct by a prisoner, did not err in finding as aggravating factors that the offenses were committed to hinder the lawful exercise of a governmental function and the defendant had breached his assurance of good behavior by faking a heart problem and falling on the floor on the third day of trial. The finding of hindering a lawful exercise of a governmental function did not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element may not be used to prove an aggravating factor) because the offense is a general intent crime while the aggravating factor requires a finding of specific intent and thus additional evidence to prove it. The finding of breaching assurance of good behavior did not violate double jeopardy because the contempt

finding was not based on the same conduct supporting this aggravating factor. The finding also did not violate G.S. 15A-1340.16(d).

Trial Judge Did Not Err Under G.S. 15A-1335 in (1) Imposing Consecutive Life Sentences After Two Death Sentences Had Been Reduced to Life Sentences, and (2) Replacing Vacated Death Sentence with Second Life Sentence to Run Consecutively to Another Life Sentence

State v. Oliver, 155 N.C. App. 209, 573 S.E.2d 257 (31 December 2002). Defendants A and B were convicted of killing two people. Defendant A was originally sentenced to two death sentences, which were not imposed consecutively. Defendant B was originally sentenced to a death sentence and a life sentence, which were not imposed consecutively. The court ruled that the trial judge did not err under G.S. 15A-1335 in imposing (1) for defendant A, consecutive life sentences after the two death sentences had been reduced to life sentences, and (2) for defendant B, replacing the vacated death sentence with a second life sentence to run consecutively to the life sentence originally entered. The court, relying on *State v. Ransom*, 80 N.C. App. 711, 343 S.E.2d 232 (1986), noted that G.S. 15A-1335 does not prohibit a trial judge from replacing concurrent sentences with consecutive sentences on resentencing if neither the individual sentences nor the aggregate sentence exceeds that imposed at the original sentencing hearing. The court stated that any number of life sentences, even if imposed consecutively, cannot be considered a greater sentence than even one death sentence.

Court Modifies Ruling of Court of Appeals on Statutory Aggravating Factor, G.S. 15A-1340.16(d)(8) (Knowingly Creating Great Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person)

State v. Sellars, 363 N.C. 112, ___ S.E.2d ___ (20 March 2009), *modifying and affirming*, ___ N.C. App. ___, 664 S.E.2d 45 (5 August 2008). The court affirmed the ruling of the North Carolina Court of Appeals that found no error in the defendant's trial and sentence. However, it rejected the implication in the court of appeals' opinion that a jury's determination that a defendant is not insane resolves the presence or absence of the statutory aggravating factor, G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person). Nor does a jury's finding that a defendant is not insane automatically render any *Blakely* error concerning this aggravating factor harmless beyond a reasonable doubt. However, the court examined the evidence and determined that the trial judge's finding of the aggravating factor was harmless beyond a reasonable doubt.

Aggravating Factor G.S. 15A-1340.16(d)(8) (Knowingly Creating Great Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person) Was Properly Found for Second-Degree Murder and Felonious Assault Convictions Involving Vehicle Crash

State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250 (15 May 2007). The defendant was convicted of second-degree murder and four counts of assault with a deadly weapon inflicting serious injury involving a vehicle crash in which the defendant was impaired. The jury found the aggravating factor G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person) for these convictions. The court ruled that the finding of the aggravating factor did not violate G.S. 15A-1340.16(d) (evidence necessary to prove element of offense may not be used to prove aggravating factor). The state was required to prove additional facts by additional evidence to prove the aggravating factor.

- (1) Trial Judge Did Not Err in Finding Statutory Aggravating Factor G.S. 15A-1340.16(d)(8) (Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person)**
- (2) Trial Judge Erred in Finding Statutory Aggravating Factor G.S. 15A-1340.16(d)(12) (Committing Offense While on Pretrial Release)**

State v. Sellers, 155 N.C. App. 51, 574 S.E.2d 101 (31 December 2002). (1) The defendant was convicted of several offenses involving his shooting at law enforcement officers with a semi-automatic pistol. The court ruled that the trial judge did not err in finding statutory aggravating factor G.S. 15A-1340.16(d)(8) (risk of death to more than one person by weapon normally hazardous to lives of more than one person). The finding did not violate the statutory provision that evidence necessary to prove an element of an offense may not be used to prove an aggravating factor. The state only needed to prove that a firearm was used to prove the offenses; it did not need to prove that the defendant used a weapon that was normally hazardous to the lives of more than one person. (2) The court ruled that the trial judge erred in finding statutory aggravating factor G.S. 15A-1340.16(d)(12) (committing offense while on pretrial release). The state's evidence showed that an officer had arrested the defendant two months before the shootings and was released pending trial. The court stated that proof of the arrest and the absence of proof that a trial occurred was not sufficient evidence to conclude that the defendant was on pretrial release when the shootings occurred.

Trial Judge Erred in Finding Aggravating Factor G.S. 15A-1340.16(d)(2) (Defendant Joined with More Than One Other Person in Committing Offense and Was Not Charged with Conspiracy) When Defendant Committed Offense with Only One Other Person

State v. Moses, 154 N.C. App. 332, 572 S.E.2d 223 (3 December 2002). The defendant was convicted of armed robbery in which there was only one accomplice. The court ruled that the trial judge erred in finding aggravating factor G.S. 15A-1340.16(d)(2) (defendant joined with more than one other person in committing offense and was not charged with conspiracy) when the defendant committed the offense with only one other person.

Trial Judge Erred in Finding Aggravating Factor G.S. 15A-1340.16(d)(15) (Defendant Took Advantage of Position of Trust) When State Used Parental Relationship to Prove Force in Prosecution of Second-Degree Forcible Sexual Offense

State v. Corbett, 154 N.C. App. 713, 573 S.E.2d 210 (17 December 2002). The court ruled that the trial judge erred in finding aggravating factor G.S. 15A-1340.16(d)(15) (defendant took advantage of position of trust) when the state used the parental relationship (defendant was victim's stepfather) to prove force in a prosecution of second-degree forcible sexual offense.

Trial Judge Erred in Finding Aggravating Factor G.S. 15A-1340.16(d)(14) (Damage Causing Great Monetary Loss) Because That Factor Only Applies to Monetary Loss from Property Damage

State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566 (19 September 2000). In sentencing the defendant for a conviction of felonious assault, the trial judge found aggravating factor G.S. 15A-1340.16(d)(14) (damage causing great monetary loss). The court ruled, relying on *State v. Bryant*, 318 N.C. 632, 350 S.E.2d 358 (1986), that this aggravating factor only applies to monetary loss from property damage, not from physical injuries. Thus the trial judge erred in finding this aggravating factor.

Statutory Aggravating Factor of Knowingly Creating Great Risk of Death to More Than One Person By Means of Hazardous Device [G.S. 15A-1340.16(d)(8)] Was Properly Found for Second-Degree Vehicular Murder Conviction

State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861 (20 June 2000). The defendant was convicted of two counts of second-degree murder. A trooper clocked the defendant traveling 77 m.p.h. in a 55 m.p.h. zone. The defendant failed to stop when the trooper activated his blue light and siren, and a 16.7 mile chase ensued (with the defendant traveling 90-95 m.p.h.). After running a stop sign and a red stop light to pass stopped traffic, the defendant then went through an intersection at 80-85 m.p.h. and struck a truck, killing its two passengers. A test of the defendant's blood revealed a 0.15 alcohol concentration. The court ruled that the trial judge properly found the statutory aggravating factor of knowingly creating a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person. (1) Relying on *State v. Ballard*, 127 N.C. App. 316, 489 S.E.2d 454 (1997), the court ruled that the defendant's operation of the motor vehicle did not constitute one of the elements of second-degree murder, and thus the finding of this aggravating factor was not barred because it constituted an element of this offense. (2) Relying on *State v. McBride*, 118 N.C. App. 316, 454 S.E.2d 840 (1995) and *State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993), the court ruled that judge properly found that the defendant's automobile, under the circumstances surrounding its use in this case, constituted a device which in its normal use was hazardous to the lives of more than one person.

Trial Judge Did Not Err in Finding Aggravating Factor That Defendant Involved Person Under 16 in Committing Offense [G.S. 15A-1340.16(d)(13)] Although Defendant Was Acquitted of Other Offenses Involving Young People

State v. Boyd, 162 N.C. App. 159, 595 S.E.2d 697 (6 January 2004). The defendant was convicted of conspiracy to sell cocaine in which two juveniles were also involved. The defendant was acquitted of contributing to the delinquency of a minor and using a minor to commit a drug offense. The court ruled, distinguishing *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133 (1987), that the trial judge did not err in finding as an aggravating factor that the defendant involved a person under 16 in committing an offense [G.S. 15A-1340.16(d)(13)], although the defendant was acquitted of other offenses involving young people.

Trial Judge Erred in Sentencing for Second-Degree Murder in Finding Non-Statutory Aggravating Factor That Defendant Left Without Rendering Aid to Victim and Showed No Mercy

State v. Baldwin, 139 N.C. App. 65, 532 S.E.2d 808 (18 July 2000). The court ruled that the trial judge erred in sentencing for second-degree murder in finding the non-statutory aggravating factor that defendant left without rendering aid to the victim and showed no mercy. The court ruled, distinguishing *State v. Reeb*, 331 N.C.159, 415 S.E.2d 362 (1992) (upholding similar non-statutory aggravating factor in felonious assault case), that this finding violated the statutory provision that bars using evidence necessary to prove an element (in this case, malice) to prove an aggravating factor. [Note: Although this case involved the Fair Sentencing Act, the ruling would also apply under the Structured Sentencing Act.]

Trial Judge Properly Found as Aggravating Factor Defendant's Use of Weapon of Mass Destruction in Sentencing for Armed Robbery Conviction

State v. McMillan, 147 N.C. App. 707, 557 S.E.2d 138 (18 December 2001). The defendant was convicted of armed robbery in which he used a sawed off shotgun. The court ruled that the trial judge properly found as an aggravating factor in sentencing that the defendant used a weapon of mass destruction. The finding of this aggravating factor did not violate the provision in G.S. 15A-1340.16(d) that evidence necessary to prove an element of an offense may not be used to prove an aggravating factor.

- (1) Judge Improperly Found Non-Statutory Aggravating Factor That Defendant, Immediately After Commission of Offense, Gave to Another Person the Weapon Used to Commit Crime**
- (2) Judge Under Structured Sentencing Act May Find Non-Statutory Aggravating Factors Even If Not Requested by State**

State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (15 December 1998). The defendant was convicted of discharging a firearm into occupied property. (1) At the sentencing hearing held under the Structured Sentencing Act, the judge found as a non-statutory aggravating factor that the defendant attempted to dispose of evidence by giving the handgun used to commit this offense to another person immediately after the commission of the offense. The evidence showed that the defendant, moments after commission of the offense and near the scene of the shooting, handed the handgun used in the offense to another person. No law enforcement officers were present and the investigation had not focused on the defendant yet. Relying on *State v. Blackwood*, 60 N.C. App. 150, 298 S.E.2d 196 (1982), the court ruled that the defendant's passing of the weapon to another lacked the characteristic of affirmative misconduct or active misrepresentation to law enforcement officials. The defendant's possession of the handgun necessarily implicated himself in unlawful activities and the use of this conduct as a non-statutory aggravating factor unconstitutionally punished him (in violation of the Fifth Amendment privilege against self-incrimination) for in effect remaining silent and not presenting the weapon to law enforcement authorities. (2) The court ruled, following case law under the Fair Sentencing Act such as *State v. Flowe*, 107 N.C. App. 468, 420 S.E.2d 475 (1992), that a judge under the Structured Sentencing Act may find a nonstatutory aggravating factor even if it is not requested by the state.

- (1) Trial Judge Erred in Ordering Restitution When Imposing Active Sentence (But Note Later Legislation)**
- (2) Trial Judge Did Not Err in Failing to Find Mitigating Circumstance That Defendant Made Substantial Restitution, Based on Facts in This Case**
- (3) Length of Probation Was Improper When Findings Not Made**

State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (21 December 1999). (1) The court ruled that the trial judge erred in ordering restitution when imposing an active sentence. [Note: The Crimes Victims' Rights Act, which was not applicable to the case before the court because it applies to offenses committed on or after December 1, 1998, apparently requires restitution in some cases in which an active sentence is imposed and authorizes restitution in other cases. See, for example, G.S. 15A-1340.34(b) and discussion in John Rubin, *1998 Legislation Affecting Criminal Law and Procedure*, Administration of Justice Bulletin 98/05 (Institute of Government, Dec. 1998) at pages 4-6. This bulletin is available at <http://www.iog.unc.edu/programs/crimlaw/aoj.htm>.] (2) The court ruled, relying on *State v. McDonald*, 94 N.C. App. 371, 380 S.E.2d 406 (1989), that the trial judge did not err in failing to find as a mitigating circumstance that the defendant made substantial restitution [G.S. 15A-1340.16(e)(5)]. The court noted that the victim had to bring a civil lawsuit and employ an investigator to recover monies and property from the defendant. (3) The court ruled that the trial judge erred in placing the defendant on supervised probation for a

period of sixty months without making findings, as required by G.S. 15A-1343.2(d), that a period longer than thirty-six months was necessary.

Trial Judge Properly Found Statutory Aggravating Factor That Child Victim Was Very Young [G.S. 15A-1340.16(d)(11)] in Sentencing for Felonious Child Abuse Conviction

State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (17 August 1999). The court ruled, relying on *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), that the trial judge properly found the statutory aggravating factor that child victim was very young [G.S. 15A-1340.16(d)(11)] in sentencing the defendant for a felonious child abuse conviction. The victim's age, while it is an element of the offense and normally disqualifying as an aggravating factor by G.S. 15A-1340.16(d), may span sixteen years from birth to adolescence. The fact that the victim, who was three weeks old, was *very young* was not an element necessary to prove the offense. An abused child may be vulnerable due to his or her tender age, and vulnerability is clearly the concern addressed by this factor.

Court States That Recently-Enacted Aggravating Factor G.S. 15A-1340.16(d)(12a) (Defendant Willfully Violated Probation or Parole Condition During Ten-Year Period Before Commission of Offense for Which Defendant Being Sentenced) Applies to Probation or Parole Violations That Occurred Before Enactment of Legislation Creating Aggravating Factor

State v. Black, ___ N.C. App. ___, ___ S.E.2d ___ (2 June 2009). The court stated that the recently-enacted aggravating factor G.S. 15A-1340.16(d)(12a) (defendant willfully violated probation or parole condition during ten-year period before commission of offense for which defendant being sentenced), applicable to offenses committed on or after December 1, 2008, includes probation or parole violations that occurred before the enactment of the legislation (S.L. 2008-129) creating the aggravating factor.

- (1) Trial Judge Erred in Finding Statutory Aggravating Factor That Victim Was Very Young [G.S. 15A-1340.16(a)] in Burglary Conviction, Based on Facts in This Case**
- (2) Court Suggests that If Judge in Probationary Judgment Decides to Address Pretrial Release Bond in Event That Defendant Violates Specified Probation Condition, Judge Should Recommend, Not Mandate, Bond in Specified Amount**

State v. Hilbert, 145 N.C. App. 440, 549 S.E.2d 882 (7 August 2001). (1) The defendant was convicted of first-degree burglary in which a husband, wife, and two children were home when the defendant broke and entered. However, none of the victims was aware of the defendant's presence in the home. The court ruled, relying on *State v. Styles*, 93 N.C. App. 596, 379 S.E.2d 255 (1989), that the trial judge erred in finding the statutory aggravating factor that victim was very young [G.S. 15A-1340.16(a)]. There was no evidence that the defendant targeted the children or took advantage of their age in committing the burglary. (2) The trial judge placed the defendant on probation for other convictions and imposed a requirement that the defendant submit to drug or alcohol testing when instructed by the probation officer. The judge then provided that if there was a positive test, the defendant was to be immediately arrested and placed under a \$100,000 cash bond to await the probation violation hearing. The court, noting G.S. 15A-1345(b), stated that the better practice—if a judge decides to address the issue of bond in a probationary judgment—is that the judge should recommend, not mandate, the bond in a specified amount when a defendant is ordered to be arrested for an alleged violation of probation.

- (1) Trial Judge Did Not Err in Finding That Each Aggravating Factor Standing Alone Outweighed All Mitigating Factors Combined**
- (2) Trial Judge Did Not Err in Finding Non-Statutory Aggravating Factors That Victims Were Asleep When Sexually Assaulted, Which Made Them More Vulnerable and Susceptible to Injury or Victimization**

State v. Norman, 151 N.C. App. 100, 564 S.E.2d 630 (18 June 2002). (1) The court ruled that the trial judge did not err in finding that each aggravating factor standing alone outweighed all mitigating factors combined. It is not improper to do so, even though such a finding would insulate the sentence from a remand for resentencing if an aggravating factor had been improperly found. (2) The court ruled that the trial judge did not err in finding as non-statutory aggravating factors that the victims were asleep when sexually assaulted, which made them more vulnerable and susceptible to injury or victimization.

Defendant Whose Suspended Sentence Was Activated Was Entitled to Credit Against Prison Time for Time Spent in IMPACT During Probation—Court of Appeals Ruling Reversed

State v. Hearst, 336 N.C. 132, 567 S.E.2d 124 (16 August 2002), *reversing*, 147 N.C. App. 298, 555 S.E.2d 357 (20 November 2001). The court ruled that a defendant whose suspended sentence was activated was entitled to credit under G.S. 15-196.1 against his prison time for time spent in IMPACT (Intensive Motivational Program of Alternative Correctional Treatment) during probation. The court, distinguishing house arrest, concluded that the defendant was in custody and not at liberty and therefore was “in confinement” under G.S. 15-196.1 while at IMPACT.

No Credit Against Sentence for Time Served While Subject to Pretrial Electronic House Arrest

State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875 (3 October 2000). The court ruled that a defendant is not entitled to credit for time served while subject to pretrial electronic house arrest.

- (1) Judge Who Imposes Enumerated Special Probation Condition Is Not Required to Find That It Is Reasonably Related to Defendant’s Rehabilitation**
- (2) Probation Condition That Defendant Not Engage in Practice as Paralegal or Private Investigator Was Valid**

State v. Lambert, 146 N.C. App. 360, 553 S.E.2d 71 (2 October 2001). The defendant was convicted of the unauthorized practice of law and placed on probation. (1) The trial judge imposed as a specific probation condition under G.S. 15A-1343(b1)(3c) that the defendant remain under a curfew and not be away from his residence from 7:00 p.m. until 6:00 a.m. The court ruled that G.S. 15A-1343(b1)(10) (judge may impose any other conditions reasonably related to the defendant’s rehabilitation) does not require a judge who imposes an enumerated special probation condition [see subdivisions (b1)(1) through (9a)] to find that the condition is reasonably related to the defendant’s rehabilitation. Thus the probation condition was validly imposed. (2) In the defendant’s first appeal, the court of appeals in an unpublished opinion ruled that a probation condition that the defendant not engage in the practice as a paralegal or private investigator was valid (because the condition bore some relation to the offense and was aimed at preventing the defendant from engaging in similar offenses). In this appeal, the court ruled that it was bound by the prior ruling that the condition was valid because one panel of the court of appeals cannot overrule a prior panel’s ruling unless it has been overturned by a higher court.

Trial Judge Erred in Setting Probationary Term Without Required Finding Under G.S. 15A-1343.2(d)(1), and Defendant’s Failure to Object at Sentencing Hearing Did Not Bar Appellate Review of Error

State v. Love, 156 N.C. App. 309, 576 S.E.2d 709 (4 March 2003). The defendant was convicted of communicating threats, and the trial judge sentenced the defendant to community punishment with a probationary term of twenty-fourth months—without making a finding required by G.S. 15A-1343.2(d)(1) why a longer period beyond eighteen months was necessary. The court ruled that the judge erred in setting the probationary term without required statutory finding, and the defendant’s failure to object at the sentencing hearing did not bar appellate review of this error.

Trial Judge Erred in Assigning Additional Point Under G.S. 15A-1340.14(b)(7) (Offense Committed While Serving Sentence of Imprisonment) When Defendant Was In Juvenile Training School (Now Known as Youth Development Center) When Offense Was Committed

State v. Tucker, 154 N.C. App. 653, 573 S.E.2d 197 (17 December 2002). The court ruled that the trial judge erred in assigning an additional point under G.S. 15A-1340.14(b)(7) (offense committed while serving sentence of imprisonment) when the defendant was in a juvenile training school (now known as a youth development center) when the offense was committed.

- (1) Trial Judge Did Not Have Authority to Impose Two Consecutive Five-Year Probationary Sentences at Sentencing Hearing**
- (2) Trial Judge Did Not Err in Ordering Defendant to Pay Restitution in Amount Up to \$2,000 for Future Treatment of Victims**

State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262 (15 October 2002). The defendant was convicted of four counts of indecent liberties. (1) The court ruled that under G.S. 15A-1346 the trial judge did not have the authority to impose two consecutive five-year probationary sentences at the sentencing hearing. A sentence of probation must run currently with any other probation sentences imposed on a defendant. However, the court noted that under G.S. 15A-1346, a trial judge may impose a probationary sentence to run at the end of a prison sentence. (2) The court ruled that the trial judge did not err in ordering the defendant to pay restitution in amount up to \$2,000 for the future treatment of the victims. The victims had already accumulated \$680 in treatment bills, which was the subject of a separate order of restitution. There was evidence that the victims were still undergoing treatment as a result of the defendant’s crimes and that the treatment would be needed for an appreciable time period.

Trial Court Erred in Ordering Restitution to Murder Victims’ Families When Defendant Was Convicted of Accessory After Fact of First-Degree Murder and There Was No Direct and Proximate Causal Link Between Defendant’s Actions and Harm Cause to Victims’ Families

State v. Best, ___ N.C. App. ___, 674 S.E.2d 467 (3 February 2009). The defendant was convicted of three counts of accessory after the fact to first-degree murder. The court examined the evidence in this case and ruled that the trial court erred in ordering restitution to the murder victims’ families when there was no direct and proximate causal link between the defendant’s actions and harm cause to victims’ families.

Prosecutor’s Unsworn Statement Was Insufficient by Itself to Support Award of Restitution

State v. Swann, ___ N.C. App. ___, 676 S.E.2d 654 (19 May 2009). The court ruled that the trial court erred in ordering the defendant to pay restitution because the award was not supported by competent evidence. The prosecutor presented a restitution worksheet without any supporting documentation. The victim did not testify. The defendant did not stipulate to the award. The prosecutor's unsworn statement about the reason for restitution was insufficient by itself to support the award of restitution.

Restitution May Not Be Ordered for Victim's Pain and Suffering

State v. Wilson, 158 N.C. App. 235, 380 S.E.2d 386 (3 June 2003). The court ruled that restitution may not be ordered for a victim's pain and suffering.

Judge Did Not Abuse Discretion in Choosing Level 3 Instead of Level 2 Disposition for Juvenile Adjudicated of Violent Offenses and With Low Delinquency History

In re Robinson, 151 N.C. App. 733, 567 S.E.2d 227 (6 August 2002). The juvenile was adjudicated delinquent of assault with a deadly weapon with intent to kill inflicting serious injury and armed robbery. Under G.S. 7B-2508(f), the judge had a choice of Level 2 or 3 dispositions because the offenses were violent and the juvenile's delinquent history was low. The court examined the facts and ruled that the judge did not abuse her discretion in choosing Level 3, commitment to the Department of Juvenile Justice and Delinquency Prevention.

- (1) **Defendant Failed Under G.S. 15A-980 to Meet Burden of Proof in Suppressing Prior Convictions Used in Calculating Prior Record Level Based on Denial of Right to Counsel**
- (2) **Defendant Has No Sixth Amendment Right to Have Jury Determine Whether Prior Convictions Used in Calculating Prior Record Level Were Obtained in Violation of Right to Counsel**

State v. Jordan, 174 N.C. App. 479, 621 S.E.2d 229 (15 November 2005). The trial judge determined that the defendant was in Prior Record Level III based on several prior convictions. (1) The court ruled that the defendant failed under G.S. 15A-980 to meet his burden of proof on a motion to suppress prior convictions used in calculating his prior record level based on the denial of the right to counsel. The defendant's only evidence was his testimony that he did not have an attorney for each conviction and he was not able to afford one at that time. Relying on *State v. Rogers*, 153 N.C. App. 203, 569 S.E.2d 657 (2002), and *State v. Brown*, 87 N.C. App. 13, 359 S.E.2d 265 (1987), the court ruled that the defendant's testimony was insufficient to support a finding of indigency. (2) The court ruled that the defendant had no Sixth Amendment right to have a jury determine whether prior convictions used in calculating the defendant's prior record level were obtained in violation of his right to counsel.

Defendant Failed to Prove by Preponderance of Evidence That He Was Indigent When He Was Convicted of Two Misdemeanors To Support Suppression of Those Convictions in Felony Sentencing Hearing

State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657 (1 October 2002). The court ruled, relying on *State v. Brown*, 87 N.C. App. 13, 359 S.E.2d 265 (1987), that the trial judge did not err in denying the defendant's motion to suppress the state's use of two prior misdemeanor convictions to elevate his prior record level in sentencing the defendant for felony convictions. The defendant's mere assertion that he could not afford an attorney at the time of the prior convictions

did not prove by a preponderance of evidence that the defendant was indigent, as required under G.S. 15A-980.

III. Firearm Enhancement Cases

Author's Note: For a discussion of *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), see the discussion of *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (1 July 2005), at the beginning of this paper.

Additional Sixty-Month Firearm Enhancement under G.S. 15A-1340.16A Was Properly Imposed for Second-Degree Kidnapping

State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (9 October 1998), *reversing*, 127 N.C. App. 575, 492 S.E.2d 374 (1997). The defendant pointed a gun in the victim's face, transported her in his pickup truck to field, and raped her. The defendant was convicted of first-degree rape and first-degree kidnapping and was sentenced for first-degree rape and second-degree kidnapping (the judge apparently reduced the kidnapping based on prior appellate case law). The trial judge sentenced the defendant to additional sixty-months under G.S. 15A 1340.16A for the use of the firearm during the kidnapping. The court rejected the analysis of the Court of Appeals, which had found the enhancement improper based on Fair Sentencing Act case law involving aggravating factors. The court ruled that the enhancement was properly imposed on the second-degree kidnapping conviction because the use or display of a firearm is not an element of that offense. The court stated that it was irrelevant that the use of a firearm was an element of the first-degree rape conviction. [Note: This ruling may cast doubt on the ruling in *State v. Brice*, 126 N.C. App. 788, 486 S.E.2d 788 (1997) (error to apply firearm enhancement to second-degree kidnapping conviction because evidence of the use of a firearm was needed to prove an element of offense, restraint of victim), although the court in *Ruff* did not discuss *Brice* or the statutory bar on firearm enhancement when evidence of a firearm is needed to prove an element of an offense.] See also *State v. Guice*, 141 N.C. App. 177, 541 S.E.2d 474 (29 December 2000) (relying on *Ruff*, court ruled that enhancement was statutory permissible for second-degree kidnapping, but court also ruled that firearm enhancement statute was facially unconstitutional).

Evidence Did Not Support Firearm Enhancement for Kidnapping Conviction

State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (15 July 1997). The defendants were convicted of kidnapping A and armed robbery of B and C. While one defendant threatened A with a gun and forced her to lie on the living room floor, another defendant went into the bedroom and robbed B and C. The court ruled that the sentencing judge erred in applying the firearm enhancement statute (G.S. 15A-1340.16A) to the kidnapping sentence, because a firearm was used to commit the kidnapping offense and therefore was a necessary element of that offense. [Note: The court did not discuss *State v. Evans*, 125 N.C. App. 301, 480 S.E.2d 435 (1997), which upheld the firearm enhancement to a kidnapping sentence.]

Firearm Sentence Enhancement Was Improper When Evidence Conclusively Showed That Object Displayed Was Not a Firearm, Although It Appeared to Be a Firearm When Offense Was Committed

State v. Williams, 127 N.C. App. 464, 490 S.E.2d 583 (7 October 1997). The defendant was convicted of second-degree kidnapping, and the trial judge imposed a firearm sentence enhancement under G.S. 15A-1340.16A. At the time of the offense, it appeared to the victim that the defendant displayed a gun. However, the victim testified at trial that the object displayed by

the defendant was merely a cigarette lighter shaped like a gun. The court ruled that because the evidence conclusively showed that the object was not a firearm, the judge erred in imposing the firearm sentence enhancement.

Sixty-Month Firearm Enhancement of Kidnapping Sentence Was Proper

State v. Evans, 125 N.C. App. 301, 480 S.E.2d 435 (4 February 1997). The defendant was convicted of felonious assault, armed robbery, first-degree kidnapping, and possession of cocaine. The court ruled that the trial judge under G.S. 15A-1340.16A properly enhanced the kidnapping sentence by sixty months for using a firearm; the use of a firearm was not necessary to prove an element of the kidnapping conviction. The court also ruled that consecutive sentences for armed robbery and kidnapping did not violate the double jeopardy clause. The two crimes require proof of different elements.

Sixty-Month Firearm Enhancement of Voluntary Manslaughter Sentence Was Improper

State v. Smith, 125 N.C. App. 562, 481 S.E.2d 425 (4 March 1997). The defendant was convicted of voluntary manslaughter in which he killed the victim with a gun. The court ruled that the trial judge improperly imposed a sixty-month sentence enhancement under G.S. 15A-1340.16A because to find the defendant guilty of voluntary manslaughter, the jury had to find the defendant intentionally killed the victim with a deadly weapon. The court rejected the state's argument that the enhancement was proper because use of a firearm was not an element of the offense. The court noted that the pertinent issue was whether the use of a firearm was necessary to prove an element, which it was in this case.