

## Jail Credit and Sentencing

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Mecklenburg County, NC

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## Jail Credit

How Do We Count the  
Ways?  
I Mean the DAYS!!!  
CLOCK vs. CALENDER

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## Question 1

Your client was arrested on 1-1-08 and released 1-2-08. How many days of jail credit can you certify?

- a) 1
- b) 2
- c) 0
- d) Do not have enough information.

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## Credits allowed §15-196.1

"The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence.

The credit provided shall be **calculated from the date custody under the charge commenced and**

**shall include credit for all time spent** in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing.

Provided, however, the credit available herein **shall not include any time that is credited on the term of a previously imposed sentence** to which a defendant is subject. "

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## Answer 1

d) Do not have enough information.

"Provided, however, the credit available herein shall not include any time that is credited on the term of a **previously imposed sentence** to which a defendant is subject."

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## Question 2

Your client was arrested at **11:59 p.m.** on 1-1-08 and released at **12:03 a.m.** on 1-2-08. How many days of jail credit can you certify?

- a) 1
- b) 2
- c) 0
- d) Do not have enough information.

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### State v. Richardson 295 NC 309 (1978)

The trial court did err, however, in computing the amount of credit as 154 days. Defendant was arrested on the rape charge on 4 May 1977. The three consecutive sentences to State's prison were pronounced and commitments issued on 6 October 1977. The time from 4 May to 6 October is computed by **excluding the first day and including the last.**

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### The time from May 4<sup>th</sup> to October 6<sup>th</sup>

Have to count each day of each month  
How can we remember how many days are in each month?  
30 Days Hath September . . .  
58 variations of the above!

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### My Favorite

Thirty days hath September,  
All the rest I can't remember.  
The calendar hangs on the wall;  
Why bother me with this at all?

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## Knuckle Trick



- Count the months on your knuckles and the grooves between your knuckles. Leave out your thumb knuckle. Every month that lands on a knuckle is 31 days, every month that lands on a groove between knuckles is 30 days (or 28 for February).

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## Real Mathematicians Use Their Fingers Count from May 4<sup>th</sup> to October 6<sup>th</sup>

Knuckle Trick	Days in the month
May	31
June	30
July	31
August	31
September	30
October	31

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## Real Mathematicians Use Their Fingers Count from May 4<sup>th</sup> to October 6<sup>th</sup>

Month	Days in month	Days served per month
May	31	27
June	30	30
July	31	31
August	31	31
September	30	30
October	31	6

**Total =155**

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### Summary of State v. Richardson

Credit is computed by excluding the first day and including the last.

Defendant is therefore entitled to credit for **155** days instead of 154.

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### Question 3

Your client was arrested at **11:59 p.m.** on 1-1-08 and released at **11:59 p.m.** on 1-2-08. How many days of jail credit can you certify?

- a) 1
- b) 2
- c) 0
- d) Do not have enough information.

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### d) Do not have enough information.

Why?

Depends on the **type** of charge.

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### Question 4

Your client is charged with **DWI** and was arrested at **11:59 p.m.** on 1-1-08 and released at **11:59 p.m.** on 1-2-08. How many days of jail credit can you certify?

- a) 1
- b) 2
- c) 0
- d) Do not have enough information.

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### DWI Sentencing §20-179

(p) Limit on Amelioration of Punishment. -- For active terms of imprisonment imposed under this section:

(1) The judge **may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial**

- (s)(1) Method of Serving Sentence (hour for hour for time actually served)
- (s)(3) weekend sentence immediately into effect if reports to jail with alcohol in system

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### Question 5

Your client is charged with DWI, you expect him to be a level 1. What recommendations do you have to minimize the active portion?

- a) Use any pre-trial credit available.
- b) Request weekend sentence.
- c) Recommend your client go into inpatient treatment.
- d) All the above.

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## DWI Sentencing §20-179 (o)

### Proof of Prior Convictions

If the judge decides to impose an active sentence of imprisonment that would not have been imposed but for a prior conviction of an offense, the judge shall afford the defendant an opportunity to introduce evidence that the prior conviction had been obtained in a case in which he was **indigent**, had **no counsel**, and **had not waived his right to counsel**. If the defendant proves by the preponderance of the evidence all three above facts concerning the prior case, the **conviction may not be used** as a grossly aggravating or aggravating factor.

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## DWI Sentencing §20-179

(k1) Credit for Inpatient Treatment. -- Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. . . . The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. . . .

This language is not present in the Habitual DWI statute. Therefore, no way around mandatory 12-month sentence. Other bad news, no provision for credit against the active sentence imposed on a defendant for time the defendant was an inpatient at a treatment facility.

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## Question 6

If your client is charged with Habitual DWI and a separate/unrelated DWLR, which case would you want to dispose of first?

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### Habitual Impaired Driving §20-138.5

(b) A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection **shall run consecutively with and shall commence at the expiration of any sentence being served.**

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### Habitual Impaired Driving §20-138.5

Amended for offenses on or after 12-1-06  
10 year look-back window for 3 required priors  
Still 7 years for misdemeanor DWI sentencing

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### Question 7(a)

Your client is in jail for offense A only, for **10 days**. He is re-arrested for offense A and for offense B. After **10 days** of incarceration, the following occurs:  
a) Offense A is dismissed. How many days credit for offense B?  
**10**, you don't get to use credit from another charge.

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### Question 7(b)

Your client is in jail for offense A only, for **10 days**. He is re-arrested for offense A and for offense B. After **10 days** of incarceration, the following occurs:

b) Offense B is dismissed. How many days credit for offense A? **20**, since he was in custody "as a result of the charge."

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### Question 7(c)

Your client is in jail for offense A only, for **10 days**. He is re-arrested for offense A and for offense B. After **10 days** of incarceration, the following occurs:

c) Offense A is dismissed, a new warrant is taken out for the same acts, but a new case number is assigned. Is he still entitled to 20 days credit?

**Yes**, same charge. May have to get copies of all warrants to establish same offense.

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### Question 7(d)

Your client is in jail for offense A only, for **10 days**. He is re-arrested for offense A and for offense B. After **10 days** of incarceration, the following occurs:

d) He is sentenced to 1 day, credit 1 day for offense B. How many days credit are left for offense A?

**19**. "[C]redit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject."

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### Question 7(e)

Your client has **10 days** credit for offense A. He is re-arrested for offense A and for the new offense of B.

Is there an incentive to add him on for a plea to **offense A** if he receives a 30-day active sentence for **offense B**?

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### Be VERY, VERY quiet!!!

#### Allowance in cases of multiple sentences §15-196.2

... Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. **Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence.**

#### Concurrent and Consecutive terms §15A-1354

(a) Authority of Court. -- When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. **If not specified or not required by statute to run consecutively, sentences shall run concurrently.**

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### Question 8(a)

Your client receives a 120-day sentence with a split of 30 days. He has credit for 25 days.

How many more days does your client have to serve?

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## Sentences of Imprisonment §15A-1351(a)

“... Except for probationary sentences of impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, **shall not exceed one fourth the maximum penalty allowed by law.**

In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to **either the suspended sentence or to the imprisonment required for special probation . . . .**”

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## Question 8(b)

Ultimately, your client's probation is revoked.  
Is he entitled to credit for the 30 day split?

**Yes, *State v. Farris, 111 N.C. App. 254 (1994)*,** states that a defendant who has served, pursuant to special probation, an active sentence is entitled to credit for that time on any sentence imposed upon revocation of probation.

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## Sentencing

How to Avoid that  
“Oh Shit” Moment

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### Question 1

Your client has the following prior record.

- 2-15-05 DWLR PJC
- 9-17-08 Speeding 51/35 Cost
- 3-6-06 Felony Larceny Prob
- 3-9-06 R/O (sup ct) Prob
- 1-29-01 City Code Viol. Fine
- 6-21-07 PV (fel. Lar) Revoked
- ??? Contempt of Court 30 days
- 4-13-06 Infraction Fine

How many points? What is the record level?

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### Prior conviction

§15A-1340.11(7) Prior conviction. -- A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:

- a. In the district court, and the person **has not given notice of appeal and the time for appeal has expired.**

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### Appeal time frame

§15A-1431 (c) Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate court.

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### PJC's & prior convictions §15A-1340.11 (7)

Prior conviction. -- A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:

- a. In the district court, and the person has not given notice of appeal and **the time for appeal has expired.**

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### PJC's & prior convictions

When an accused is convicted with **prayer for judgment continued, no judgment is entered**, see *State v. Thompson*, 267 N.C. 653 (1966), and **no appeal is possible (until judgment is entered)**.

When the prayer for judgment is continued there is no judgment -- only a motion or prayer by the prosecuting officer for judgment. And when the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment (fine or imprisonment) the order is in the nature of a final judgment, from which the defendant may appeal. *State v. Griffin*, 246 N.C. 680, 100 S.E.2d 49 (1957).

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### State v. Hatcher 136 N.C. App. 524 (2000)

Defendant next contends the court erred in computing his prior record level points by assessing points for an offense to which he pled no contest and for which prayer for judgment was continued. **"A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime ...."** N.C. Gen. Stat. 15A-1340.11 (7) (1997). **"For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest."** N.C. Gen. Stat. 15A-1331(b) (1997). We have interpreted N.C. Gen. Stat. 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction. Consequently, we conclude that defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered. This assignment of error is overruled.

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### PJC's & prior convictions

Despite §15A-1340.11(7)(a)  
In the district court, and the person has not  
given notice of appeal and **the time for  
appeal has expired.**  
PJC counts as prior conviction.

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### Multiple prior convictions

§15A-1340.21(d) Multiple Prior Convictions  
Obtained in One Court Week. -- For  
purposes of this section, if an offender is  
convicted of more than one offense in a  
**single session of district court, or in a  
single week of superior court** or of a court  
in another jurisdiction, only one of the  
convictions may be used to determine the  
prior conviction level.

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### City code violations

§14-4 (a) Except as provided in subsection (b), if any  
person shall violate an ordinance of a county, city,  
town, or metropolitan sewerage district created  
under Article 5 of Chapter 162A, he shall be guilty of  
a Class 3 misdemeanor

§14-4 (b) If any person shall violate an ordinance of a  
county, city, or town regulating the operation or  
parking of vehicles, he shall be responsible for an  
infraction.

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## Contempt of Court

State v. Reaves, 142 N.C. App. 629 (2001)

"[w]e conclude the General Assembly did not intend an adjudication of criminal contempt to constitute a "prior conviction" for sentencing purposes."

"In sum, defendant's 1994 criminal contempt adjudication did not constitute a "prior conviction" for purposes of the Act, and the trial court erred by including such adjudication within its computation of defendant's sentencing level."

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## Infractions

§14-3.1 Infraction defined; sanctions

(a) An infraction is a noncriminal violation of law not punishable by imprisonment. Unless otherwise provided by law, the sanction for a person found responsible for an infraction is a penalty of not more than one hundred dollars (\$ 100.00).

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## Level II, with 2 or 3 points

-	2-15-05	DWLR	PJC	1
-	9-17-08	Speeding 51/35	Cost	X
-	3-6-06	Felony Larceny	Prob	1
-	3-9-06	R/O (sup ct)	Prob	X
-	1-29-01	City Code Viol.	Fine	?
-	6-21-07	PV (fel. Lar)	Revoked	X
-	???	Contempt of Court	30 days	X
-	4-13-06	Infraction	Fine	<u>X</u>

2 or 3

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## Question 2

Your client is charged with Second-Degree Trespassing and is a Level I.  
Class 1, level I = Community Punishment

He has been in jail for 8 days.

Does the Judge have to give him a suspended sentence?

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## Active punishment for time served

§15A-1340.20(c1) Active Punishment Exception. -- The court may impose an active punishment for a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence.

ANSWER: No, he can give 8 days active, credit for 8 days.

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## Question 3

The Judge hates your client. He is charged with 10 counts of Assault on a Government Officer. Your client is a Level III.

What is the maximum sentence your client could receive?

What would it be if it were 10 counts of Second-Degree Trespass?

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## Multiple convictions

§15A-1340.22(a) Limits on Consecutive Sentences. -- If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the **cumulative length of the sentences of imprisonment shall not exceed twice the maximum** sentence authorized for the class and prior conviction level of the most serious offense. **Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.**

ANSWER: 300 days maximum / 20 days for Class 3's

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## Question 4

The Judge sentences your client to the maximum active sentence of 150 days on each offense. Nothing else is said.

What is the sentence?

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## Concurrent and consecutive terms of imprisonment

§15A-1354(a) Concurrent and consecutive terms of imprisonment. -- When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. **If not specified or not required by statute to run consecutively, sentences shall run concurrently.**

ANSWER: Concurrent.

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### Question 5

Your client has a pending murder charge. He is convicted of DWLR, R/O, and Second-Degree Trespassing.

Do you need to appeal to prevent a point?

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### Prior record level for felony sentencing

§15A-1340.14(b)(5) Prior Record Level for Felony Sentencing. --For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as **any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving** (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), **but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.**

ANSWER: No.

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### Question 6

Your client is on probation and is convicted of the Second-Degree Trespass only.

What effect will this have on his probation?

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## Response to violations

§15A-1344(d) . . . provided that probation may not be revoked **solely for conviction of a Class 3 misdemeanor.**

ANSWER: No effect on probation.

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## Question 7

Can a Judge hold an inmate in Contempt for failure to complete inpatient drug treatment when only an active sentence has been ordered?

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

the defendant raised the issue of whether "the trial court erred in both requiring defendant to make restitution and imposing an active sentence in its judgment."

In the present case, defendant was not placed on probation in the judgment imposed on Count III of the indictment. He received an active sentence of imprisonment of not less than sixteen nor more than twenty months. The trial court was authorized only to "recommend" that defendant make restitution as a condition of work release or post-release supervision. Therefore, the trial court did not have the authority to order defendant to make restitution in the amount of \$ 550,283.75 in the judgment on Count III.

The authority to allow for inpatient drug treatment comes from §15A-1351 (h). In a paragraph entitled Substance Abuse Recommendation, it says that "[t]he sentencing court may recommend that the sentenced offender be assigned to the Substance Abuse Treatment Unit for treatment of alcoholism or substance abuse during his imprisonment." Interpreting this language the same way the Court did in *Hughes*, it seems clear that the court can only "recommend" drug treatment.

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## BUT

Judges can always order that treatment or restitution be a condition of work release, if recommended.

You can request a modification after completion.

ANSWER: No, if treatment can only be recommended by the court, then contempt is not an appropriate remedy for the refusal to complete it.

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## The END!!!

- Thanks
- Have fun
- Always read statute book
- Never let them see you sweat
- Kick ass in district court
- Sit down!!!

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## Cheat sheet summary

- Offense Classes and Prior Conviction Chart
- Possible felony enhancements noted with **F**
- Some collateral consequences
- (DNA/Sex Offender Registry)
- Sentencing rules and statutes
- DWI Sentencing Issues
- Pre 12-1-06 and post 12-1-06 considerations
- New mitigating factor (SCRAM device, 60 days of abstinence)
- New negative sentencing options
  - Community Service option gone
  - .15 is now aggravating factor and
  - interlock trigger with 45 day waiting period

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# **SENTENCING AND JAIL CREDIT ISSUES**

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SENTENCING ISSUES

**Misdemeanor Punishment Chart**

CLASS	PRIOR CONVICTION LEVELS		
	I	II	III
	No Prior Convictions	One to Four Prior Convictions	Five or More Prior Convictions
A1	1-60 days <b>C/I/A</b>	1-75 days <b>C/I/A</b>	1-150 days <b>C/I/A</b>
1	1-45 days <b>C</b>	1-45 days <b>C/I/A</b>	1-120 days <b>C/I/A</b>
2	1-30 days <b>C</b>	1-45 days <b>C/I</b>	1-60 days <b>C/I/A</b>
3	1-10 days <b>C</b>	1-15 days <b>C/I</b>	1-20 days <b>C/I/A</b>

**Prior conviction**

§15A-1340.11(7) Prior conviction. -- A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:

- a. In the district court, and the person **has not given notice of appeal and the time for appeal has expired.** . . .

**Multiple prior convictions**

§15A-1340.21(d) Multiple Prior Convictions Obtained in One Court Week. -- For purposes of this section, if an offender is convicted of more than one offense in a **single session of district court, or in a single week of superior court** or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.

**City code violations**

§14-4 (a) Except as provided in subsection (b), if any person shall violate an ordinance of a county, city, town, or metropolitan sewerage district created under Article 5 of Chapter 162A, he shall be guilty of a Class 3 misdemeanor.

(b) If any person shall violate an ordinance of a county, city, or town regulating the operation or parking of vehicles, he shall be responsible for an infraction.

**Active punishment for time served**

§15A-1340.20(c1) Active Punishment Exception. -- The court may impose an active punishment for a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence.

**Multiple convictions**

§15A-1340.22(a) Limits on Consecutive Sentences. -- If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the **cumulative length of the sentences of imprisonment shall not exceed twice the maximum** sentence authorized for the class and prior conviction level of the most serious offense. **Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.**

**Concurrent and consecutive terms of imprisonment**

§15A-1354(a) Authority of Court. -- When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. **If not specified or not required by statute to run consecutively, sentences shall run concurrently.**

### **Consolidation of Sentences**

§15A-1340.22(b) Consolidation of Sentences. -- If an offender is convicted of more than one offense at the same session of court, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. Any sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense.

### **Prior Record Level for Felony Sentencing**

§15A-1340.14(b)(5) Prior Record Level for Felony Sentencing. --For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as **any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving** (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), **but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.**

### **Response to violations**

§15A-1344(d) . . . provided that probation may not be revoked **solely for conviction of a Class 3 misdemeanor.**

**In *State v. Hughes, 136 N.C. App. 92 (1999)***, the defendant raised the issue of whether “the trial court erred in both requiring defendant to make restitution and imposing an active sentence in its judgment .”

In the present case, defendant was not placed on probation in the judgment imposed on Count III of the indictment. He received an active sentence of imprisonment of not less than sixteen nor more than twenty months. The trial court was authorized only to "recommend" that defendant make restitution as a condition of work release or post-release supervision. Therefore, the trial court did not have the authority to order defendant to make restitution in the amount of \$ 550,283.75 in the judgment on Count III.

The authority to allow for inpatient drug treatment comes from §15A-1351 (h). In a paragraph entitled Substance Abuse Recommendation, it says that “[t]he sentencing court may recommend that the sentenced offender be assigned to the Substance Abuse Treatment Unit for treatment of alcoholism or substance abuse during his imprisonment.” Interpreting this language the same way the Court did in *Hughes*, it seems clear that the court can only “recommend” drug treatment.

**BUT**, Judges can always order that treatment or restitution be a condition of work release, if recommended.

## JAIL CREDIT ISSUES

### **Credits allowed §15-196.1**

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be **calculated from the date custody under the charge commenced and shall include credit for all time spent** in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein **shall not include any time that is credited on the term of a previously imposed sentence** to which a defendant is subject.

### **DWI Sentencing §20-179**

(p) Limit on Amelioration of Punishment. -- For active terms of imprisonment imposed under this section:

(1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

### **DWI Sentencing §20-179**

(k1) Credit for Inpatient Treatment. -- Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. . . . The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced.

This language is not present in the Habitual DWI statute. Therefore, no way around mandatory 12-month sentence. Other bad news, no provision for credit against the active sentence imposed on a defendant for time the defendant was an inpatient at a treatment facility.

### **Habitual Impaired Driving §20-138.5**

(b) A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection **shall run consecutively with and shall commence at the expiration of any sentence being served.**

“[C]redit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.”

### **Allowance in cases of multiple sentences §15-196.2**

. . . Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence.

### **Concurrent and Consecutive terms §15A-1354**

(a) Authority of Court. -- When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. **If not specified or not required by statute to run consecutively, sentences shall run concurrently.**

### **Sentences of Imprisonment §15A-1351(a)**

“. . . Except for probationary sentences of impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, **may not exceed six months or one fourth the maximum sentence of imprisonment imposed for the offense,**

**whichever is less. . . In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation.”**

This changes for offenses committed on or after December 1, 2003. The six-month cap has been removed. This will not affect any misdemeanor case, but can allow for a longer split for felony cases.

*State v. Farris, 111 N.C. App. 254 (1994)*, states that a defendant who has served, pursuant to special probation, an active sentence is entitled to credit for that time on any sentence imposed upon revocation of probation.

§ 15A-1340.11(8) Residential program. -- A program in which the offender, as a condition of probation, is required to reside in a facility for a specified period and to participate in activities such as counseling, treatment, social skills training, or employment training, conducted at the residential facility or at other specified locations.

§ 15A-1340.11(6) Intermediate punishment. -- A sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions:

- a. Special probation as defined in G.S. 15A-1351(a) [split sentence].
- b. Assignment to a residential program.

See *State v. Hearst, 356 N.C. 132 (2002)*.

Defendant was entitled to credit for time spent in treatment program because his decision to attend it or be sentenced to longer incarceration was not voluntary, and he was in custody, as he had no control over his daily activities.