


Top Five Sentencing Errors
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 School of Government

Jamie Markham
Professor of Public Law and Government

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Determining the Top Five


- Appellate cases
- DAC Combined Records
- Your calls and emails
- Volume, impact, and avoidability

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Top Five Sentencing Errors

1. Prior record level
2. Length of probation
3. Maximum sentences
4. Place of confinement
5. Money

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Top Five Sentencing Errors

1. Prior record level
2. Length of probation
3. Maximum sentences
4. Place of confinement
5. Money



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1. Prior Record Level

- 1.a "Under supervision" additional point
- 1.b "Elements included" additional point
- 1.c Out-of-state offenses



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1. Prior Record Level

- 1.a "Under supervision" additional point
- 1.b "Elements included" additional point
- 1.c Out-of-state offenses



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“Under Supervision”

- “If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.” G.S. 15A-1340.14(b)(7)



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“Under Supervision”

- This point must be proved like an aggravating factor (unless the defendant admits to it)
- The State must give notice like an aggravating factor (at least 30 days before trial or the entry of a guilty or no contest plea)



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“Under Supervision”

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division
STATE VERSUS	NOTICE OF AGGRAVATING FACTORS	
Name Of Defendant	G.S. 15A-1340.16(a6)	
Pursuant to G.S. 15A-1340.16(a6), the defendant is hereby notified that the State of North Carolina intends to prove the existence of aggravating factor(s) under G.S. 15A-1340.16(a) and/or the existence of a prior record level point under G.S. 15A-1340.14(b)(7), as indicated below.		
AGGRAVATING FACTORS		
The State intends to prove the following aggravating factors:		
<input type="checkbox"/> 1. The defendant: <input type="checkbox"/> a. induced others to participate in the commission of the offense.		
<input type="checkbox"/> 2. The defendant: <input type="checkbox"/> a. occupied a position of leadership or dominance of other participants in the commission of the offense.		
<input type="checkbox"/> 2a. The offense was committed for the benefit of, or at the direction of, any <input type="checkbox"/> (for offenses committed Dec. 1, 1997 - Nov. 30, 2017) criminal street gang, <input type="checkbox"/> (for offenses committed on or after Dec. 1, 2017) criminal gang as defined by G.S. 14-20.15A(1), with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy.		
<input type="checkbox"/> 3. The offense was committed for the purpose of: <input type="checkbox"/> a. avoiding or preventing a lawful arrest. <input type="checkbox"/> b. effecting an escape from custody.		
<input type="checkbox"/> 4. The defendant was: <input type="checkbox"/> a. hired to commit the offense. <input type="checkbox"/> b. paid to commit the offense.		
<input type="checkbox"/> 5. The offense was committed to: <input type="checkbox"/> a. disrupt <input type="checkbox"/> b. hinder the lawful exercise of a governmental function or the enforcement of laws.		
<input type="checkbox"/> 6. The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Public Safety or the Department of Adult Correction, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.		
<input type="checkbox"/> 6a. The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal, an assistance animal, or a search and rescue animal (for offenses committed on or after Dec. 1, 2009) as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.		
<input type="checkbox"/> 7. The offense was especially heinous, atrocious or cruel.		
<input type="checkbox"/> 8. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be		



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“Under Supervision”

- A proposed Prior Record Level worksheet does not satisfy the notice requirement—even when the defendant stipulates to the points on that worksheet. *State v. Crook*, 247 N.C. App. 784, 797 (2016)
- A stipulation to the fact of the point, standing alone, does not constitute an implied waiver of notice. *Id.*

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Case Number	Case	Offense	Year	Level	Points	Notice

16. (Use if sentencing points are selected above) Have you admitted the existence of the following sentencing points not related to prior convictions: offense committed while on supervised or unsupervised probation, parole, or post-release supervision; offense committed while serving a sentence of imprisonment; offense committed while on escape from a correctional institution. Have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you understand that you are waiving any notice requirement that the State may have with regard to these sentencing points? I agree that the State has provided you with the appropriate notice about these sentencing points.

17. (Use if No. 15 or 16 selected above) Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination?

18. Do you understand that you also have the right being a sentencing hearing to present to the Court the existence of any mitigating factors that may apply to your case?

19. Do you understand that the State has disclosed the proper plea arrangements and you can discuss any plea arrangement with me without making any agreement?

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“Under Supervision”

- [PROSECUTOR]: Your Honor, these convictions began back in 2002 running all the way up to his second-degree murder conviction in 2009 for which he was on parole at the time of this offense, and we have indicated that by adding the proper point in the prior sentencing worksheet.
- **THE COURT: Had notice been given of that?**
- [PROSECUTOR]: Yes, sir. We had discussed that.
- [DEFENSE COUNSEL]: Yes, Judge.
- THE COURT: Okay.



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1. Prior Record Level

- 1.a "Under supervision" additional point
- 1.b "Elements included" additional point
- 1.c Out-of-state offenses



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"Elements Included"

- "If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point." G.S. 15A-1340.14(b)(6).
- No notice required
- A question of law for the judge



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"Elements Included"

- Two common errors:
 - Improper stipulation. Trial judge must compare the elements of the offenses



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1. Prior Record Level

- 1.a "Under supervision" additional point
- 1.b "Elements included" additional point
- 1.c Out-of-state offenses



Out-of-State Prior Convictions

- By default:
 - Out-of-state felonies: Treat as Class I (2 points)
 - Out-of-state misdemeanors: Treat as Class 3 (0 points)
- With "substantial similarity" showing:
 - Count like comparable NC offense
 - Proponent proves by preponderance of the evidence
 - A question of law; court must make findings
 - Stipulations ineffective



STATE OF NORTH CAROLINA

County: _____

STATE VERSUS _____

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING (STRUCTURED SENTENCING)

(For Offenses Committed On or After Dec. 1, 2005)

NUMBER	1. SCORING PRIOR RECORD/ONLY SENTENCING	POINTS	POINTS
1	One felony Class 1 conviction	2	2
2	Two felony Class 1 convictions	4	4
3	Three felony Class 1 or 2 convictions	6	6
4	Four felony Class 1 or 2 convictions	8	8
5	Five felony Class 1 or 2 convictions	10	10
6	Six felony Class 1 or 2 convictions	12	12
7	Seven felony Class 1 or 2 convictions	14	14
8	Eight felony Class 1 or 2 convictions	16	16
9	Nine felony Class 1 or 2 convictions	18	18
10	Ten felony Class 1 or 2 convictions	20	20
11	Eleven felony Class 1 or 2 convictions	22	22
12	Twelve felony Class 1 or 2 convictions	24	24
13	Thirteen felony Class 1 or 2 convictions	26	26
14	Fourteen felony Class 1 or 2 convictions	28	28
15	Fifteen felony Class 1 or 2 convictions	30	30
16	Sixteen felony Class 1 or 2 convictions	32	32
17	Seventeen felony Class 1 or 2 convictions	34	34
18	Eighteen felony Class 1 or 2 convictions	36	36
19	Nineteen felony Class 1 or 2 convictions	38	38
20	Twenty felony Class 1 or 2 convictions	40	40
21	Twenty-one felony Class 1 or 2 convictions	42	42
22	Twenty-two felony Class 1 or 2 convictions	44	44
23	Twenty-three felony Class 1 or 2 convictions	46	46
24	Twenty-four felony Class 1 or 2 convictions	48	48
25	Twenty-five felony Class 1 or 2 convictions	50	50
26	Twenty-six felony Class 1 or 2 convictions	52	52
27	Twenty-seven felony Class 1 or 2 convictions	54	54
28	Twenty-eight felony Class 1 or 2 convictions	56	56
29	Twenty-nine felony Class 1 or 2 convictions	58	58
30	Thirty felony Class 1 or 2 convictions	60	60
31	Thirty-one felony Class 1 or 2 convictions	62	62
32	Thirty-two felony Class 1 or 2 convictions	64	64
33	Thirty-three felony Class 1 or 2 convictions	66	66
34	Thirty-four felony Class 1 or 2 convictions	68	68
35	Thirty-five felony Class 1 or 2 convictions	70	70
36	Thirty-six felony Class 1 or 2 convictions	72	72
37	Thirty-seven felony Class 1 or 2 convictions	74	74
38	Thirty-eight felony Class 1 or 2 convictions	76	76
39	Thirty-nine felony Class 1 or 2 convictions	78	78
40	Forty felony Class 1 or 2 convictions	80	80
41	Forty-one felony Class 1 or 2 convictions	82	82
42	Forty-two felony Class 1 or 2 convictions	84	84
43	Forty-three felony Class 1 or 2 convictions	86	86
44	Forty-four felony Class 1 or 2 convictions	88	88
45	Forty-five felony Class 1 or 2 convictions	90	90
46	Forty-six felony Class 1 or 2 convictions	92	92
47	Forty-seven felony Class 1 or 2 convictions	94	94
48	Forty-eight felony Class 1 or 2 convictions	96	96
49	Forty-nine felony Class 1 or 2 convictions	98	98
50	Fifty felony Class 1 or 2 convictions	100	100

II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL

NOTE: If sentencing for a felony, grade of offense and prior record level are used. If sentencing for a misdemeanor, only prior record level is used.

1. If the Court has determined the number of prior convictions to be used for sentencing, the Court has entered the State's PRIORITY LEVEL.

2. If the Court has determined the number of prior convictions to be used for sentencing, the Court has entered the State's PRIORITY LEVEL.

3. If the Court has determined the number of prior convictions to be used for sentencing, the Court has entered the State's PRIORITY LEVEL.

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50. If the Court has determined the number of prior convictions to be used for sentencing, the Court has entered the State's PRIORITY LEVEL.

For each out-of-state conviction...the court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that ...classification assigned to this offense in Section V is correct.

The Court finds that all of the elements of the present offense are included in a prior offense.

For each out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.


The Court finds that the State and the defendant have stipulated in open court to the prior convictions, points, and record.

Date _____ Name Of Presiding Judge (type or print) _____ Signature Of Presiding Judge _____

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Substantial Similarity


- A question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense.



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Substantial Similarity

- Virginia identity theft NOT substantially similar
 - Virginia’s version can be violated using information of a “false or fictitious person,” whereas North Carolina’s requires that the defendant used the identifying information of a real person
 - Therefore, error to treat it as Class G instead of Class I
 - State v. Fuller, 298 N.C. App. 199 (2025)



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Substantial Similarity

- Defendant had prior felony convictions from Kentucky, counted as Class G and F on the worksheet
- PROSECUTOR: "Your Honor, I believe the record – the record speaks for itself and the prior convictions speak for themselves and we just leave – obviously leave it in your discretion, but we don't have a position one way or another."
- Court of Appeals: "The State did not meet its burden to establish substantial similarity for purposes of determining Defendant's prior record level." State v. Sandefur, 296 N.C. App. 287 (2024)



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Top Five Sentencing Errors

1. Prior record level
2. Length of probation
3. Maximum sentences
4. Place of confinement
5. Money



29

2. Length of Probation

- 2.a Length of probation at sentencing
- 2.b Propriety of probation extension



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Probation Extensions

OTHER MODIFICATIONS OF PROBATION

1. The defendant's term of probation is extended for a period of _____

a. for good cause shown, pursuant to G.S. 15A-1344(d). (NOTE: The total of the original period of probation plus all extensions under G.S. 15A-1344(d) may not exceed five years.)

b. with the defendant's consent, pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d). (NOTE: The extension must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation. The extension may be ordered only during the last six months of the original, unextended period of probation and may not exceed three years beyond the original period of probation.)

2. The defendant's assignment to intensive supervision is terminated and the defendant is continued on supervised probation.

3. The defendant is transferred to _____ supervision probation.

4. The defendant is allowed until _____ to comply with the following condition(s): _____

Ordinary

Special purpose

37

Probation Extensions

- Both boxes are unchecked

OTHER MODIFICATIONS OF PROBATION

1. The defendant's term of probation is extended for a period of 24 MONTHS

a. for good cause shown, pursuant to G.S. 15A-1344(d). (NOTE: The total of the original period of probation plus all extensions under G.S. 15A-1344(d) may not exceed five years.)

b. with the defendant's consent pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d). (NOTE: The extension must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation. The extension may be ordered only during the last six months of the original, unextended period of probation and may not exceed three years beyond the original period of probation.)

2. The defendant's assignment to intensive supervision is terminated and the defendant is continued on supervised probation.

3. The defendant is transferred to _____ supervision probation.

4. The defendant is allowed until _____ to comply with the following condition(s): _____

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Probation Extensions

- Extension goes beyond 60 months, and it's styled as "ordinary"

OTHER MODIFICATIONS OF PROBATION

1. The defendant's term of probation is extended for a period of 36 months

a. for good cause shown, pursuant to G.S. 15A-1344(d). (NOTE: The total of the original period of probation plus all extensions under G.S. 15A-1344(d) may not exceed five years.)

b. with the defendant's consent, pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d). (NOTE: The extension must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation. The extension may be ordered only during the last six months of the original, unextended period of probation and may not exceed three years beyond the original period of probation.)

2. The defendant's assignment to intensive supervision is terminated and the defendant is continued on supervised probation.

3. The defendant is transferred to unsupervised supervised probation.

4. The defendant is allowed until _____ to comply with the following condition(s): _____

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Probation Extensions

- Probation has already been extended once, and it's styled as "special purpose"

OTHER MODIFICATIONS OF PROBATION	
<input checked="" type="checkbox"/>	1. The defendant's term of probation is extended for a period of _____ <input type="checkbox"/> a. for good cause shown, pursuant to G.S. 15A-1344(d). (NOTE: The total of the original period of probation plus all extensions under G.S. 15A-1344(d) may not exceed five years.) <input checked="" type="checkbox"/> b. with the defendant's consent, pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d). (NOTE: The extension must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation. The extension may be ordered only during the last six months of the original, unextended period of probation and may not exceed three years beyond the original period of probation.)
<input type="checkbox"/>	2. The defendant's assignment to intensive supervision is terminated and the defendant is continued on supervised probation.
<input type="checkbox"/>	3. The defendant is transferred to <input type="checkbox"/> unsupervised <input type="checkbox"/> supervised probation.
<input type="checkbox"/>	4. The defendant is allowed until _____ to comply with the following condition(s): _____
<input type="checkbox"/>	5. The special conditions of probation identified below, as numbered and set out in the Judgment Suspending Sentence, are modified as follows: (State number of each condition to be modified and set out modification.) _____



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use shown, pursuant to G.S. 15A-1344(d). (NOTE: **ed five years.**)
endant's consent, pursuant to G.S. 15A-1342(a) or
complete a program of restitution or continue medical or p
the last six months of the original, unextended period of pro
assignment to intensive supervision is terminated and
ansferred to unsupervised supervised
llowed until _____
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tion to be modified and set out modification.)

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Top Five Sentencing Errors

1. Prior record level
2. Length of probation
3. Maximum sentences
4. Place of confinement
5. Money



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3. Maximum Sentences

- 3.a Sex offender maximum
- 3.b "Time served"



43

3. Maximum Sentences

- 3.a Sex offender maximum
- 3.b "Time served"



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Sex Offender Maximum Sentence

- Class B1-E crimes requiring registration get an elevated maximum sentence (120% of the minimum plus 60 months)
- Watch out for kidnapping of a minor

Sex offender maximum

64 → 89 (137)

Section	Offense	Minimum	Maximum
19A.01
19A.02
19A.03
19A.04
19A.05
19A.06
19A.07
19A.08
19A.09
19A.10
19A.11
19A.12
19A.13
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19A.92
19A.93
19A.94
19A.95
19A.96
19A.97
19A.98
19A.99
19A.100



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Top Five Sentencing Errors

1. Prior record level
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5. Money



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4. Place of Confinement

- 4.a Misdemeanors and DWI
- 4.b State-Federal interactions



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4. Place of Confinement

- 4.a Misdemeanors and DWI
- 4.b State-Federal interactions



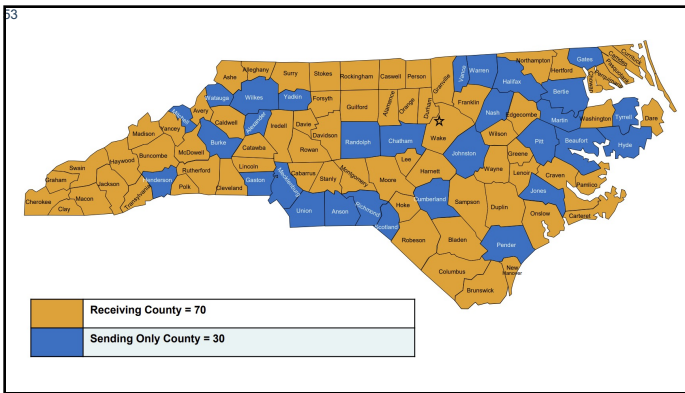
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Misdemeanors and DWI

- Place of confinement rules
 - Misdemeanors
 - 90 days or less: Local sheriff
 - 91 days and up: Statewide Misdemeanant Confinement Program
 - DWI
 - Split: Local sheriff
 - Active: SMCP



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Misdemeanors and DWI

- Even if concurrent, order to proper place of confinement
- § 15-6.2. Concurrent sentences for offenses of different grades or to be served in different places.** When by a judgment of a court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement.



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Misdemeanors and DWI

- If consecutive, must order to proper place
- N.C. DAC requests that misdemeanors be ordered as the last sentences in a consecutive string



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4. Place of Confinement

- 4.a Misdemeanors and DWI
- 4.b State-Federal interactions



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State-Federal Sentence Interactions

- Typical fact pattern
 - Defendant arrested by State officers
 - Does not make State bail
 - Defendant charged federally
 - Writ to Federal court; Federal sentence imposed
 - Return to State custody
 - State sentence imposed



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State-Federal Sentence Interactions

- State judge and prosecutor are content to have State sentence run concurrently with already-imposed Federal sentence



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State-Federal Sentence Interactions

§ 15-6.3. Credit for service of sentence while in another jurisdiction.

When a person in actual confinement under sentence of another jurisdiction is brought for trial before a court of this State, the court may, upon sentencing, specifically impose a sentence to be concurrently served and direct that such person receive credit against the sentence imposed for all time subsequently served in the jurisdiction possessing physical custody of such person. (1971, c. 828.)



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Sounds Good; Might Not Work

- Federal BOP hasn't yet started Federal sentence
 - BOP considers defendant to be in State primary custody based on the initial arrest
 - BOP will not start Federal sentence until defendant is released from State primary custody
 - Arresting authority retains primary custody until defendant is released by bail, dismissal, parole, or sentence expiration



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How to Avoid This Issue

- Sentence in State court first
 - Downside: Defendant will serve the sentence in State prison
- Temporarily release on bail or dismiss
 - Allows Federal detainer to kick in
 - Federal sentence first, State sentence concurrent, defendant in Federal prison



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Top Five Sentencing Errors

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5. Money

- **Restitution:**
 - Must have proof of restitution amount (or a stipulation)
 - “A restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution.”
 - “Unsworn statements of a prosecutor are insufficient proof of restitution.”
- **Attorney fees:**
 - “Before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue.” State v. Friend, 257 N.C. App. 516, 523 (2018)



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Takeaways

- Watch out for PRL bonus points and out-of-state priors
- Be careful with probation length and extensions
 - “Ordinary extensions” whenever possible
- It probably isn’t “time served,” but in many cases “jail post-release” is correct
- Active DWI’s go to SMCP
- Ask for proof (or stipulation) for restitution amount



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