FELONY SENTENCING FOR DISTRICT COURT JUDGES

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A. Jurisdictional issues

Guilty or no contest pleas for Class H and Class I felonies. Under G.S. 7A-272(c), with the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or Class I felony if (1) the defendant is charged with a felony in an information filed pursuant to G.S. 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense, or (2) the defendant has been indicted for a criminal offense but the case is transferred from superior court to district court pursuant to G.S. 15A-1029.1.

- When a plea is accepted in district court the trial judge must require that a true, complete, and accurate record be made of the proceeding. G.S. 7A-191.1.
- Authorized appeals from a plea entered in district court are to the appellate division. G.S. 7A-272(d).

Probation violations. The superior court has exclusive jurisdiction over probation violation hearings where the district court accepted a plea under G.S. 7A-272(c), except that the district court shall have jurisdiction to hear these matters with the consent of the State and the defendant. G.S. 7A-271(e).

- If a Class H or I felony is pled in district court under G.S. 7A-272(c) and a subsequent revocation hearing is held in district court, the appeal of the revocation is to the superior court for a de novo revocation hearing, not to the Court of Appeals. State v. Hooper, 358 N.C. 122 (2004).

Supervision of felony drug treatment court or a therapeutic court in district court. With the consent of the chief district court judge and the senior resident superior court judge, the district court has jurisdiction to preside over the supervision of a probation judgment entered in superior court in which the defendant is required to participate in a drug treatment court program or a therapeutic court (a court that promotes activities designed to address underlying problems of substance abuse and mental illness that contribute to a person's criminal activity). G.S. 7A-272(e).

- The district court judge may modify or extend probation judgments supervised under G.S. 7A-272(e).
- The superior court has exclusive jurisdiction to revoke probation of cases supervised under G.S. 7A-272(e), except that the district court has jurisdiction to conduct the revocation proceeding when the chief district court judge and the senior resident superior court judge agree that it is in the interest of justice that the proceedings be conducted by the district court. G.S. 7A-271(f).
- If the district court exercises jurisdiction to revoke probation in a case supervised under G.S. 7A-272(e), appeal of an order revoking probation is to the appellate division. G.S. 7A-271(f).

B. Steps for sentencing a felony under Structured Sentencing

1. Determine the applicable law
2. Determine the offense class
3. Determine the defendant's prior record level
4. Consider aggravating and mitigating factors
5. Select a minimum sentence
6. Determine the maximum sentence
7. Choose a sentence disposition

Step 1: DETERMINE THE APPLICABLE LAW

Select the appropriate version of the sentencing grid, depending on the defendant's offense date.

- Offenses committed on or after October 1, 1994;
- Offenses committed on or after December 1, 1995;
- Offenses committed on or after December 1, 2009;
- Offenses committed on or after December 1, 2011.

Step 2: DETERMINE THE OFFENSE CLASS

The N.C. Sentencing and Policy Advisory Commission posts a list of all commonly-charged felonies, sorted by offense class. It is available at http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/App-f11.pdf.

- Unless otherwise provided by law, the following offense class step-down rules apply for participants in crimes, attempts, and other inchoate offenses:

Offense Class	**Aiding and abetting** **Accessory before fact (14-5.2)** *Same as principal felony*	**Attempt (14-2.5)** **Conspiracy (14-2.4)** *One offense class lower*	**Solicitation (14-2.6)** **Accessory after fact (14-7)** *Two offense classes lower*
A	A	B2	C
B1	B1	B2	C
B2	B2	C	D
C	C	D	E
D	D	E	F
E	E	F	G
F	F	G	H
G	G	H	I
H	H	I	Class 1 misd.
I	I	Class 1 misd.	Class 2 misd.

Step 3: DETERMINE THE DEFENDANT'S PRIOR RECORD LEVEL

Burden of proof. The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named the prior conviction. A prior conviction may be proved by:

- Stipulation;
- Court records or administrative records; or
- Any other method found by the court to be reliable. G.S. 15A-1340.14(f).
  - A print-out of an email from the prosecutor to defense counsel that included a screen capture from the AOC computerized criminal record system was sufficient proof of the defendant's prior conviction. State v. Best, 202 N.C. App. 753 (2010).

Use AOC-CR-600, *Prior Record Level Worksheet* (note that a different worksheet is used depending on whether the offense to be sentenced was committed before or after December 1, 2009).

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

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

- In the superior court, regardless of whether the conviction is on appeal, or
- In the courts of the United States, another state, the Armed Forces, or another country, regardless of whether the offense would be a crime if it occurred in North Carolina. G.S. 15A-1340.11(7).

Prior record points. Prior offenses count for points as follows:

Class A:	10 points	Class E, F, or G:	4 points
Class B1:	9 points	Class H or I:	2 points
Class B2, C, or D:	6 points	Covered misdemeanors:	1 point

Covered misdemeanors include Class A1 and Class 1 nontraffic misdemeanors; DWI (G.S. 20-138.1); commercial DWI (G.S. 20-138.2); and misdemeanor death by vehicle (G.S. 20-141.4(a2).

In determining prior record level, use the classification assigned to a prior offense as of the offense date of the crime now being sentenced. G.S. 15A-1340.14(c).

If the defendant has more than one prior conviction from a single superior court during one calendar week, count only the conviction with the highest point total. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used. G.S. 15A-1340.14(d).

Crimes from other jurisdictions. By default, crimes from other jurisdictions count as follows:

- A prior conviction for a crime that another jurisdiction classifies as a felony counts as a Class I felony for record-level purposes in North Carolina (2 points).
- A conviction for a crime that another state classifies as a misdemeanor counts as a Class 3 misdemeanor here—and so does not factor into a defendant's felony prior record level at all.

If the offender can prove by a preponderance of the evidence that an offense classified as a felony in another jurisdiction is *substantially similar* to an offense that is a misdemeanor in North Carolina, the conviction will be treated as that class of misdemeanor for prior record level purposes. Conversely, if the State proves by the preponderance of the evidence than an offense classified as either a misdemeanor or a felony in another jurisdiction is substantially similar to a particular felony in North Carolina, or that a misdemeanor offense from another jurisdiction is substantially similar to a Class A1 or Class 1 misdemeanor here, then the out-of-state crime is treated as the class of its North Carolina counterpart for prior record level purposes. G.S. 15A-1340.14(e).

- A defendant may validly stipulate to the bare fact that an out-of-state conviction exists, and may also stipulate that the crime is a felony or misdemeanor in the other state. Those stipulations alone are a sufficient basis for the State to treat an out-of-state felony at the default Class I level for prior record purposes. State v. Hinton, 196 N.C. App. 750 (2009).
- A defendant may not, however, validly stipulate that an out-of-state felony is substantially similar to a North Carolina offense. Substantial similarity is a question of law that must be determined by the trial court, not by the jury and not by stipulation. State v. Hanton, 175 N.C. App. 250 (2006); State v. Palmateer, 179 N.C. App. 579 (2006). Form AOC-CR-600 includes a check-box for the court to note a finding that out-of-state convictions are substantially similar to a North Carolina offense.
- If an out-of-state crime has elements that are substantially similar to multiple North Carolina offenses, and the prosecutor relies only on the statutory definitions in proving substantial similarity, the rule of lenity requires that the court assign record points corresponding to the less serious North Carolina offense. *Hanton*, 175 N.C. App. at 259.
- The court can base its determination on a comparison of the other state's criminal statutes to the criminal laws of North Carolina. See State v. Rich, 130 N.C. App. 113 (1998) (holding that photocopies of statutes from New York and New Jersey were sufficient proof that the defendant's crimes in those states were substantially similar to crimes in North Carolina).

- With an appropriate determination of substantial similarity, an out-of-state conviction for impaired driving may count for a prior record point under G.S. 15A-1340.14(e). State v. Armstrong, __ N.C. App. __, 691 S.E.2d 433 (2010).

Prior record "bonus points." Certain defendants are eligible for the following additional prior record level points:

- 1 point if all the elements of the present offense are included in any prior offense for which the offender was convicted. G.S. 15A-1340.14(b)(6). The point may be counted whether or not the prior offense itself factored in the defendant's prior record level (it may not count if, for example, it is not the most serious offense from a single week of superior court).
  - This factor is a question of law to which the defendant may not validly stipulate. State v. Prush, 185 N.C. App. 472 (2007). Form AOC-CR-600 includes a check-box for the court to note a finding that all the elements of the present offense are included in a prior offense.
  - A defendant qualifies for this point only when the most serious conviction in a consolidated judgment is included within the elements of a prior offense. State v. Mack, 188 N.C. App. 365 (2008).
- 1 point if the offense was committed while the offender was on 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 sentence of imprisonment. G.S. 15A-1340.14(b)(7).
  - The State must provide the defendant with written notice of its intent to prove the existence of this point at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. G.S. 15A-1340.16(a6).

Count:

- All felony convictions.
- Covered misdemeanor convictions.
- Prayer for judgment continued (PJC). State v. Canellas, 164 N.C. App. 775 (2004).

Do not count:

- Class 2 and Class 3 misdemeanors.
- Misdemeanor traffic offenses other than impaired driving, commercial impaired driving, and misdemeanor death by vehicle.
- Infractions.
- Contempt. State v. Reaves, 142 N.C. App. 629 (2001).
- Probation revocations.
- Juvenile adjudications.

Step 4: CONSIDER AGGRAVATING AND MITIGATING FACTORS

- The court shall consider evidence of aggravating or mitigating factors present in the offense, but the decision to depart from the presumptive range is in the discretion of the court.
  - The court has discretion to enter a presumptive range sentence, even if it finds mitigating factors and finds that they outweigh factors in aggravation. State. v. Bivens, 155 N.C. App. 645 (2002).
  - The weighing of aggravating and mitigating factors is not a mathematical balance. A single factor in aggravation can outweigh multiple mitigating factors. State v. Gillespie, __ N.C. App. __, 707 S.E.2d 712 (2011).
  - If the court departs from the presumptive range, it must make written findings of the aggravating and mitigating factors present. G.S. 15A-1340.16(c). The rule applies even when the sentence is entered pursuant to a plea agreement. State v. Bright, 135 N.C. App. 381 (1999).

- Aggravating factors:
  - The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists. The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury. G.S. 15A-1340.16(a)–(a1).
  - The State must provide 30 days notice of its intent to prove aggravating factors.
  - Statutory aggravating factors need not be alleged in a charging instrument, but non-statutory aggravators must be pled.
- Mitigating factors: The defendant must prove mitigating factors by a preponderance of the evidence.

Step 5: SELECT A MINIMUM SENTENCE

- Choose a minimum sentence from the appropriate cell on the front of the sentencing grid, and in the appropriate range (presumptive, aggravated, or mitigated) based on weighing of aggravating and mitigating factors.

Step 6: DETERMINE THE MAXIMUM SENTENCE

Find the maximum sentence that corresponds to the selected minimum sentence on the back of the appropriate sentencing grid.

- Offenses committed before December 1, 2011:

  Class F-I: Maximum is 120% of the minimum, rounded to the next month.

- Offenses committed on or after December 1, 2011:

  Class F-I: Maximum is 120% of the minimum, plus 9 months. The inmate will be released from prison 9 months before maximum, less earned time, to serve 9 months of supervised release (60 months of supervised release for sex offenders).

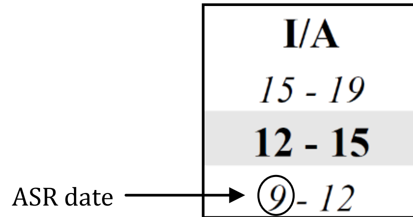
Step 7: CHOOSE A SENTENCE DISPOSITION

"A" = Active — Felony active sentences are served in the Department of Public Safety, Division of Adult Correction (DAC, formerly DOC). G.S. 15A-1352.

Advanced Supervised Release. Advanced Supervised Release (ASR) is an early-release program created in the Justice Reinvestment Act. S.L. 2011-192, as amended by S.L. 2011-412. It is available to certain felons who enter a plea or are found guilty on or after January 1, 2012, and receive an active sentence. When imposing an active sentence for an eligible defendant, the court, in its discretion and without objection from the prosecutor, *may* order the defendant into the ASR program. G.S. 15A-1340.18.

Defendants ordered into the program will have an opportunity to complete certain "risk reduction incentives" while in prison. If the inmate completes those incentives (or if the inmate is unable to complete them through no fault of his or her own), the inmate will be released to post-release supervision on the "ASR date." If the inmate does not complete the program, he or she will be released according to the regular minimum and maximum sentence imposed.

For a defendant who receives a presumptive- or aggravated-range sentence, the ASR date is the shortest permissible minimum sentence from the mitigated range in the defendant's cell on the sentencing grid. For instance, for a Class H/Prior Record Level V offender (whose grid cell is depicted below) sentenced anywhere in the presumptive or aggravated range, the ASR date is 9 months.



If the court imposes a mitigated-range sentence, the ASR date is 80 percent of the minimum sentence actually imposed. Thus, if the court imposed a 10–21 month sentence for the Class H/Prior Record Level V offender depicted above, the ASR date would be 8 months.

Some additional rules and restrictions apply to ASR:

- Only defendants sentenced to an active sentence may be ordered to the ASR program.
- All Class H felons who receive an active sentence are eligible to be ordered into the ASR program.
- No Class I felons are eligible for ASR.
- ASR must be imposed at sentencing if it is going to be imposed at all; DAC may not admit anyone into the program unless ASR is ordered in the sentencing judgment.
- Defendants ordered into the program "shall be notified at sentencing that if the defendant completes the risk reduction incentives as identified by the Department, then he or she will be released on the ASR date." G.S. 15A-1340.18(e).
- If an inmate is terminated from the ASR program while in DAC, the ASR date is nullified and the defendant's release date is determined based on the regular minimum and maximum term imposed by the court at sentencing.

DAC is still in the process of creating the risk reduction incentive programs for defendants admitted to the ASR program. The law states that they will consist of treatment, education, and rehabilitative programs designed to reduce participating offenders' likelihood of reoffending.

Note: The effective date for the ASR law says that it applies to defendants who "enter a plea or are found guilty on or after January 1, 2012." But many offenders will enter pleas or be found guilty on or after January 1, 2012 for offenses that occurred before December 1, 2011. For Class H felonies that occur before December 1, 2011, the defendant does not receive post-release supervision—and therefore won't have any "supervision" to be released to in advance as described in the ASR law. With that in mind, it is unclear how the ASR law applies to those defendants, if at all.

"I" = Intermediate

- *For offenses committed before December 1, 2011:* An intermediate sentence requires that the court suspend the sentence of imprisonment and impose supervised probation that *must* include one of the six conditions set out in G.S. 15A-1340.11(6):
  - Special probation (a "split sentence")
    - Active portion of split sentence capped at ¼ of the imposed max. G.S. 15A-1351(a).
  - Residential program
  - Electronic house arrest
  - Intensive supervision
  - Day reporting center
  - Drug treatment court

- *For offenses committed on or after December 1, 2011:* An intermediate sentence requires that the court suspend the sentence of imprisonment and impose supervised probation that *may* include drug treatment court, special probation, or one or more of the "community and intermediate probation conditions" set out in G.S. 15A-1343(a1). Intensive supervision, residential programs, and day reporting center are repealed as intermediate conditions of probation.

"C" = Community

- *For offenses committed before December 1, 2011:* A community punishment is a non-active punishment that does not include any of the six intermediate probation conditions. It may consist of unsupervised or supervised probation, or a fine only without probation. G.S. 15A-1340.11(2).

- *For offenses committed on or after December 1, 2011:* A community punishment is a non-active punishment that does not include drug treatment court or special probation. It may include any of any one or more of the "community and intermediate probation conditions" set out in G.S. 15A-1343(a1). It may consist of unsupervised or supervised probation, or a fine only without probation.

"Community and Intermediate probation conditions" under G.S. 15A-1343(a1) [only for offenses committed on or after December 1, 2011]

- Electronic house arrest
- Community service
- "Quick dip confinement" of up to 18 days, served in 2-3 day increments, no more than 6 days per month, in three separate months
- Obtain a substance abuse assessment, monitoring or treatment
- Participation in an educational or vocational skills development program
- Submit to satellite-based monitoring if described by G.S. 14-208.40(a)(2) (sex offenders)

LENGTH OF PROBATION

- Unless the court makes specific findings that a longer or shorter period of probation is necessary:
  - Community punishment: Not less than 12 nor more than 30 months
  - Intermediate punishment: Not less than 18 nor more than 36 months
- If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years. G.S. 15A-1343.2(d).

MULTIPLE CONVICTIONS

When a defendant is convicted of multiple offenses, the court has broad discretion in determining how those sentences are served relative to one another.

- Consolidation for judgment. G.S. 15A-1340.15(b).
  - Permissible for convictions arising at the same time; most serious offense controls.
- Concurrent sentences
  - By default, sentences run concurrently. G.S. 15A-1340.15(a).
- Consecutive sentences
  - The court may, in its discretion, order a sentence to run consecutively with (that is, begin at the expiration of) another sentence. There is no statutory limit on the court's authority to run felony sentences consecutively.
  - When felony sentences are run consecutively, DAC treats them as a single sentence under G.S. 15A-1354(b). DAC will sum all of the individual minimum sentences to determine an aggregate minimum sentence. The aggregate maximum sentence will be the sum of all the

maximums, less 9 months for each of the second and subsequent post-release supervision–eligible sentences imposed. That subtraction accounts for the fact that 9 extra months are built into every maximum sentence for a post-release supervision–eligible Class F–I felony. Because the defendant will serve only a single 9-month term of supervised release upon his or her release from prison, the "duplicate" time built into second and subsequent felonies is subtracted.

- "Contingent" probation sentence: The court may run a probation period consecutive to an active judgment under G.S. 15A-1346(b).
    - Probation periods run concurrently with one another and may not be stacked. G.S. 15A-1346(a).

FINES

There is no statutory limit on the court's power to impose a fine for a felony.